EVIDENCE AT THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS:

THE CASE FOR AN EQUITABLE APPLICANT-CENTRED APPROACH AS A PATHWAY TO SUBSTANTIVELY FAIRER DECISIONS

by

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List of abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACmHPR	African Commission on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
EACJ	East African Court of Justice
ECCJ	ECOWAS Court of Justice
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
FIDH	International Federation for Human Rights
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICHEIC	International Commission on Holocaust Era Insurance Claims
ICJ	International Court of Justice
NGOs	Non-governmental organisations
OAU	Organisation of African Unity
PCIJ	Permanent Court of International Justice
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

Abstract

Evaluation of evidence is the fulcrum of the adjudicative function of the African Court on Human and Peoples' Rights. However, there is an acute shortage of comprehensive research on how the Court assesses evidence to determine whether claims of human rights violations have been established or disproved. This study contributes to filling this research gap by systematically studying the evidentiary practices at the African Court to unveil not only its explicit and implicit application of evidence rules but also how its evidential approaches impact the substantive fairness of its decisions. It does this by critically analysing the evolution of the Court's case law from 2013 to 2024 and this analysis is supplemented by review of relevant literature and fieldwork data from interviews with judges and registry members of the Court. Based on this, the study's main proposition is that the African Court is gradually abandoning its initial preference for a flexible, applicant-centred approach in favour of an equal balancing of applicants' and States' interests in its consideration of evidence. The negative consequences of the increasing dominance of the latter approach include a less accessible African Court, more decisions that are substantively unfair as a result of the Court's formalistic attempt at neutrality while considering evidence, and inconsistencies in the case law. To address these negative developments, the study proposes a return to and consistent application of an equitable applicant-centred approach to evidence. The justification for the suggested approach is in its responsiveness to the evidentiary difficulties faced by most individual applicants and unique socio-legal realities in Africa that hinder presentation of required evidence. Not prescriptive in their details, the study recommends four pillars that could anchor an equitable applicant-centred evidentiary approach: (1) communication of applicable evidence standards to litigants, (2) a more proactive fact-finding role by the Court, (3) flexibility regarding acceptable forms of evidence and (4) reliance on presumptions of fact and the taking of judicial notice of certain facts in some specific circumstances.

Samenvatting

De beoordeling van bewijsmateriaal is de spil van de rechtsprekende functie van het Afrikaanse Hof voor de Rechten van Mensen en Volkeren. Er is echter een acuut tekort aan uitgebreid onderzoek naar hoe het Hof bewijs beoordeelt om te bepalen of claims van mensenrechtenschendingen werden aangetoond of weerlegd. Deze studie draagt bij aan het opvullen van deze onderzoeksleemte door het systematisch bestuderen van de bewijspraktijken aan het Afrikaanse Hof om niet alleen de expliciete en impliciete toepassing van bewijsregels te onthullen, maar ook hoe de bewijsbenaderingen de inhoudelijke rechtvaardigheid van zijn beslissingen beïnvloeden. Dit wordt gedaan door een kritische analyse van de evolutie van de jurisprudentie van het Hof van 2013 tot 2024, en deze analyse wordt aangevuld met een overzicht van relevante literatuur en gegevens uit interviews met rechters en griffieleden van het Hof. Op basis hiervan is de belangrijkste hypothese van deze studie dat het Afrikaanse Hof bij de beoordeling van bewijsmateriaal geleidelijk zijn aanvankelijke voorkeur voor een flexibele, op de verzoeker gerichte aanpak opgeeft ten gunste van een evenwichtige afweging van de belangen van verzoekers en staten. De negatieve gevolgen van de toenemende dominantie van deze laatste benadering zijn onder andere een minder toegankelijk Afrikaans Hof, meer beslissingen die inhoudelijk onrechtvaardig zijn als gevolg van de formalistische poging tot neutraliteit bij het beoordelen van bewijsmateriaal door het Hof, en inconsistente jurisprudentie. Om deze negatieve ontwikkelingen aan te pakken, stelt deze studie voor om terug te keren naar, en consequent gebruik te maken van, een billijke, op de verzoeker gerichte benadering van bewijsvoering. De voorgestelde benadering is gerechtvaardigd omdat ze beantwoordt aan de bewijsproblemen waarmee de meeste individuele verzoekers worden geconfronteerd, en aan de unieke sociaal-juridische realiteit in Afrika, die het voorleggen van het vereiste bewijsmateriaal bemoeilijkt. Zonder prescriptief te zijn in de details, raadt deze studie vier pijlers aan die een rechtvaardige, op de aanvrager gerichte benadering van bewijsvoering kunnen verankeren: (1) communicatie van de geldende bewijsnormen aan rechtzoekenden, (2) een meer proactieve rol van de rechtbank als onderzoeker/vaststeller van de feiten, (3) flexibiliteit met betrekking tot aanvaardbare vormen van bewijs en (4) vertrouwen op feitelijke vermoedens en het zelfstandig nemen van gerechtelijke kennisgeving van bepaalde feiten in bepaalde specifieke omstandigheden.

CHAPTER 1: General Introduction

1.1 Introduction

This thesis is dedicated to the study of the evidentiary regime of the African Court on Human and Peoples' Rights (African Court or the Court), developed as part of a broader research project (DISSECT) that has been investigating evidence in international human rights adjudication.[1] As this Chapter will demonstrate, comprehensive studies on evidentiary practices in international human rights adjudicating bodies are scarce and therefore examining how the African Court approaches evidence matters contributes to fill a glaring research gap. This study assesses what is the fulcrum of the Court's adjudicative function – how it deals with evidence matters. To clarify this from the onset, the study's reference to *evidence* speaks to the elements which are presented to the African Court in order to prove or disprove the existence of facts which are claimed to exist or to have existed.[2] The study is centred on an investigation of the Court's reasoning in its assessment of evidence before arriving at its conclusions as to whether the claims in cases brought before the Court have been established or disproved.[3] It does this by examining both the explicit and implicit application of evidence rules and principles at the Court. Some specific examples of these rules and principles that preoccupy the study include application of the burden of proof and its distribution, use of presumptions, inferences and taking judicial notice of certain facts, the standards of proof applied by the Court and its discretion in this regard, the role of the parties and the Court on evidential matters, and related issues. The importance of the inquiry into the African Court's evidentiary practices hinges on the proposition that evidence issues and protection of human rights through adjudication are inseparable. Beyond the technical examination of the Court's interpretation and application of evidence rules and principles, the study takes particular interest in understanding and explaining the legal and political motivations behind the African Court's evidentiary approaches.[4] In this respect, this research analyses how the African Court has over time dealt with the inequalities between individual applicants and respondent States and how it has fared in addressing evidence questions in the context of opposing interests of what the study

[1] See the description of the project, DISSECT: Evidence in International Human Rights Adjudication, at https://dissect.ugent.be/ (accessed 7 November 2024). It is a HORIZON 2020 research project funded by the European Research Council (ERC-AdG-2018-834044) and hosted by Ghent University.

[2] This paraphrases Amerasinghe's definition of the term evidence, see CF Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005), 31.

[3] In this sense the study is also concerned with how the Court arrives at *proof,* which is 'the result or effect of evidence'. See Marco Roscini, 'Evidentiary Issues in International Disputes Related to State Responsibility for Cyber Operations' (2015) 50 Texas International Law Journal 233, 239.

[4] Judicial determination of evidential weight has been said to be intertwined with moral and political choices. See Alex Stein, 'The Refoundation of Evidence Law' (1996) 9 Canadian Journal of Law and Jurisprudence 279, 287.

shows are unequal parties. Importantly in this regard, this research is keen to unearth the implications of the Court's evidentiary practices on what the study argues is its main purpose or core business – to substantively protect human rights through fair and just decision-making.[5]

This Chapter's aim, therefore, is to specifically set the scene for the study as broadly described above by explaining why and how this research probes the subject of evidence at the African Court. It begins with a note on the history of the Court in section 1.2, which aids the reader in appreciating the historical context that birthed the Court. Section 1.3 provides a background to the main focus of this study – evidentiary practices at the Court. Section 1.4 outlines the main research question to be answered and the sub-questions deriving from it and this is followed by an explanation of the research methodology in section 1.5. The significance of the study and its limitations are discussed in sections 1.6 and 1.7, respectively. The Chapter concludes with an outline of the thesis' structure in section 1.8.

1.2 A brief history of the African Court

The idea of establishing a court with a human rights mandate for Africa was first mooted at the African Conference on the Rule of Law convened in Lagos, Nigeria in 1961 that had been organised by the International Commission of Jurists. One of the proposals emerging from this conference was that 'a court of appropriate jurisdiction be created' alongside the adoption of an 'African Convention on Human Rights'.[6] This proposal was not followed through and a court was not established when the Charter establishing the now defunct Organisation of African Unity (OAU) and the predecessor to the African Union (AU) was adopted in 1963, two years after this conference. It took 37 years from when the idea of the Court was conceived in 1961 to adoption of the Protocol establishing the Court in 1998 in what has been described as a 'prolonged gestation'.[7] Notably, even when discussions about establishment of a court resurfaced in the preparatory stages leading to the adoption of the African Charter on Human and Peoples' Rights (African Charter or the Charter) in 1981, there was not enough support. The idea of an African human rights court was shelved again as its proposed establishment was deemed 'premature' at

[5] There exists a connection between evidence and justice and an argument has been made that 'the assessment of evidence is intrinsically linked to the thorny issue of justice and legality of rulings adopted by trial courts', see Jorg Sladič & Alan Uzelac 'Assessment of Evidence' in Ve Rijavec, T Keresteš, T Ivanc (eds) *Dimensions of Evidence in European Civil Procedure* (2016), 110.

[6] See International Commission of Jurists 'African Conference on the Rule of Law: a report on the proceedings of the Conference', (Lagos, 2-7 January 1961), para 4 of 'Law of Lagos'. Available at <www.icj.org/wp-content/uploads/1961/06/Africa-African-Conference-Rule-of-Law-conference-report-1961-eng.pdf>(accessed 26 October 2024).

[7] Chidi Anselm Odinkalu, 'Advice without Consent?: Assessing the Advisory Jurisdiction of the African Court on Human and Peoples' Rights, (2023) 45(3) Human Rights Quarterly 365, 366.

the time.[8] Instead, efforts were geared towards establishing an African Commission on Human and Peoples' Rights (African Commission or the Commission) and which became the African Charter's sole supervisory body.[9]

A number of reasons for the delay or opposition to the establishment of the Court during this period have been pointed out in the literature on the Court's history. One explanation is that at this time (1960s and 1970s), the continent did not prioritise judicial dispute resolution with many States preoccupied with sovereignty and territorial integrity concerns.[10] There is also the suggestion that the drafters of the African Charter preferred negotiations and diplomatic settlement of disputes rather that adjudication. There was the argument that 'African culture frowned upon litigation, the adversarial and adjudicative procedures common to Western legal systems' and traditional dispute settlement in Africa 'place[d] a premium on the improvement of relations between the parties on the basis of equity, good conscience, and fair play rather than on strict legality'.[11] Opponents of the idea of a Court also argued that there was insufficient political will to support its establishment and according to one of the drafters of the African Charter, Kéba Mbaye, the Charter contained 'what the African States were able to accept in 1981'.[12] Related to this, exclusion of the Court from the Charter has been termed as 'one of the clearest manifestations of the lack of will to relinquishing sovereignty'.[13] Human rights groups, NGOs and activists were also said to be divided on whether a Court should be established with some preferring that the African Commission be strengthened first 'to allow a clear jurisprudence of African human rights to emerge before a judicial body was established'.[14] All the above factors generally informed the preference for establishment of the African Commission, inaugurated in 1987, with a mandate to promote, protect and interpret provisions of the African Charter.[15]

Having preceded the African Court, the Commission's history and performance are inseparable from the history and rationale for establishing the Court. In its 37 years of existence, the African

[8] Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (2004) 30 Brooklyn Journal of International Law, 6; Gina Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51 Journal of African Law 151, 153.

[9] Solomon T Ebobrah, 'The Admissibility of Case before the African Court on Human and People's Rights: Who Should Do What' (2009) 3 Malawi Law Journal 87, 88.

[10] Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (n 8), 6.

[11] Nsongurua J Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late than Never' (2000) 3 Yale Human Rights and Development Law Journal 45, 74; Rebecca Wright, 'Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights' (2006) 24 Berkeley Journal of International Law 463, 473-474; Gina Bekker (n 8), 153.

[12] Udombana (n 11), 74-75.

[13] Misha Ariana Plagis & Lena Riemer, 'From Context to Content of Human Rights: The Drafting History of the African Charter on Human and Peoples' Rights and the Enigma of Article 7' (2021) 23 Journal of the History of International Law 556, 572.

[14] Udombana (n 11), 75.

[15] Article 45, African Charter on Human and Peoples' Rights.

Commission has developed a rich jurisprudence and detail on the content of the African Charter and in the process informed the international human rights system.[16] Besides interpretation and application of the Charter in contentious matters, other notable contributions by the African Commission include the adoption of key resolutions, principles and guidelines, General Comments, model laws and advisory opinions. The Commission has also been commended for adopting special mechanisms such as special rapporteurs, committees, working groups dealing with thematic human rights issues and for its fact-finding missions.[17] Even with these achievements, there is consensus that the Commission has continued to face significant challenges. Some critics have viewed it as a weak institution and pointed out that the initial hope that the Commission would robustly construe provisions of the African Charter given the weaknesses in its text have 'largely gone unrealised'.[18] Viljoen has discussed the challenges facing the Commission, which can be summarised as follows: (1) the perceived non-binding status of its recommendations has weakened their impact, (2) inability to provide effective remedies and oversee implementation, (3) inefficiencies in dealing with urgent matters that require interim relief, (4) ineffective dissemination of information about its existence and its case law, (4) delay in finalising communications and (5) poor visibility of the Commission's decisions.[19] These challenges partly informed the pursuit of a continental judicial body.[20] It is widely understood that establishment of the African Court was a response to the weak protective mandate of the Commission.[21] There was a presumption that given the States' failure to take the African Commission seriously, they 'would pay more adherence to the legally binding rulings of an African Court'.[22]

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[16] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019), 4.

[17] Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' (2018) 7 International Human Rights Law Review 1, 7.

[18] Makau Mutua, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 No. 2 Human Rights Quarterly 342, 345; Gina Bekker (n 8), 157.

[19] Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012), 414-419. Although these challenges were identified by Viljoen close to a decade ago, to date many of them still remain.

[20] I say 'partly' because other reasons, besides the challenges facing the Commission, have been advanced to explain the push for establishment of the Court. These include contemporaneous reasons such as the Rwandan genocide which meant that 'African states wanted to be seen to be doing something tangible to address the genocide which had just taken place', see Gina Bekker (n 8), 164; Udombana also observes that the wave of democratic changes in the 1990s also gave impetus to the push for establishment, see Udombana (n 11), 77.

[21] Allwell Uwazuruike, *Human Rights Under the African Charter* (Palgrave Macmillan 2020) 161; Rebecca Wright, (n 11) 473; Udombana (n 11), 47 (Udombana argues here that the African Commission 'is, and was created to be, a paper tiger'; Andreas O'Shea, 'A critical Reflection on the Proposed African Court on Human and Peoples' Rights (2001) 2 African Human Rights Law Journal 285, 286 (O'Shea contends that the African Commission had been 'a useful tool for the promotion of human rights but a largely ineffective mechanisms for the protection of human rights').

[22] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (n 16), 816; Barney Pityana, 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 African Human Rights Law Journal 121, 122. Pityana notes that after five years of being operational, the Commission was seen as 'largely ineffectual, and that a court would give it teeth and a higher degree of effectiveness'.

In 1994, the Assembly of Heads of State and Government requested the OAU Secretary General 'to convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court of Human and Peoples' Rights'.[23] This initiated a process which would eventually culminate in the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) on 10 June 1998 and which entered into force on 25 January 2004.[24] The African Court became operational in 2006 and has its seat in Arusha, Tanzania. To date, the Court Protocol has been ratified by 34 out of the 55 AU Member States, but only eight States have deposited the declaration recognising the competence of the Court to receive cases directly from NGOs and individuals.[25]

Chapter two of the thesis discusses in greater detail the Court's structure, how it is accessed, its jurisdiction and admissibility conditions as well as its successes and challenges. The next section provides a background to the focus of this study – the evidentiary practices of the African Court.

1.3 Background to the study

1.3.1 The research gap

There is a general acknowledgment that evidentiary practices in international human rights adjudication is a largely unexplored area of study.[26] International rules related to evidence such as those dealing with attribution, causality, burden and standard of proof have been understood as secondary rules of international law that are 'treated as stepchildren in scholarly literature and have seen fragmented application in international adjudication'.[27] This limited attention has been termed as 'relative neglect' of fact-finding by complaints bodies and analysis of how human rights bodies

[23] AHG/Res.230 (XXX): Resolution on the African Commission on Human and Peoples' Rights, adopted by the Assembly of Heads of State and Government of the Organization of African Unity, meeting in its Thirtieth Ordinary Session in Tunis, Tunisia, from 13 to 15 June, 1994, para 4 .

[24]<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and> (accessed 26 October 2024).

[25] The eight States are: Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi , Niger and Tunisia. Rwanda withdrew its declaration in 2017, Tanzania in 2019, Côte d'Ivoire and Benin in 2020.

[26] Some of the works where this is acknowledged include: Rachel Murray, 'Evidence and Fact-finding by the African Commission' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2008) at 139; Christopher Roberts, 'Reversing the burden of proof before human rights bodies' (2021) 25 The International Journal of Human Rights 1682 at 1; Torsten Stirner, *The procedural law governing facts and evidence in international human rights proceedings: developing a contextualized approach to address recurring problems in the context of facts and evidence* (Brill, 2021) 3-4.

[27] G. Kajtár, B. Çali and M. Milanović (eds.), *Secondary Rules of Primary Importance in International Law* (Oxford: Oxford University Press, 2022), see online abstract, available at https://academic.oup.com/book/44892 (accessed 1 October 2024).

examine evidence noted as having 'received little attention'.[28] Similarly, the standards that these bodies have employed or should employ relative to evidence law issues have been described as 'relatively understudied' and the subject of evidence before human rights bodies termed a 'dry topic'.[29] Notably, there is a suggestion that the relative scarcity of evidence regulations in international human rights adjudication is deliberate as the adjudicative bodies prefer an unrestricted approach to facts and evidence. For this reason they have 'generally welcomed the limited guidance in the treaty frameworks allowing them to develop flexible procedural solutions'.[30] To this, there is the counterargument that in practice having the appropriate approach to evidentiary questions 'is key to ensuring that rights adjudication is fit for purpose'.[31]

Whereas there is minimal focus on evidence in international human rights adjudication as noted above, the paucity of studies on applicable evidentiary standards at the African Court is even more acute. There is a dearth of comprehensive research on how the Court considers evidence, with the available and relevant sources mainly focusing on the African Commission.[32] Related to this, there is very little discussion on the implications of the African Court's evidentiary approach on the fairness of substantive outcomes of the adjudication process, a key focus of this study. Almost two decades since its establishment, the African Court has been extensively studied. This thesis complements and contributes to existing knowledge on the Court with a largely missing nuance, namely, an assessment through doctrinal and empirical approaches of how the African Court treats evidence. In doing this, the study will have hopefully given this subject the attention it deserves but which it has rarely received.

1.3.2 The study's main proposition

This study is founded on the premise that the overriding purpose of the African Court is to protect human rights through fair and just decision-making, which necessarily requires responsiveness to

[28] Frans Viljoen, 'Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms' in A von Bogdandy and R Wolfrum (eds) (2004) 8 *Max Planck Yearbook of United Nations Law* 49, 62; Rachel Murray, 'Evidence and Fact-finding by the African Commission' (n 26), 139.
[29] Christopher Roberts (n 26), 1, 15.
[30] Torsten Stirner (n 26), 4.
[31] Christopher Roberts (n 26), 15.
[32] Some sources that discuss evidentiary practices at the African Court include: Rachel Murray *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019); Sègnonna Horace Adjolohoun, 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights' (2020) 20 African Human Rights Law Journal 1, 25; Christopher Roberts, 'Reversing the burden of proof before human rights bodies' (2021) 25 The International Journal of Human Rights 1682, 1; The International Federation for Human Rights, *Admissibility of Complaints before the African Court: Practical Guide* (2016) 101-102; Tarisai Mutangi, 'Tracing the developing reparations jurisprudence of African Court on Human and Peoples' Rights as reflected in its first cases of Mtikila, Zongo and Konate' in Alejandro Fuentes & Annika Rudman (eds) *Human Rights Adjudication in Africa: Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems* (PULP 2023), 17, 20; JJ Tala Fomba, 'The notion of fairness in reparation litigation before the African Court on Human and Peoples' Rights' (2023) 7 African Human Rights Yearbook 52.

practical inequalities that often disadvantage individual applicants pitted against well-resourced respondent States. The study will show that the Court's attempt to shed its earlier pro-applicant approach in favour of an equal balancing of parties' interests in considering evidence (hereinafter 'equal approach to evidence') has rendered the substantive fairness of its decisions questionable. The research will further demonstrate that the earlier flexible and applicant-centred approach to decision-making (including decisions on evidence) that defined the Court's initial case law was not a random act by the Court but had been informed by context-related reasons. The study makes the argument that these reasons that informed the Court's flexible and applicant-centred approach to evidence questions still apply and the Court has struggled in justifying the shift to an equal approach in considering evidence. The thesis contends that the Court's decisions are inherently unjust in cases where they rest on an incomplete presentation of the facts and law owing to the said context-related factors that affect the quantity and quality of evidence submitted to the Court as will be further elaborated in subsequent Chapters.

A central argument of the study is that given the absence of a true power and information equilibrium between applicants and respondent States, the Court should adapt its evidentiary approach in order to achieve substantively fairer outcomes. The practical inequalities that exist between applicants and respondent States as explained in the Chapters that follow would be best redressed, this study contends, through the application of an equitable applicant-centred evidentiary approach – as opposed to one that strives to balance the interests of the parties equally. An analysis of the Court's case law (2013-2024) supplemented by data from interviews with judges and Registry staff at the Court reveals an emerging shift in the Court's conception of procedural fairness from an initial preference for an equitable applicant-centred approach to the current leaning towards an equal approach to evidence. While analysis of fieldwork data reveals observations pointing to this change being applicable to the Court's decisions in general, case law analysis shows that this shift is more pronounced in certain aspects of the Court's decision-making than others. As a whole, however, all the analysed data tells a story of the general direction in which the African Court is heading regarding how it perceives its adjudicative role and its preferred evidentiary approach.

Notably, the emerging preference for a 'balanced' approach to evidence is not without negative impact. The study shows it has made the Court less accessible, led to inappropriate dismissal of more applications and claims for reparation and engendered inconsistencies in the case law. To redress the abovementioned negative impact of the emerging change of approach to evidence on substantive human rights protection, the study proposes four guidelines or principles that, although not exhaustive or prescriptive in their detail, could inform an equitable applicant-centred

evidentiary approach by the Court. They are: (1) communication of applicable evidence standards to litigants, (2) a more proactive fact-finding role by the Court, (3) flexibility regarding acceptable forms of evidence and (4) integrating presumptions of fact (inferences) and the taking of judicial notice of certain facts in the Court's factual reasoning. In a nutshell, the study examines the African Court's evidentiary practices through the lens of an equal balance of parties' interests and an equitable applicant-centred approach to procedural fairness as the framework that best explains what has informed the evidentiary practices that the Court has adopted so far and the basis for suggested improvements to safeguard human rights.

1.3.3 Locating the study in legal theory

In terms of where the study positions itself in legal theory, the research is more closely aligned with legal realism. One of the main contributions of legal realists to our understanding of the law was opposition to legal formalism, described as 'the use of deductive logic to derive the outcome of a case from premises accepted as authoritative'.[33] Elsewhere, this approach by legal formalists is explained as one where they present judicial decisions 'as the inevitable consequence of a careful analysis of the facts and the applicable law based on the classification of [a] case in relation to previous cases'.[34] In sharp contrast, legal realists view the law as reflecting 'historical, social, cultural, political, economic, and psychological forces, and the behaviour of individual legal decision makers is a product of these forces'.[35] Legal realists had drawn inspiration from earlier works by the likes of Roscoe Pound who expounded on 'sociological jurisprudence'. Pound was of the view that sociological jurists stood out from other legal schools of thought because: (1) they focus more on the working of the law than its abstract content, (2) they view law as a social institution that may be improved by intelligent human effort, (3) they lay more emphasis on the purpose of the law than its sanction and (4) they hold that legal precepts are to be 'regarded more as guides to results which are socially just and less as inflexible molds'.[36] Leane has summed up the Realists' view of the law as one requiring that 'law is judged by its social consequences, that is to say, not by its formalism but by its ability to deliver substantive justice'.[37] He argues that legal realism, which he terms a 'court-centred movement', has as one of its main contributions to the

[33] Richard A. Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37 Case Western Reserve Law Review 179, 181.
[34] Phoebe C. Ellsworth, 'Legal Reasoning' in K. J. Holyoak and R. G. Morrison Jr. (eds), *The Cambridge Handbook of Thinking and Reasoning* (New York: Cambridge Univ. Press, 2005) 685, 689.
[35] Phoebe C. Ellsworth (n 34), 690.
[36] Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1912) Vol. 25 No. 6 Harvard Law Review 489, 516.
[37] Geoffrey Leane, 'Testing Some Theories About Law: Can We Find Substantive Justice Within Law's Rules?' (1994) 19(4) Melbourne University Law Review 924, 930.

understanding of how the law operates exposed the reality of the social agenda behind the law. He posits as follows:

> Legal Realism certainly suggests a consciousness of substantive justice in its demands that the 'real' legal context of politics and social life be acknowledged and honoured. Law does not and cannot operate in isolation from society, and to the extent that it tries to do so through Formalism it distorts and truncates its practice and possibilities. Yet the Realists seem not so much to promote a particular vision or program for realising substantive justice as to simply point out how ludicrous it is to expect it as an outcome of Formalism, which uses rules as dogma to conceal the reality of choice, indeterminacy and moral relativism.[38]

The study finds it easy to affiliate with these Realist views of the law in examining application of evidence law principles at the African Court and the corollary *substantive* implications or consequences of its evidentiary approaches. The study pays attention both to the jurisprudential outlook of judges and member of the Registry on evidence law matters in proceedings at the African Court, the contextual realities at the domestic level and circumstances of applicants who submit applications and how these factors (ought to) impact treatment of evidence and the substantive fairness of the Court's decisions. The study critically examines whether the Court's decisions are alive to and reflect these realities and circumstances, especially in view of the information asymmetry between individual applicants and States on evidence issues as well as applicants' challenges related to lack of awareness and difficulties in accessing or adducing required evidence. The study is attentive to organisational factors at the Court such as staff capacity, the tenure and transitioning of judges and how these factors impact or influence how the Court addresses evidence matters. The personal views of judges and members of the Registry are germane to the study's explanation of the evolution of the Court's choices on evidential matters over the last decade of its decision-making. There is an assumption in the study's empirical approach that institutions are partly defined by the individuals that run them. As observed, realists believe that within international institutions 'powerful actors are able not only to ignore their dictates when they dislike the expected results but also to restructure the arrangements at will'.[39] Importantly, this view is supported by my interview data. One interviewed judge observed that 'even among the Registry [officers] you can always tell which officers are very conservative, which ones are more pro-human rights and which ones are either nonchalant or indifferent'.[40] The study

[38] Geoffrey Leane (n 37) 930, 931.
[39] Oran R. Young, 'The effectiveness of international institutions: hard cases and critical variables' in James Rosenau & Ernst-Otto Czempiel (eds) *Governance without government: Order and change in world politics* (Cambridge Univ. Press,1992) 160, 161.
[40] Interview with Judge No. 1 of the African Court (Arusha, Tanzania, 7 September 2023).

will argue that some personal philosophies of the judges and Registry members can be read in the Court's change of approach to evidence in the recent past.

With the above background in mind, the main research question and sub-questions to be answered in the thesis are summarised next.

1.4 Research questions

As a starting point, this study concurs with the idea that there is an existing tension between formalism and substantive justice in how the law operates.[41] When the law takes a formalist form, it tends to be blind to the lived realities of those who come before it in the endeavour to be 'rule based' or to display a 'law-like rationality'.[42] Substantive justice however requires that 'we must be sensitive to the facts and context of the individual case, taking it as socially and culturally situated rather than as potentially reducible to some legally recognisable norm'.[43] This study thus investigates the African Court's application of evidence law concepts such as the burden of proof, the standard of proof, presumptions, inferences, judicial notice, the probative value given to various forms of evidence, and other related issues. It further examines how its efforts to be procedurally neutral in considering evidence matters, and thus arrive at 'legally correct' decisions through a formalistic approach, has impacted the fairness of substantive outcomes. It does this by probing answers to the main research question, which is: ***How have the African Court's evidentiary practices impacted the substantive fairness of its decisions while navigating the tension between an applicant-centred approach, and equal consideration of applicants' and States' interests?*** While exploring a response to this overarching question, the study simultaneously seeks answers to the following related sub-questions:

i. What are the core evidentiary practices at the African Court?
ii. What are the main challenges in relation to how the African Court treats evidence?
iii. How can the African Court's evidentiary practices be improved to enhance protection of human rights?

1.5 Research methodology

This study commenced in January 2021, employing two main approaches with regard to research methods. The first was a doctrinal approach to understanding and explaining evidentiary practices

[41] Geoffrey Leane (n 37) 924-925.
[42] ibid, 925.
[43] ibid, 926.

at the African Court. It aimed at systematising and clarifying, from a legal perspective, the applicable evidentiary rules and practices. This entailed desk research to critically analyse judgments and rulings by the African Court from an evidence standpoint. In addition, the African Charter and other relevant human rights instruments ratified by respondent States, the Protocol establishing the Court, Rules of Court, Practice Directions, publications and guidelines by the Court and its annual activity reports were studied. Decisions, guidelines, resolutions and Rules of Procedure by the African Commission were also reviewed as part of the study's references to the Commission's work. Review of the abovementioned sources was supplemented by a detailed assessment of relevant literature on the subject of evidence at the African Court and other international adjudicatory bodies, with particular focus on those with a human rights mandate. This approach allowed a description of the explicit and implicit evidentiary rules and practices applicable at the African Court as well as identification of gaps in the Court's evidentiary approaches.

1.5.1 Selection of cases for analysis

The analysed decisions in the study were delivered in the period between 2013 when the Court issued its first decision on merits and September 2024. In other words, the study consulted relevant data on evidence in all decisions of the Court in this period. As at September 2024, the Court had finalised 228 out of the 351 contentious cases before it and the decisions in the period between 2013 to 2021 are documented in five volumes of the African Court Law Report.[44] Although I skimmed through all the 228 finalised decisions, I read word for word and critically analysed the *relevant* decisions and in this regard the thesis cites a total of 116 cases.[45] To identify relevant decisions for analysis, I relied on the search function in the five volumes of the African Court Law Report to locate sections in each decision where evidence issues are addressed. The key words searched included: 'evidence', 'evidentiary', 'evidential', 'proof', 'prove', 'probative', 'weight', 'establish', 'substantiate', 'burden', 'burden of proof', 'standard of proof', 'presumption', 'inference' 'infer', 'presume', 'judicial notice', 'adversarial', 'inquisitorial', 'common law', 'civil law', 'document', 'documentation', 'statement', 'corroborate', 'corroboration', 'affidavit', 'report', 'sufficient', 'convincing', 'satisfactory', 'prima facie', 'balance of probabilities', 'preponderance of evidence', 'clear and convincing' and 'beyond reasonable doubt'. For decisions not yet documented

[44] The first Volume covers the period between 2006-2016. It should be noted that while the study covers decisions from 2013 when the first decision on merits was delivered, the Court had issued several rulings in the period between 2006 to 2013, most of which found that the Court had no jurisdiction to hear applications from the particular respondent States. The five volumes can be accessed at https://www.african-court.org/wpafc/african-court-law-reports/ (accessed 10 October 2024).

[45] I fully read all decisions of the Court issued during the period of the research (January 2021 to September 2024), including those without relevant or new information based on data already gathered.

in the Law Report (from 2022-2024), I downloaded all these from the Court's website and into a folder that allowed the word search as described above. This approach to locating relevant data for the study was necessitated by the fact that the African Court still does not have a searchable online database for the text (other than case titles) in its decisions. Even with this practical limitation, the adopted search method as described above was sufficient to identify relevant decisions that were then critically analysed.

Equally useful to note regarding case law analysis, the study makes considerable reference to decisions of the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Commission on Human and Peoples' Rights. Although the African Court itself very frequently cites the decisions of these three tribunals and it is therefore logical that a discussion of its cases should similarly reflect their approaches, this study in citing cases from the three bodies is not engaging in a systematic and comprehensive comparative analysis. Rather, the study makes ad hoc references to the decisions of these regional human rights bodies with two aims. The first is to contrast their approaches with that of the African Court to generally show convergence or divergence in how evidence is treated and the second is to cite other decisions normatively as suggested inspiration for the African Court where the study contends that those external evidentiary approaches are more progressive, that is, pro-human rights.

1.5.2 Fieldwork in Arusha

The second methodological approach to the research is empirical and it involved conducting fieldwork at the seat of the Court in Arusha. It has been observed that empirical research 'merely entails research based on observations from the real world: the data' and what distinguishes empirical legal scholarship from the more traditional (doctrinal) approaches to legal research is *explicit* use of qualitative or quantitative methods to analyse legal questions.[46] The two qualitative methods I use in this study are observation and interviews during my fieldwork at the African Court, which I staggered in two visits. The first visit took place from March to June 2022 when I worked at the Court as a 'legal intern' and was fully immersed in the Court's work. I made the second visit in August-September 2023 when I returned as an 'independent researcher' where this time I had lesser involvement in supporting the activities of the Court and more time for interviews and review of case files.

[46] C.E. Koops, *Contemplating compliance: European compliance mechanisms in international perspective*, (PhD Thesis, Universiteit van Amsterdam 2014),66-67.

The decision to undertake fieldwork was partly informed by the realisation that a full account of all evidence issues in a case was not available from only reading the text of judgments and rulings, many of which summarily capture the exchange of pleadings and facts of a case. One of the two data collection methods was semi-structured interviews with judges and Registry staff aided by a questionnaire (annexed to the thesis) with a list of questions that I shared with the interviewees beforehand. I held a total of 18 interviews at the Court, eight during the first visit and ten in the second one. All interviews were conducted in person and ranged from 35 minutes to 1.5 hours in length. I obtained written consent to record 14 of the 18 interviews and which I personally transcribed, with all data being anonymised and now on file with me.[47] In the four interviews that were not recorded, I was allowed to take notes. The Court helpfully provided translators when I interviewed judges who were more comfortable providing responses in French. Staggering my fieldwork in two visits meant that I was able to ask a different set of questions in my second visit when I had gained more clarity on the direction of the research. However, in both periods, I modified and added some questions in later interviews based on responses in earlier interviews, which helped to get a clearer view of the nuances in the responses given. Also important to note, part of the analysis of interview data involved comparing responses from different interviews and synthesising disagreements between interviewees as the substantive Chapters of the thesis will show. A final note on interviews during my second visit is that the responses had the benefit of the rapport I had created with interviewees, some of whom I was interviewing for a second time. Rapport in the context of interviews has been described by some authors as 'a feeling of connection, mutual comfort, and conversational ease' while others describe rapport between an interviewer and respondent in terms of 'chemistry' and being 'in tune'.[48] There is no consensus on whether or not rapport enhances data quality. However, a view I can identify with based on my experience during the second visit when I was not a stranger to those I interviewed, is that it motivates respondents to 'engage more deeply with the interview and give thoughtful, honest responses'.[49]

[47] With regard to conserving the integrity of my interview data in future, I have stored interview transcripts and recordings on password protected and encrypted computer files. Related to future use of the data, I specifically sought consent from my interviewees for perpetual storage of the information that can be used in the context of other research related to human rights law.

[48] Karen Bell, Eldin Fahmy & David Gordon, 'Quantitative conversations: the importance of developing rapport in standardised interviewing' (2016) 50 Qual Quant 193–212, 195 citing J.N. Capella, 'On defining conversational coordination and rapport'. (1990) 1 Psychol Inquiry 303–305 and D.D. Gremler, K.P. Gwinner, 'Rapport-building behaviors used by retail employees' (2008) 84 J. Retail 308–324, respectively.

[49] Bell, Fahmy & Gordon (n 48) 196 citing A.L. Holbrook, M.C. Green, J.A. Krosnick, 'Telephone versus face-to-face interviewing of national probability samples with long questionnaires: comparisons of respondent satisficing and social desirability response bias ' (2003) 67 Public Opin. Quart. 79–125.

The second main method of collecting data during fieldwork was through observing and participating in the Court processes. The first visit where I was accepted to work as a legal intern involved full participation in the Court's activities. Working under the supervision of a senior legal officer, I drafted judgments, rulings and various notices to parties in ongoing cases. To undertake these tasks, I had access to the case files for matters assigned to me but this access also allowed me to peruse files for concluded cases. Examination of physical cases files was useful in filling information gaps from my previous engagement with concluded cases that was hitherto limited to the text of the judgments uploaded on the Court's website. For example, I had better appreciation of the submissions by applicants in domestic proceedings by reading judgments by domestic courts available in the files. Such information and how the African Court analyses it is not captured in detail in the final texts of the judgments and rulings. Further, I attended all meetings of the Legal Division of the Court where legal officers were in the process of revising the standard forms used in case management. My contributions during these meetings led to amendment of some forms to incorporate my feedback on evidence issues.[50] In addition, I had opportunity to make a presentation during a meeting of the Legal Division on a draft of Chapter five of the thesis on application of standards of proof at the Court. The discussions during this presentation were very useful and have informed the analyses in Chapter five. Although no hearings took place during my fieldwork, the Court has uploaded several hearings on its YouTube channel and I have watched these hearings during the period of the research (2021-2024) as part of observing the Court's processes. A notable limit to my participation at the Court was that I was not allowed to be present during deliberations by judges for a first-hand account of discussions on evidence by the judges. Nonetheless, legal officers formally (in interviews) and in informal interactions explained to me how the deliberation process generally proceeds. Overall, the insights gained from interviews, observation and participation in the Court's activities are interwoven with the case law analyses to strengthen and complement the latter.

1.5.3 Research in the course of research

There were two important requests from the Court for me to provide research support on evidence matters during my first fieldwork visit. The first request came soon after I arrived at the Court and it was for me to undertake research on use of affidavit evidence in international adjudication. The background to this request, as explained in the instructions I was given, was a challenge the Court

[50] For example, in the standard form for a 'Notice of Acknowledgement of Receipt of Application', I suggested that a sentence be added to the effect that an applicant requested to provide additional information or documentation should submit a justification for when such information or documentation is unavailable or missing or inaccessible for consideration by the Court. This proposal was accepted and the form amended accordingly. A similar amendment was made on the form for a 'Notice of Acknowledgment of Receipt of Request for Provisional Measures'.

was facing regarding uncertainty over the probative value to be given to affidavit evidence that was adduced without any other supporting documentation. The second request, one of the high points of the study, was made towards the end of my fieldwork. The Court asked me to develop a document collating evidentiary standards that (could) apply at the Court. This idea was born out of discussions in interviews with key actors at the Court as well as my questions and comments during the Registry's process of reviewing standard forms used in the Court's correspondence with parties on various matters under its Rules and the Court Protocol. This culminated in my submission of a draft text that was considered by the Court as part of an ongoing process at the time of reviewing its Practice Directions that had been in existence since 2012. To develop this draft, I undertook extensive research on existing rules of evidence for various international tribunals, including those without a human rights mandate. The content of this draft was also informed by the Court's case law, its rules on evidence and its publications. While the sources of information and inspiration for the text varied as stated above, the unifying theme and overriding consideration while developing it was to retain and expand flexibility on evidence and inform litigants on the subject, in accordance with the preliminary findings in the study at the time. On 5 March 2024, the African Court adopted new Practice Directions which include the set of evidentiary standards I recommended to the Court.[51]

This overall research support to the Court that was influenced by the aims of my own ongoing research and done in consultation with key actors at the Court reveals elements of 'action research'. Greenwood and Levin describe this as 'a research practice with a social change agenda' that brings together a researcher and stakeholders (such as members of an organisation, community or network) seeking to improve the participants' situation.[52] An important aim of this study from its early stages, as reflected in how the research sub-questions are framed, was to identify challenges in the Court's evidentiary practices and explore ways of addressing them. The coinciding of this research aim with the African Court's openness and willingness to improve its evidentiary practices provided enabling circumstances for action research whose purpose has been described as being 'always and explicitly to improve practice'.[53] Pertaining to this, a note on my positionality is necessary to particularly disclose how my self-identification and experience influenced my research

[51] Available at https://www.african-court.org/wpafc/wp-content/uploads/2024/03/EN-Practice-Direction-Adopted-5-March-2024_.pdf (accessed 30 September 2024). Related to this, see an acknowledgement letter from the African Court which is annexed to the thesis as Appendix 7.

[52] Davydd J. Greenwood and Morten Levin, *Introduction to Action Research : Social Research for Social Change* (2nd edn, SAGE, 2007) 3-4.

[53] Loraine Blaxter, Christina Hughes & Malcom Tight, *How to Research* (2nd edn, Open University Press, 2001), 67 citing Morwenna Griffiths, *Educational Research For Social Justice: Getting Off the Fence* (Open University Press 1998), 21.

methods.[54] As Cardozo observes: 'We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own'.[55] I have a background of working in human rights NGOs in Kenya that particularly focused on labour rights advocacy. This work involved advocating for reforms in employment laws, policies and practices to improve conditions of workers in precarious employment.[56] Based on this experiential knowledge, I have an ingrained activist view of how the law ought to operate and be responsive to the conditions of those who are vulnerable. Therefore, as a researcher on evidentiary practices at the African Court, I naturally took interest in how the typical individual applicants engage with the Court's processes and how their contexts, circumstances and vulnerabilities affect the quality of evidence they present. In relation to this, I was interested in how to improve the 'legibility' of the Court's procedural machinery to the 'common person' and enhance their access to justice. In view of this, I associate with the position that 'intellectual work cannot afford to be complacent with mere exposition of reality and be a silent spectator to its predicament'.[57] This explains my inclination towards investigating evidentiary practices at the African Court through action research in the sense described by Bhat as denying separation between thought and action and engaging in research that 'generates knowledge along with production of action'.[58]

1.5.4 Research design

In terms of how the research is designed, to understand the core evidentiary rules and practices at the Court two substantive Chapters (four and five) are dedicated to the evidential concepts of burden of proof, standard of proof and related adjudicatory tools such as presumptions, inferences and judicial notice. Discussions in these Chapters clarify *what* the applicable evidentiary standards are, particularly regarding where the onus of proof lies and how the Court distributes this burden as well as the threshold of evidence required to discharge the burden. These Chapters also investigate the explicit and implicit application of evidentiary rules at the Court. With a clear understanding of these foundational evidentiary concepts and how they are applied by the African Court, the thesis zooms in on two case studies that are concerned with the implications of the Court's evidentiary approaches on substantive outcomes of its decisions in specific types of cases. The two other substantive Chapters of the thesis (six and seven) discuss case studies to qualitatively

[54] Lynette J. Chua and Mark Fathi Massoud (eds), *Out of Place: Fieldwork and Positionality in Law and Society* (CUP 2024), xiii (preface).
[55] Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921), 3.
[56] I trained workers, trade union officials and employers' representatives in the horticulture, tea and sisal sectors on labour and human rights. Major problems faced by workers in these sectors in Kenya include low wages, insecure jobs, inadequate workplace health and safety measures, unfair terminations, discrimination, sexual harassment and victimisation on account of trade union membership.
[57] P. Ishwara Bhat, *Idea and Methods of Legal Research* (OUP 2019) 534.
[58] ibid.

illustrate the Court's treatment of evidence and related challenges in two particular issues – assessment of compliance with the admissibility condition under Article 56(6) of the African Charter requiring submission of applications within reasonable time after exhaustion of local remedies, and determination of compensation claims, one of five forms of reparation available at the Court. The two case studies therefore clarify to the reader what the *implications* of the Court's evidentiary approaches are.

As further justified in Chapter six, the narrowed focus on the first issue is informed by the fact that while its jurisprudence on other admissibility conditions is largely settled, the Court's determination of reasonableness of time taken to file cases remains contentious and the controversy has hinged on evidence assessment. As a result, access to the Court has been further limited. Particular focus on the second issue regarding determination of compensation claims is informed by the study's deduction after reviewing decisions of the Court and conducting interviews that this is possibly the most frequently sought form of reparation and also the most contested one on evidence questions when compared with other forms of reparation sought at the Court. It is in assessment of compensation claims that the study also argues that substantive accuracy of the Court's decisions is sacrificed in favour of procedural 'correctness' in application of evidence rules. Insights from the two case studies inform the study's recommendations on how the African Court could improve on its evidence practices to enhance substantive fairness of its decisions. Although Chapter three, which presents the conceptual framework for the study, precedes the four substantive Chapters, it was drafted after preliminary findings had taken shape. Based on analysis of the study's data, Chapter three seeks to unearth and explain the factors below the surface of the legal text in judgments that are informing the African Court's evidentiary approaches.

1.6 Significance of the study

As noted earlier, the study undertakes a systematic assessment of the evidentiary practices of the African Court, an area that has been scarcely researched and only in a piecemeal manner as the reviewed literature shows. By clarifying the main features of the Court's evidentiary regime, the study's findings will particularly interest the scholarly community with a useful reference from an African Court's perspective that will hopefully contribute to the development of comparative studies in international human rights adjudication. The study has the novelty of developing an

empirically grounded understanding of evidentiary practices at the African Court.[59] Its specific focus on contextual factors and circumstances of applicants that impact the ability to adduce evidence and the quality of evidence submitted provides useful insights for scholarship on how the absence of equality of arms expresses itself in international human rights adjudication, its impact on the fairness of substantive outcomes and the feasibility of the recommended evidentiary techniques to address the asymmetry between parties.

As noted earlier, the provisions on evidence in the revised Practices Directions at the African Court are an outcome of this study. This development reflects the Court's acceptance of one of the key recommendations of the study, namely, to communicate applicable evidence standards to (prospective) parties. Codes on evidence are typically associated with rigidity and indeed the initial response from most of those interviewed was to caution against rigidity when I asked whether the Court could benefit from some form of guidelines on evidence. Contrary to these concerns, the innovation of the set of evidence standards now captured in the new Practice Directions is to clearly and explicitly protect the flexibility on evidence (which would be particularly favourable to applicants) as advanced throughout the discussions in the study. This intervention is pivotal given what the study will show to be an emerging dominance of the equal approach to evidence that has allowed rigid evidentiary approaches to make inroads into the Court's jurisprudence. The evidence standards in the Practice Directions serve as a practical illustration of how a regional human rights court can safeguard evidentiary flexibility through codification that systematizes and communicates applicable standards. They are both an external guide for litigants as well as an internal guide for the Court and it is hoped that the clarity they provide and the expanded flexibility they permit will improve the quality of pleadings from an evidence standpoint, enhance substantive protection of human rights and promote consistency in decision-making on evidence matters. To realise this will however depend on the extent to which both litigants and the Court breathe life into the standards in actual cases.

1.7 Limitations of the study

There are two notable limitations in the study. The first relates to the scope of the data set informing the analyses and findings. As at September 2024, out of the 228 finalised applications at the Court 119 were against Tanzania and this represents 52%. Importantly with regard to these statistics is that the overall percentage of finalised applications against Tanzania was much higher

[59] Originality in research manifests in multiple ways and one of the many definitions of originality is 'carrying out empirical work that hasn't been done before', see Loraine Blaxter, Christina Hughes & Malcom Tight, *How to Research* (n 53), 13.

before the country withdrew the declaration permitting individuals and NGOs to directly access the Court five years ago in November 2019. This high number of cases involving Tanzania means that decisions in those cases is what has largely defined the Court's evidentiary practices. This has concurrently meant that the bulk of the analyses in this study have relied on cases against Tanzania and the particular attention paid to circumstances of applicants in the thesis' discussions was by default mostly related to those of individual applicants based in Tanzania. Although the study shows that the Court has extrapolated its reasoning in cases involving Tanzania to some decisions involving other respondent States, the analyses in the study would have benefitted from a more inclusive or varied sample of cases in terms of respondent States.[60]

An additional note in relation to the skewing effect of the high number of cases against Tanzania is that the bulk of the Court's decisions are on alleged violations of fair trial rights, the most recurring complaint by convicted applicants in Tanzanian prisons. The Court's evidentiary practices and by extension this study's analyses are therefore centred on cases, facts and circumstances of incarcerated applicants claiming violation of fair trial rights. Further, given that Tanzania has a Common Law legal tradition, the high number of cases against this State has, according to a legal officer I interviewed, meant that the Court leans towards applying Common Law principles. The officer observed as follows:

> I think the Court is generally more Common Law leaning because most cases come from the Common Law legal system, mostly from Tanzania. I have learnt a lot of things that I did not know from my Civil Law background, like identification parades in criminal matters. Even assessors and juries, we do not have such in Civil Law systems and I have to examine how fair they are in domestic trials. Unless you know how the Common Law operates, you cannot process the case. If you deal with more cases from Common Law, you tend to apply Common Law principles.[61]

The over-representation of Common Law at the African Court and its adoption of Common Law language (discussed further in Chapter five) in its evidentiary rules and practices has in a limited way similarly been reflected in the study's analyses, particularly while examining the application of burden and standard of proof. This imbalance in the study was reinforced by the fact that I am a lawyer trained in the Common Law system. Therefore, approaches to my analyses and the sources I consult in the study partly reflect this bias.

A further note on the scope of the data set is that interview data was only drawn from conversations with judges at the Court and officers in the Registry. Several requests to interview

[60] Related to the cases discussed, while Chapter two refers to Advisory Opinions issued by the Court, the study primarily focuses on evidentiary practices in exercise of its jurisdiction in contentious proceedings.
[61] Interview with Registry Member No. 1 at the African Court (Arusha, Tanzania, 14 August 2023).

representatives of a prominent institution that regularly engages in strategic litigation at the Court and provides *pro bono* legal representation were unsuccessful. A more expansive empirical focus and particularly a broader range of participants in interviews to, for example, get perspectives from lawyers and NGOs that regularly litigate at the Court as well as document the experiences of government representatives, self-represented and represented applicants and victims could have enriched the study's findings. Additionally, as explained in the research methodology section above, the two case studies in the thesis had a narrow (but justified) focus limited to examination of evidentiary practices in admissibility decisions on one of seven admissibility conditions and one of five forms of reparations granted at the Court.

The second limitation relates to how the study's analyses draw upon the practices of other human rights adjudicating bodies. A comprehensive comparative analysis of evidentiary practices in the three regional human rights courts was beyond the scope of the study. However, the discussions regularly cited decisions of the European Court, the Inter-American Court and the African Commission. As noted earlier, the aim of this was to generally contrast the evidentiary approaches of these bodies with those of the African Court and as sources of inspiration for the Court in particular discussions. A notable gap in this exercise was not considering decisions of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and sub-regional courts that exercise a human rights mandate like the ECOWAS Court of Justice and the East African Court of Justice for a complete African perspective on the subject. Decisions from these sub-regional bodies were excluded from the analyses in the study's aim of limiting the comparison to the regional level and thus compare practices of peer institutions. A note on future research in the Conclusion Chapter speaks to this omission of case law from these sub-regional courts and particularly the ECOWAS Court of Justice.

1.8 Structure of the thesis

The thesis consists of eight Chapters. This introductory Chapter gives a background to the study, describes the main research question and the sub-questions deriving from it and methodology used to answer the questions. It also explains the significance of the study, its limitations and an outline of subsequent Chapters.

Chapter two provides a background to the African Court to help the reader appreciate the context of the Court, in other words, its operating environment. The Chapter's discussions provide a foundation for building arguments in subsequent Chapters that the Court's approach to evidence needs to be responsive to contextual factors that affect the quality of applications by individual

applicants, especially those without legal representation. To do this, the Chapter outlines the Court's structure, how it is accessed and challenges related to its access. It then provides an overview of the jurisdiction of the Court and admissibility conditions under Article 56 of the African Charter. This is followed by a discussion of the main challenges, both internal and external, facing the Court. The Chapter concludes with a look at the history of attempts to restructure the Court and where things stand in this planned transition.

Chapter three sets out a conceptual framework for the study. It begins with an examination of the purpose of establishing the African Court in the first place and links this with an inquiry about the applicable model of procedural fairness at the Court, including on evidence matters. Building on the discussion of contextual factors in Chapter two, this Chapter then delves into the evidentiary difficulties that applicants at the Court face. This provides the basis for the study's argument that the Court should adapt its evidentiary approach in appreciation of the discussed difficulties. A justification is provided in this Chapter for why this adaptation should take the form of an equitable, applicant-centred approach to evidence.

Chapter four focuses on application of the concept of burden of proof at the African Court. It provides an overview of evidence rules that generally apply at the Court before zooming in to unpack the meaning of the concept of the burden of proof. The Chapter discusses the Court's position on the party with the onus of proof, generally the applicant, and circumstances under which the burden of proof will shift or reverse to the respondent State. The African Court's practices in this regard are contrasted with approaches in other international human rights adjudicatory bodies. The Chapter analyses how presumptions, inferences and judicial notice impact on the burden of proof and the relevance of these tools to the African Court's evidentiary approach. Overall, the Chapter contends that the Court's practices on shifting the burden of proof and use of presumptions in some cases illustrate progressive, pro-human rights flexibility on evidence. It concludes that this flexible approach, although applied inconsistently, demonstrates the applicability and relevance of an equitable applicant-centred evidentiary approach as advanced in the study.

Chapter five of the thesis addresses the issue of standard of proof in adjudication at the African Court. It begins with a review of common law and civil law traditions on standards of proof as these have concurrently influenced the Court's practices on application of standards of proof. An overview of international practices on standards of proof is provided to contrast these with the African Court's approach before an in-depth examination of how the Court applies the concept in its decisions. Based on identified gaps from this examination, the Chapter concludes with

suggestions of how an equitable applicant-centred approach to applying standards of proof could look like.

Chapter six studies the Court's approach to evidence in its assessment of compliance with the admissibility condition under Article 56(6) of the African Charter requiring applications to be submitted at the Court within reasonable time after exhaustion of local remedies. It starts by interrogating the rationale behind the requirement to file applications within reasonable time and provides a summary of the approach taken by the African Commission, as the path taken by the latter is strikingly similar to that of the Court. The Court's jurisprudence in applying Article 56(6) is then critically examined paying particular attention to how the Court's position between 2013-2018 has drastically changed in decisions made between 2019-2024 and the impact of the latter approach, namely, a less accessible African Court. The Chapter concludes with the study's take on how the Court can apply an equitable applicant-centred evidentiary approach to assessing compliance with Article 56(6).

Chapter seven looks at how the African Court has dealt with evidence in determining compensation claims, one of the five forms of reparation available at the Court. It provides a summary of the legal framework on reparations and the principles that have settled in the Court's decisions on reparations. The Chapter then zooms in on the two main approaches to evidence in considering compensation claims, namely, an occasional applicant-centred flexible approach to evidence and the more prevalent strict requirement of documentary proof. The Chapter highlights challenges related to the Court's oscillation between these two approaches. It then contrasts the African Court's evidentiary practices in compensation claims with those of other international adjudicating bodies. Based on identified gaps from the analysis in the Chapter, it concludes with proposals on how the African Court can minimise substantively unfair outcomes while determining compensation claims through an equitable applicant-centred evidentiary approach.

Chapter eight is the conclusion and it provides a summary of the findings and recommendations. It outlines the practical implications of the study following the Court's adoption of new Practice Directions which contain an annexture on applicable evidence standards at the Court that I developed during my fieldwork at the seat of the Court in Arusha, Tanzania. It concludes with a note on further research that can be conducted to build on the findings of this study.

CHAPTER 2: An Overview of the African Court

2.1 Introduction

This Chapter will provide a background to the African Court and the relevance of this basic information to the study is three-pronged. Firstly, arguments in the subsequent Chapters make reference to contextual factors that should inform an adapted evidentiary approach for the benefit of individual applicants. For this reason, it is logical that those arguments be preceded by spelling out what these contextual factors are. Discussions in this Chapter on accessibility of the African Court as well as the external and internal challenges it faces will therefore enhance the coherence of subsequent analyses and arguments. Secondly, the discussions cover the foundational details of the Court's set up which will eliminate the need to elaborate these aspects where they are referred to in the substantive Chapters. Thirdly, this overview of the Court is also beneficial to the reader who may be unfamiliar with the details of the Court's configuration and operating environment as a starting point to appreciating the critique of the Court's evidentiary practices. In view of this, the Chapter discusses the structure of the Court (section 2.2), how the Court is accessed (section 2.3), its jurisdiction (section 2.4), admissibility conditions that must be met by those who submit cases before the Court (section 2.5), the Court's major challenges (section 2.6) and efforts made to restructure the Court (section 2.7).

2.2 Structure of the Court

2.2.1 Judges

The African Court consists of 11 judges who serve on an individual capacity and must be nationals of AU Member States. These judges should be 'jurists of high moral character and of recognised practical, judicial or academic competence in the field of human and peoples' rights'.[1] Judges of the Court cannot hold diplomatic, political or administrative positions, be government legal advisers or participate in activities that compromise their independence and impartiality.[2] This requirement in the Court's Rules provides further clarity on the general prohibition in the Protocol for judges to engage in activities that are 'incompatible' with their independence and impartiality. Soon after adoption of the Court Protocol, one author had raised concern that the part-time status

[1] Article 11(1) of the Court Protocol.
[2] Rule 5 of the Court's Rules.

of judges may result in them taking up 'additional posts incompatible with their judicial duties'.[3] The revised, current Rules have addressed this concern.

State Parties to the Court Protocol nominate candidates and the AU Assembly elects judges by secret ballot. In electing judges, the Assembly is required to ensure representation of the main regions of Africa, their principal legal traditions and adequate gender representation.[4] A group of non-state actors dubbed 'the Arusha Initiative' launched a campaign in March 2024 aimed at identifying suitable experts to serve as judges. This platform has decried the 'lack of transparency around the national nomination processes and the absence of a system to facilitate citizens participation' in the process of nominating judges.[5] All judges of the Court serve on part-time basis (except the President) for a six-year term that is renewable once.[6] The judges elect from among themselves the President and Vice President of the Court. The President serves on a full-time basis and must reside at the seat of the Court.[7] The President and Vice President of the Court collectively consist of the Courts 'bureau'.[8] They are both elected for a two-year term and can only be re-elected once.[9] The composition of the bureau should 'as far as possible' ensure there is gender balance and representation of main legal traditions and regions of Africa.[10] The President of the Court has a number of key functions which include: representing the Court, presiding at the sittings of the Court, directing and supervising administration of the Court, promoting activities of the Court and conducting an annual performance assessment for judges based on criteria adopted by the Court. The Vice President assists the President in exercising these functions.[11]

Notably, a judge who is a national of a State that is party to a case cannot hear the case.[12] Commenting on the first bench elected to serve at the Court, Viljoen observed that based on experience at the African Commission, the success of the African Court would depend on 'the activism and jurisprudential approach' of the judges. He also noted that by excluding a judge who is a national of a State that is a party to a case from hearing the matter, the 'African political reality'

[3] Nsongurua J Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late than Never' (2000) 3 Yale Human Rights and Development Law Journal 45, 84.
[4] Article 14 of the Court Protocol.
[5] See news updates by the Centre for Human Rights, University of Pretoria at https://www.chr.up.ac.za/latest-news/3700-arusha-initiative-launches-campaign-to-identify-experts-for-upcoming-elections-to-the-african-court-on-human-and-peoples-rights (accessed 4 September 2024) and https://www.chr.up.ac.za/latest-news/3855-as-newly-elected-judges-take-their-seats-on-the-african-human-rights-court-the-arusha-initiative-calls-for-greater-transparency-in-the-nomination-and-election-of-judges-2 (accessed 4 September 2024).
[6] Article 15 of the Court Protocol.
[7] Article 21 of the Court Protocol.
[8] Rule 10(1) of the Court's Rules
[9] Rule 13(1).
[10] Rule 10(2).
[11] Rule 14.
[12] Article 23 of the Court Protocol.

outweighed 'the ideal of representation and other possible operational advantages' that such a judge who is familiar with a particular domestic setting could bring to the Court.[13]

The Court Protocol requires it to render judgment within 90 days of concluding deliberations. This requirement which was meant to create a time-bound process of decision-making has some ambiguity because 'deliberations' do not have a time frame. The revised Rules of the Court (2020) have since addressed this loophole by providing that deliberations must be completed 'within two consecutive ordinary sessions of the Court following the close of pleadings'.[14] The decisions are final and not subject to appeal.[15] However, the Court can review its own decision in cases where there is discovery of new evidence after judgment is issued and it may also interpret its own decision.[16] Adjolohoun has observed that the lack of an appeal mechanism, coupled with the fact that the Court is now determining critical matters such as electoral disputes, has contributed to the challenge of States withdrawing the declaration that allows individuals and NGOs direct access to the Court. He argues that in the absence of a possibility of appeal 'States may well find disengagement the most appropriate means of protecting their sovereignty against an unfavourable ruling'.[17] This view can however be challenged on two fronts. First, under Article 35 of the Court Protocol, a State Party can request for amendment of the Protocol. There is therefore a legally valid and legitimate alternative to introduce an appeal mechanism rather than taking the extreme measure of disengaging the Court that is deleterious to the overall aim of protecting human rights. Second, it is arguably disingenuous of States to disengage the Court following unfavourable findings of the Court. This is because their acceptance of the Court's jurisdiction to determine cases and disputes involving them has an inbuilt acknowledgment that the success of their claims or defences cannot be guaranteed by a Court whose decision-making is based on evidence.

Also useful to note, decisions are made by a majority of the judges present and abstentions are not allowed in the final vote to decide a case.[18] To determine a case, the Court must have a quorum of at least seven judges.[19] One member of the Court's Registry whom I interviewed held the view that the requirement to have a quorum of seven judges has partly contributed to the backlog problem at the Court. According to this officer, requiring seven judges to deliberate on every case and

[13] Frans Viljoen, *International Human Rights Law in Africa* (2nd edn OUP, 2012) 423,424.
[14] Rule 67(3).
[15] Article 28.
[16] Article 28 of the Court Protocol; See, for example, *Urban Mkandawire v. Malawi*, Application No. 001/2013, Ruling of 28 March 2014 (Review of judgment in Application No. 003/2011) and *APDH v. Cote d'Ivoire*, Application No. 003/2017 Judgment of 28 September 2017 (Interpretation of Application No. 001/2014).
[17] Segnonna Horace Adjolohoun, 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights' (2020) 20 African Human Rights Law Journal 1, 19.
[18] Rule 69(2) of the Court's Rules.
[19] Article 22 of the Court Protocol.

particularly the repetitive cases where the Court's jurisprudence is well established was not efficient. The member suggested that the Court should capitalise on the ongoing conversation on reforming AU institutions to recommend amendment of the Court Protocol to lower the quorum and provide for division of judges into chambers to expedite decision-making.[20]

2.2.2 The Registry

The Court Protocol establishes the Court's Registry which comprises of the Registrar, Deputy Registrar and other staff.[21] In constituting the Registry, the Court observes 'gender parity and representation of different regions and legal traditions'.[22] The Registrar supervises and coordinates all operations and activities of the Registry. With support from other staff, the Registrar has some key roles that include: keeping a general list of all cases and publishing it on the Court's website, transmitting pleadings and documents to parties, preparing minutes in Court sessions, publishing decisions of the Court, maintaining relations between the Court and other AU organs, among other functions.[23]

Although this is not expressly provided for in the Court's Rules, based on my observations while on fieldwork at the Court, legal officers who form part of the staff of the Registry play an important role in managing the process of exchange of pleadings and communication with involved parties as well as developing the first drafts of the Court's judgments. They do this while working closely with the Judge Rapporteur assigned to the case. The draft judgment developed by a legal officer is also commented on by other legal officers within the Legal Unit of the Registry before it is submitted to the judges for deliberations during Court sessions. Deliberations take place in camera and remain confidential, although the Rules allow the relevant legal officer to be present during deliberations where the Court deems this necessary.[24] One of the legal officers I interviewed likened the collaboration between legal officers and judges to a car, noting that 'legal officers are the engine while judges are the drivers'.[25] Some of the challenges that the Registry is facing are highlighted in section 8 below.

2.3 Accessing the African Court

The issue of accessing the African Court is provided for in Article 5 of the Court Protocol for contentious matters and in Article 4 on requests for advisory opinions. As regards contentious

[20] Interview with Registry Member No. 6 at the African Court (Arusha, Tanzania, 22 August 2023).
[21] Article 24 and Rule 16(1).
[22] Rule 16(2).
[23] See the full list of the Registrar's functions in Rule 21 of the Court's Rules.
[24] Rule 67(2).
[25] Interview with Registry Member No. 1 at the African Court (Arusha, Tanzania, 14 August 2023).

proceedings, access to the Court is either direct or indirect. Under Article 5, the following entities are entitled to *directly* submit cases to the Court: (1) the African Commission, (2) the State Party which has lodged a complaint to the Commission, (3) the State Party against which a complaint has been lodged at the Commission, (4) the State Party whose citizen is a victim of human rights violation, (5) African Intergovernmental Organisations, (6) a State Party with an interest in a case may request the Court permission to join, (7) NGOs with observer status before the African Commission and (8) individuals. Notably, Article 34(6) of the Protocol stipulates that NGOs and individuals can only directly submit cases against a State that has made a declaration accepting the competence of the Court to receive cases from individuals and NGOs. Where such declaration has not been made, the only possibility of individuals and NGOs to submit a case to the Court against a State Party to the Protocol is *indirectly* through a referral of the case from the African Commission to the Court.

From the above, it is evident that access to the Court by individuals and NGOs is limited. Juma has faulted the wording of Article 5 for giving primacy to States as almost all possibilities of directly accessing the Court cater to States given that even African Intergovernmental Organisations can be considered State-like.[26] This is particularly odd because as he rightly observes, 'individuals are the typical consumers of human rights courts'.[27] Since the Court was established, it is only in 2023 that it has received an inter-state application and which is still pending determination.[28] The indirect route to the Court for individuals and NGOs is determined by the Commission and on this Juma also identifies additional difficulties. He notes that the Commission has no legal obligation to refer cases to the Court. Additionally, protracted proceedings at the Commission may translate to further delays in transferring cases for adjudication at the Court. He also suggests that given that the Commission has a narrower material jurisdiction (violations of the Charter and the Maputo Protocol) than the Court (violations of the Charter and any other human rights instrument ratified by the State), the scope of grievances that individuals and NGOs can submit via the Commission is possibly limited.[29] Since inception of the Court, the Commission has only referred three cases to the Court, a clear indication that the Commission's route to accessing the Court is one rarely taken. Heyns, writing before the Court started receiving cases, accurately predicted that access to the Court through the Commission could mean that individuals and NGOs are 'left to

[26] Dan Juma, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper' (2007) Vol. 4 No. 2 Essex Human Rights Review, 6
[27] ibid, 5.
[28] *Democratic Republic of the Congo v. Republic of Rwanda,* Application 007/2023, received at the Court on 21 August 2023.
[29] Dan Juma (n 26), 8-9. See also Frans Viljoen & Chidi Odinkalu *The Prohibition of Torture and Ill-treatment in the African Human Rights System: A Handbook for Victims and their Advocates* (OMCT Handbook Series Vol. 3), 86 where the Court's wider jurisdiction is acknowledged.

the mercy of the Commission to take their cases further'.[30] This would mean the Protocol would likely 'provide a very low level of protection for the individual, except if the Commission follows an activist approach, which cannot be guaranteed'.[31]

The Court has itself acknowledged the fact that accessing the African Court is far from a straightforward endeavour by noting that:

> For all its gains over the past five years, the African Court's ultimate weakness undermining its mission to protect the human rights and freedoms of all African people remains its limited accessibility to human rights victims.[32]

Other studies as highlighted in this section also confirm this 'ultimate weakness', to use the Court's own words. The International Federation for Human Rights, a non-governmental federation for human rights organizations, has developed a guide on admissibility of complaints before the African Court. This guide lists challenges in accessing the Court that include 'lack of awareness and information, lack of capacity and legal expertise, geographical distance and isolation, language barriers, lack of resources and…rights-hostile national regimes and inadequate remedial systems'.[33] Viljoen has identified four reasons that impede access to the African Court: (1) existence of Article 34(6) in the Court Protocol which requires a State to make a declaration accepting the Court's competence to receive complaints against it from individuals and NGOs, (2) the small number of States that have made this declaration, currently standing at eight, (3) the requirement to exhaust domestic remedies and (4) lack of awareness about the Court by the general population and lack of knowledge and capacity for approaching the Court among domestic lawyers.[34] Windridge has expressed concern that 'the triple layer of ratifications (African Charter, African Court Protocol, and the additional declaration in Article 34(6) of the Protocol) needed for individuals and NGOs…to access the African Court continues to leave [it] hamstrung in its objective of becoming a truly continent-wide human rights court'.[35]

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[30] Christof Heyns, 'The African regional human rights system: In need of reform?' (2001) 1 African Human Rights Law Journal 155, 169.
[31] ibid.
[32] African Court on Human and Peoples' Rights Strategic Plan 2021-2025, para 14 of Executive Summary section. Available at https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-strategic-plan-2021-2025/ (accessed 5 April 2024)
[33] The International Federation for Human Rights (FIDH), *Admissibility of complaints before the African Court: Practical Guide* (June 2016), 8; Murray also points out that three decades later, there is still lack of awareness of the African Charter, the African Commission and the African Court and their rich jurisprudence, see Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019), 4.
[34] Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 International and Comparative Law Quarterly 63, 70-75.
[35] Oliver Windridge, 'Necessary Check Points or Immovable Roadblocks? Accessing the African Court on Human and Peoples' Rights' (2018) 35 Wisconsin International Law Journal 458, 483-484.

Further to the above, other challenges that precede submission of cases to the Court compound its accessibility. Hampton *et al* argue that difficulties of accessing the African Court are explained by factors that precede the admissibility phase of applications at the Court. First, they point out that 'legal awareness or rights literacy' is low in most of Africa and that 'few people construct the injuries or wrongs against them as "cases" involving a legal issue about which something can be done'.[36] Second, there are divided loyalties in African legal culture with many African societies split between traditional dispute settlement and formalized courts of Western origins. In this context, they argue that 'people feel alienated from formal courts, which are seen as the preserve of a minority elite with proficiency in a European language'.[37] Third, legal services in Africa are 'professionalized, cumbersome, and culturally alienating, and the fees are out of the reach of ordinary people'. Lastly, they identify the challenge of lack of independent judiciaries, perceptions of corruption in the judicial systems, routine disregard of court orders and 'a low level of awareness or interest in the regional human rights system' among ordinary people and lawyers.[38]

Overall, it can be observed that the current design of access to the African Court remains very restrictive and one would expect that the current conversations about reforming AU institutions can extend to doing away with the requirement for States to accept (through a separate declaration) the competence of the Court to receive applications from individuals directly. Realistically, this seems very unlikely as a current judge of the Court has confirmed that the Court has made three attempts at this but its proposals 'have been dismissed out of hand without a proper hearing and the Court was asked not to bring back these proposals again'.[39] Related to the main argument in the thesis, a consensus can be observed from the above summary of literature on the contextual factors that impede a majority of individual applicants from submitting required evidence at the Court. The study argues that these factors cannot be ignored and should be reflected in the Court's reasoning while assessing evidence in cases before it. As the sources cited above document, low legal literacy and a general lack of awareness about regional human rights mechanisms such as the African Court is a cross-cutting theme. So is the inadequate capacity of domestic lawyers to engage with the African human rights institutions and their processes, a problem that is compounded by inaccessible legal services in most African countries. In view of this, the typical individual

[36] Françoise Hampson, Claudia Martin & Frans Viljoen, 'Inaccessible apexes: Comparing access to regional human rights courts and commissions in Europe, the Americas, and Africa' (2018) Vol. 16 No. 1 International Journal of Constitutional Law 161, 164.
[37] ibid.
[38] Hampson, Martin & Viljoen (n 36) 165.
[39] Presentation by Justice Ben Kioko in Inter American Court on Human Rights, *Dialogue between Regional Human Rights Courts* (2020), 148. Available at https://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-en.pdf (accessed 13 March 2024).

applicants who submit human rights cases against respondent States begin from a procedural disadvantage as the abovementioned factors do not apply to well-resources States and their representatives. As the substantive Chapters of the thesis argue, this reality calls for the Court to exercise greater evidentiary flexibility in favour of applicants who are beleaguered by these contextual challenges.

2.3.1 Access in relation to advisory opinions

Regarding access to the Court for advisory opinions, only four entities can submit such request: (1) the AU, (2) an AU Member State, (3) an AU organ and (4) an African organisation recognised by the AU. Although the AU Constitutive Act lists nine institutions as its organs[40] and the African Committee of Experts on the Rights and Welfare of the Child is not among these, the Court has determined that it is an organ of the AU because 'the policy organs of the AU have treated the Committee as an organ of the Union'.[41] It can therefore submit requests for advisory opinions. The Court has taken a narrow view of what is meant by an 'African organisation recognised by the AU'. It struck out a request for an advisory opinion by NGOs with observer status at the African Commission noting that recognition by the AU meant recognition 'by the AU itself' and not its organs.[42] Further, that this recognition takes the form of granting of observer status by the AU or signing of a memorandum of agreement between the AU and an NGO.[43] It has been suggested that it would have been 'logical and practical' to permit NGOs with observer status with AU organs and agencies to submit requests for advisory opinions and that this would be a 'sensible purposive' interpretation of 'recognition by the AU'.[44] The additional hurdle placed by the Court in its interpretation has the net effect of limiting access to the Court for such opinions over and above the limitations of access for contentious proceedings. There are two other conditions that a request for an advisory opinion must meet under Article 4 of the Protocol. One is that it must concern a legal matter related to the African Charter or other human rights instrument ratified by the State concerned. The Court has found that it has no jurisdiction to issue an advisory opinion on a matter related to the Pan-African Parliament Protocol and its Rules of Procedure because these were not

[40] The Assembly, Executive Council, Pan-African Parliament, the Court, the AU Commission, the Permanent Representatives Committee, specialised Technical Committees, the Economic, Social and Cultural Council and Financial Institutions.
[41] *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child*, Request No. 002/2013, 5 December 2014, para 56.
[42] *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria & Others*, Request No. 001/2016, 28 September 2017, para 46.
[43] ibid, para 47.
[44] Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (n 34), 91; Anthony Jones, 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 African Human Rights Law Journal 320, 327.

human rights instruments.[45] The other condition is that it must not be related to a matter pending before the African Commission.[46]

2.4 Jurisdiction of the Court

The jurisdiction of a court relates to its powers and the extent of those powers.[47] The above summary on who has *locus standi* to request for advisory opinions and the subject matter of such requests sums up the Court's advisory jurisdiction. This section focuses on the Court's jurisdiction in contentious matters. The African Court's jurisdiction on contentious proceedings is defined in Article 3 of the Court Protocol and further elaborated in Rule 29 of the Court's Rules. These provisions specifically address the Court's material jurisdiction, but the Court also considers whether it has personal, temporal and territorial jurisdiction to hear a case.[48] The Court assesses these four aspects of jurisdiction even when the respondent State has not raised objections to its jurisdiction.[49]

2.4.1 Material jurisdiction

The Court determines cases concerning interpretation and application of the African Charter, the Court Protocol and any other human rights instrument ratified by the State.[50] The African Court therefore has a comparatively wider material jurisdiction.[51] Writing after adoption of the Court Protocol but before operationalisation of the Court, Heyns expressed the concern that the wide jurisdiction of the Court could lead to 'jurisprudential chaos' if it meant that the Court could interpret not only the Charter but also UN and other African human rights instruments.[52] Viljoen suggested that the wide jurisdiction could potentially 'lead to divergence in jurisprudence and to forum shopping' where human rights adjudicative bodies 'are compared and played off against one

[45] *Request for Advisory Opinion by Pan-African Parliament*, Request No. 001/2021, 16 July 2021, para 46.
[46] The Court rejected a request from the SADC as the subject matter was still pending at the Commission. See *Request for an Advisory Opinion by Pan African Lawyers Union & Southern African Litigation Centre*, Request No. 002/2012 para 8.
[47] James Thuo Gathii & Jacquelene Wangui Mwangi, 'The African Court on Human and Peoples' Rights as an Opportunity Structure' in James Thuo Gathii (ed) *The Performance of Africa's International Courts* (OUP 2020), 228. It has also been described as the 'the power that signifies the scope within which an adjudicatory body can act with integrity over persons, matters and territory'. For this definition see: Annika Rudman, 'The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights' (2021) 21 African Human Rights Law Journal 699, 700.
[48] *Mohamed Abubakari v. Tanzania* Application No. 007/2013, Judgment of 3 June 2016, para 34.
[49] *African Commission on Human and Peoples' Rights v. Libya*, Application No. 002/2013, Judgment of 3 June 2016, para 44.
[50] Article 3(1) of the Court Protocol.
[51] The ECtHR, for example, is limited to applying the European Convention on Human Rights and its Protocols, see Article 32 of the European Convention on Human Rights.
[52] Christof Heyns, 'The African regional human rights system: In need of reform?' (n 30), 166-167.

another'.[53] These concerns were mainly raised before the Court started receiving cases and therefore although reasonable, the views had not benefitted from a look at the approach the Court has taken in actual cases. Based on the Court's case law so far, there is general consensus in more recent analyses of the Court's decisions that at the international level these concerns about the consequences of the broad material jurisdiction have largely not materialised.[54] It is however useful to note that within the African continent, exercise of human rights mandates by sub-regional courts such as the ECOWAS Court of Justice (ECCJ) and the East African Court of Justice (EACJ) means the risk of fragmentation of African human rights jurisprudence and forum shopping remains. Wiebusch warns that the option to litigate human rights at the sub-regional level and avoid the African Court is likely to deprive the Court full exercise of its jurisdiction and 'drastically limit its authority'.[55] In practice, however, these Courts have opted to develop mechanisms to cooperate and reinforce each other's mandate. For example, tripartite dialogues involving the African Court, ECCJ and EACJ have been organised to enhance cooperation.[56] The ECCJ and the African Court have signed a five-year memorandum of understanding on areas of cooperation 'at both the operational and judicial levels of the two courts'.[57] The African Court has also cited decisions of the ECCJ[58] and EACJ[59] and found that cases previously settled by the ECCJ are not admissible at the African Court.[60]

The Court has broadly interpreted what constitutes a 'human rights instrument' to include treaties that are not typical human rights instruments but which impact implementation of rights in the African Charter.[61] This reasoning allowed the Court to find the African Charter on Democracy, Elections and Governance to be a human rights instrument subject to its material jurisdiction.[62]

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[53] Frans Viljoen, *International Human Rights Law in Africa* (n 13), 437; Frans Viljoen, 'Human rights in Africa: normative, institutional and functional complementarity and distinctiveness' (2011) 18:2 South African Journal of International Affairs 191, 210.

[54] See for example, Adamantia Rachovitsa, On New 'Judicial Animals': The Curious Case of an African Court with Material Jurisdiction of a Global Scope' (2019) 19 Human Rights Law Review 255, 266-288; Annika Rudman, 'The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights' (n 47), 725.

[55] Micha Wiebusch, *A Theory on Africanizing International Law* (PULP 2023) 147-148.

[56] See Press Release by the African Court available at https://www.african-court.org/wpafc/the-second-tripartite-judicial-dialogue-joint-communique/ (accessed 25 November 2024).

[57] See Joint communique by the two courts at https://www.african-court.org/wpafc/joint-communique-of-the-african-court-on-human-and-peoples-rights-and-the-community-court-of-justice-ecowas/ (accessed 4 March 2024); Press Release by the African Court, available at https://www.african-court.org/wpafc/ecowas-court-of-justice-judges-to-visit-the-african-court/ (accessed 4 March 2024).

[58] See, for example, *Request for Advisory Opinion by the Pan African Lawyers Union (PALU)*, Request No. 001/2018, 4 December 2020 at para 62; Maguchu makes the point that judgments by sub-regional courts in Prosper Maguchu, 'When to push the envelope? Corruption, human rights and the request for an advisory opinion by the SERAP to the African Court' (2020) 4 African Human Rights Yearbook 436, 450.

[59] *Dexter Eddie Johnson v. Ghana*, Application No. 016/ 2017, Ruling of 28 March 2019, para 48 at footnote 10.

[60] It held so in *Jean-Claude Roger Gombert v. Côte d'Ivoire* Application No. 038/2016, Judgment of 22 March 2018.

[61] *APDH v. Cote D'Ivoire* Application No. 001/2014, Judgment of 18 November 2016, paras 57-65.

[62] ibid.

Some examples of how the Court has handled cases involving interpretation and application of UN human rights treaties are useful. In the *Mtikila* case the Court relied on the interpretation of the UN Human Rights Committee in General Comment No. 25 on the right to participate in public affairs and accepted it as 'authoritative' interpretation of Article 25 of the ICCPR, which 'reflects the spirit' of Article 13 of the Charter.[63] In the *Zongo* case, whereas the applicant had alleged a violation of both Article 7 of the Charter and Article 14(1) of the ICCPR (on the right to a fair trial), the Court found that having established a violation of Article 7 of the Charter, it '[did] not need to consider the allegations made in the same vein' for violation of Article 14(1) of the ICCPR.[64] In *Alex Thomas*, the applicant had alleged violation of Article 7(1) on the right to a fair trial for not being provided with legal assistance. Although the right to legal assistance is not expressly provided for in the Charter, the Court found that given that the Respondent was a party to the ICCPR it could interpret Article 7(1)(c) of the Charter (right to defence) 'in light of' Article 14(3)(d) that had an express right to legal assistance.[65] In *Wilfred Onyango Nganyi* the Court followed the same approach on these provisions in the Charter and ICCPR and further clarified that it 'can not only interpret Article 7(1)(c) of the Charter in light of the provisions of Article 14(3)(d) of the ICCPR but also apply the latter provisions'.[66] For a final example, the Court found violations of various provisions of CEDAW in the *APDF v. Mali* case.[67]

From its decisions, it is notable that rather than contradict the jurisprudence of other human rights adjudicative bodies, the Court relies on the same to aid its own interpretation of the Charter and other human rights instruments. It has, for example, 'drawn inspiration' from the Human Rights Committee[68] and 'taken judicial notice' of decisions by the ECOWAS Court.[69] Related to this, as the Court's jurisprudence has grown, analysis of its cases shows that reliance on decisions of other regional courts has decreased as it increasingly cites its own decisions in what has been described as 'internalisation' of its jurisprudence.[70] The Court has thus been said to have avoided the

[63] *Reverend Christopher R. Mtikila v. Tanzania*, Application No. 11/2011, Judgment of 14 June 2013, para 107.3.
[64] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, Application No. 013/2011, Judgment of 28 March 2014, para 157; the Court follows the this approach in the same case (at para 170) by dispensing with a finding on alleged violation of Article 14 of ICCPR having found a violation of Article 3 of the Charter.
[65] *Alex Thomas v. Tanzania* Application No. 005/2013, Judgment of 20 November 2015, para 88.
[66] *Wilfred Onyango Nganyi & 9 Others v. Tanzania*, Application No. 006/2013, Judgment of 18 March 2016, para 165.
[67] *APDF & IHRDA v. Mali* Application No. 046/2016, Judgment of 11 May 2018 where the Court found violations of CEDAW (paras 90 & 95,125).
[68] *Reverend Christopher R. Mtikila v. Tanzania* (n 63), para 107.4; *Wilfred Onyango Nganyi* case (n 66), para 170.
[69] *Request for Advisory Opinion by Pan-African Lawyers Union*, Request No. 001/2018, 4 December 2020, para 62.
[70] Martin Lolle Christensen, 'In someone else's words: Judicial borrowing and the semantic authority of the African Court of Human and Peoples' Rights' (2023) Leiden Journal of International Law 1, 17-19.

'jurisprudential chaos' that Heyns had anticipated owing to a wide material jurisdiction by creatively striving to harmonise and recognise interpretations by other human rights bodies.[71]

2.4.2 Personal jurisdiction

In determining the overall question of whether it has jurisdiction to hear and determine a case, the Court has to establish that it has personal jurisdiction, which concerns the parties that can be applicants or respondents before the Court.[72] Under Article 5 of the Court Protocol, the African Commission, State parties to the Protocol, African International Organisations can submit cases. Additionally, individuals and NGOs with observer status before the Commission can be applicants provided that they file the application against a State that has accepted the Court's competence to do so through a declaration as required under Article 34(6) of the Protocol. In *Kennedy Gihana v. Rwanda*, the respondent State argued that the Court had no personal jurisdiction to consider the case because two applicants in the matter 'were convicted in Rwanda for genocide-related crimes and crimes of threatening State security' and were 'fugitives from justice' for having fled Rwanda after their convictions.[73] The Court rejected this argument by holding that the Court Protocol in Article 5(3) as read with Article 34(6) 'provides for access to the Court for individuals regardless of their status and the nature of the crimes they are alleged to have committed or to have been convicted of'.[74] The Court has also found that it had no personal jurisdiction to hear an application filed by an NGO without observer status before the African Commission.[75]

In terms of which parties can be respondents, the Court cannot consider a case filed against a State that is not party to the Court Protocol.[76] The Court also lacks personal jurisdiction to consider applications from individuals and NGOs against States that have ratified the Protocol but have not made the declaration accepting the competence of the Court to directly receive such applications.[77] The Court has also found that it lacked personal jurisdiction to determine cases against non-State respondents such as the AU because it is not a party to the Protocol and has a separate legal personality from that of its members.[78] It has further determined that an applicant could not file an application against the African Commission because the Commission was not a

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[71] Annika Rudman (n 47), 725-726.
[72] Frans Viljoen, *International human Rights Law in Africa* (n 13), 435.
[73] *Kennedy Gihana v. Rwanda*, Application No. 017/2015, Judgment of 28 November 2019, para 20.
[74] ibid, para 25.
[75] *Association Juristes d'Afrique pour la Bonne Gouvernance v. Cote d'Ivoire*, Application 006/2011, Ruling on Jurisdiction, 16 June 2011, para 6-10; *La Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. Gabon* Application No. 012/2011 Ruling on Jurisdiction, 15 December 2011, para 10
[76] See decision in French in *Ekollo Moundi Alexandre v. Cameroon & Nigeria*, Application 008/2011, Ruling on Jurisdiction, 23 September 2011, para 6.
[77] *Michelot Yogogombaye v. Senegal*, Application No. 001/2008, Ruling on Jurisdiction, 15 December 2009, para 36-40.
[78] *Femi Falana v. African Union*, Application No. 001/2011, Ruling on Jurisdiction, 26 June 2012, para 70-73.

State party to the Protocol and there was also no declaration allowing the applicant, as an individual, to directly access the Court as envisaged in Article 5(3) and 34(6) of the Protocol.[79] In the early days of the Court, Justice Ouguergouz repeatedly urged in separate opinions that the Court should have rejected, through a simple letter from the Registrar, applications in which the Court manifestly lacked personal jurisdiction such as where there was no declaration under Article 34(6).[80] One author, in agreement with the suggestion by the judge, adds that listing all the applications where the Court found that it lacked personal jurisdiction as 'finalised cases', the Court was 'obfuscating the extent of individuals meaningfully accessing the Court'.[81] The current Rules reflect the position that Justice Ouguergouz advocated for and the Court now informs such applicants that it lacks personal jurisdiction and advises them to file their applications before the African Commission.[82]

2.4.3 Temporal jurisdiction

An important consideration in relation to the Court's temporal jurisdiction is the question of *when* the facts in issue arose and thus whether the Court can adjudicate over those matters. The Court addressed the issue of temporal jurisdiction in the *Mtikila* case, its first decision on merits. It rejected the contention by the respondent State that it lacked temporal jurisdiction because the violation occurred after the State ratified the African Charter but before the Court Protocol came into operation. It found that the State having ratified the Charter, it was operational and the State was already under a duty to protect the rights alleged to have been violated.[83] Justice Niyungeko, in a separate opinion, pointed out that the majority should have clarified that the Court lacked temporal jurisdiction as long as the Protocol conferring jurisdiction on it was yet to become operational. He argued that to hold that the Court could determine cases on alleged violations occurring prior to the Court Protocol being operational would violate the principle of non-retroactivity of treaties provided in Article 28 of the VCLT.[84] In the subsequent *Zongo* case, the Court seems to have adopted Niyungeko's position. It first clarified that one of the alleged violations was an 'instantaneous' and 'complete' violation that occurred after the respondent State had ratified the Charter but before the it became bound by the Court Protocol. It then found that

[79] *Femi Falana v. African Commission on Human and People's Rights*, Application 019/2015, Ruling on Jurisdiction, 20 November 2015, para 8-9.
[80] See his Separate Opinion in *Amir Adam Timan v. Sudan*, Application No. 5 of 2012, Ruling on Jurisdiction, 30 March 2012, para 1. He had expressed the same view in other Separate Opinions such as in *Michelot Yogogombaye v. Senegal* (n 119).
[81] Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (n 34), 68.
[82] Rule 38 (2).
[83] *Reverend Christopher R. Mtikila v. Tanzania* (n 63), para 84.
[84] See Separate Opinion of Justice Gerard Niyungeko in the *Reverend Christopher R. Mtikila v. Tanzania* (n 63), paras 8-17.

it had no temporal jurisdiction because the violation 'occurred before the entry into force of the instrument, that is, the Protocol, which gives the Court jurisdiction to hear, inter alia, the alleged violations of the Charter'.[85] In the same case, the Court took a position that has been restated in other cases, that the 'relevant dates' regarding temporal jurisdiction are the dates the Charter and Protocol came into force as well as the date when the State made the declaration allowing applications from individuals and NGOs.[86] The Court's position therefore seems to be that it considers the dates of the three instruments *cumulatively* and the alleged violations must have occurred after these dates for the Court to have temporal jurisdiction.[87] There is, however, an exception to this as the Court will assume temporal jurisdiction in cases where alleged violations took place before any of the dates when the three above-stated instruments became operational in the respondent State and are continuing in nature.[88] The decision in *Akwasi Boateng & 351 Others v. Ghana*, the most recent of the cases highlighted here has probably settled the Court's position. It concluded that it 'does not have jurisdiction to hear acts of violations occurring before the State concerned became party to the Protocol and filed the Declaration, except in cases where the violations alleged are continuous in character'.[89] It further clarified that for such acts, it lacks temporal jurisdiction as they are 'instantaneous' acts which in this case were laws passed by the respondent State before the Charter and Protocol and which had ceased to operate.[90]

2.4.4 Territorial Jurisdiction

The question of territorial jurisdiction has not been a contentious issue in the cases that the Court has considered so far. Its position on the issue is that if the facts in an alleged violation occurred on the territory of the respondent State that is a party to the Court Protocol, then the Court has territorial jurisdiction to hear the case.[91] Viljoen suggests that given the silence in the Charter and the Protocol on whether they are only applicable in the territorial space of the respondent State, an inference can be drawn that the Court has jurisdiction over violations 'related to the jurisdiction

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[85] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, (n 64), para 65-69.
[86] ibid, para 62.
[87] See *Jebra Kambole v. Tanzania* Application No. 018/2018, Judgment of 15 July 2020, para 22; *The African Commission on Human and Peoples' Rights v. Kenya*, Application No. 006/2012 Judgment of 26 May 2017, para 64; *APDH v. Cote d'Ivoire* (n 61), para 66. Previous decisions have left uncertainty on relevant dates for purposes of determining temporal jurisdiction. For example, in *Urban Mkandawire v. Malawi* Application No. 003/2011 Judgment of 21 June 2013 (para 32) and *Peter Joseph Chacha v. Tanzania*, Application No. 003/2012, Ruling of 28 March 2014 (para 126), the Court still formulated the issue in the same manner as it did in the *Mtikila* case, suggesting that the relevant date is when the African Charter came into force for the respondent State, even in a case where the alleged violations were not continuing in nature.
[88] *Peter Joseph Chacha v. Tanzania* (n 87), para 126 ; *Urban Mkandawire v. Malawi* (n 92), para 36.
[89] *Akwasi Boateng & 351 Others v. Ghana*, Application No. 059/2016, Ruling on Jurisdiction, 27 November 2020, para 53.
[90] ibid, paras 54-62.
[91] *APDH v. Cote d'Ivoire* (n 66), para 67; *African Commission on Human and Peoples' Rights v. Libya* (n 49), paras 58-59; *Kijiji Isiaga v. Tanzania*, Application No. 032/2015, Judgment of 21 March 2018, para 37.

rather than the territory of the respondent State'.[92] The African Court is yet to pronounce itself on whether it would be seized of a matter where the alleged violation occurred outside the territory of the respondent State.

2.5 Admissibility criteria at the Court

An applicant wishing to litigate a human rights claim at the African Court is required to demonstrate that their application meets the admissibility criteria set in Article 56 of the African Charter and restated in Rule 50(2) of the Court's Rules. There are seven conditions that an application must meet: (1) indicate the author, (2) be compatible with the Constitutive Act of the African Union(AU) and with the Charter, (3) not written in disparaging or insulting language against the respondent State or the AU, (4) not based exclusively on news disseminated through mass media, (5) submitted after exhaustion of local remedies, if any, unless these are unduly prolonged, (6) submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter, (7) do not deal with cases already settled through an international adjudicatory process by the States involved. The Court has determined that these requirements are cumulative and all of them must be met for an application to be admissible.[93] Even where the respondent State does not object admissibility, the Court has found that it has a duty to determine admissibility as required by the Charter and Protocol as the respondent's failure to raise objection 'cannot render admissible an application which is otherwise inadmissible'.[94] The Court's approach to determining compliance with each of the seven conditions is summarised below.

2.5.1 Applications must indicate their authors

The rule on identification of authors is that the application needs to indicate the author(s), even if they are requesting for anonymity. The Court has been flexible on this admissibility requirement. In *XYZ v. Benin* the Court granted anonymity to the applicant who had requested the same for what the Court termed as 'personal security reasons'.[95] It has also allowed substitution of the name of a person erroneously indicated as a party to an application with the name of the proper party on the grounds that this 'would not adversely affect either the procedural or substantive rights of the respondent'.[96] Related to this, the Court has taken the view that an error on the title of an

[92] Frans Viljoen, *International Human Rights Law in Africa* (n 13), 439.
[93] *Frank David Omary and Others v. Tanzania*, Application No. 001/2012, Judgment of 28 March 2014, para 86; *Mariam Kouma and Ousmane Diabaté v. Mali,* Application No. 040/2016, Judgment of 21 March 2018, para 63.
[94] *Urban Mkandawire v. Malawi* (n 87), para 37.
[95] *XYZ v. Benin*, Application No. 010/2020, Judgment of 27 November 2020, para 1.
[96] *Karata Ernest and Others v. Tanzania* (procedure) (2013) 1 AfCLR 356, para 6-8.

application, though related to the identity of an applicant is not a ground to find the application inadmissible.[97] Where an applicant has generally referred to other persons who are not indicated as applicants, the Court has determined that this fact does not negate the identity of those who have filed the application.[98] Also useful to note in relation who has standing before the Court, the applicant does not have to be the victim of the alleged violations. In *Sebastien Ajavon v. Benin* the respondent State had objected to admissibility on the ground that the applicant was not a victim. The Court rejected this argument and noted that 'neither the Charter, nor the Protocol, nor do the Rules require that the applicant and the victim have to be the same' and termed this a 'peculiarity of the African regional human rights system'.[99] The Court's Rules have further guidance on this by providing that where the applicant is also the victim of a human rights violation and has requested anonymity, the Court only discloses the identity to the Respondent State and not the public.[100] Presumably, the disclosure to the respondent is to enable the State to sufficiently respond to the applicant's case. As a final note, where a request for anonymity has been granted, the Rules require that all documents to the public must refer to the applicant in pseudonyms.[101]

2.5.2 Compliance with the Constitutive Act of the AU

The African Charter at Article 56(2) requires that applications be compatible with the Constitutive Act of the AU *or* the Charter. Useful to note, the Court's Rules require compatibility with the Act *and* the Charter.[102] The framing of the Rule reflects earlier observations on this that suggested that the 'or' in Article 56(2) should be read conjunctively to be understood as 'requiring compatibility with the Charter in all circumstances'.[103] In terms of what is meant by compatibility with the Act and the Charter, the Court's reasoning is that the Constitutive Act provides one of the objectives of the AU as being to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments. Therefore as long as the substance of a complaint relates to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned, compliance with this admissibility condition is met.[104] There is still compliance with this requirement even where an application does not specifically mention provisions of the Charter 'as long as the rights alleged to

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[97] *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013 Judgment of 5 December 2014, para 46.
[98] *Kennedy Gihana v. Rwanda* (n 73), paras 42-43.
[99] *Sébastien Germain Marie Aïkoue Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, paras 58-59; also see *XYZ v. Benin*, Application No. 059/2019, Judgment of 27 November 2020, para 55.
[100] Rule 41(7).
[101] Rule 41(8).
[102] Rule 50(2)(b)
[103] Frans Viljoen, *International Human Rights Law in Africa* (n 13), 311 where although the discussion is on the Commission, the same point can be made regarding the Court.
[104] *Peter Joseph Chacha v. Tanzania* (n 87), para 118-124; Also see *Alex Thomas v. Tanzania* (n 65), para 52 and *XYZ v. Benin* (n 99), paras 66-67.

have been violated are guaranteed in the Charter or any other human rights instrument ratified by the State concerned'.[105] The Court has also clarified that Article 56(2) of the Charter 'addresses the nature of an application and not the applicant's status'.[106]

2.5.3 Language of the application

Applications submitted to the Court must not be written in 'disparaging' or 'insulting' language directed at the respondent State, its institutions or the AU. To ascribe meaning to this requirement, the Court has relied on the jurisprudence of the African Commission.[107] The Commission has found that a remark in a Communication before it will be disparaging or insulting if: (1) aimed at unlawfully and intentionally violating the dignity, reputation and integrity of a judicial official or body, (2) used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice, (3) aimed at undermining the integrity and status of the institution and bring it into disrepute.[108] The Court in the *Konate* case relied on this exact criteria to find that the language complained of by Burkina Faso was not disparaging or insulting. The Court did, however, add that the phrase in question had not been used by the applicant in 'bad faith'.[109] It has relied on the Commission's approach to the issue in other cases.[110]

2.5.4 Not based exclusively on news disseminated through mass media

Another admissibility condition is that applications submitted to the Court should not be based exclusively on news disseminated through mass media. The Court first dealt with an objection to admissibility based on this requirement in the case of *Frank David Omary v. Tanzania* where the State argued that the applicant only relied on newspapers as the only proof of alleged police brutality. The Court in disagreeing with the respondent observed that the applicants reliance on newspaper excerpts had 'as its only objective to support the allegations which they made in the application'.[111] The Court further noted that the applicants had submitted information with other accounts of the alleged police brutality and on this basis dismissed the objection that the application was based on information exclusively disseminated through mass media. It would appear that the Court gives weight to the term 'exclusively' in this admissibility condition and will not fault an applicant who relies on information from the media to corroborate other evidence

[105] *Frank David Omary v. Tanzania*, (n 93), para 93.
[106] *Kennedy Gihana v. Rwanda* (n 73), para 48.
[107] *Lohé Issa Konaté v. Burkina Faso* (n 97), paras 69-71.
[108] *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication 284/03, para 91.
[109] *Lohé Issa Konaté v. Burkina Faso* (n 97), para 72.
[110] See, for example, *APDH v. Côte d'Ivoire*, (n 61) paras 81-82.
[111] *Frank David Omary v. Tanzania*, (n 93) para 95.

and support their allegations. The African Commission has taken a similar position, noting that given the use of the word 'exclusively' it would be 'damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media'.[112]

2.5.5 Exhaustion of local remedies

Applications should only be submitted at the African Court after the applicant has exhausted local remedies, if any, unless it is obvious that this procedure is unduly prolonged. The requirement to exhaust local remedies has been described by the African Commission as 'a well established rule of customary international law'.[113] The rule ensures 'that a petitioner will not resort to an international court, commission, or body until the petitioner has given the authorities of the respondent State the opportunity to provide a remedy for the wrong done'.[114] Chenwi notes that in the African context and specifically in the decisions of the African Commission and the African Children's Committee, the aim of the rule is 'to give States the first opportunity to address alleged human rights violations at the domestic level before submitting the cases to a regional or international body or before such bodies hold the State accountable'.[115]

The African Court has observed that the rule on exhaustion of local remedies 'reinforces and maintains the primacy of the domestic system in the protection of human rights vis-a-vis the Court'.[116] In the *Konate* case, it noted in relation to this rule that 'referral to international courts is a subsidiary remedy compared to remedies available locally within States'.[117] Further, that exhausting local remedies 'is not a matter of choice' but an 'exigency of international law'.[118] The local remedies to be exhausted are 'primarily judicial remedies' as clarified in the *Mtikila* case because these are 'the most effective means of redressing human rights violations'.[119] In this case, the Court found that it was not necessary for applicants to pursue a parliamentary remedy.[120] There has been further clarification by the Court that the judicial remedies to be exhausted are 'ordinary judicial remedies'.[121] Related to this, in cases against Tanzania, the Court has consistently rejected

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[112] *Sir Dawda K. Jawara v. The Gambia* Communications Nos. 147/95 and 149/96, 11 May 2000, para 24.
[113] *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, (n 108), para 99.
[114] Gerald L. Neuman, 'Subsidiarity' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013) 312.
[115] Lilian Chenwi, 'Exhaustion of Local Remedies Rule in the Jurisprudence of the African Court on Human and Peoples' Rights' (2019) Volume 41, Number 2, Human Rights Quarterly 374, 377.
[116] *The African Commission on Human and Peoples' Rights v. Kenya* (n 87), para 93.
[117] *Lohé Issa Konaté v. Burkina Faso* (n 97), para 78.
[118] *Peter Joseph Chacha v. Tanzania* (n 87), para 142 & *Diakité Couple v. Mali*, Application No. 009/2016, Judgment of 28 September 2017, para 53.
[119] *Reverend Christopher R. Mtikila v. Tanzania* (n 63) paras 82.1 and 82.3; *Urban Mkandawire v. Malawi* (n 129), para 38.1.
[120] *Reverend Christopher R. Mtikila v. Tanzania* (n 63) para 82.3.
[121] *Mohamed Abubakari v. Tanzania* (n 48), para 64; *Alex Thomas v. Tanzania* (n 65), para 64.

the State's argument that applicants should have filed an application for review of the decision by the final domestic court or a Constitutional petition challenging delays in processing review applications after a final decision. It has termed these as 'extraordinary remedies' that applicants are not required to exhaust before approaching the African Court.[122]

The Charter provides for an exception to the requirement to exhaust local remedies, namely, when such remedies are unduly prolonged then an applicant need not exhaust them. However, the Court has adopted 'other criteria' as applied by the African Commission and other international human rights courts, that the local remedies need to be available, effective and sufficient.[123] On the question of whether the procedure for local remedies is unduly prolonged or not, the African Court's approach is that this is to be determined 'on a case-by-case basis depending on the circumstances of each case'.[124] In the *Zongo* case, it found proceedings in domestic courts that lasted nearly eight years to be unduly prolonged. Importantly, the term 'unduly prolonged' in the exception to the rule on exhaustion of local remedies has been understood by the Court to mean 'unjustifiably prolonged'. This means if there are justifiable reasons for prolonging a case in domestic courts such as civil strife or war that affects judicial operations or delays caused by the victim, then this exception does not apply.[125]

An applicant is also not required to exhaust local remedies if they are unavailable, ineffective or insufficient.[126] On this, the Court has relied on the decisions of the African Commission and particularly the decision in *Sir Dawda K. Jawara v. The Gambia.*[127] The Commission held that:

> A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.[128]

On availability, the Court has held that for local remedies to be deemed available 'it is not enough that they should be established in the domestic system but also that individuals should be able to use them without any hindrance'.[129] In the *Zongo* case, it found that the effectiveness of a local

[122] *Alex Thomas v. Tanzania* (n 65), para 65; *Mohamed Abubakari v. Tanzania* (n 48) para 65-68; the Court has also found an application for review under the Rwandan legal system to be an extraordinary remedy that was not effective and efficient and which the applicant did not have to exhaust – see *Ingabire Victoire Umuhoza v. Rwanda* Application No. 003/2014, Judgment of 24 November 2017, para 73.
[123] *Lohé Issa Konaté v. Burkina Faso* (n 97), para 77; *Reverend Christopher R. Mtikila v. Tanzania* (n 63), para 82.1
[124] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, (n 64), para 92.
[125] *Wilfred Onyango Nganyi & 9 Others v. Tanzania*, (n 66), para 91.
[126] *Mgosi Mwita Makungu v. Tanzania*, Application 006/2016, Judgment of 7 December 2018, para 41
[127] *Reverend Christopher R. Mtikila v. Tanzania* (n 63), para 82.1; *Lohé Issa Konaté v. Burkina Faso* (n 97), para 96.
[128] *Sir Dawda K. Jawara v. The Gambia,* (n 112), para 32.
[129] *Mgosi Mwita Makungu v. Tanzania* (n 126), para 44.

remedy is measured 'in terms of its ability to solve the problem raised by the Applicant'.[130] In *APDH v. Côte d'Ivoire*, it observed that since administrative jurisdictions under Ivorian law had no competence to hear cases on constitutionality of laws that the applicant was challenging, the administrative remedy was not sufficient and needed not be pursued by the applicant.[131]

To conclude on this admissibility condition, in several applications against Tanzania where applicants mainly allege violation of fair trial rights, the Court has developed the 'bundle of rights and guarantees' doctrine. In these cases, the State has consistently objected to admissibility on the grounds that some of the applicants' alleged violations of fair trial rights had not been raised in domestic courts and so the rule on exhaustion of local remedies had not been complied with. The African Court has taken the position that such allegations 'happened in the course of domestic judicial proceedings…and form part of the bundle of rights and guarantees that were related to or were the basis of their appeals'. The Court then finds that 'domestic authorities thus had ample opportunities to address these allegations even without the applicants having raised them explicitly'.[132] Critics of this approach have argued that it is 'unprincipled' and that the Court 'waters down' or circumvents the rule on exhaustion of local remedies and denies the State the first option to redress alleged human rights violations domestically.[133] Its supporters however point out that it is a 'non-obstructive approach' to applying the rule on exhaustion of local remedies that facilitates access to justice.[134] Further, that the approach allows considerations of alleged violations that would otherwise not be heard if the rule was applied rigidly restricting issues to only those explicitly raised before domestic courts.[135]

2.5.6 Submitting applications within reasonable time

Under Article 56(6) of the Charter as read with Rule 50(2)(f) of the Court's Rules, applications must be 'submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be

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[130] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, (n 64), para 68.
[131] *APDH v. Cote d'Ivoire* (n 61), para 96-98.
[132] See, for example, *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. Tanzania*, Application No. 003/2015, Judgment of 28 September 2017, para 54*; Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. Tanzania*, Application No. 006/2015, Judgment of 23 March 2018, para 53.
[133] Mwiza Jo Nkhata, 'A Bundle of Mystery? Unpacking the Application of the 'Bundle of Rights and Guarantees' in the Admissibility of Applications before the African Court on Human and Peoples' Rights' (2020) 4 African Human Rights Yearbook 192, 211; Derick de Klerk & Annika Rudman, 'The ultimate withdrawal: A critical analysis of the jurisprudence of the African Court on Human and Peoples' Rights' in Alejandro Fuentes & Annika Rudman (eds) *Human Rights Adjudication in Africa: Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems* (PULP 2023) 29, 48; Sègnonna Horace Adjolohoun, 'Jurisdictional Fiction? A Dialectical Scrutiny of the Appellate Competence of the African Court on Human and Peoples' Rights' (2019) Vol 6, No 2, Journal of Comparative Law in Africa 1, 18.
[134] Lilian Chenwi (n 115), 397.
[135] ibid.

seised with the matter'. Given that there is no specific timeframe within which to file cases, the Court has adopted the position that 'the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis'.[136]

For the Court to determine the reasonableness of the time taken to submit applications, it has had to clarify on the starting date regarding computation of time. Under Rule 50(2)(f), there are two possible starting dates: (1) from the date local remedies were exhausted or (2) from the date set by the Court as being the commencement of the time limit. Under the first limb, the position of the Court is straightforward - time starts running after delivery of the final decision by the highest domestic court.[137] Under the second limb, the Court has set various start dates based on different facts of a case. In some instances, it has found that no specific start dates were applicable. For example, where the Court found no domestic judicial remedies were available to the applicant it held that 'the question of reasonableness of time…does not arise'.[138] There is also no specific date from when time starts running in situations where violations are continuing because such violations 'renew themselves everyday as long as the State fails to take steps to remedy them' and the Court can be 'seized of the matter at any time' as long as the violation continues.[139] Where the date of the final domestic court's decision precedes the date when the respondent State made the declaration allowing individuals and NGOs direct access to the Court, time is calculated from the date when the State deposited the declaration.[140] Where there is delay in receiving the final judgment by the highest domestic court, the African Court has held that time will start running from the date copies of the judgment are received.[141] Where local remedies are not exhausted for being unduly prolonged, the Court has found that 'the date that should be considered is that of the expiry of the right to appeal not exercised under national law'.[142]

As seen above on the requirement to exhaust local remedies, some remedies are 'extra-ordinary' and such need not be exhausted before approaching the Court. Where an applicant nonetheless pursues them, the Court has concluded that the time taken pursuing the extra-ordinary remedy or waiting for its outcome is a factor that informs the reasonableness of time taken before submitting

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[136] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, Application No. 013/2011, Ruling on Preliminary Objections, 21 June 2013, para 121.
[137] *Ally Rajabu and Others v. Tanzania* Application No. 007/2015, Judgment of 28 November 2019, para 49; *Alex Thomas v. Tanzania* (n 70), para 73.
[138] *Jebra Kambole v. Tanzania* (n 87) para 50.
[139] ibid para 52-53.
[140] *Christopher Jonas v. Tanzania* Application No. 011/2015, Judgment of 28 September 2017, para 50-51; *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. Tanzania* (n 132), para 62; *Alex Thomas v. Tanzania* (n 65), para 73.
[141] *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. Tanzania* (n 132), para 64. Also see *Alex Thomas v. Tanzania* (n 65) at para 74 where the Court factored in the delay in providing the applicant with court records in the domestic courts.
[142] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, (n 64), para 118.

an application. As seen earlier, in cases against Tanzania, an application for review of the decision of the Court of Appeal, which is the highest national court is considered as 'extra-ordinary'. In this regard, the Court has held that 'although the process of exhaustion of ordinary remedies stops with the appeal at the Court of Appeal … the applicants should not be penalised for choosing to pursue a review of this decision'.[143] Nkhata has suggested that 'an application for review freezes time for purposes of computing reasonable time'.[144] However, I observe that the majority of the decisions on this suggest that the Court merely takes the fact of pursuing extra-ordinary remedies into consideration and does not necessarily 'freeze' or deduct such time from computation of time.

Chapter six of the thesis discusses in greater detail how the Court has interpreted this requirement to file applications within reasonable time.

2.5.7 Application should not be based on issues settled by other international tribunals

Applications submitted to the African Court should 'not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter'.[145] The Court has stated that the rationale for this admissibility condition is 'to prevent States from being asked to account more than once in respect of the same alleged violations of human rights'.[146] Further, the Court is of the view that examining compliance with this condition means confirming whether the case before the Court has been 'settled' and whether the matter is settled 'in accordance with the principles' of the listed instruments. In assessing 'settlement' the Court looks at three conditions: (1) the identity of the parties; (2) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and (3) the existence of a first decision on the merits.[147] The Court has also endorsed the African Commission's position that a case is inadmissible if it 'involved the same parties, the same issues … and must have been settled by an international or regional mechanism'.[148]

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[143] *Nguza Viking (Babu Seya) And Johnson Nguza (Papi Kocha) v. Tanzania* (n 132), para 58. Also see *Ally Rajabu and Others v. Tanzania* (n 142) at para 51 where the Court noted that 'the applicants were expected to observe some time while awaiting the outcome of the review procedure before filing the present application'.

[144] Mwiza Jo Nkhata 'What counts as a 'reasonable period'? An analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications' (2022) 6 African Human Rights Yearbook 129, 145.

[145] Rule 50(2)(g) of the Court's Rules.

[146] *Dexter Eddie Johnson v. Ghana* (n 59), para 55. The Court cited the African Commission which found that this admissibility condition is also a 'recognition of the fundamental *res judicata* status of judgments issued by international and regional tribunals and/or institutions', see *Bakweri Land Claims v. Cameroon*, Communication 260/02, para 52.

[147] *Jean-Claude Roger Gombert v. d'Ivoire* (n 60), para 45. In arriving at these conditions, the Court cites decisions by the African Commission, EACJ, IACtHR and the ICJ.

[148] *Dexter Eddie Johnson v. Ghana* (n 59), para 48 where the Court cites the Commission's decision in *Kevin Mgwanga Gunme and others v. Cameroon*, Communication 266/03, para 86.

On whether a matter has been settled 'in accordance with the principles' of the UN Charter, the AU Constitutive Act or the African Charter, the Court clarified in *Dexter Eddie Johnson v. Ghana* that even when the applicant invokes different instruments in the previous international tribunal and at the African Court, the matter will still be considered 'settled' if the principles are identical in their substance. For example, an applicant who litigated at the Human Rights Committee on violation of their fair trial rights under Article 14 of the ICCPR could not re-litigate the same issue at the African Court by alleging violation of Article 7 of the Charter, also on fair trial rights.[149] Other notable clarifications by the Court from the *Dexter* case is that it does not matter that the decision by the international tribunal that previously determined the issues in question has not been implemented. It also does not matter whether the previous decision, for example by the Human Rights Committee or the African Commission, is classified as a binding or not.[150] There has been an observation that by finding the *Dexter* case inadmissible for having been previously settled by the HRC, the Court missed an opportunity to distinguish cases that may have been settled by another international tribunal but where the State's violations are continuing and which should therefore be admissible at the Court.[151]

2.6 Challenges facing the African Court

The African Court's challenges are relatively well documented and this section summaries them in two categories – internal and external challenges. The summary draws both from existing literature and data from fieldwork at the Court. The discussion will also link the identified challenges to the argument underpinning the thesis as appropriate.

2.6.1 Internal challenges

a) Insufficient funding

AU Member States determine the Court's structure and budget and from the last annual activity report (for 2023), 86% of the Court's budget was from Member States and 14% from international partners.[152] A member of the Registry whom I interviewed observed that the budgetary allocations to the Court have not allowed it to optimise operations and insufficient funding also impacts the judicial functions of the Court such as fact-finding. The example given by the officer in this regard

[149] *Dexter Eddie Johnson v. Ghana* (n 59), para 52. Also see the example given by the Court at footnote 13 of the decision.
[150] *Dexter Eddie Johnson v. Ghana* (n 59), para 54.
[151] Andrew Novak, 'A missed opportunity on the mandatory death penalty: a commentary on Dexter Eddie Johnson v Ghana at the African Court on Human and Peoples' Rights' (2019) 3 African Human Rights Yearbook 456, 466; Justice Blaise Tchikaya made a similar argument at para 23 of his dissenting opinion in the case.
[152] Activity Report Of The African Court On Human And Peoples' Rights 1 January – 31 December 2023, EX.CL/1492(XLIV), para 34. Available at https://www.african-court.org/wpafc/activity-report-of-the-african-court-on-human-and-peoples-rights-afchpr-1-january-31-december-2023/ (accessed 2 April 2024).

was the *ACmHPR v. Kenya* case where the Court had planned an *in-situ* visit to the Mau Forest where the Ogieks inhabit but this did not materialise due to budget constraints.[153] Under the current Rules, the Court can delegate fact-finding or *in-situ* investigations to the African Commission in cases where the Commission is not a party. However, the resource challenges are likely to apply to the Commission as well. Suggestions by the Court for creation of an Endowment Fund that would enhance autonomy from States has been rejected by AU policy organs.[154] As a judge of the Court has noted, this leaves the same States that it condemns for violation of human rights in charge of considering and approving the Court's budget and this is a challenge for a continent where 'a culture of respect for human rights, tolerance and accommodation is work in progress'.[155] Also related to funding, the AU has not operationalised the Legal Aid Fund for human rights organs within the Union despite adoption of a Statute on establishment of the Fund in 2016.[156] An official at the Court has observed that the Fund would enable legal representation of deserving applicants and anticipated that this would 'result in timely and quality pleadings'.[157]

b) Inadequate personnel

The lack of sufficient funding for the Court has resulted in the related problem of an inadequate number of personnel, particularly technical staff, and which negatively impacts the Court's efficiency. In an interview with a member of the Registry, it was pointed out that the number of legal officers was low and this partly contributed to the backlog of cases. Importantly, the officer interviewed noted that inadequate staffing affects the quality of draft judgments developed because the heavy workload for legal officers limits 'the depth that an officer can go' in managing a case.[158] Similar views were expressed by a second member who observed that 'the limited human resource affects the quality of judgments and the level of assessment adopted in the draft judgments'.[159] It may be argued that the challenge of an inadequate number of legal officers and their heavy workload as a result explains why the Court has been reluctant to adopt the position in the consistent dissenting opinions calling for the Court to routinely ask for additional evidence before dismissal of claims for lack of sufficient evidence. The equal approach to evidence as explained in the substantive Chapters of the thesis would arguably be favoured by a court with personnel

[153] Interview with Registry Member No.4 at the African Court (Arusha, Tanzania, 30 August 2023).
[154] Presentation by Justice Ben Kioko (n 39), 149.
[155] ibid.
[156] Statute on the Establishment of the Legal Aid Fund of Human Rights Organs of the African Union, available at https://au.int/sites/default/files/treaties/36399-treaty-0054_-_african_legal_aid_fund_e.pdf (accessed 2 April 2024).
[157] Presentation by Grace Kakai, Head of Legal Division (as she then was) during a Webinar titled 'The state of the African human rights system: stakeholder reflections'. Available at https://www.youtube.com/watch?v=ayYOA8Uo90Y (accessed 2 April 2024).
[158] Interview with Registry Member No. 6 at the African Court (Arusha, Tanzania, 22 August 2023).
[159] Interview with Registry Member No. 1 at the African Court (Arusha, Tanzania, 14 August 2023).

constraints as it permits quicker decisions based on the technicality of lack of evidence. The preference for technical decisions on evidence which the study argues miss the bigger picture of striving for substantively just outcomes from the adjudication process at the Court was evident in some interview responses. One member of the Registry made the following observation in this regard:

> If you did not provide evidence it means there is no evidence. That would be my stand. I don't think it is the role of the Court to tell counsel or applicants what to do.[160]

The case studies discussed in Chapters six and seven demonstrate that the above stance is the reason behind dismissal of applications and reparation claims that may have had merit. Further, the discussions will demonstrate that an equitable applicant-centred approach to evidence offers better prospects of substantively fairer decisions. This approach is arguably feasible notwithstanding the inadequate number of legal officers as the challenge is counterbalanced by the relatively low number of applications received at the Court.

c) Multilingual nature of the Court

According to a member of the Registry interviewed during fieldwork at the Court, the multilingual nature of the Court poses particular difficulties which are often overlooked in discussions on challenges facing the African Court. The officer pointed out that although the Court has four working languages (Arabic, English, French and Portuguese), documents are not always prepared in all the four languages and further that even during deliberations, information 'gets lost in translation'.[161] In cases where bulky documents have been filed as evidence, the officer noted that not all documents are translated in the four languages and according to this official, this has 'an impact on appreciation of facts' by some judges. In instances where there is no full translation in all languages, the officer pointed out that this has meant that some judges have to work with documents in a language they are not (fully) conversant with. Such judges, the officer observed, 'are at the mercy of the translator and the quality of the translation'.[162]

2.6.2 External challenges (related to resistance of the Court)

External challenges facing the African Court have mostly taken the form of resistance to the Court. Madsen, Cebulak & Wiebusch have developed an analytical framework to explain resistance to

[160] Interview with Registry Member No. 4 at the African Court (Arusha, Tanzania, 30 August 2023).
[161] ibid.
[162] ibid.

international courts, which they understand as attempts at 'blocking or reversing advancements in law triggered by international courts'.[163] They go beyond the general lumping of all critical reactions to international courts as constituting 'backlash' to argue that there is a distinction between pushback and backlash against the work of international courts. They define pushback as 'ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law'.[164] Conversely, backlash constitutes 'extraordinary resistance challenging the authority of an [international court] with the goal of not only reverting to an earlier situation of the law, but also transforming or closing [it]'.[165] In other words, pushback is resistance in accordance with the 'rules of the game' while backlash is resistance aimed at changing the 'rules of the game'.[166] Alter, Gathii & Helfer in their study covering a decade of backlash against international courts in West, East and Southern African observe that in the three regions, an African government responded to a politically controversial decision by a sub-regional court with one of three proposals: to eliminate the court, narrow its jurisdiction and access or augment the rules for disciplining its judges.[167] Also important to note in understanding resistance to international courts as Daly and Wiebusch observe is that, besides States, national courts are 'gate-keepers' for penetration of jurisprudence from an international court in national law.[168] They however point out that it is not possible to say whether there has been 'pushback' or backlash' from national courts against the African Court and the more accurate description is that the relationship between national courts and the African Court is 'underdeveloped'.[169] With the above types of resistance in mind, below are some of the forms in which resistance to the African Court has manifested.

d) Existence of Article 34(6) of the Court Protocol

The requirement in Article 34(6) of the Protocol for States to make a declaration permitting filing of applications against them from NGOs and individuals, together with the limited number of States that have made the declaration has significantly restricted access to the Court.[170] This, it has been observed, has resulted in 'a continental judicial governance regime with a very limited

[163] Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197, 201.
[164] ibid, 203.
[165] ibid.
[166] Madsen, Cebulak & Wiebusch(n 163), 209.
[167] Karen J. Alter, James T. Gathii and Laurence R. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) Vol. 27 no. 2 The European Journal of International Law 293, 294.
[168] Tom Gerald Daly & Micha Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court' (2018) 14 International Journal of Law in Context 294, 300.
[169] ibid, 302.
[170] Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (n 34), 70-74.

geographical reach' and thus undermined the Court's mandate to protect human rights on the continent.[171] Madsen *et al* contend that resistance can be in regard to membership to an international court and in the context of the African Court this has manifested through limited approval of the Court's jurisdiction (34 out of 55 African States have ratified the Court Protocol) and an even more limited number of States (eight) that have accepted access to the Court by NGOs and individuals.[172] As the discussion in section 2.3 above noted, access to the African Court is State-centred and very limited for individuals and NGOs. This study will show that there are trends in certain areas of the Court's decision-making that are, lately, leaning more towards re-centering State sovereignty and other State concerns in the Court's reasoning on evidence and on procedural fairness more generally as confirmed by the views of its keys actors.

e) Withdrawal of Article 34(6) declarations

Four States that had made the declaration accepting access to the Court by NGOs and individuals have since withdrawn their declarations – Rwanda, Tanzania, Benin and Côte d'Ivoire. Rwanda's reason for withdrawal was its rejection of the fact that 'a genocide convict who is a fugitive from justice…[had] secured a right to be heard' at the Court, a development it had not envisaged when it made the declaration.[173] Viljoen has termed this reasoning by Rwanda 'disingenuous' because Article 34(6) of the Court Protocol does not qualify the kinds of NGOs and individuals that can submit cases.[174] Tanzania gave its reason for withdrawal as implementation of the declaration 'contrary to the reservations' the State submitted when making it.[175] Adjolohoun has suggested that the actual reason for Tanzania's withdrawal was 'litigation fatigue coated in justification based on reservation'.[176] Côte d'Ivoire withdrew the declaration because the Court's decisions against the State had caused 'serious disturbances' to its legal order which resulted in legal uncertainty.[177] Benin gave similar reasons.[178] However, some suggest that the real reasons behind Benin's withdrawal is rejection of unfavourable decisions in cases filed by the Government's political opponents in order

[171] Micha Wiebusch, *A Theory on Africanizing International Law* (n 55), 150.
[172] Madsen, Cebulak & Wiebusch(n 163), 209.
[173] See statement by Rwanda's ministry of foreign affairs at https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Rwanda.pdf (accessed 28 March 2024).
[174] Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (n 34), 66.
[175] See statement by Tanzania's ministry of foreign affairs at https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf (accessed 28 March 2024).
[176] Segnonna Horace Adjolohoun, 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights' (n 17), 7.
[177] See statement by the Ministry of Communication as cited restated Segnonna Horace Adjolohoun (n 17) at 17. The State did not give a reason for withdrawal in its formal notification of the same to the Court – see https://www.african-court.org/wpafc/wp-content/uploads/2020/10/withdrawal-Cote-divoire.pdf (accessed 28 March 2024)
[178] See https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Benin.pdf (accessed 28 March 2024).

to 'increase impunity and block human rights scrutiny by an independent judicial body'.[179] Gathii and Mwangi suggest that a common reason for all the four withdrawals is that they are 'the result of the effectiveness with which litigants brought pressure and unwelcome scrutiny to bear on their governments'.[180] They further argue that these withdrawals have made the African Court 'a victim of its success'.[181] De Klerk and Rudman observe that while on the face of it these withdrawals may seem like a form of pushback because the States only resist an aspect of the Court's personal jurisdiction, these withdrawals as a form of resistance 'more closely resembles a form of *backlash'*.[182] They argue that the withdrawals are an attack on the African Court's legitimacy because they restrict 'the most important stream of cases to the African Court' and are therefore a form of backlash because they 'pose a serious risk to the future operation of the African Court'.[183] The African Court, in response to the withdrawals of the declaration allowing direct access to the Court, has embarked on what it describes as 'judicial diplomacy' with States and urging States that have made the withdrawals to reconsider.[184] The current President of the Court has led several Court delegations to various African countries in what the Court terms as 'outreach' or 'sensitization' missions and met with Heads of State and other high level government officials.[185] This has included countries like Tanzania and Benin that have withdrawn declarations allowing direct access to the Court.

During fieldwork interviews, I asked judges and legal officers whether the withdrawals have had an impact on the Court's decision-making and views were varied. A legal officer pointed out that in the wake of the withdrawals 'the Court seems to have acknowledged that it should sometimes engage in diplomacy'.[186] The officer however added that I would be 'hard pressed' to find a direct connection between a political situation in a respondent State and the Court's decision. One judge

[179] Martin Faix & Ayyoub Jamali, 'Is the African Court on Human and Peoples' Rights in an Existential Crisis?' (2022) 40(1) Netherlands Quarterly of Human Rights 56, 68.
[180] James Thuo Gathii and Jacquelene Wangui Mwangi, 'The African Court on Human and Peoples' Rights as an Opportunity Structure' in James Thuo Gathii (ed) *The Performance of Africa's International Courts* (n 47), 222.
[181] ibid.
[182] Derick de Klerk & Annika Rudman (n 133), 39-40.
[183] ibid, 40.
[184] Activity Report of the African Court on Human and Peoples' Rights 1 January – 31 December 2022, EX.CL/1409(XLII), paras 82, 89. Available at https://www.african-court.org/wpafc/wp-content/uploads/2023/03/2022-Activity-Report-AfCHPR-_-E-.pdf (accessed 26 November 20224).
[185] Press releases available on the Court's website show that between May 2021 and October 2023, the Court visited the following countries to meet Heads of State and other high level government officials: Tanzania (twice), Benin, Niger, Comoros, Mauritania, Ethiopia, Kenya, Mozambique, Cape Verde, Sao Tome & Principe. Before May 2021, the Court had not had such missions for close to three years, the last one being to Sierra Leone and Liberia in July 2018. This is a clear indication of increased activity in the Court's engagement with States in the recent past to not only convince some of the States that withdrew to re-deposit the declaration but also possibly forestall further withdrawals.
[186] Interview with Registry Member No. 2 at the African Court (Arusha, Tanzania, 15 August 2023).

took the view that the Court is 'guided by the (law) books' and negative responses by some respondent States is partly explained by the fact that they have misunderstood the Court's decisions, hence the ongoing diplomatic efforts by the Court to explain its decisions.[187] A second legal officer held the view that 'everything is decided on the basis of evidence' and further that 'although the Court is alive to the fact of withdrawals and is concerned about it, it doesn't mean it will affect how it decides a matter based on the evidence'.[188]

Not all those interviewed were in agreement with the above view as a third legal officer observed that the Court had issued problematic orders against some of the respondent States by, for example, suspending entire elections after an application by an aggrieved contestant in the elections. The officer argued that the Court could have avoided the backlash of some withdrawals through a different approach to its orders such as by ordering an aggrieved contestant to be allowed to participate in elections instead of ordering suspension of entire elections. A further contention from this officer was that the Court's adoption of the latter approach in more recent decisions (after withdrawals) confirms that the Court does indeed respond to political realities in its decision-making.[189] Two responses from separate interviews with officers also concurred on the existence of a debate within the Registry on whether in view of political occurrences within a respondent State, the Court shouldn't be deliberate about 'management of its cause list' by altering the timing of delivery of judgments to factor in the political realities in a State.[190]

As the analyses in Chapter six reveal, there has been a shift from a flexible applicant-centred evidentiary approach to a stricter 'balanced' approach while assessing the admissibility condition of filing applications within reasonable time. This change of approach from 2019 coincided with some of the withdrawals of the declaration allowing direct access to the Court by individuals and NGOs that took place around the same. The study infers that this was not a mere coincidence but rather the Court's deliberate reaction to happenings in the political environment it operates in. The study further speculates that the Court used evidence assessment instrumentally to signal a change of approach in an effort to tame the political backlash against it.

[187] Interview with Judge No. 3 of the African Court (Arusha, Tanzania, 6 September 2023).
[188] Interview with Registry Member No. 6 at the African Court (Arusha, Tanzania, 22 August 2023).
[189] Interview with Registry Member No. 5 at the African Court (Arusha, Tanzania, 24 August 2023).
[190] Interview with Registry Member No. 2 at the African Court (Arusha, Tanzania, 15 August 2023); Interview with Registry Member No. 4 at the African Court (Arusha, Tanzania, 30 August 2023).

f) Non-compliance with decisions of the Court

According to the more recent statistics from the Court, less than 10% of the decisions adopted by the Court since its establishment have been fully implemented.[191] Erika de Wet points out that the problem of non-compliance with international courts' decisions stems from the domestic level. She argues that 'States which systematically fail to accept the binding authority of their own domestic courts are also unlikely to respect the authority of a binding international court or tribunal'.[192] Compliance with international courts' decisions has also been said to be dependent on 'a range of political considerations at the domestic and international levels' that include 'States' capacity to comply and leaders' political interests'.[193] Related to this, one study on implementation of decisions of international human rights bodies has concluded that 'a diverse range of tools—both persuasive and coercive - can be conducive to implementation in differing contexts'.[194] There is, however, the view that compliance is not the sole measure for success in human rights adjudication and there is power in what else human rights courts communicate. This includes relief to victims by affirming their entitlement to better treatment, educating others about the abuse and decisions serving as models for transformation.[195] In the context of the discussion on resistance to international courts, non-implementation of African Court's decisions has been termed as a form of pushback against the Court that undermines its *de jure* authority and which in turn negatively impacts its *de facto* authority.[196] The African Court has requested AU policy organs to 'adopt a compliance framework and establish focal points to recognise and implement the decisions of the Court at the domestic level'.[197]

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[191] Activity Report of the African Court on Human and Peoples' Rights 1 January – 31 December 2022, EX.CL/1409(XLII), para 85.

[192] Erika de Wet, 'Reactions to the Backlash: Trying to Revive the SADC Tribunal through Litigation', 5 August 2016, Blog post available at https://www.ejiltalk.org/reactions-to-the-backlash-trying-to-revive-the-sadc-tribunal-through-litigation/ (accessed 28 March 2024).

[193] Nicole De Silva, 'African Court on Human and Peoples' Rights,' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press, 2018) 95, 4.

[194] Clara Sandoval, Philip Leach, and Rachel Murray, 'Monitoring, Cajoling and Promoting Dialogue: What Role for Supranational Human Rights Bodies in the Implementation of Individual Decisions?' (2020) 12 Journal of Human Rights Practice 71, 74.

[195] Anonymous Note 'Law Without Violence: Human Rights Adjudication as World Building' (2024) 137 Harvard Law Review 1403, 1410. Available at https://harvardlawreview.org/print/vol-137/law-without-violence-human-rights-adjudication-as-world-building/ (accessed 28 March 2024).

[196] Derick de Klerk & Annika Rudman (n 133), 36.

[197] Activity Report of the African Court on Human and Peoples' Rights 1 January – 31 December 2022, EX.CL/1409(XLII)Annex 4, at page 2 of the annex, B(vi).

2.6.3 Other external challenges

g) Inadequate awareness of the Court

In most of its annual activity reports to the AU's Executive Council, the Court has reported lack of awareness of existence of the Court as a major challenge facing the Court.[198] One judge at the Court has observed that the limited awareness of the Court's existence among ordinary Africans affects the Court's 'sociological legitimacy'.[199] In Chapter six, I examine in greater detail the implications of the lack of awareness about the Court on its approach to evidence.

h) Lukewarm relationship with the African Commission

The African Court's mandate is to 'complement' and to 'reinforce' the protective function of the African Commission.[200] One positive note on the relationship between the two institutions is that the Court often relies on the jurisprudence of the Commission in its reasoning. A study that examined the jurisprudence of the Court from 2009 to 2018 observed that it cites decisions of the Commission as persuasive (and not binding) authorities and in the period under study the Court referred to the Commission's decisions 68 times in 38 Communications.[201] Murray notes that the initial concerns that the Court would undermine the Commission by 'diluting its protective mandate' or disagree with its jurisprudence have not materialised.[202] The relationship between the Court and the Commission, however, is also strained. Given the limited access to the Court for individuals and NGOs as seen earlier, and in a context where human rights violations remain a major concern, the ideal is that the Commission steadily refers cases to the Court for binding decisions.[203] This has not happened as the Commission has so far only referred three cases.[204]

In a media interview in 2021, the Registrar of the Court observed that the 'greatest failure' of the Court is not complementing the protective mandate of the African Commission. At the heart of the difficulty in operationalising complementarity, according to the Registrar, is that the two

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[198] These activity reports are available on the Court's website. See for example, para 45 of the 2020 report, para 78 of the 2021 report and para 87 of the 2022 report.
[199] Presentation by Justice Ben Kioko (n 39), 148.
[200] See last paragraph of the Preamble to the Court Protocol and Article 2 of the same.
[201] Prosper Maguchu (n 58), 452-453.
[202] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (n 33), 11.
[203] Murray and Long have argued that the assumption that States would more likely implement decisions of the Court than those of the Commission was mistaken and that 'factors other than the legal status of a decision or judgment are more significant in determining levels of implementation'. See R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2021) 21 African Human Rights Law Journal 836, 838, 846.
[204] See statistics on cases at https://www.african-court.org/cpmt/statistic (accessed 2 April 2024). There is an argument that one of the reasons why the Commission has not referred cases to the Court where there is non-implementation is that in effect such referral would be an acknowledgement of its own weakness – see Murray & Long (n 203) 850.

institutions understand complementarity differently. On the one hand, the Commission's expectation is that the Court's role is to facilitate enforcement of recommendations by simply making them legally binding and not to re-open cases from the Commission and to consider them *de novo*. On the other hand, the Court's view is that as a judicial body, it would be abdicating on its judicial responsibility if it were to simply 'rubber stamp' recommendations from the Commission. Further, the Registrar considered that '[i]f the Court does not consider jurisdiction and admissibility afresh, it would not be acting in conformity with the Protocol'.[205]

Both institutions revised their Rules of Procedure in 2020 and the relevant provisions suggest that the tension alluded to above by the Registrar of the African Court has found its way into these Rules. The Court's Rules have clarified that while it is considering a case determined by the Commission, the Court may 'review the decision of the Commission'.[206] On the same matter, the Commission's Rules provide that the Commission may refer cases to the Court but on the apparent condition that the referral is 'before deciding on admissibility'.[207] Arguably, the Commission's Rules are drafted such that the Court has no opportunity to review the Commission's decision. Further, the Commission's Rules can be interpreted to mean that after determining admissibility on a case, the Commission *cannot* procedurally refer such case to the Court regardless of the circumstances of the case. Given that the previous Rules of the Commission allowed it to seize the Court 'at any stage'[208], one can argue that a joint reading of the current Rules of both institutions was a missed opportunity as they complicated (instead of improving) the complementarity envisaged by the Court Protocol.

2.7 The future Court

The African Court on Human and Peoples' Rights (in this section referred to as the 'current African Court') is in some sense, and for a long time now, a court that is about to transition as this section shows. The Protocol establishing the African Court was adopted in June 1998 but only came into force in January 2004. In the period in between, the OAU transitioned to the AU after adoption of the Constitutive Act of the AU in July 2000. The Constitutive Act provided for establishment of a Court of Justice of the African Union[209], and this was actualised through

[205] Faustine Kapama 'Registrar Reviews Challenges to African Court On Human and People's Rights', *Daily News*, 12 July 2021. Available at <https://dailynews.co.tz/news/2021-07-1260ec04af1f4b4.aspx> (first accessed 7 August 2021 and now archived on https://allafrica.com/stories/202107120946.html (accessed 2 April 2024).
[206] Rule 36(5) of the Court's Rules.
[207] See Rule 130 of the Rules of Procedure of the African Commission on Human and Peoples' Rights of 2020. Available at https://achpr.au.int/en/rules-procedure (accessed 26 November 2024).
[208] See Rule 118 of the Commission's Rules adopted in 2010, available at https://achpr.au.int/en/node/875 (accessed 2 April 2024).
[209] Article 18 of the Constitutive Act of the AU.

adoption of the Protocol of the Court of Justice of the African Union (hereinafter 'AU Court of Justice') in July 2003. Although this Protocol came into force in February 2009, the AU Court of Justice was not operationalised. This was because the AU, concerned by the financial burden of having two continental judicial bodies (the current African Court and the AU Court of Justice) and 'proliferation' of AU organs, decided to merge the two courts.[210] The legal instrument providing for this merger is the Protocol on the Statute of the African Court of Justice and Human Rights, adopted in 2008. The court established by the 2008 Protocol is referred to here as 'the merged court'. The Protocol on the merged court currently has eight ratifications and is not yet in force.

While the current African Court continued to operate as the 2008 Protocol on the merged court has not attained the required ratifications (15) to become operational, there was a significant development in 2014. The AU decided to further re-design the merged court by granting it criminal jurisdiction. The context informing this development was rejection by African States of the application of universal jurisdiction principles to prosecute high level African leaders following the indictment of Presidents Al Bashir of Sudan and Uhuru Kenyatta of Kenya by the International Criminal Court.[211] The legal instrument providing for this additional criminal jurisdiction was yet another Protocol, adopted in Malabo in Equatorial Guinea, providing for amendments to the 2008 Protocol on the merged court. This amending Protocol is referred to here as the 'Malabo Protocol'. If the Malabo Protocol, ever comes into operation, the current African Court will transition to the *African Court of Justice and Human and Peoples' Rights*.[212] This new or future court will have three sections – General Affairs section, Human and Peoples' section and the International Criminal Law section. On these developments, Odinkalu clarifies that the 2014 Malabo Protocol, being a legal instrument to effect amendments to the 2008 Protocol on the merged court, it is not possible to operationalise the former without the latter and the two instruments must co-exist to realise the fully evolved *African Court of Justice and Human and Peoples' Rights* (the future court) with the three sections mentioned above.[213]

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[210] Ibrahima Kane & Ahmed C. Motala, 'The Creation of a New African Court of Justice and Human Rights' in Malcolm Evans & Rachel Murray (eds) *The African Charter on Human and Peoples' Rights- The System in Practice, 1986-2006* (2nd Edition, CUP 2008) 406, 409.

[211] Rachel Murray, 'The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights' in Charles Jalloh, Kamari Clarke & Vincent Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: development and challenges* (CUP 2019), 965, 966; James Gondi, 'The Malabo Protocol: Truth or Dare?' in *The Future of International Criminal Justice in Africa* (ICJ Kenya Section, 2023) 46, 46-47.

[212] The Malabo Protocol is available at https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 3 April 2024).

[213] Chidi Anselm Odinkalu, 'Advice without Consent?: Assessing the Advisory Jurisdiction of the African Court on Human and Peoples' Rights, (2023) 45(3) Human Rights Quarterly 365, 374.

Some demerits of having a section on international criminal law as part of the future court and implications on the human rights protection mandate of the court have been identified. One is that accepting the jurisdiction of the future court is framed in an 'all or nothing' fashion and a State that, for example, may be willing to subject itself to the human rights jurisdiction of the court and not the criminal one may be inclined to reject the court's jurisdiction entirely.[214] The future Court, with its three sections, also risks reducing 'the focus on and prominence of human rights', particularly because criminal prosecutions are resource intensive and are likely to be prioritised.[215] Notably, the high cost of running such international criminal court is related to evidence. Viljoen notes the standard of proof in criminal matters (beyond reasonable doubt) 'requires extensive fact-finding, presentation of extensive evidence, opportunities to question witnesses, careful assessment of evidence and lengthy judgments'.[216] To conclude on a practical note, it has taken 16 years for the 2008 Protocol on the merged court to garner 8 ratifications and it requires 7 more before the African Court of Justice and Human Rights (merged court) can be operationalised. In 10 years, only one State (Angola) has ratified the 2014 Malabo Protocol.[217] One could postulate that the fully evolved court with three sections is not likely to materialise, an eventuality that some welcome given the many flaws associated with the proposals in the Malabo Protocol.[218]

[214] Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol' 23 May 2012 *AfricLaw blog*. Available at https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213 (accessed 3 March 2024).
[215] ibid.
[216] ibid.
[217] See update on this by Human Rights Watch, available at https://www.hrw.org/news/2024/06/14/angola-becomes-first-country-join-african-criminal-court (accessed 25 November 2024)
[218] Rachel Murray, 'The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights' (n 211), 988.

CHAPTER 3: A Conceptual Framework for the African Court's Approaches to Evidence

3.1 Introduction

The African Court has generally favoured a flexible application of its Rules such as with regard to timelines and other formalities related to pleadings. To illustrate this, whereas the Rules stipulate timelines within which various pleadings must be filed, the Court has on numerous occasions allowed pleadings filed out of time.[1] It has also held that failure by an applicant to cite specific provisions of the African Charter that are alleged to have been violated is not a valid reason to oust its jurisdiction.[2] Similarly, it has accepted a letter filed by an applicant's grandmother as sufficiently disclosing the applicant's grievances to the respondent State although this was not in the prescribed format for filing of applications.[3] The Court has allowed an email from an applicant to the Court as a properly filed application.[4] These examples of the Court's flexibility are backed by the Court's Rules which provide that 'nothing in these Rules shall limit or otherwise affect the inherent power of the Court to adopt such procedure or decisions as may be necessary to meet the ends of justice'.[5]

From this study's examination of the Court's decisions from 2013-2024 as well as interviews with judges and members of the Court's Registry, it has become evident that this flexibility, which was predominantly in favour of individual applicants in the Court's earlier decisions is presently a contentious issue when it comes to considering evidence. With passage of time (which has meant changing composition of the bench and Registry) views at the Court appear to have evolved in terms of how flexible the Court should be on evidential matters, how that impacts perceptions of fairness and who the primary beneficiary of the flexibility should be. Importantly, the changing views on conceptualisation of fairness in considering evidence and where to strike a balance between applicants and respondent States' interests has impacted the substantive outcomes of the adjudication process at the Court. This Chapter therefore spells out a framework for understanding and explaining the evolution of the African Court's approaches to evidence as the formula for

[1] In *Alex Thomas v. Tanzania,* Application No. 005/2013, Judgment of 20 November 2015, para 10; *APDH v. Cote D'Ivoire*, Application No. 001/2014, Judgment of 18 November 2016, para 26; *Nguza Viking (Babu Seya) And Johnson Nguza (Papi Kocha) v. Tanzania*, Application No. 006/2015, Judgment of 23 March 2018, paras 8 and 11.
[2] *Peter Joseph Chacha v. Tanzania*, Application No. 003/2012, Ruling of 28 March 2014, para 122.
[3] *Robert John Penessis v. Tanzania*, Application No. 013/2015, Judgment of 28 November 2019, paras 41-50.
[4] *Anudo Ochieng Anudo v. Tanzania*, Application No. 012/2015, Judgment of 22 March 2018, paras 15-16.
[5] Rule 90 of the Rules of Court.

answering the study's main research question of how evidentiary practices have impacted the substantive fairness of its decisions.

The Chapter does this in the following structure. It begins, in section 3.2, by questioning what the main purpose of the African Court is as a necessary starting point to understanding the study's critique of procedural fairness in relation to evidence at the Court. This is followed by section 3.3 which examines the model of procedural fairness applicable at the Court in considering evidence given the conflicting views among judges and Registry staff on what should prevail between an equitable applicant-centred approach and an equal balancing of the parties' interests. Section 3.4 then sums up the challenges that some applicants face in meeting evidentiary requirements and which justify application of an equitable applicant-centred evidentiary approach. To mitigate these challenges, four principles are suggested in section 3.5 as inexhaustive examples of interventions that could define an equitable approach to evidence. In section 3.6, a justification for why an equitable evidentiary approach is appealing is then provided before concluding with a summary of the Chapter in section 3.7.

3.2 Purpose of the African Court

In order to clarify my critique of the African Court's approaches to evidence and justify the propositions I make, this study has to address the question of what the Court's central purpose or aim is. Variations of or sub-questions to this main question are: why was the Court established? What is its rationale? Who is the Court primarily meant for or meant to serve? Is the Court mainly meant to advance human rights or adjudicate over human rights? Is an international human rights court such as the African Court special in nature to justify a distinct evidentiary approach? Answers to these questions in turn aid my evaluation of whether the Court, through its evidentiary practices, remains faithful to its purpose. To get clarity on the Court's purpose, I seek to understand three issues: (1) what the Court, as an institution, communicates as its purpose, (2) what academic literature suggests its purpose is or ought to be and (3) the views of insiders at the Court (judges and Registry staff) on what purpose they consider the Court should serve. These three issues are fleshed out in this section and I conclude it with my own take on the purpose question.

The African Court's 'mission' and 'vision' statements are an appropriate starting point in examining the Court's own view of its purpose. As stated on its website, the Court's mission is to complement the protective mandate of the African Commission by ensuring respect for and compliance with

the African Charter and other international human rights instruments 'through judicial decisions'.[6] This mission statement restates the Court's mandate under the Court Protocol which additionally acknowledges that attainment of the objectives of the Charter requires establishment of the Court.[7] The Court's vision is 'an Africa with a viable human rights culture', an evidently broader ambition than what is aimed for in its mission. Notably, while the Court's mission is confined to a judicial process, the vision of the Court suggests a continent-wide interest in advancing human rights beyond the courtroom. The two are arguably two sides of the same coin because the aggregate quality of the Court's judicial decisions in pursuit of its mission impacts the viability of the vision.

The Court's current Strategic Plan (2021-2025) has additional pointers on what we can understand the Court's purpose to be. The document has several statements that directly refer to its purpose including: (1) 'its purpose of defending and improving the continental human rights landscape'[8], (2) 'the Court's purpose of ensuring respect for human rights on the African continent'[9], and (3) 'the ultimate goal … as the continental court which protects the inalienable and indivisible human and peoples' rights of Africans'.[10] In perhaps what answers the sub-question of who the Court is primarily meant for, the Strategic Plan in its preambular sections states that '[the Court has] also learnt that improved judicial processes have little meaning if they do not adequately cater to the needs of the Court's core constituents, individuals and peoples whose rights have been violated'.[11] Somewhat related to this statement is the decision of the Court in the *Jean-Claude Roger Gombert* case where it observed that 'as a human and peoples' rights court, [the Court] can make a determination only on violations of the rights of natural persons and groups to the exclusion of private or public law entities'.[12]

Besides these Court's sources, the reviewed literature has other takes that speak to the main aim and, to use the Court's words, 'core constituents' of the African Court and international human rights courts in general. Writing before his appointment as Registrar of the Court, Robert Eno made this observation about the African Court:

> After all, it is individuals and NGOs, and not the African Commission, regional intergovernmental organisations or state parties who would be the primary beneficiaries and users of the African

[6] See the basic information section of the Court's website - https://www.african-court.org/wpafc/basic-information/ (accessed 5 April 2024).
[7] Article 2 and paragraph 7 of the preamble to the Court Protocol.
[8] African Court on Human and Peoples' Rights - Strategic Plan: 2021-2025, page 1. Available at https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-strategic-plan-2021-2025/ (accessed 5 April 2024)
[9] African Court on Human and Peoples' Rights - Strategic Plan: 2021-2025, page iii (Executive Summary section).
[10] ibid.
[11] African Court on Human and Peoples' Rights - Strategic Plan: 2021-2025, page ii (Forward by the Registrar).
[12] *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, Application No. 038/2016, Judgment of 22 March 2018, para 47.

> Court. The Court is not an institution for the protection of the rights of states. A human rights court exists primarily for protecting citizens against the state and other government agencies.[13]

This view is supported by Dan Juma who observes that individuals 'are the typical consumers of human rights courts'.[14] He further notes that the idea of human rights mainly developed to 'protect the individual or groups of individuals from inimical conduct of the state' and that human rights are 'an antidote for taming the predatory state'.[15] Related to this and as observed by Kamunyu, human rights institutions such as the African Court embody a paradox inherent in international human rights law. This is because, she argues, they are created and funded by States, the primary human rights duty bearers who also are the main violators of the same rights.[16] The fact that bodies like the African Court have no coercive powers to enforce their findings and depend on the cooperation of the same States only complicates this reality.[17] Makau Mutua's argument is along the same lines. He points out that the normative regime of international human rights law stems from liberal theory and philosophy according to which 'individual rights act as a bar against the despotic proclivities of the State'.[18] The tendency and nature of the State, according to Mutua, is to oppress and control the individual.[19] If human rights are to be understood as the barrier against the State's propensity for overreach to the detriment of the individual, I contend that the approaches to interpretation and application of human rights norms (and related evidentiary standards in that process) should not lose sight of the fact that individuals are the primary clients of the African Court and protection of individuals' rights is the main reason for its existence.

However, States' interests in adjudication before human rights courts are not to be ignored. One of the demands from States on proceedings at the African Court according to one judge whom I interviewed was a limit on its flexibility. While discussing the Court's previously flexible approach to the admissibility condition of filing cases within reasonable time, the judge noted that 'there have been complaints by States on how we are handling those matters and why we are giving a very big leeway on that'.[20] The judge further pointed out that in more recent times and during

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[13] Robert Wundeh Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 African Human Rights Law Journal 223, 231.
[14] Dan Juma 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper' (2007) 4(2) Essex Human Rights Review, 5.
[15] ibid, 3.
[16] Mariam Kamunyu, 'Exploring the Impact of State Behaviour on the African Commission's Autonomy', 2. A paper developed for the Coalition for the Independence of the African Commission (CIAC), July 2021. Available at https://achprindependence.org/exploring-the-impact-of-state-behaviour-on-the-african-commissions-autonomy/ (accessed 8 April 2024).
[17] ibid.
[18] Makau Mutua, *Human Rights Standards -Hegemony, Law, and Politics* (SUNY Press 2016), 11.
[19] ibid, 11-12.
[20] Interview with Judge No. 1 of the African Court (Arusha, Tanzania, 7 September 2023)

deliberations, there has been a push from some judges that the Court should 'remember that there are two parties and [it] cannot just go on the side of one and not the other'.[21] Similar views were expressed by another judge who, in response to my question on whether the Court should be more *proactive*[22] in requiring additional evidence from applicants than it presently does, emphasized that the African Court 'cannot become a referee and a player'.[23] The judge added that judges at the Court must be 'neutral and impartial' and it was not the role of the Court to 'guide a party to do this and that against a State that also has interests'.[24] These views point to the Court increasingly seeing its role as that of an adjudicator and not necessarily that of (just) protecting human rights. In one publication Horace Adjolohoun, who is also the current Head of Legal Division at the Court, suggests that there is a link between the Court's approach to evidence and the withdrawal of the declaration allowing direct access to the Court for individuals and NGOs by some States. He argues that:

> The African Court's practice with respect to assessing evidence may also have contributed to loss of confidence by the states that withdrew and other states generally…The Court's approach in these instances can only leave the impression that it does not give due consideration to submissions and evidence of respondent states. Decisions of the Court therefore may cause a sentiment of bias or unfairness to which states believe withdrawal is the effective response for lack of alternative means of contestation.[25]

While human rights adjudication has to contend with the reality of State interests in the process, their overemphasis risks undermining the entire human rights project, akin to what Dembour has termed as a 'human rights reversal' in her discussion of migrant case law at the European Court of Human Rights.[26] She faults the European Court's application of what it has erroneously found to be a 'well established' principle of international law that States have the prerogative to control the entry and residence of aliens. She argues that the 'Strasbourg reversal' prioritises State sovereignty over human rights and it has meant that 'instead of human rights law serving to scrutinise state behaviour as its function should be, it is the behaviour of the individual which comes under

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[21] ibid.

[22] The terms 'proactive' and 'proactivity' as used in the thesis generally refer to the study's call for the African Court, through its Registry, to actively participate in fact-finding and evidence gathering where there are evidence gaps before the Court dismisses claims for lack of or insufficiency of evidence. This suggestion is informed by Rules 51 and 55 of the Court's Rules that permit this but, as argued in the study, the Court has not consistently applied these Rules. Instead, in the context of particular discussions in the study, the Court has opted to determine cases based on the evidence presented by parties.

[23] Interview with Judge No. 7 of the African Court (Arusha, Tanzania, 7 September 2023).

[24] ibid.

[25] Segnonna Horace Adjolohoun, 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights' (2020) 20 African Human Rights Law Journal 1, 25-26.

[26] Marie-Bénédicte Dembour, *When humans become migrants: a study of the European Court of Human Rights with an Inter-American Counterpoint*,(Oxford University Press, 2015), 127.

scrutiny'.[27] In support of prioritisation of individuals' human rights, this thesis is informed by the position that while States' interests, including their concern about neutrality are important to consider as they could potentially dent the Court's legitimacy with non-compliance and other forms of resistance against the Court, its approach to evidence should not overstate these interests to the detriment of the main goal of protecting human rights. The twin argument to this is that given the power imbalance between applicants and States and other contextual factors that impede applicants' efforts to adduce required evidence, the African Court's approach to evidence should be adapted to take cognizance of these factors if it is to arrive at decisions that are just and fair to applicants and victims. Lixinski has made the relevant observation that in terms of fairness there is an important difference between inter-State disputes and individual-State disputes in human rights courts. In the former, fairness is 'aggregated', so formal sovereign equality means States will be treated equally while in the latter 'disaggregated fairness' demands that 'specific circumstances of the individual be taken into account'.[28]

In a dialogue forum bringing together the three regional human rights courts, Justice Ben Kioko made an observation which lends credence to the study's call for an adapted evidentiary approach as stated above. He observed that:

> Despite the fact that the African Court epitomizes the characteristics of the other regional human rights tribunals in Europe and the Americas, it has its unique and Africa-specific challenges, some of which are common to any nascent international judicial body, others that are specific to the African continent and to the environment within which the African Court operates.[29]

Some of the challenges alluded to in the above quote and which are also captured in reviewed literature were identified in Chapter two where challenges of accessing the Court were discussed. This Chapter highlights challenges related to evidence in section 3.4 below and investigates the implications of these challenges on the Court's approach to evidence throughout the study. Importantly, the challenges have not just been discussed outside the courtroom as by Judge Kioko above but have been acknowledged by the Court in its decisions. In the case of *XYZ v. Benin*, the Court took cognizance of 'the practical difficulties that ordinary African victims of human rights violations may encounter in bringing their complaints before the Court'.[30] These challenges and practical difficulties arguably underscore the need for flexibility in the Court's application of

[27] ibid, 128.
[28] Lucas Lixinski, 'Procedural Fairness in Human Rights Systems' in Arman Sarvarian *et al* (eds), *Procedural Fairness in International Courts and Tribunals* (BIICL 2015) 325, 326.
[29] Inter American Court on Human Rights, *Dialogue between Regional Human Rights Courts* (2020),145. Available at https://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-en.pdf (accessed 8 April 2024).
[30] *XYZ v. Benin*, Application No. 059/2019, Judgment of 27 November 2020, para 55.

evidence rules. The Court has itself acknowledged that while it is 'a fundamental rule of law' that whoever alleges a fact must prove it, 'when it comes to violations of human rights, this rule cannot be rigidly applied'.[31] The study problematises instances when the Court adopts a strict approach to applying this fundamental rule on evidence without heeding to its own caution against rigidity.

Further to this, excerpts from two Separate Opinions by a former judge at the Court illustrate what I contend is the special nature of human rights adjudication and thus the need for flexibility, which is often in favour of the applicant. In *APDH v. Côte d'Ivoire*, Justice Ouguergouz noted that '*in a trial before a human rights court*, the judge may, of course, show flexibility with respect to an applicant who is an individual or a non-governmental organization'(emphasis in italics added).[32] In another case, *Peter Joseph Chacha v. Tanzania*, the judge held the view that the rule on exhaustion of local remedies should be applied 'with a certain degree of flexibility and without excessive formalism, *given the context of human rights protection*' (emphasis in italics added).[33] These views are related to Tarisai Mutangi's observation that 'there is a public interest in human rights adjudication'.[34] Equally relevant is the view that regional human rights courts and commissions are 'semi-autonomous human rights legal orders' and their rationale 'lies in their ability to articulate and institutionalize human rights in ways that are more responsive to and legitimate in a certain region and its particular cultural, legal, and political contexts'.[35]

An additional point in support of my argument about the special nature of human rights adjudication (which then justifies the call for an exceptionally flexible approach to evidence) is the general acceptance that human rights treaties are themselves of a special character. Human rights treaties, as noted by Mechlem, are special because they are not mainly concluded for a reciprocal exchange of rights for mutual benefit of parties involved but to benefit third parties (individuals). For this reason, they call for interpretation 'in a manner sufficiently favorable to the effective protection of individual rights'.[36] Similarly, the European Court notes that the European

[31] *Kennedy Owino Onyachi and Charles John Mwanini Njoka v. United Republic of Tanzania,* Application 003/2015, Judgment of 28 September 2017, para 142.
[32] *APDH v. Cote D'Ivoire*, Application No. 001/2014, Judgment of 18 November 2016, Separate Opinion of Judge Fatsah Ouguergouz, para 36.
[33] *Peter Joseph Chacha v. Tanzania*, Application No. 003/2012, Ruling of 28 March 2014, Separate Opinion of Judge Fatsah Ouguergouz, para 20.
[34] Tarisai Mutangi, 'Tracing the developing reparations jurisprudence of African Court on Human and Peoples' Rights as reflected in its first cases of Mtikila, Zongo and Konate in Alejandro Fuentes & Annika Rudman (eds) *Human Rights Adjudication in Africa: Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems* (PULP 2023), 23.
[35] Başak Çalı, Mikael Rask Madsen and Frans Viljoen, 'Comparative regional human rights regimes: Defining a research agenda' (2018) Vol. 16 No. 1, International Journal of Constitutional Law 128, 130.
[36] Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905, 912.

Convention is 'unlike international treaties of the classic kind'.[37] It has also observed that the Convention is of 'special character as a treaty for the protection of individual human beings and its safeguards must be construed in a manner which makes them practical and effective'.[38] Arguably, the same can be said of the African Charter. I suggest that if human rights treaties are special in character, so are human rights courts as well as the procedures that guide interpretation and application of these treaties. This view, I suggest, is the basis for the flexibility that generally defines proceedings in human rights courts and which I argue should be retained or expanded at the African Court on evidence matters as appropriate.[39] This take has support from the observations of Michael O'Boyle who contends that the key to understanding the European Court's approach to proof 'is that it is an international human rights court' and as such

> its approach to evidence cannot be that of applying rigid formulae without having regard to the context of the case, the vulnerability of the parties, the seriousness of the allegations, and any difficulties that the applicant might have in adducing evidence. It must also somehow bear in mind the inequality of arms, in cases brought by individuals, between the applicant, faced with the considerable resources of the government, as well as the stigma attaching to the finding of a breach of the Convention.[40]

In view of the above and coming back to the question of the African Court's purpose, the study proceeds on the understanding that the overriding objective of the Court is to protect human rights through fair and just decision-making. Brems and Lavrysen, in support of this view, have observed that 'reaching solutions that are just and fair is the core business of any human rights adjudicating body'.[41] In seeking to achieve this objective, I argue that the African Court should prioritise individuals as the intended primary beneficiaries of its work. Realising this objective and prioritisation, as the study demonstrates, requires an evidentiary approach that is consistently conscious of the Court's operating environment and the circumstances of applicants. Arguably, what the Court lists as one of its core values, namely, 'responsiveness to the needs of those who approach the Court' is addressed to individuals, who constitute the vast majority of those who

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[37] *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99 (ECHR, 4 February 2005), para 100.
[38] *Cruz Varas and others v. Sweden*, Application No. 15576/89, (ECHR, 20 March 1991), para 94; See also *Loizidou v. Turkey*, Application No. 15318/89 Preliminary Objections, (ECHR, 23 March 1995), para 70;
[39] To further support the proposition that the African Court as an international human rights court is specialised in nature, Rule 31(1) of the Court's Rules allows a party to be represented by non-lawyers. Legal representation in an ordinary court is generally a preserve of lawyers.
[40] Michael O'Boyle 'Proof: European Court of Human Rights' (2018) Max Planck Encyclopedias of International Law', para 70.
[41] Eva Brems & Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 Human Rights Quarterly 176, 182.

approach the Court.[42] This in my view is an implicit acknowledgement of the need for the suggested evidentiary approach. In sum, the study contends that actualising the Court's purpose necessarily requires an approach to evidence that consistently bears in mind who its core constituents are, its specialised nature as a human rights court and African specificities.

How the Court should go about realising this objective, however, remains contested. While some of my interlocutors during fieldwork at the Court wish to see even greater flexibility in considering evidence matters so as to accommodate specific needs of some applicants, others think that the '[the Court's] empathy is far exceeding the requirements of the law' and this is making the Court to 'disregard the rules'.[43] The study will demonstrate that the aggregate of these personal philosophies among judges and the Registry staff has over time influenced the Court's position on procedural fairness and its approach to evidence. Whether or not the Court remains faithful to its purpose, therefore, will turn on how it resolves the described divide. Pertinent to settling this divide is the Court's conceptualization of fairness, particularly on evidence questions. This issue is discussed next.

3.3 What model of procedural fairness should apply at the African Court?

The Court Protocol requires judges of the African Court to discharge their duties 'impartially'.[44] This imperative means judges are required to be neutral or fair in their decision-making. A review of the Court's decisions as subsequent Chapters of the thesis show as well as information from interviews with judges and Registry staff reveals two camps or schools of thought on the Court's approach to fairness on evidential matters. One camp favours what the study will refer to as an *equitable applicant-centred approach* to fairness in considering evidence issues, where the procedural and substantive rights and interests of individual applicants have pre-eminence in the conception of what constitutes fair adjudication at the Court because of their often weaker or disadvantaged procedural positions. The other camp prefers an *equal approach* to fairness in considering evidence where interests of both applicants and respondent States are balanced equally. The study demonstrates that the choice between the two approaches impacts substantive outcomes of adjudication at the Court. The uncertainty or incoherence about what fairness is in the context of assessing evidence at the African Court as informed by the two schools of thought has resulted in

[42] See the Court's website at https://www.african-court.org/wpafc/basic-information/ (accessed 8 April 2024). According to the Court's statistics available on its website, out of all applications received as at November 2024, 325 are from individuals, 22 from NGOs and 3 from the African Commission. Arguably, the responsiveness referred to also applies to NGOs that file cases on behalf of individuals and groups of individuals.
[43] Interview with Registry Member No. 1 at the African Court (Arusha, Tanzania, 14 August 2023).
[44] Article 16 of the Court Protocol.

inconsistent decisions and regular dissenting opinions on the issue by at least one judge at the Court.[45] In addition, as shown in Chapter six, preference for an equitable applicant-centred approach to fairness and specifically in relation to evidence matters defined the Court's early jurisprudence (particularly on the admissibility condition of filing applications within reasonable time) but the more recent decisions reveal a shift in the jurisprudence of the Court that has been informed by an emerging push for an equal approach to fairness in examining evidence. In the latter approach, there is an implied effort by the Court to place State interests or 'rights' on an equal footing with those of the individual applicant in the understanding of procedural fairness and assessment of evidence.

Observations by Laurence Burgorgue-Larsen on what generally divides interpretation approaches in the three regional human rights courts are relevant to my study and invite a response. She argues that divisions at the European and Inter-American Courts are based on 'methodological strategy' while at the African Court the divide is based on 'technical issues'.[46] At the European Court, she notes that the division on interpretation revolves around determination of existence of a European consensus and the related issue of the scope of margin of appreciation. At the Inter-American Court, she points out that the divide is between judges advocating for strict observance of the rules of the Vienna Convention and those who promote an interpretation approach based on the *pro persona* principle.[47] Regarding the African Court, she contends that divisions among judges are not comparable to the two other courts where progressive or pioneer judges are pitted against conservative or orthodox judges. Instead, she argues that divisions at the African Court 'are mostly technical and do not seem to indicate that there are two camps within the Court'.[48] She adds that at the African Court 'each particular case engenders specific approaches, which, for the time being, do not reveal strategic divides but only views characterized by the importance given to factual and/or procedural elements'.[49] Findings from my study, however, reveal that while Burgorgue-Larsen's observations may have been accurate at the time she wrote (2018) and based on the few

[45] Justice Bensaoula Chafika has written numerous separate opinions and declarations that indicate clear preference for an applicant-centred approach to evidence. For example, she has consistently taken the view that the Court should request the applicant for additional evidence before dismissing claims for insufficient evidence. See for example: Declaration of Judge Bensaoula Chafika in *Aminata Soumaré v. Mali* Application No. 038/2019 Ruling of 5 September 2023; Dissenting Opinion of Judge Bensaoula Chafika in *Joseph John v Tanzania*, Application No. 005/2018, Judgment of 22 September 2022.

[46] Laurence Burgorgue-Larsen, ' "Decompartmentalization": The key technique for interpreting regional human rights treaties' (2018) 16(1) International Journal of Constitutional Law 187, 204.

[47] ibid.

[48] ibid, 208.

[49] ibid, 211.

early cases she analysed (12 cases decided between 2011-2014)[50], it is presently not accurate to suggest that there are no strategic or ideological divisions among judges at the African Court. With the benefits of an expanded period of assessment, more cases to analyse (decisions from 2013-2024) and interview data, I demonstrate that there is a conceptual division on the understanding of procedural fairness and by extension, the related issue of its approach to evidence. In a sense, therefore, this research will show that the division that Burgorgue-Larsen identified at the Inter-American Court in 2018 is presently mirrored at the African Court, with the concern about considering parties' interests equally in the adjudication process the main driver of the increasingly conservative approach at the latter.

The above-stated divide on the approach to procedural fairness necessitates some non-exhaustive highlights on conceptions of procedural fairness or procedural justice[51] as discussed in literature. Meyerson, Mackenzie and MacDermott have identified two main accounts that dominate the literature by legal theorists and philosophers on theories of procedural justice, namely, the 'instrumental and dignitarian accounts'.[52] The instrumental accounts have an outcome-oriented view according to which 'the only purpose of procedures is to lead to outcomes that uphold substantive legal rights'.[53] The instrumental vision on procedural fairness has also been described as informed by the view that 'people value seeing justice being done because it increases the probability of a fair outcome'.[54] The dignitarian accounts argue that some procedures have an 'inherent value that is independent of any contribution they make to arriving at legally correct outcomes'.[55] This view requires respect for people as active (not passive) subjects who can reason and explain themselves. An unfair procedure, such as denying a defendant a hearing, is therefore unjust in itself even when an accurate decision can be arrived at without their participation.[56] Brems & Lavrysen have elaborated on the value of procedural justice in the context of human rights adjudication as follows:

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[50] Her analyses were based on decisions and dissenting opinions issued between 2011-2014 in 12 cases: *Lohe Konate, Nobert Zongo, Christopher Mtikila , Peter Chacha, Femi Falana, Atabong Denis Atemnkeng, Ekollo Moundi Alexandre, Soufiane Abadou, Daniel Amare and Mulugeta Amare, Michelot Yogogombaye, Frank Omary* and *African Commission v. Libya.*

[51] The terms are used interchangeably in some literature. See for example, Filippo Fontanelli & Paolo Busco, 'What We Talk About When We Talk About Procedural Fairness' in Arman Sarvarian *et al* (eds) *Procedural Fairness in International Courts and Tribunals* (BIICL 2015) 17, 19; these authors also cite other sources that use the term interchangeably - Eva Brems & Laurens Lavrysen (n 41) 177 and John Rawls, 'Justice as Fairness' (1958) 67 (2) The Philosophical Review 164.

[52] Denise Meyerson, Catriona Mackenzie, and Therese MacDermott, 'Introduction: Procedural justice in law, psychology, and philosophy' in Denise Meyerson, Catriona Mackenzie, and Therese MacDermott (eds), *Procedural Justice and Relational Theory - Empirical, Philosophical, and Legal Perspectives* (Routledge 2021),3.

[53] ibid.

[54] Cathérine Van de Graaf, 'Procedural fairness: Between human rights law and social psychology' (2021) Vol. 39(1) Netherlands Quarterly of Human Rights 11, 14 citing Gerard Leventhal.

[55]Meyerson, Mackenzie, and MacDermott (n 52) 3-4.

[56] ibid 4.

> [H]uman rights adjudicating bodies have substantive reasons for valuing procedural justice. These bodies differ from other legal institutions, such as the police or a commercial court, for which procedural justice is something to be added to their work that is otherwise driven by a different dynamic. As for bodies that were set up to protect human rights, the procedural justice principles are the procedural mirror of the substantive work they are trying to accomplish. In other words, procedural justice is much closer to their core business. Hence, procedural justice should matter for human rights adjudicating bodies regardless of its impact on legitimacy, simply because it is part of the value system they represent.[57]

John Rawls in *A Theory of Justice* addresses the issue of procedural fairness while discussing distributive justice and makes observations relevant to legal proceedings.[58] Rawls distinguishes between perfect and imperfect procedural justice through the analogy of a group of men who are to divide a piece of cake equally amongst themselves. To achieve this, they adopt the procedure of having one man divide the cake but he would be the last one to pick. In this example, perfect procedural justice is achieved because of two characteristic features, namely, 'an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it'.[59] Rawls uses the example of a criminal trial to illustrate imperfect procedural justice. He notes that in a trial the desired outcome or purpose is to only pronounce the guilt of the defendant if he committed the crime and the trial procedure is framed to search for the truth in this regard. He however points out that even though the 'theory of trials examines which procedures and rules of evidence, and the like, are best calculated to advance this purpose', it is 'impossible to design the legal rules so that they always lead to the correct result'.[60] Rawls makes a point relevant to my study in noting that a legal system must 'contain rules of evidence that guarantee rational procedures of inquiry'. While these procedures vary, Rawls argues that they must be 'reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances'.[61]

Relating the above to the African Court, although evidence assessment (a procedural issue) cannot be expected to always produce the correct result the Court arguably has a duty to adopt an evidentiary approach that comes closest to this. Lawrence Solum talks of a 'minimal notion of procedural justice' while acknowledging that a perfectly just procedure that would guarantee correct outcomes remains idealistic. For this reason, 'a procedure would be more or less fair or

[57] Eva Brems & Laurens Lavrysen (n 41) 184-185.
[58] John Rawls, *A Theory of Justice* (Revised Edition, Harvard University Press 1999).
[59] ibid, 74.
[60] ibid.
[61] Rawls (n 58) 210.

just insofar as it approximates this ideal'.[62] Rawls similarly underlines that 'different arrangements for hearing cases may reasonably be expected in different circumstances to yield the right results, not always but at least most of the time'.[63] How an approach to evidence can operate at the African Court to come closer to this ideal of arriving at correct (and thus fair and just) decisions is discussed further in section 3.5 below. It is however important to clarify that for purposes of this study, a 'correct' decision is not synonymous with the applicant winning their case at the African Court. Such a decision should be understood as one not grounded on legal technicalities such as 'insufficiency' of evidence that are blind to socio-legal realities that inhibit presentation of evidence by applicants. As will be discussed throughout the thesis, in the context of the African Court, decisions are *fair/just/correct/right/substantively fair or accurate*, regardless of who the winner is, when arrived at after applicants are: (1) made aware of evidence requirements, (2) given opportunity to fill evidence gaps, if any, with additional evidence and (3) the evidentiary difficulties they face are factored in the Court's reasoning on proof, such as through use of presumptions and flexibility on acceptable/alternative forms of evidence.

An equally important contribution on the subject of procedural fairness is that of Tom Tyler who has developed a social-psychological theory of compliance with the law. He observes that voluntary compliance with the law is linked to 'judgments about the legitimacy of authorities and the morality of the law'. Building on this, he further argues that 'public views about the legitimacy of legal authorities are linked to judgments about the fairness of the procedures through which those authorities make decisions'.[64] He identifies four factors that determine how people judge procedural justice, namely: (1) trustworthiness of legal authorities, (2) quality of treatment by legal authorities, (3) neutrality and (4) participation or voice. On the first issue of trust, Tyler argues that when people feel that the authorities making legal rules are 'trying to be fair' to them then they are much more willing to accept those rules. He points out that one important way through which lawyers and judges can communicate that they are trying to be fair is through justification, which entails 'explaining why they are making their decisions'.[65] On the second issue of quality of treatment, Tyler observes that how people react to legal authorities is related to interpersonal respect and that 'being treated politely, with dignity and respect, and having respect shown for one's rights and status within society, all enhance feelings of fairness'.[66] Regarding the third issue of neutrality in decision-making procedures, Tyler notes that this includes 'assessments of honesty,

[62] Lawrence B. Solum, 'Procedural Justice' (2004) 78 Southern California Law Review 181, 184.
[63] Rawls (n 58) 75.
[64] Tom R. Tyler, 'Procedural Fairness and Compliance with the Law' (1997) 133 (2/2) Swiss Journal of Economics and Statistics 219, 219.
[65] ibid 229.
[66] Tyler (n 64) 231.

impartiality, and the use of fact, not personal opinions, in decision-making'.[67] Lastly, related to participation, he observes that people feel more fairly treated by legal authorities if 'allowed to participate in shaping decisions which affect the resolution of their problems or conflicts'.[68]

Although Tyler's study is based on perceptions of individuals and their compliance with the law, arguably, the four factors also directly or indirectly impact how respondent States perceive procedural fairness. After all, States are represented by and advised by individuals. As noted earlier, the issue of neutrality or impartiality, one of the four factors in Tyler's analysis, is provided in the Protocol establishing the African Court. On the face of it, an equitable applicant-centred approach to assessment of evidence as mentioned earlier seemingly offends the requirement of neutrality. However, as Tyler observes regarding perceptions on neutrality of decision-making procedures, 'people seek a level playing field in which no-one is *unfairly* advantaged' (emphasis added)[69]. This, it can be argued, leaves room for a litigant to be *fairly* advantaged (in an effort to level the playing field), especially where there is no symmetry in power and information between applicants and States as is often the case in human rights adjudication. Therefore, an equitable approach (which is applicant-centered by default, given the African Court's context) still has a place at the African Court even with the directive to be 'impartial' as provided in the Protocol.

The issue of neutrality is also picked up by Brems and Lavrysen in their discussion of procedural justice in human rights adjudication and in the context of the European Court of Human Rights.[70] They identify four aspects of the neutrality requirement. The first is that the Court should abstain from expressing bias and maintain transparency and in this regard they identify separate opinions as a useful transparency tool. The second aspect of neutrality is consistency. They observe that the European Court is not strictly bound by its precedents and to mitigate against inconsistency the Court has 'adopted the practice of providing a detailed justification for an explicit change of direction compared to previous case law'.[71] The third aspect is accuracy and they point out that the Court should 'avoid the temptation of easy generalizations or assumptions that are not supported by facts'.[72] The final aspect of neutrality identified is correctability and they note that in the case of the European Court there is compliance with this because of the possibility of review of chamber judgments by the Grand Chamber. Another approach to correctability that they identify, and which would be relevant to the African Court that does not have an appeal

[67] Tyler (n 64) 232.
[68] ibid.
[69] ibid.
[70] Brems & Lavrysen (n 41).
[71] ibid 186.
[72] ibid 187.

mechanism, is to 'leave room for exceptions'.[73] They argue that balancing rights and competing interests may involve 'generalizations in the underlying assumptions' and when this is done to individuals for whom the assumption does not apply there is inaccuracy if no exceptions are made in their case. They therefore conclude that accuracy and correctability require exceptions for cases when 'crucial assumptions contradict reality'. Relating this to the African Court, the requirement in the Court Protocol for judges to act impartially arguably assumes there is equality between litigants, but the reality is that individual applicants, especially the unrepresented, are not on an equal footing with respondent States. For this reason, allowing exceptions to how evidence law conventionally operates leaves room for legitimate application of an equitable (and applicant-centred) approach to evidence where circumstances demand it.

A final source worth highlighting is Volker Schmidt's contribution that unpacks what constitutes a fair process by identifying six components.[74] These are (1) taking into account all relevant considerations, (2) considering all relevant information, (3) giving a voice to all those affected, (4) a public and transparent process as far as this is possible, (5) giving reasoned decisions and (6) possibility of reversal of a decision on appeal. This again shows similarities in conceptions of procedural fairness with other literature discussed earlier. Particularly relevant from the components of fairness as discussed by Schmidt and related to evidentiary practices at the African Court is the need to 'consider all relevant information'. As subsequent discussions in this and subsequent Chapters further show, there is a risk of procedural unfairness and substantively unfair outcomes when the African Court does not capitalise on all avenues allowed under its Rules to receive all relevant information from some applicants before a final determination on whether sufficient evidence has been adduced to support claims of violations or reparations. The need to seek all relevant information is particularly pronounced in the context of the African Court whose decisions are not subject to appeal, an important component in the overall goal of fair decision-making.

To conclude the discussion in this section, I suggest that the instrumental value of a fair procedure as the conduit for substantively fair outcomes at the African Court is inseparable from the need for fairness in the Court's approaches to evidence. While procedural fairness has a necessary component of neutrality, coming as close as possible to just outcomes requires room for exceptions to formal equality (on evidence matters) between individual applicants and respondent States who have different and unequal statuses. Indeed as one author concludes, 'equal treatment

[73] ibid.
[74] Volker H. Schmidt, 'Procedural Aspects of Distributive Justice' in Klaus F. Röhl and Stefan Machura (eds), *Procedural Justice* (Dartmouth: Ashgate, 1997) 161, 174–6.

can be unjust, and unequal treatment can be just'.[75] To increase the accuracy of decisions, flexibility is required in considering evidence and making the *equal approach* to evidence a rigid standard at the African Court is likely to undermine or reduce the accuracy of its decisions given the context in which the Court operates in, including the circumstances of applicants who approach the Court. While the equal approach to evidence assessment carries with it the promise of enhanced legitimacy from a States' standpoint (on paper at least), given the specialised nature of human rights courts and adjudication as discussed earlier in section 3.2, considerations of procedural justice that give better prospects of realising substantive justice should trump any legitimacy concerns. Brems & Lavrysen make a similar point as highlighted earlier in this section. The African Court's implied application of an equal approach to evidence assessment may be seen as an attempt to treat applicants and respondent States equally through application of the equality of arms principle. What this attempt arguably misses is that the equality of arms principle, beyond its formal aspect of treating parties equally, also has a substantive dimension. Some scholars have argued that while the individual and the State may formally be equal in proceedings, 'the individual often faces a substantial weaker procedural position'.[76] This means that the substantive dimension of the equality of arms principle, as some have argued, requires 'that the procedural law and the human rights institutions should adopt measures to counter the inequality'.[77] The long and short of this is the study's contention that application of an equitable applicant-centred approach to evidence assessment need not be institutionalized bias nor contrary to the requirement of impartiality provided in the Court Protocol. In view of this, the study is informed by the proposition that an equitable applicant-centred approach to considering evidence is better aligned with and advances the African Court's purpose.

The next section discusses the context-specific realities that necessitate an equitable applicant-centred approach to evidence at the African Court.

3.4 Evidentiary difficulties faced by applicants

My review of decisions by the Court prior to undertaking fieldwork had lead me to preliminary conclusions about lack of equilibrium between some applicants and respondent States in terms of effectively presenting their cases before the Court. I therefore sought to clarify this during

[75] Kent Greenawalt, 'How Empty Is the Idea of Equality' (1983) 83 Columbia Law Review 1167 ,1183.
[76] Torsten Stirner, *The procedural law governing facts and evidence in international human rights proceedings : developing a contextualized approach to address recurring problems in the context of facts and evidence* (Brill Nijhoff 2021) 14-15.
[77] Ibid, citing Tyagi Yogesh, *The UN Human Rights Committee, Practice and Procedure* (Cambridge University Press 2011), 611.

fieldwork. In an interview with a legal officer at the Court, I asked about the most significant challenge for the Court regarding evidence and the officer's response was as follows:

> The biggest challenge is the circumstances of applicants. They have different difficulties because of long periods in prison, being lay and not being able to understand the intricacies of the law… Sometimes in applications drafted by applicants, you understand nothing. This affects our understanding of the facts of the case. Also, the clearer it is, the easier for the drafter to develop their opinion.[78]

One of my main tasks during fieldwork at the Court was to develop draft decisions for consideration by the Court under the supervision of a senior legal officer. This meant not only having access to case files for ongoing cases but concluded cases as well. I particularly took note of the asymmetry between individual applicants and respondent States in terms of the quality of submissions especially where applicants were unrepresented. In an interview with another legal officer, I asked about the experience in handling applications submitted by represented applicants and how they compared with those of unrepresented applicants. The officer stated that:

> The way the judgments are drafted, you will notice that there is heavy recollection of what the parties have said. So in terms of identifying the issues that have to come up for final resolution, this is based on what the parties have filed. Unrepresented applicants at the Court are disadvantaged because on very few occasions have I found submissions filed by unrepresented applicants which are solid and comprehensive. Often they are just skeletal. If they are from Tanzania it is even worse because in English they are filed very poorly...The truth is that unrepresented applicants do not articulate their cases as competently as when they are represented by counsel.[79]

Importantly, it would appear that even legal representation does not always redress the disadvantaged position of some applicants. The above-mentioned legal officer had this to add about some legal representatives – 'sometimes even when you grant such applicants pro bono legal representatives, some counsel have also failed. They have also embarrassed'.[80] This view confirms existence of the challenge highlighted in literature (discussed in Chapter two) of limited capacity to engage with regional human rights systems among domestic lawyers on the continent.[81] Notably,

[78] Interview with Registry Member No. 1 at the African Court (Arusha, Tanzania 14 August 2023). The officer was in this remark mainly referring to applications against Tanzania, most of which are filed by applicants who are in prison.
[79] Interview with Registry Member No.2 at the African Court (Arusha, Tanzania, 15 August 2023).
[80] ibid.
[81] A related point to this is that the Court has pointed out evidence gaps even in cases where applicants have legal representation. In the reparations decision in *Crospery Gabriel and Ernest Mutakyawa v. Tanzania* [Application No. 050/2016 Judgment of 13 February 2024] for example, the applicants (represented by the East Africa Law Society) were faulted by the Court for failure to demonstrate a causal link between the violation and alleged loss, failure to submit evidence of their claimed monthly earnings (see para 127 of the judgment). While lack of evidence may not be

the lack of equality of arms between individual applicants and respondent States is not a phenomenon limited to the African Court. Dembour observes that inequality of arms is evident at the European Court where she notes that:

> In the great majority of Strasbourg cases, the applicant is a mere individual with minute resources compared to those available to the respondent state: the individual has no police service upon which to rely for conducting investigations and no access to government documents kept outside the public domain.[82]

Against the backdrop of the above realities, this study identifies instances that present notable evidentiary dilemmas which require the African Court to exercise discretion. These include: (1) where applicants cannot access evidence for reasons such as the fact that the evidence required is in the possession of the respondent State, (2) where applicants cannot produce required evidence because of genuine reasons such as prolonged periods of incarceration, (3) where because of power imbalance and/or information asymmetry between applicants (especially those without legal representation) and respondent States, such applicants are unaware of the (relevant) evidence required by the Court and therefore do not adduce such evidence, (4) where applicants can only produce circumstantial evidence in certain claims (like reparations) while the Court's practice is to require specific (and often documentary) proof and (5) instances that call for application of presumptions of facts or drawing of inferences (rather than demanding particular evidence) because of difficulties in adducing evidence that stem from a unique African context. Hugh Thirlway notes that some of these evidentiary difficulties such as the difficulty of one party obtaining evidence raise the issue of '*practical inequalities*' between litigants.[83] The study proposes that such practical inequalities necessitate intervention by the Court in the form of an equitable approach to evidence.

Article 26(5) of the Court Protocol requires the Court to make its decisions on the basis of evidence, but the highlighted dilemmas and the context in which they present themselves arguably

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the fault of legal counsel, failure to explain why necessary documentary evidence in support of claims made is missing can be blamed on legal representatives. Similarly, in *Dominick Damian v. Tanzania* [Application No. 048/2016, Judgment of 4 June 2024], although the applicant had legal representation the compensation claims for material prejudice were not supported by evidence to prove the loss incurred. Instead, the applicant had requested for an amount 'as the Court deems fit' (see para 146). The Court dismissed the claim for lack of evidence. Given the well established jurisprudence by the Court on compensation for material loss where the Court insists on documentary proof, failure to supply evidence or justify its absence in this case can be blamed on the legal representative. A similar situation is seen in *Nzigiyimana Zabron v. Tanzania* Application No. 051/2016 Judgment of 4 June 2024, para 187.

[82] Marie-Bénédicte Dembour, 'Beyond Reasonable Doubt at its Worst – But Also at its Potential Best: Dissecting Ireland v the United Kingdom's No-Torture Finding' 2023 (4) European convention on human rights law review 375, 381.

[83] Hugh Thirlway, 'Procedural Fairness in the International Court of Justice' in Arman Sarvarian *et al* (eds), *Procedural Fairness in International Courts and Tribunals* (BIICL 2015) 243, 225.

require more than one legal solution of simply needing the applicant to present evidence for their claims to succeed. This means the Court's exercise of judicial discretion is an important factor in its overall aim of ensuring justice in the outcome of the adjudicative process.[84] In this regard, some inexhaustive highlights from literature are useful. Owen Fiss has observed that 'adjudication is interpretation' and that legal interpretation 'is neither a wholly discretionary nor a wholly mechanical activity'.[85] Related to this, Shai Dothan, has identified three reasons for interpretive discretion. The first is that legal rules are indeterminate, do not point to just one legal solution given their ambiguity and not all future situations can be foreseen and addressed by a legal text. The second reason is the existence of multiple conflicting rules pertaining to the same legal problem. The third is that applying rules to factual situations requires facts to be constructed according to legal categories and because facts can be classified in several possible ways, this construction involves judicial discretion.[86] Similarly, Barak notes that judicial discretion exists because 'there are legal problems that do not have a single legal solution; because law contains uncertainty; because there are situations with more than one legal resolution'.[87] In view of this, the study examines how the abovementioned evidentiary dilemmas play out in selected cases. It shows that in determining proof, the Court oftentimes has to interpret and apply what the study deduces are three key evidentiary rules. These are: (1) that the burden of proof is on the applicant to establish the admissibility and merits of their claim (*actori incumbit probatio*), (2) that the applicant must prove their claim by meeting the required standard of proof, (3) that for claims of material loss in reparation claims, an applicant must adduce specific evidence of the precise loss suffered as a result of the violation.[88] Applying these evidence rules in actual cases, many of which are submitted by applicants beleaguered by the difficulties highlighted earlier arguably requires an adapted approach to evidence. Such approach should prioritise an *equitable approach* instead of an *equal approach* in consideration of evidence. The basis for this proposition is laid out in the next section.

[84] See Rule 90 of the Court's Rules which provides for the Court's inherent powers to adopt any procedures and decisions necessary to meet the ends of justice.
[85] Owen M. Fiss, 'Objectivity and Interpretation' (1982) 34 Stanford Law Review 739, 739.
[86] Shai Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights' (2019) 42 Fordham International Law Journal 765, 779.
[87] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005), 208.
[88] Fact Sheet on Filing Reparation Claims (Revised October 2020). Available at https://www.african-court.org/wpafc/wp-content/uploads/2020/10/FACT-SHEET-ON-FILING-REPARATION-CLAIMS-Revised-October-2020.pdf (accessed 18 December 2023), 5-6.

3.5 Problematising the African Court's application of evidence rules

The study's critique of some evidentiary practices at the Court is best understood by examining its past and present practices and a synthesis of that to suggest how future practices could look like if the Court is to remain faithful to its main purpose as discussed earlier. In Chapter six, through an examination of the Court's jurisprudence from 2013 to 2024, I illustrate a shift in the approach to evidence in admissibility decisions and particularly in assessing compliance with the requirement to file applications within reasonable time. This shift is marked by a move from generally flexible requirements on evidence to an evidently stricter approach and which I argue has resulted in the African Court being less accessible. Backed by analyses of cases from 2013-2024 and interview data, Chapter seven of the thesis demonstrates that a flexible approach to proof of moral damages in compensation claims has remained but a strict approach defines evidence assessment for material damage.

The study contends that the Court should retain or return to what was clearly an equitable applicant-centred approach to evidence in its early days because the factors that informed its flexibility in favour of individual applicants still exist, and the Court has struggled to articulate cogent reasons for the shift to an equal approach. An applicant-centered approach in conceptualizing fairness as suggested in the equitable approach advanced in the thesis is not altogether foreign in human rights adjudication. Yogesh Tyagi notes that in recognition of the weaker position of the complainant relative to the State, the Human Rights Committee 'has softened the rigour of the procedure in favour of the former'.[89] The Inter-American Court's interpretive methodology has been said to derive from a combined reading of Article 31 of the Vienna Convention and Article 29 of the American Convention of Human Rights and collectively captured in the *pro homine* principle (hereinafter referred to in the gender neutral equivalent - '*pro persona*').[90] Lucas Lixinski points out that the Inter-American Court's *pro persona* interpretation method interprets the American Convention 'in the way which is most protective of human rights' and that this declared 'bias' by the IACtHR essentially advances the purposive or teleological interpretation method.[91] There has been a recommendation that the African Court should 'understand the context in which it conducts its judicial mandate and prefer a purposive interpretation of the law as opposed to committing itself to a narrow approach that limits the

[89] Tyagi Yogesh, *The UN Human Rights Committee, Practice and Procedure* (Cambridge University Press 2011), 612.
[90] Hayde Rodarte Berbera, 'The Pro Personae Principle and its Application by Mexican Courts' (2017) 4(1) Queen Mary Human Rights Review 1, 11.
[91] Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 European Journal of International Law 585, 588.

scope of beneficiaries of its decisions'.[92] Hayde Berbera argues that the *pro persona* principle as applied by the Inter-American Court has 'crystallised the purpose of international human rights law by prioritising the human person'.[93] She points out that the principle speaks to two directives – one on interpretation and the other on prioritization of norms. In the first directive, the principle 'implies the need to choose, among the different possible ways of interpretation, the one that better protects the human rights of the person concerned, either by extending or by limiting the meaning, content and scope of the norm'.[94] In the second directive, the principle 'requires the selection of, among the different existing human rights norms, the one that most benefits the person concerned'.[95] Further, the *pro persona* principle underscores 'the notion that international human rights law must first and foremost take into account the protection of the human person'.[96]As an interpretive tool, the *pro persona* principle has been said to 'maximize' the object and purpose of the American Convention on Human Rights.[97]

A relevant point for purposes of my study in relation to application of the *pro persona* principle is that the Inter-American Court 'has actively used it as a means to adapt the American Convention on Human Rights to the socio-legal realities of the different countries in Latin America'.[98] This idea of considering socio-legal realities is a prominent feature in my analyses of the evidentiary practices at the African Court. It informs the study's suggestion of principles that could inform the Court's application of evidence rules so that determinations on evidence are informed by its operating context and applicants' circumstances, leading to more fairer and just decisions. Berbera has observed that legal interpretation, being more of an art than a science, is subjective and relative and so it requires tools and methodologies. The selection of such tools and their use by the interpreter, she argues, 'is what ultimately ensures that legal interpretation can accomplish its primary aim, namely the delivery of justice'.[99] Informed by this logic, the study proposes some principles or guidelines that can inform an equitable applicant-centred approach to evidence. The proposals are neither prescriptive nor exhaustive of all that the African Court could do to preserve flexibility and fairness in considering evidence. They are a product of analyses of the Court's jurisprudence so far as well as proposals emerging from interviews with judges and legal officers

[92] Mutangi (n 34), 23.
[93] Berbera (n 90) 13.
[94] ibid,10.
[95] ibid.
[96] Valerio de Oliveira Mazzuoli & Dilton Riberio, 'The Pro Homine Principle as an Enshrined Feature of International Human Rights Law' (2016) 3 Indonesian Journal of International & Comparative Law 77, 94
[97] Alejandro Rodiles, 'The Law and Politics of the *Pro Persona* Principle in Latin America' in Helmut Philipp Aust & Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016) 153, 162.
[98] Berbera (n 90), 12.
[99] ibid, 2.

at the Court. I suggest that they serve as an inexhaustive but concrete illustration of how an equitable applicant-centred evidentiary approach that the African Court is intermittently applying could solidly be defined and then consistently applied. The guiding principles as advanced in subsequent Chapters are: (1) communication of applicable evidence standards to litigants, (2) a more proactive fact-finding role by the Court, (3) flexibility regarding acceptable forms of evidence and (4) that the Court integrate in its factual reasoning, presumptions of fact (inferences) and the taking of judicial notice of certain facts in appropriate circumstances.

3.6 Justification for an equitable evidentiary approach

The four proposals outlined above are advanced as some of the identifiable pillars for an equitable applicant-centred approach to evidence at the African Court. However, the suggestions warrant a justification and I provide this in two-fold – an explanation of the appeal to 'equity' and an illustration of how substantive justice is a major benefit of applying an equitable evidentiary approach.

3.6.1 Why an appeal to equity?

According to Black's Law Dictionary, one meaning of the term *equitable* is 'just, fair, and right, in consideration of the facts and circumstances of the individual case'.[100] The European Court has while considering awarding of just satisfaction defined equity, which it termed as its 'guiding principle', as involving:

> flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.[101]

The idea of courts doing what is equitable can be traced way back to Aristotle who stated as follows:

> So when law speaks universally, and a particular case arises as an exception to the universal rule, then it is right - where the law-giver fails us and has made an error by speaking without qualification - to correct the omission. This will be by saying what the lawgiver would himself have said had he been present, and would have included within the law had he known. What is equitable, therefore, is just, and better than one kind of justice. But it is not better than unqualified justice, only better

[100] Henry Campbell Black, *Black's Law Dictionary* (4th edn, West Publishing Co. 1968) 632.
[101] *Varnava and Others v. Turkey* Judgment of 18 September 2009, GC, para 224

> than the error that results from its lacking qualification. And this is the very nature of what is equitable - a correction of law, where it is deficient on account of its universality.[102]

The study draws parallels between its analyses and proposals and the law of equity that has its roots in English law. This is not done to suggest that an international court such as the African Court should adopt an approach that flourished in a domestic context of one of the major legal traditions - common law. Rather, the study turns to the law of equity because of the striking similarities in its aims and which can inspire possible solutions to the gaps the study identifies with regard to evidentiary practices at the African Court. The features of the law of equity (in the English law context) are thus, in a nutshell, discussed here because of the power of their example. Wasserstrom observes that 'many of the adherents of a decision procedure based upon "doing justice in the particular case" have pointed to equity courts as exemplifying the kind of procedure that is desirable'.[103] Also relevant to highlight here is an observation by some authors that rules of equity 'form part of international law as, indeed, of any system of law'.[104] They further point out that application of principles of equity are reflected in Article 38(1)(c) of the ICJ Statute as subsidiary sources of international law under the head of 'general principles of law as recognized by civilized nations'.[105] This is then the basis for ICJ's application of principles of equity such as 'unjust enrichment, estoppel, and acquiescence'.[106] Equally relevant to mention here is the observation that the term 'equity' has a broader 'jurisprudential sense' where 'equity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules'.[107] This sense of the term is inferred in the discussion in this and subsequent Chapters of the thesis.

The law of equity developed distinctly alongside common law and one of its main aims was to 'address injustices produced by or through the common law'.[108] This branch of the law consisted of rules, principles, doctrines, maxims, and remedies that fell under the jurisdiction of the Court of Chancery in the fourteenth and fifteenth centuries.[109] Equity relied on these tools 'to correct injustices made possible by the formality and strictness of the common law and its evidentiary

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[102] Roger Crisp (ed) *Aristotle: Nicomachean Ethics* (Cambridge University Press 2004), 100.
[103] Richard A. Wasserstrom, *The Judicial Decision: Towards a Theory of Legal Justification* (Standford University Press, 1961), 87.
[104] Thomas M. Franck & Dennis M. Sughrue, 'The International Role of Equity-as-Fairness' (1993) 81 Georgetown Law Journal 563, 570.
[105] ibid, 564.
[106] ibid.
[107] Kevin C. Kennedy, 'Equitable Remedies and Principled Discretion: The Michigan Experience' (1997) 74 University of Detroit Mercy Law Review 609, 609.
[108] Evan Fox-Decent, 'The Constitution of Equity' in Dennis Klimchuk, Irit Samet & Henry Smith (eds) *Philosophical Foundations of the Law of Equity* (OUP 2020) 116, 120.
[109] ibid 116.

rules'.[110] It has been observed that, historically, this equitable jurisdiction was 'discretionary rather than rule-bound, driven by particularities rather than abstract ideas and precedent'.[111] However, equity was only meant to supplement the law and not to supersede it and so equitable solutions did not abandon rules but allowed judges the 'discretion to disapply or to override the rule where it would do injustice and so come to a just decision instead'.[112] In sum, equity was accepted as 'a means of reaching what is considered to be a fair decision on any particular set of facts where the application of strict legal rules would be considered undesirable'.[113] Griffin notes that every legal system whether based on common law or civil law requires a degree of certainty but the quest for certainty must be tempered by equity to avoid unfairness. He adds that every legal system 'must respond to the specific circumstances of those coming before the law, individuals ultimately living unequal lives, and bending strict legal principles to achieve justice'.[114] Evidence rules applicable in courts of equity, for example, accepted that both oral and written evidence could be primary evidence and because evidence was in writing did not necessarily make it primary as compared with oral evidence.[115] Drawing parallels with practices at the African Court, where hearings are rarely held and the demand for documentary evidence particularly pronounced in reparation claims, the Court would arguably arrive at fairer and more just conclusions if, in appropriate cases, applicants are given opportunity to give oral testimony where documentary evidence is unavailable.

The idea of equity, with its historical roots as broadly described above, is not altogether alien in the practices of the African Court. In all claims for reparations after a violation is established, the Court awards applicants damages for the moral prejudice suffered. The Court has, for example, found that it has 'discretion to evaluate based on equity' the moral prejudice suffered by an applicant.[116] In all awards for moral prejudice, the Court does not require applicants to adduce evidence of the prejudice suffered. Notably, a publication by the Court to guide applicants on filing reparations claims points out that the Court is 'guided by the principles of equity, fairness and reasonableness in the process of allowing and considering evidence'.[117] This publication, however, only speaks to proceedings in reparations claims and even here, it goes further to clarify that it

[110] Fox-Decent (n 108), 119.
[111] ibid 120.
[112] Charlie Webb, 'Discretionary Justice' in Dennis Klimchuk, Irit Samet & Henry Smith (eds) *Philosophical Foundations of the Law of Equity* (OUP 2020) 12, 14-15.
[113] Alastair Hudson, 'Equity, Individualisation and Social Justice' WG Hart Workshops (Institute of Advanced Legal Studies July 2002) 4. Available at http://www.alastairhudson.com/equity/Equity-socialjusticethroughindividualisation.pdf (accessed 18 December 2023).
[114] J.G. Griffin, 'Equity: Balancing certainty and flexibility to secure justice' (2022) Fields Journal of Huddersfield Student Research 1, 2.
[115] Alexander Hamilton Sands, *History Of A Suit In Equity: As Prosecuted And Defended In The Virginia State Courts And In The U.S. Circuit Courts* (2nd edn, 1882), 430.
[116] *Armand Guehi v. Tanzania*, Application No. 001/2015, Judgment of 7 December 2018, para 181.
[117] Fact Sheet on Filing Reparation Claims (n 88), 6.

applies equity for moral prejudice because for reparation claims for material prejudice the applicant must 'adduce specific evidence of the precise loss'.[118] In Chapter seven of the thesis, I argue for extension of an equitable approach to evidence even in claims for damages for material prejudice in suitable cases, an area where the African Court appears to have mainstreamed a rigid or mechanical approach to evidence by insistence on documentary proof. Through selected cases, I illustrate the injustice of this rigid approach. In summary, the four principles that I propose could guide the Court's consideration of evidence as seen earlier are some of the ways through which it could avoid possible injustice through a strict application of evidence rules. The principles would do so in the same manner that the law of equity sought to correct the rigidity of common law. Additionally, these principles could address the inadequacy of the universal language of evidence rules such as *actori incumbit probatio* that the Court relies on and which rules fail to lead to substantive justice if applied without qualification in some cases. By advancing the principles as concrete illustrations of what could inform the equitable (and applicant-centered) approach to evidence, the study addresses a criticism levelled against 'advocates of an equitable decision procedure', namely, that they fail to 'specify the way in which such a procedure should operate'.[119]

3.6.2 Substantive justice as the outcome of an equitable approach to evidence

It has been suggested that evaluation of evidence by a court, whether this is guided by positive rules or *ad hoc* discretion affects its 'compliance with justice'.[120] Equally important is the acknowledgment that 'procedure is an instrument of power that can…generate or undermine substantive rights'.[121] This study contends that to ensure substantive justice, which one author has described as 'the felt need for a "fair" result in each particular case',[122] the flexibility that defines an equitable applicant-centred approach should have primacy in considering evidence. This simultaneously translates to the study's rejection of the Court's apparent formalism through the equal approach to evidence, and in this regard Leane's description of formalism as 'the search for universal rules of law before which we are all, as liberal social units, equal' is relevant. In my interviews with some officers and judges at the Court, I noted a recurring theme in the call for the Court to follow 'the letter of the law', including on evidence matters. What this call for lawfulness

[118] ibid 5-6.
[119] Richard A. Wasserstrom (n 103) 91.
[120] Filippo Fontanelli & Paolo Busco (n 51) 25.
[121] Thomas O. Main, 'The Procedural Foundation of Substantive Law' (2010) 87 Washington University Law Review 801, 802.
[122] Geoffrey Leane, 'Testing Some Theories About Law: Can We Find Substantive Justice Within Law's Rules?' (1994) 19(4) Melbourne University Law Review 924, 924.

arguably misses is the caution that 'uncompromising application of procedural law can cause unjust outcomes'.[123]

A strict approach to evidential matters at the Court as demonstrated in Chapter seven where applicants without documentary evidence almost always do not succeed in their compensation claims for material damage is undesirable because of the possibility of miscarriage of justice. Webb has observed that no legal system can formulate rules that will secure justice in all cases to which those rules apply. Therefore the system turns to equity by 'granting its judges some measure of discretion at the point these rules fall to be applied'.[124] A strict application of evidence rules such as *actori incumbit probatio*, which respondent States prefer in adjudication at the African Court leads to dismissal of claims that may in substance have merit. It also means more applicants do not get their day in court because their applications are found inadmissibility as demonstrated in Chapter six. Again, parallels can be drawn with the intervention of equity in English law where Penner notes that the moral basis for intervention of equity was 'where the common law rules, in particular owing to their rigidity, would give rise to injustice'.[125] The study shows that an equitable approach to evidence is necessary to avoid injustices of strict application of evidence rules.

I further demonstrate that the emerging preference for purely adversarial proceedings at the African Court negatively impacts fact-finding and that this calls for an adapted evidentiary approach in the form of an equitable applicant-centred approach. This recommended adaptation involves the Court capitalizing on its fact-finding function as allowed under its Rules in order to have a better shot at realising substantive justice. As Juliane Kokott observes, proceedings in international human rights courts are both adversarial and investigatory/inquisitorial.[126] Arguably, the African Court's Rules require it to be more than a neutral arbiter between an applicant and the respondent State. The Rules empower the Court to: (1) on 'its own accord' obtain any evidence that can clarify facts in a case, (2) request any person or institution to provide an opinion or submit a report for purposes of obtaining information, (3) assign one or more judges to conduct an enquiry or visit a scene, and (4) request the African Commission to undertake fact-finding or *in-situ* investigations during the hearing of a case.[127] Given these wide-ranging powers to gather evidence, it is my argument that the Court should not limit its role to a neutral 'referee' as some of

[123] Filippo Fontanelli & Paolo Busco (n 51) 29.
[124] Charlie Webb (n 112) 29.
[125] J E Penner, 'Equity, Justice and Conscience – Suitors Behaving Badly?' in Dennis Klimchuk, Irit Samet & Henry Smith (eds) *Philosophical Foundations of the Law of Equity* (OUP 2020) 52, 52.
[126] Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer Law International, 1998) 234. She notes, however, that investigatory powers of international courts are often discretionary(at 187).
[127] See Rules 55 and 36.

my interviewees at the Court suggested. There appears to be the contradiction that, on the one hand, the Court's Rules permit it a greater fact-finding role akin to what typically transpires in inquisitorial legal systems. On the other hand, some of the Court's practices and views of some judges and legal officers indicate a leaning towards the role of the Court as a passive arbitrator where parties monopolise and control the content and boundaries of a trial as it generally happens in adversarial legal systems.[128]

There is no justification, in my view, why the African Court should not fully capitalise on the good in both procedural traditions as its Rules permit. Attempts by the Court to treat applicants and respondent States equally in its procedures, especially where there is imbalance of power and information such as when applicants are unrepresented, is in my view an acontextual attempt at formal equality that ultimately results in unjust outcomes.[129] As argued by Treves, equality of arms in international adjudication requires that all parties have substantially the same possibility of presenting their cases. Where funding is unavailable for the party with less resources, he contends that this translates to 'a duty of the court or tribunal [to] acting proactively to rebalance the playing field' by showing greater 'leniency' to the weaker party such as through greater procedural flexibility.[130] Justice Chafika has repeatedly called on the African Court to adopt this proactivity but hers remains a minority view that the study argues should be mainstreamed at the Court. Importantly, she links this proactive role to the justice aim of the Court. In her dissenting opinion in *Aminata Soumaré v. Mali*, she observed as follows:

> As a human right court whose procedures are not always familiar to applicants who, in any case, do not master legal intricacies, the Court must at all times play a positive role during deliberations because doing justice means delivering a judgment on the merits, including a dismissal, and not declaring it inadmissible for lack of evidence, which would leave the dispute in abeyance, a situation that the applicants would not understand.[131]

I suggest that the above-mentioned fact-finding powers, if appropriately exercised, could address the imbalance in proceedings brought about by the fact that there are unrepresented and

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[128] See a description of the two systems in Tom Decaigny, 'Inquisitorial and Adversarial Expert Examinations in the Case Law of The European Court of Human Rights' (2014) 5 (2) New Journal of European Criminal Law 149, 152.
[129] Analysis of interview data in Chapter six suggests that the Court's increasing preference for a passive or reactive role as opposed to a proactive one on evidence matters is partly a result of the Court's yielding to the pressure to consider State interests more seriously in its decision-making.
[130] Raymundo Tullio Treves, 'Equality of Arms and Inequality of Resources' in Arman Sarvarian *et al* (eds) *Procedural Fairness in International Courts and Tribunals* (BIICL 2015) 153, 165; According to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 by the African Commission, equality of arms is an essential element of a fair hearing regardless of whether proceedings are administrative, civil, criminal or military [see paragraph 2(a)].
[131] Declaration of Judge Bensaoula Chafika in *Aminata Soumaré v. Mali* Application No. 038/2019 Ruling of 5 September 2023, para 6.

inadequately represented applicants who submit cases before the Court. If the Court is to arrive at just decisions, I suggest that the Court should do more than simply allowing a competitive process between applicants and respondents to determine facts, especially when the former are unrepresented as has often been the case, particularly in applications against Tanzania. Schopp has observed that there is a reasonable expectation that individual litigants represented by competent lawyers are more likely than those unrepresented to raise 'systemically appropriate' issues, present relevant evidence and advance persuasive arguments.[132] By playing a proactive role in fact-finding and gathering evidence as the study suggests the Court should, including by seeking additional evidence particularly from unrepresented applicants pitted against represented States, the Court will arguably render decisions more proximate to substantive justice. Aharon Barak has rightly pointed out that 'justice accompanies the interpretive process from start to finish' and further that justice is the 'residual value' in the legal system that decides hard cases.[133] Instances at the African Court that invite judicial discretion for reasons such as unavailability of evidence for valid reasons in a forum that ideally decides on availed evidence are arguably hard cases. The study demonstrates how the motivation to do justice in such cases provides the basis for an equitable applicant-centred approach to evidence defined by interventions such as allowing alternative proof (e.g. oral testimony or affidavit evidence instead of documentary evidence) in appropriate cases. As Forlati rightly concludes, involvement of non-State actors in an international dispute settlement system 'is more structurally likely to generate imbalances between the parties and may require tailored rules or more intense use of a court's express or inherent powers to counter-balance them'.[134] She gives examples of interventions in this regard by human rights courts such as shifting the burden of proof and relying on adverse inferences.[135] Similar interventions by the African Court while it is applying evidence rules are urged in this study.

3.7 Summary

This Chapter has provided a guide to the reader for navigating the remainder of the thesis. It has explained that the overriding purpose of the African Court is to protect human rights through fair

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[132] Robert F. Schopp, 'Pursuing Non-Adversarial Justice within an Adversarial Structure' (2011) 37 Monash University Law Review 102, 108; There are numerous cases where self-represented applicants are unable to effectively argue their cases even in areas where the Court's case law is settled such as the need to support claims for material losses with specific evidence. See, for example, the recent decision in *Kabalabala Kadumbagula and Daud Magunga v. Tanzania*, Application No. 031/2017, Judgment of 4 June 2024, para 120. The Court also dismissed compensation claims for material prejudice by the self-represented applicant *in John Mwita v. Tanzania* [Application No. 044/2016 Judgment of 13 February 2024] for not 'specifying the nature of the pecuniary reparations sought' (see para 127).
[133] Aharon Barak, (n 87*)*, 213.
[134] Serena Forlati, 'Fair Trial in International Non-Criminal Tribunals' in Arman Sarvarian *et al* (eds) *Procedural Fairness in International Courts and Tribunals* (BIICL 2015) 101, 110.
[135] ibid.

and just decision-making and that this necessarily requires responsiveness to practical inequalities that disadvantage some individual applicants. To achieve substantively fair outcomes from the adjudication process at the Court requires adaptation of its approach to evidence given the absence of a true power and information equilibrium between applicants and respondent States. As this study will show, some applicants and especially those unrepresented, do not effectively prosecute their cases because of limitations related to the overall operating context for the Court and their individual circumstances. For the African Court to do justice in cases where these practical inequalities are pronounced requires application of an equitable applicant-centred approach to considering evidence and not an equal balancing of parties' interests in the process. The study elaborates four inexhaustive, non-prescriptive but concrete principles that could guide an equitable applicant-centred approach to evidence at the Court. With the above in mind, the rest of the Chapters examine the Court's evidentiary practices through the lens of an equal balance of parties' interests and an equitable applicant-centred approach to procedural fairness as the framework that best explains what informs the evidentiary practices that the Court has adopted so far and the basis for suggested improvements to safeguard human rights.

CHAPTER 4: Burden of Proof at the African Court

4.1 Introduction

This Chapter will examine the application of the concept of burden of proof at the African Court as one of the important features of the Court's evidentiary regime. It will unpack the meaning of this concept as discussed in literature and delve into how the African Court has interpreted and applied the concept in cases before the Court. While on the face of it the general principle in relation to the burden of proof appears to be a straightforward one – that whoever alleges must prove – discussions in the Chapter show that there are important qualifications in application of this principle, commonly referred to in the Latin legal maxim, *actori incumbit probatio*. In this regard, discussions will reveal important exceptions to this general rule and examine circumstances under which the onus of proof is shifted or reversed. The Chapter will also critically assess the use of presumptions, inferences and judicial notice and how these tools that aid the African Court's judicial reasoning impact the application of the burden of proof, particularly when applicants have difficulties in accessing the required evidence. For an understanding of the African Court's approach to the burden of proof, including the factual circumstances that inform its shift to the respondent State, the analyses draw on the practices of other international human rights tribunals. The discussions also highlight the Court's practices on shifting the burden of proof and use of presumptions in specific cases as illustrations of progressive or pro-human rights flexibility on evidence. These 'best practices', albeit not applied consistently in the Court's decisions as subsequent Chapters reveal, nonetheless demonstrate the practical application of an equitable applicant-centred approach to evidence as advanced in the study. Overall, this Chapter's doctrinal study of how the concept of the burden of proof is applied in the decisions of the African Court will have clarified an important pillar of what constitutes the core evidentiary practices at the Court.

The Chapter is structured as follows: section 4.2 discusses the evidence rules that generally apply at the African Court so as to identify the sources of legal authority for the Court's evidentiary practices generally, including on the burden of proof. This is followed by a summary of definitions of the concept of burden of proof in section 4.3. The African Court's approach to the burden of proof and circumstances that inform its reversal or shift are examined in section 4.4 through an analysis of relevant decisions that address the issue. Section 4.5 provides an overview of practices by other international human rights tribunals on shifting the burden of proof and compares these with approaches by the African Court. This is then followed, in section 4.6, by a discussion of how the African Court applies the concepts of presumptions, inferences and judicial notice and their

effect on the burden of proof in cases before the Court. Section 4.7 links the Court's application of the burden of proof to the study's discussions and proposal of an equitable applicant-centred evidentiary approach. Section 4.8 provides a summary of the Chapter.

4.2 General rules on evidence at the African Court

The Court Protocol, the Court's Rules, publications by the Court and the revised Practice Directions as well as judgments of the Court are all sources with information on the applicable rules on evidence at the African Court. This section will highlight relevant provisions on evidence from these sources that collectively paint a general picture of the evidentiary norms applicable at the Court.

To start with, the Court Protocol provides in Article 26 that the Court shall hear submissions from all parties and where necessary, hold an enquiry. Further, the Court may receive written and oral evidence, including expert testimony and 'shall make its decision on the basis of such evidence'.[1] Although decisions of the Court are final and not subject to appeal, the Protocol allows for review of a judgment where there is discovery of new evidence.[2] All nine applications for review that the Court has received to date have been dismissed for having been found inadmissible or the submitted information and material being found not to constitute new facts or evidence.[3] When I asked one judge during an interview why there had been a 100% failure in the review applications, he observed as follows:

> Generally speaking, to succeed in the review application [the party is] basically asking the judges to admit they were wrong! And I think for any human being to admit they were wrong is difficult… But in all review applications there [hasn't been] any new and crucial evidence. Most [applicants]are re-litigating their matters again. There has not been a serious argument for review.[4]

Building on the provisions of the Protocol, the Court's Rules elaborate further the applicable evidential rules. First, applications submitted to the Court must contain a summary of the facts and the evidence to be adduced.[5] Related to this, the application is required to specify evidence of exhaustion of local remedies or evidence of the inordinate delay or ineffectiveness of such local remedies.[6] Second, the Rules require that applications be filed together with supporting documents

[1] Article 26 of the Court Protocol.
[2] Article 28(3) of the Court Protocol.
[3] All nine applications are listed here: https://www.african-court.org/cpmt/review (accessed 5 June 2024).
[4] Interview with Judge No. 1 of the African Court (Arusha, 22 March 2022).
[5] Rule 40(1).
[6] Rule 40(2); Rule 41(3)(b).

and evidence relating to a request for reparations.[7] Third, Rule 55 lists 'measures for taking evidence' at the Court. These include the power of the Court to obtain any evidence that clarifies the facts of a case, hear witnesses and experts whose evidence can assist the Court and request for opinions and reports from individuals and institutions to obtain more information.[8] Under the same Rule, the Court can conduct an enquiry, carry out a visit to the scene or 'take evidence in any other manner'. Fourth, the Rules elaborate on circumstances under which a party may request revision of a judgment, and this is where a party discovers a new fact or evidence unknown to the party when judgment was delivered.[9] The new fact or evidence should be one which by its nature 'has a decisive influence' and which was unknown to the party when the decision was delivered and could not with due diligence have been known to that party.[10] Finally, Rule 36(4) permits the Court to request the African Commission to undertake fact-finding or *in-situ* investigations on behalf of the Court in cases where the Commission is not a party. Rule 130 of the Commission's Rules of Procedure permits the Commission, before it decides on admissibility, to refer a Communication (complaint) to the Court. Related to this, all evidence and documents concerning the Communication should be transmitted together with the case file to the Court.[11]

In addition to the above-stated provisions on evidence in the Protocol and the Rules, there are two publications by the Court that also address evidence standards applicable at the Court. The first is the *Fact Sheet on Filing Reparation Claims*.[12] This publication clarifies five approaches to evidence that apply in claims for reparations, which are as follows: (1) to be entitled to reparations, an applicant must prove the causal link between the wrongful act by the State and the harm incurred. This requirement applies both in cases of direct harm from a violation and secondary and consequential harms; (2) the burden of proof that the victim suffered harm and that the harm was caused by a violation perpetrated by the State is generally on the applicant. However, the burden may shift to the Respondent State when it has more or exclusive access to relevant information about the case; (3) the standard of proof to be met is the preponderance of evidence standard, which means the applicant has to prove that what is alleged to have occurred is more probable than not; (4) the Court has wide latitude to admit and consider a broad array of evidence

[7] Rule 40 (4)
[8] While the Rules allow filing of 'any' evidence, this free admissibility of evidence has some limitations. For example, under Rule 64(3) of the Court's Rules, any communication, offer or concession made in negotiations aimed at reaching an amicable settlement between parties is not admissible in proceedings before the Court. Rule 46(4) also prohibits filing of additional evidence after close of pleadings unless permitted by the Court.
[9] Rule 78(1).
[10] Ibid.
[11] Rule 133(3).
[12] Fact Sheet on Filing Reparation Claims, Adopted During The Fifty-Third Ordinary Session of The African Court on Human And Peoples' Rights, Arusha, Tanzania 10 June – 5 July 2019 (Revised October 2020).

and may rely on 'all forms of evidence' as it is not bound by strict rules regarding admissibility of evidence. Further, principles of equity, fairness and reasonableness guide the Court's consideration of evidence. However, in claims for reparation related to material loss, an applicant is required to adduce 'specific evidence of the precise loss suffered as a result of the violation'; (5) the Court will apply presumptions as one way in which to remain 'flexible and sensitive to the conditions within which applicants are making claims for reparations'. The five approaches outlined here appear to have been informed by a comparative study on reparations commissioned by the Court as the wording in the Factsheet is similar to the findings in this study.[13] They are also reflected in decisions of the Court. For example, the Court has held the view that the wide latitude to receive all types of evidence under Article 26 of the Protocol:

> highlights the principle of free admissibility of evidence (and) implies in particular that the Court is not limited by internal restrictive rules of law with regard to admissible evidence. It may therefore decide that a type of evidence required under domestic law is not necessarily required before it as an international court.[14]

The provisions on evidence as reflected in the abovementioned Factsheet and comparative study by the Court specifically address the Court's evidentiary approach in reparations claims and there has therefore been silence or uncertainty on whether the standards therein equally apply to admissibility and merits stages. This uncertainty has been cleared with the recent adoption of new Practice Directions in March 2024 and which include an annexure on evidence matters that is applicable to all stages of proceedings.[15] I highlight the main provisions of this annexture in the Practice Directions below.

First, consistent with the Court's publications and decisions as will be discussed in this Chapter, there is a restatement that the burden of proof lies with the applicant to prove merits of their case and justify the claims thereof. However, the burden will shift to the respondent State where it 'has more or exclusive access to relevant information about a fact in issue'.[16] Second, the applicable standard of proof 'in all proceedings at the Court' is the balance of probabilities.[17] Third, the Court can use of presumptions, draw inferences and taking judicial notice of facts which are of common

[13] African Court on Human and Peoples' Rights, 'Comparative Study on the Law and Practice of Reparations for Human Rights Violations' (2019), 30-44.
[14] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, Application No. 013/2011, Judgment on Reparations of 5 June 2015, para 52.
[15] Practice Directions Adopted on 5 March 2024 during the Seventy Second Ordinary Session of the Court, held at Arusha, Tanzania.
[16] Paras 4-5 of the Practice Directions, 2024.
[17] Para 6 of the Practice Directions, 2024. Prior to adoption of these Directions, the Court was only explicit about application of the preponderance of evidence standard in reparations decisions and this provision now clarifies that the standard applies in all proceedings at the Court.

knowledge[18], all of which are what Kokott refers to as 'shortcuts to proof' and which have the effect of excluding application of the burden of proof.[19]

Fourth, where a party is unable to provide the required documentary evidence, the new Practice Directions allow for an explanation of why such document cannot be provided and permit oral evidence instead. Additionally, the Directions state that the Court will 'take into consideration the difficulties experienced by a party in obtaining evidence in support of their claims'.[20] Notably, the clarification that oral evidence is acceptable where documentary evidence is unavailable for good reason is an important development particularly in reparations claims where the Court's practice has been to require specific documentary evidence as earlier highlights on the Court's Factsheet on reparations showed and as further discussed in Chapter seven. Fifth, the revised Practice Directions permit use of affidavits as evidence before the Court, including exclusive reliance on affidavits where for valid reasons supporting or corroborating evidence is inaccessible.[21]

Arguably, the provisions on evidence in the revised Practice Directions is a step towards greater flexibility by the African Court on evidence matters, which have the potential to enable the Court to concretely apply an equitable applicant-centred approach while considering evidence as argued in this study. It should be noted, however, that given that they are a recent development that is informed by the findings of this study, the bulk of the analyses and proposals offered in this thesis have been developed as informed by the state of play prior to adoption of the new Practice Directions. The extent to which the latter address the gaps identified in the study is considered in the final Chapter of the thesis. How they impact adjudication at the Court going forward will only be possible to assess through future studies on evidence at the Court.

This Chapter and the next one will zero in on how the Court has applied the concepts of burden of proof and standard of proof respectively as the concepts that most broadly define and contain the main features of the evidentiary regime obtaining at the African Court. The next section explains the basics of the concept of burden of proof before turning to its application at the African Court.

[18] Paras 6-10 of the Practice Directions, 2024.
[19] Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer Law International, 1998) 29.
[20] Paras 11-12.
[21] Paras 21-24.

4.3 Unpacking the burden of proof concept

The burden of proof has been said to be 'one of the important aspects of the law of evidence'.[22] Understanding how it applies at the African Court is therefore critical to this study's attempt at unveiling the main features of the Court's evidentiary regime. However, before turning to its application at the Court, it is essential to start by examining what the concept actually means and I do this through a review of the existing literature on evidence. The term 'burden of proof' has been described as the 'obligation to prove' or 'the duty of a party to persuade the trier of fact by the end of the case of the truth of certain propositions'.[23] It has also been defined as a term that 'represents a specific crystallization of the general obligation of the parties to present evidence'.[24] The concept of burden of proof is relevant both in domestic and international courts but while there are similarities in how it applies at the two levels there are important differences. At the domestic level in common law jurisdictions, a distinction has been made between the *burden of production* and the *burden of persuasion*. Prakken and Sartor have provided a good summary of various terminologies related to the concept of 'burden of proof' from existing literature.[25] They point out the distinctions between the burden of production and burden of persuasion by citing various evidence law texts and note that in common law systems, the *burden of production* is also known as the 'evidential burden', the 'duty to produce evidence', the 'duty of passing the judge' or 'the burden of adducing evidence'. Alternative terms for the *burden of persuasion* are 'the legal burden' or 'the risk of non-persuasion' or the 'probative burden' or the 'ultimate burden'.[26] The terms 'legal burden' (burden of persuasion) and 'evidential burden' (burden of production) have in turn been defined as follows: 'the legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved)' while the evidential burden is 'the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue'.[27]

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[22] Mojtaba Kazazi, *Burden of Proof and Related Issues-A Study on Evidence Before International Tribunals* (Kluwer Law International 1996) 7.

[23] ibid, 22; CF Amerasinghe *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005), 34. J.D. Heydon, *Cases and Materials on Evidence* (Butterworths, London, 1975) 13; Kabir Duggal & Wendy W. Cai, 'Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof' (2018) 2.2 International Investment Law and Arbitration 1, 5.

[24] V. S. Mani, *International Adjudication: Procedural Aspects* (Nijhoff, 1980) 202.

[25] Henry Prakken and Giovanni Sartor, 'A Logical Analysis of Burdens of Proof' in H. Kaptein, H. Prakken & B. Verheij (eds), *Legal Evidence and Proof: Statistics, Stories, Logic. (*Farnham: Ashgate Publishing, Applied Legal Philosophy Series, 2009) 224-225.

[26] Henry Prakken and Giovanni Sartor, (n 25), 2; Hodge M. Malek (ed) *Phipson on Evidence* (16th edn, Sweet & Maxwell 2005) 125.

[27] J D Heydon, *Cross on Evidence* (10th Australian Edition, LexisNexis Butterworths 2015) 292-293.

There are other definitions from the reviewed literature, including that of Phipson who points out that '[a] party who fails to discharge a persuasive burden placed on him to the requisite standard of proof will lose on the issue in question'.[28] Wigmore distinguishes between the two conceptions of the burden of proof with the observation that the risk of non-persuasion (burden of persuasion) operates 'when the case has come into the hands of the jury' while the duty of producing evidence (burden of production) 'implies a liability to a ruling by the judge disposing of the issue without leaving the issue open to the jury's deliberations'.[29] A relevant point to note from Phipson is his observation that 'the general rule is that the party bearing the persuasive burden will also bear the evidential burden'.[30] As seen from the above, the distinction between the burden of production and burden of persuasion according to the cited sources is particularly pronounced in common law jurisdictions and especially where there is a jury system. This is because 'the discharge of the burden of production is a precondition for moving to the trial phase, where the factual issue is decided by the jury according to the burden of persuasion'.[31] In civil legal tradition, there is a suggestion that the term burden of proof is 'used only to refer to the duty of parties to prove their allegations' as the system does not separate adjudication of fact and law.[32]

The question that follows from the above somewhat complex synopsis of the burden of proof definitions and descriptions is whether the distinctions or variations of the concept, particularly in common law jurisdictions, has application at the international level. To start with, international tribunals generally approach the question of who bears the burden of proof 'pragmatically rather than dogmatically'.[33] It has been pointed out that the literature on the distinction between burden of production and burden of persuasion 'is full of confused terminology and doubts as to the continued adherence to the dichotomy'.[34] The distinction has also been the subject of a study by the *Institut de Droit International* that concluded that it was not necessary[35] while other sources suggest that the common law concept of evidential burden 'is not generally recognised in international tribunals'.[36] Notably, the comparative study on the law and practice of reparations

[28] Hodge M. Malek (ed), *Phipson on Evidence* (n 26) 125.
[29] J H Wigmore, *Evidence in Trials at Common Law*, (1981) 9 Chadbourn Rev 2487 as cited in J D Heydon, *Cross on Evidence* (n 100) 294.
[30] Hodge M. Malek (ed), *Phipson on Evidence* (n 26) 126.
[31] Henry Prakken and Giovanni Sartor, (n 25), 2
[32] Anna Riddell & Brendan Plant, *Evidence before the International Court of Justice* (BIICL 2009) 82.
[33] Anna Riddell, 'Evidence, Fact-Finding, and Experts' in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013), 859.
[34] Riddell & Plant, (n 32) 81; Some sources note that the different notions of burden of proof 'have been described by different scholars in different ways', see Henry Prakken and Giovanni Sartor, (n 25), 223.
[35] Giulio Alvaro Cortesi, *Proof and the Burden of Proof in International Investment Law* (Springer 2022) 17, citing Amerasinghe C. F., Final Report, Mars 2002, in Annuaire de l'I.D.I., vol. 70-1, 2002–2003, 345–346. An online version of this cited report is not available.
[36] Caroline E Foster, 'Burden of Proof in International Courts and Tribunals' (2010) 29 Australian Year Book of International Law 27, 45.

that was commissioned by the African Court observed that the concept of burden of proof refers to *who* must present proof.[37] This position is consistent with observations in some literature that 'burden of proof answers the question "who" has to prove or convince a tribunal of a fact'.[38] Stated differently and simply, the burden of proof 'identifies the litigant that has the onus of meeting the standard of proof by providing the necessary evidence'.[39] This is also the understanding of the concept of burden of proof at the African Court which in the revised Practice Directions clarifies that 'in general, the burden to prove the merits of a case and justify claims thereof lies with the applicant'.[40] This conception of the burden of proof is what is alluded to where the term is referred to in this Chapter and throughout the thesis.

Having dealt with definitional issues, the next section examines how the burden of proof applies in cases at the African Court and particularly circumstances under which the burden will not be borne by the applicant

4.4 Distribution of the burden of proof at the African Court

The African Court addressed the issue of burden of proof, albeit very briefly, in its first decision on merits in *Reverend Christopher Mtikila v. Tanzania* where in the judgment on reparations the Court noted that 'the applicant bears the burden of proof regarding the reparations claimed'.[41] It further clarified that 'the applicant has to remit probative documents and to develop arguments relating the evidence to the facts under consideration'.[42] This position of the Court was restated in the *Lohe Issa Konate v. Burkina Faso* case where the Court listed four principles it applies in considering claims for reparation, one of which is that 'the burden of proof lies with the applicant to show justification for the amounts claimed'.[43] While the issue had been explicitly addressed in reparations decisions as noted in these two cases, the Court took the same position while considering merits in the case of *Mohamed Abubakari* with the observation that the applicant 'bears the burden of proof'.[44] It has stated as much in other cases.[45] In sum, application of the burden of proof at the African Court is

[37] Comparative Study on the Law and Practice of Reparations for Human Rights Violations' (n 13) 30.
[38] Kabir Duggal & Wendy W. Cai (n 23) 5; James A. Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58 International and Comparative Law Quarterly 163, 165.
[39] Marco Roscini, 'Evidentiary Issues in International Disputes Related to State Responsibility for Cyber Operations' (2015) 50 Texas International Law Journal 233, 243.
[40] Practice Directions 2024 (n 15), para 4.
[41] *Reverend Christopher R. Mtikila v. Tanzania*, Application No. 011/2011 Judgment on Reparations of 13 June 2014, para 40.
[42] ibid.
[43] *Lohe Issa Konate v. Burkina Faso*, Application No. 004/2013 Judgment on Reparations of 3 June 2016, para 15.
[44] *Mohamed Abubakari v. Tanzania*, Application No. 007/2013 Judgment of 3 June 2016, para 99.
[45] See for example, *Mgosi Mwita Makungu v. Tanzania*, Application No. 006/2016 Judgment of 7 December 2018, para 70.

embodied in the Latin legal maxim - *actori incumbit probatio*. This maxim is defined in Black's Law Dictionary as translating to - 'the burden of proof rests on the plaintiff (or on the party who advances a proposition affirmatively)'.[46] Notably, there are observations that the principle of *actori incumbit probatio* applies both to the assertions of applicants and respondents and not necessarily on the former and therefore the party bearing the burden of proof is 'the party who raised an issue' regardless of its procedural position.[47] Related to this is the suggestion that operation of the rule on burden of proof in international law is to the effect that 'each party not only [has] to prove the facts it alleges, but also to disprove those alleged by the other party'.[48]

While the earlier decisions by the Court as highlighted above made it clear *who* bore the burden of proof, the cases that followed nuanced the position of the Court on the issue with findings that the burden of proof is not always on the applicant and there are circumstances that may permit the Court to shift the burden to the respondent State. This was first done in the case of *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. Tanzania* where the Court observed that 'it is a fundamental rule of law that anyone who alleges a fact shall provide evidence to prove it'.[49] It then qualified this by noting that this rule 'cannot be rigidly applied' in human rights cases because some human rights violations such as incommunicado detention and enforced disappearances 'are shrouded in secrecy' and victims may be unable to prove their allegations because the means of doing so are likely to be controlled by the State.[50] Citing decisions by the ICJ, the Court held that in such circumstances 'neither party is alone in bearing the burden of proof' and so determination of the burden of proof will depend on the type of facts in the case.[51] However, the Court added that in order to shift the burden of proof to the respondent State, the applicants had to submit *prima facie* evidence to support their allegation. In this case, while the Court acknowledged that it was difficult for the applicants to prove that they had been denied food while in police custody, it concluded that they had not adduced *prima facie* evidence to enable the Court to shift the burden of proof to the State.[52] It gave a pointer as to what could have constituted such *prima facie* evidence by observing that proceedings in domestic courts did not indicate that applicants had raised the allegation of being denied food.

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[46] Henry Campbell Black, *Black's Law Dictionary* (4th edn, West Publishing Co. 1968) 53, although the definition provided here is for its equivalent – *'Actori Incumbit Onus Probandi'*.
[47] Marco Roscini (n 39), 243.
[48] V. S. Mani, (n 24), 204.
[49] *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. Tanzania*, Application No. 003/2015, Judgment of 28 September 2017, para 142.
[50] ibid.
[51] *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. Tanzania*, (n 49) para 143
[52] ibid, para 144-145.

The next set of facts that led the African Court to shift the burden of proof to the State was in the case of *Anudo Ochieng Anudo v. Tanzania* where the State had revoked the applicant's nationality despite the fact that he had a birth certificate and passport issued by the State. The Court noted that to determine whether there had been a violation of the right not to be arbitrarily deprived of nationality, the facts of the case made it 'necessary to establish on whom lies the burden of proof'.[53] The Court then took the view that 'since the respondent State [was] contesting the applicant's nationality held since his birth on the basis of legal documents established by the respondent State itself, the burden [was] on the respondent State to prove the contrary'.[54] The Court in the end found a violation. This decision can be contrasted with that in the *Nguza Viking* case delivered a day after and where the Court dismissed claims of incommunicado detention and ill-treatment while in police custody for the applicants' failure to submit *prima facie* evidence that would allow for a shift of the burden of proof.[55]

The next case that involved shifting of the burden of proof was *Armand Guehi v. Tanzania*, which also provided another illustration of what the Court finds as constituting *prima facie* evidence that permits a shift. The applicant had alleged violation of his right not to be subjected to inhuman and degrading treatment by being denied food while in custody. The Court held that the applicant's evidence that he was given food twice in ten days, including once by his domestic worker and which evidence was not challenged by the State was *prima facie* evidence of the alleged violation and the burden shifted to the State to prove the contrary. Having failed to do so, the State was found in violation of the applicant's right.[56] A similar approach was taken in *Leon Mugesera v. Rwanda* where the Court found the applicant's letters to authorities in the respondent State complaining of deprivation of food and difficulties in communicating with his family and lawyers were sufficient to shift the burden of proof to the State.[57] It noted that the shift was justified 'given that the applicant is in prison and that it [was] difficult for him to produce additional evidence beyond the steps he claim[ed] to have taken'.[58] In *Kennedy Gihana & Others v. Rwanda* where the applicants alleged revocation of their passports by the State, the Court shifted the burden of proof to the respondent, noting that it would be unjust to place the burden on the applicants. This was so

[53] *Anudo Ochieng Anudo v Tanzania*, Application No. 012/2015, Judgment of 22 March 2018, para 80.
[54] ibid.
[55] *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. Tanzania*, Application No. 006/2015, Judgment of 23 March 2018, para 73.
[56] *Armand Guehi v. Tanzania*, Application No. 001/2015 Judgment of 7 December 2018, paras 133-134.
[57] *Leon Mugesera v. Rwanda*, Application No. 012/2017, Judgment of 27 November 2020, para 87-88.
[58] ibid, para 88.

because all relevant information relating to issuance and revocation of passports was held by the State's agencies.[59]

For a final example of a case where the Court has shifted the burden of proof, the *Robert John Penessis v. Tanzania* case is worth highlighting because for the first time, the Court was explicit in stating that its position on the issue of burden of proof as established in the cases discussed above reflected the 'the general law principle of *actori incumbit probatio* by which anyone who alleges a fact must prove it'.[60] The Court further clarified that this principle means that 'the burden of proof lies with the alleging party and shifts to the other party only when discharged'.[61] However, according to the Court, there are two exceptions to this principle: (1) 'where the alleging party is not in a position to access or produce the required proof' or (2) 'where the evidence is manifestly in the custody of the other party or the latter is entrusted with the means and prerogatives to discharge the burden of proof or counter the alleging party'. The Court concluded that in these circumstances 'the respondent State may be required to rebut a *prima facie* allegation'.[62] The applicant in this case had alleged violation of his right to nationality and the Court accepted a birth certificate and a temporary travel document issued by the State as *prima facie* evidence of his Tanzanian nationality and shifted the burden to the State to prove the contrary.

The African Court's general approach to burden of proof as seen through the application of the principle '*actori incumbit probatio'* and as qualified with shifting of the burden in specific circumstances is what has been referred to as 'the normal default rule concerning burden of proof'.[63] This means that 'the necessity of proving falls on the party who acted, that is, who put forward the action of making the charge, allegation or complaint'.[64] It is further pointed out that the exception to this rule is that 'a litigant should not have the burden of establishing facts that are peculiarly within the knowledge of his adversary' and that this exception is based on considerations of fairness.[65] As the next section demonstrates, this approach is a common feature in international human rights adjudication.

[59] *Kennedy Gihana & Others v. Rwanda*, Application No. 017/2015, Judgment of 28 November 2019, para 84-85.
[60] *Robert John Penessis v. Tanzania*, Application No. 013/2015, Judgment of 28 November 2019, para 91.
[61] ibid para 92.
[62] ibid.
[63] Douglas Walton, *Burden of Proof, Presumption and Argumentation* (Cambridge University Press 2014) 50.
[64] ibid.
[65] ibid.

4.5 Parallels between the African Court and other human rights tribunals on shifting the burden of proof

The African Court's practices on shifting the burden of proof to respondent States are consistent with practices in other international human rights courts and treaty bodies. These practices are relatively well documented in the literature as highlighted in this section together with examples of decisions by these bodies. To start with, there is a suggestion that international courts will apply the concept of shifting the burden of proof when there is 'an evidentiary impasse, an imbalance regarding the access to evidence or generally a weaker procedural position of one of the parties'.[66] In these circumstances, international courts will shift the burden of proof as 'a suitable instrument to allow a procedural alteration in order for the court to reach a "just" outcome'.[67] There is also the observation that shifting the burden of proof has been one of the techniques used by courts and commissions in the European, African and Inter-American human rights systems to ensure strict formalism does not trump interests of justice. This is exemplified in cases where once a complainant provides evidence of exhaustion of local remedies, the State (if in dispute) equally bears the burden to show existence of a genuine remedy.[68] Roberts observes that a reversal of the burden does not mean the respondent State's evidence will automatically be believed or that the State will automatically lose the case.[69] Rather, it means that the State is 'no longer able to assume a passive role, secure in the knowledge it will succeed if the claimant cannot convince the fact-finder'.[70]

Michael O'Boyle in his discussion of evidentiary practices at the European Court refers to 'a distribution of the burden of proof' regarding exhaustion of domestic remedies. He notes that an applicant at the European Court 'must at least provide a beginning of proof' in support of the allegations with sufficient factual elements to enable the Court to conclude that the allegations are not groundless or manifestly ill-founded.[71] He concludes that there is a 'certain sharing of proof between the applicant and the government' at both the admissibility and merits stages. In the former, the respondent State will be required to 'demonstrate the existence of adequate and

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[66] Torsten Stirner, *The procedural law governing facts and evidence in international human rights proceedings : developing a contextualized approach to address recurring problems in the context of facts and evidence* (Brill Nijhoff 2021) 38.
[67] ibid.
[68] Françoise Hampson, Claudia Martin & Frans Viljoen, 'Inaccessible apexes: Comparing access to regional human rights courts and commissions in Europe, the Americas, and Africa' (2018) Vol. 16 No. 1 International Journal of Constitutional Law 161, 171-172.
[69] Christopher Roberts, 'Reversing the burden of proof before human rights bodies' (2021) 25 The International Journal of Human Rights 13,15.
[70] ibid 13-14.
[71] Michael O'Boyle 'Proof: European Court of Human Rights' (2018) Max Planck Encyclopedias of International Law', para 28-29.

effective remedies capable of remedying the applicant's complaint' while in the latter a rigorous application of the principle that the burden of proof falls on the applicant is not possible. This is because in some cases 'only the respondent government has access to information capable of corroborating or refuting the applicant's allegations'.[72] This was the European Court's position in *Yuriy Volkov v. Ukraine* where it held:

> Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof to provide a satisfactory and convincing explanation may be regarded as lying with the authorities.[73]

The Inter-American Court has the same approach as elaborated in the *Fernández Ortega Et Al. v. Mexico* case where the Court stated that:

> In principle, the burden of proof regarding the facts on which the complaint is based corresponds to the petitioner. Nevertheless, [the Court] has underscored that, contrary to domestic criminal law, in proceedings on human rights violations, the State's defence cannot be based on the impossibility of the petitioner to provide evidence, when it is the State that controls the means to ascertain facts that occurred on its territory.[74]

The African Commission's position on the burden of proof and when it shifts appears to be contradictory. It has severally held that according to its 'long-standing practice' in cases of human rights violations 'the burden of proof rests on the government'. Further to this, 'if the government provides no evidence to contradict an allegation of human rights violation made against it, the Commission will take it as proven, or at the least probable or plausible'.[75] This approach according to the Commission conforms with its duty to protect human rights.[76] However, the Commission has noted that the complainant also has obligations related to production of evidence. It has stated, regarding its position that the burden of proof rests with the government, that this 'should not be taken to mean that complainants have a right to make unsubstantiated statements'.[77] According to the Commission, in the absence of 'concrete proof' from the complainant, it will not find the

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[72] ibid, para 33.
[73] *Yuriy Volkov v. Ukraine*, Application no. 45872/06, Judgment, 19 December 2013, para 49.
[74] *Fernández Ortega Et Al. v. Mexico*, Judgment of 30 August 2010 (Preliminary Objections, Merits, Reparations, and Costs) para 112.
[75] *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, Communication 301/05, paras 178, 221,225,228; *Amnesty International and Others v. Sudan*, Communication No. 48/90, 50/91, 52/91, 89/93 (1999), para 52.
[76] *Haregewoin Gabre-Selassie and IHRDA* (n 75) para 179.
[77] *Gabriel Shumba v. Zimbabwe*, Communication 288/04, para 132.

respondent State in violation.[78] Regarding the shifting of the burden of proof, the African Commission has observed that for it to be seized of a Communication, the complainant 'needs only to present a *prima facie* case' and meet the admissibility conditions.[79] After this, 'the burden then shifts to the respondent State to submit specific responses and evidence refuting each and every one of the assertions contained in the complainant's submissions'.[80] The Commission has shifted the burden of proof in its admissibility decisions. For example, in *The Nubian Community in Kenya* case, it observed that when an applicant argues for an exception to the rule on exhaustion of local remedies because the remedies are unavailable, ineffective or unduly prolonged, then the 'onus is on the respondent State […] to demonstrate that local remedies are available, sufficient and effective'.[81] The Commission further clarified in the same case that 'when a Government argues that the Communication must be declared inadmissible because the local remedies have not been exhausted, the Government then has the burden of demonstrating the existence of such remedies'.[82]

Finally, the UN Human Rights Committee has taken a stance similar to other human rights tribunals. In *Bleier v. Uruguay*, the Committee determined that the burden of proof 'cannot rest alone on the author of the communication' for the reason that the 'author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information'.[83] It also found in *Khadzhiyev v. Turkmenistan* that in cases where there is alleged torture or death while in custody the author does not solely shoulder the burden of proof. Instead, 'the burden shifts to the State party to provide a satisfactory and plausible explanation supported by evidence'.[84] The Committee has restated this position in another case with the further nuance that 'where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations to be substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party'.[85] In *Maya v. Nepal* the Committee found that 'requiring victims of arbitrary and illegal detention to provide records thereof would amount to a *probatio diabolica*'.[86] The term *probatio diabolica* translated as

[78] ibid, para 140. The contradiction in the Commission's case law is that on the one hand there is the consistent observation that the burden of proof rests with the government and on the other hand it requires the complainant to submit 'concrete proof' to substantiate claims.
[79] *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 293/04, para 44.
[80] ibid.
[81] *The Nubian Community in Kenya v. Kenya*, Communication 317/2006, paras 46-47.
[82] ibid.
[83] *Bleier v. Uruguay*, Communication No. 030/1978, Decision on merits, 29 March 1982, para 13.3.
[84] *Annadurdy Khadzhiyev v. Turkmenistan*, Communication No. 2252/2013, Decision on merits, 06 Apr 2018, para 5.2.
[85] *Prashanta Kumar Pandey v. Nepal*, Communication No. 2413/2014, Decision on merits, 30 Oct 2018, para 8.3
[86] *Purna Maya v. Nepal*, Communication 2245/2013, 23 June 2017, para 12.7.

'devil's proof' has been said to denote proof which cannot possible be achieved or impossible proof.[87]

In view of the above discussion, this section can be concluded with the observation that the African Court's allocation and shift of the burden of proof is similar to approaches taken by other international human rights tribunals as seen above. The flexibility that underlies these practices with regard to the burden of proof, as one author points out, has the benefit of

> providing rights bodies greater space in which to calibrate their findings, and preventing rights adjudication from becoming overly bogged down in proceduralist details, at the expense of substantive justice.[88]

Notably, the African Court will shift the burden of proof not only in merits decisions as earlier discussed but also at the admissibility stage.[89] While this study has not come across reparations decisions where the burden of proof was shifted from the applicant to the State, it can be presumed that where circumstances permit such as control of relevant information or evidence by the State, there is no reason to suggest that the approach would not apply to decisions on claims for reparation. To complete the above discussion on application of the burden of proof and circumstances that permit its reversal, the next section examines three adjudicatory tools which, when applied, discharges the burden of proof. Analysis of these tools will be related to practices at the African Court.

4.6 Adjudicatory tools with implications on the burden of proof

4.6.1 Presumptions and inferences

Use of presumptions and inferences is a common evidentiary practice in international litigation, including at the African Court. Before discussing how the African Court has applied presumptions and inferences and their implications on the burden of proof, this section starts with clarifying the two terms which is essential given how closely related they are. Kazazi has defined presumptions in the following words:

[87] Kasey McCall-Smith, 'Reversing the Burden of Proof in Response to States' Non-Participation: the Human Rights Committee's Evolving Case Law on Torture', in D. Casalin, M.-B. Dembour and C. Klocker (eds.) *Questions of Evidence in the UN Human Rights Treaty Bodies' Individual Communications Procedure* (Cambridge: Cambridge University Press, forthcoming), 2.
[88] Roberts (n 69) 15.
[89] See for example, *Leon Mugesera v. Rwanda* (n 57), para 33; *Alfred Agbesi Woyome v. Ghana*, Application No. 001/2017 Judgment of 28 June 2019, para 67.

> Presumptions are conclusions drawn from known facts about unknown facts. The known fact serving as the basis for a presumption could be either a particular proven fact related to the case at issue, or a fact which is to be held true indiscriminately in all cases unless the contrary is proved.[90]

A presumption may be prescribed by law (in this case it is referred to as a legal presumption or presumption of law) or it may be a presumption of fact (in which case it is referred to as an inference or judicial presumption).[91] Amerasinghe clarifies that 'a presumption requires that a finding of a basic fact give rise to the existence of a presumed fact'.[92] He observes that a common practice in international litigation is that what is customary, normal or more probable is presumed and that the effect of a presumption is to discharge the burden of proof, unless anything contrary to what is presumed is established.[93] An inference is defined in Black's Law Dictionary as:

> a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.[94]

Inferences have been described as reasoning tools used by judges who may 'draw conclusions from certain established facts to the existence of other facts'.[95] Inferences are said to derive their force from *logic* while legal presumptions derive their force from *law*.[96] Amerasinghe however notes that it is not always easy to distinguish between legal presumptions and inferences especially given that some international tribunals use the terms 'inference' and 'presumption' interchangeably when referring to inferences.[97] He further points out that legal presumptions are rarely applied in international litigation but use of inferences is common.[98] Phipson explains that presumptions of fact (inferences) apply where 'on the proof or admission of a fact, another fact may be presumed'.[99] Presumptions have been said to be procedural tools useful in managing situations of uncertainty

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[90] Mojtaba Kazazi (n 22), 269.
[91] Marco Roscini (n 39), 265; Rudiger Wolfrum 'Taking and Assessing Evidence in International Adjudication' in Tafsir Malick Ndiaye & Rüdiger Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff Publishers 2007) 353;
[92] C F Amerasinghe, 'Presumptions and Inferences in Evidence in International Litigation' (2004) 3 Law and Practice of International Courts and Tribunals 395, 395.
[93] ibid 398.
[94] Henry Campbell Black, *Black's Law Dictionary* (Revised 4th edn, West Publishing 1968).
[95] Rudiger Wolfrum, 'Taking and Assessing Evidence in International Adjudication' (n 91) 353; Kazazi discusses 'adverse or negative inferences' and notes that international tribunals can draw negative inferences from non-production of evidence by a party or unexplained failure to produce evidence that may support the other party's case – see Mojtaba Kazazi (n 22), 361.
[96] Thomas M. Franck & Peter Prows, 'The Role of Presumptions in International Tribunals' (2005) 4 Law and Practice of International Courts and Tribunals 197, 203 citing Phipson;
[97] C F Amerasinghe, 'Presumptions and Inferences in Evidence in International Litigation' (n 92), 405.
[98] ibid, 395-396.
[99] Hodge M. Malek (n 26) 136.

to aid reaching cognitive goals without spending more effort than is necessary.[100] In legal contexts they 'fill the gap' in uncertain situations to allow for a coherent argument in order to find a solution to a legal case.[101]

A good example of a legal presumption in international litigation is in Article 38 of the Rules of Procedure of the Inter-American Commission on Human Rights. It states that:

> The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the period set by the Commission under the provisions of Article 37 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion.

A provision with a similar effect at the European Court of Human Rights but which refers to inferences is Rule 44C of its Rules (28 March 2024) which states that where a party fails to adduce evidence, provide information requested by the Court, divulge relevant information of its own motion or participate effectively in proceedings, the Court 'may draw such inferences as it deems appropriate'. It has been suggested that the two Rules noted above 'serve the interests of procedural efficiency' in the sense that where there is insufficient access to the factual information necessary in order to resolve the issue, and there is lack of cooperation from the respondent then 'there is either the presumption of truth of the allegations made in the petition (in the Inter-American context) or the court is entitled to draw inferences as it sees fit (in the European case)'.[102]

The African Court has made use of presumptions in its case law, although the Court does not expressly distinguish between a legal presumption or a presumption of fact (inference).[103] In this section, I highlight instances when the Court expressly refers to a 'presumption' or what is 'presumed' as well as when the term 'inference' is expressly used. Although the Court uses both terms interchangeably, the practical effect is that it is applying presumptions of fact (inferences) and not presumptions of law in line with the definitions discussed above. In *Oumar Mariko v. Mali*, while interpreting one of the components of the right to a fair trial under Article 7 of the African Charter (the right to be tried within a reasonable time), the Court firstly noted that the reasonableness of time taken to conduct a trial is assessed taking into account the complexity of

[100] T. Altwicker and A. E. Hansen, 'Presumptions as Secondary Rules in the Judicial Interpretation of International Human Rights' in G. Kajtár, B. Çali and M. Milanović (eds.), *Secondary Rules of Primary Importance in International Law* (Oxford: Oxford University Press, 2022), 168.
[101] Ibid.
[102] T. Altwicker and A. E. Hansen (n 100), 172.
[103] One could argue that Rule 44(8) of the Court's Rules qualifies as a legal presumption. For purposes of calculating time limits for pleadings, it provides that where pleadings, notices and other communication from the Registry is by email then 'receipt shall be presumed on the date that an electronic mail is sent'.

the case, the conduct of the applicant and domestic judicial authorities. Secondly, with regard to applying a presumption in interpreting this right, it determined that:

> when the time limit within which the judicial decision must be taken is set by law, a violation is presumed in the event of non-compliance with that time limit. However, this presumption is rebuttable provided that there are reasonable grounds for the delay specified in the impugned decision.[104]

The African Court also regularly resorts to the use of presumptions of facts where an applicant claims judges in domestic proceedings were biased. On this, the Court has adopted the consistent position that 'the impartiality of a judge is presumed and undisputable evidence is required to refute this presumption'.[105] In considering reparations claims, the Court also applies presumptions with regard to moral prejudice, which it presumes to have occurred once a violation is established. The Court's reasoning behind the use of presumptions in claims for moral damages was set out in the *Norbert Zongo* case where it observed that the causal link between the wrongful act and moral prejudice suffered results from the human right violation 'as an automatic consequence, without any need to prove otherwise'.[106] This logic has been applied in all reparations decisions (on moral prejudice) by the Court. As an example, in *Andrew Ambrose Cheusi v. Tanzania*, the Court found two violations of the applicant's right to a fair trial (right to free legal assistance and the right to be tried within a reasonable time). It then determined that 'there [was] a presumption that the applicant [had] suffered some form of moral prejudice as a result of such violation'.[107] The Court has taken the same position in other cases.[108] Related to this, the Court presumes a violation of Article 1 of the Charter where a violation of any other Article is established.[109] This practice is similar to what obtains at the African Commission.[110]

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[104] *Oumar Mariko v. Mali*, Application No. 029/2018, Judgment of 24 March 2022, para 40.
[105] *Landry Angelo Adelakoun & Others v. Benin*, Application No. 012/2021, Judgment of 4 December 2023, para 40; in *Issiaka Keita & Others v. Mali*, Application No. 005/2019, Judgment of 5 September 2023, para 83 the Court reiterated this, holding that 'incontrovertible evidence is required to rebut this presumption'.
[106] *Beneficiaries of the Late Norbert Zongo & Others v Burkina Faso*, (n 14), para 55.
[107] *Andrew Ambrose Cheusi v. Tanzania* Application No. 004/2015, Judgment of 26 June 2020, para151
[108] See, for example *Joseph John v. Tanzania*, Application no. 005/2018, Judgment of 22 September 2022, para 121 where the Court stated: 'The Applicant is entitled to moral damages because there is a presumption that the Applicant has suffered some form of moral prejudice due to the said violations'.
[109] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, Application No. 013/2011, Judgment of 28 March 2014, para 199; *Alex Thomas v. Tanzania*, Application No. 005/2013, Judgment of 20 November 2015, para 135.
[110] See *Sir Dawda K Jawara v. The Gambia* Communication 147/95 and 149/96, para 46. where the African Commission held: 'Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore, a violation of any provision of the Charter, automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article. Its violation, therefore, goes to the root of the Charter'.

Riddell and Plant have noted that where a party has difficulties with obtaining evidence, international tribunals such as the ICJ 'will be more willing to have recourse to inferences and circumstantial evidence than usual, so that it is not impossible in such cases for that party to meet the burden of proof'.[111] They add that inferences are 'an important tool of judicial reasoning' for the ICJ where 'evidence is not freely available'.[112] At the African Court, the decision on reparations in the case of *Anudo Ochieng Anudo v. Tanzania* illustrates this use of an inference. The applicant had sought damages for loss of income from his two business ventures (a sawmill and a school). The Court noted that it expected the applicant to produce evidence such as accounting records, bank transaction records and balance sheets to prove that these businesses were profitable. However, given the applicant's difficult circumstances (he had been expelled from Tanzania), the Court found that it 'can infer from the mere fact that [the businesses] exist, that the applicant made investments in them and it was logical for him to have expected income from them'.[113] A second example of applying an inference is in the case of *Laurent Métongnon & Others v. Benin*. As mentioned earlier, the Court has established in its case law that in an alleged violation of the right to a fair trial (conducting trial within a reasonable time), one of the factors that determines whether the time taken to conclude a trial is reasonable is the complexity of the case. In *Laurent Métongnon*, the Court held that appeal proceedings that took six months were not unduly prolonged because the case was complex and this complexity could be inferred from the nature of the offences being prosecuted (corruption and abuse of power) and the number of persons involved (12 people had been prosecuted).[114]

Amerasinghe has observed that international tribunals may also base an inference on 'inaction or failure to deny a fact or facts' and the example he gives is the *Nicaragua Case (merits)* at the ICJ where the Court concluded that 'US military aircraft had made overflights over territory, because that fact had not been denied'.[115] A similar approach has been applied by the African Court. In *XYZ v. Benin*, the applicant had asserted that Benin's electoral body (COS-LEPI) 'appears to be a genuine electoral body in the process of organising elections'. The African Court then stated that in view of the State's failure to challenge this assertion, it 'infers from this that the parties agree that COS-LEPI is a genuine electoral body'.[116] Another illustration of this is in the case of *Kijiji Isiaga v. Tanzania* where the Court observed that the respondent State had not disputed that the

[111] Anna Riddell & Brendan Plant, *Evidence before the International Court of Justice* (n 32) 115.
[112] ibid, 122.
[113] *Anudo Ochieng Anudo v. Tanzania*, Application No. 012/2015, Judgment on Reparations of 2 December 2021, para 44.
[114] *Laurent Métongnon & Others v. Benin*, Application No. 031/2018, Ruling of 24 March 2022, para 57.
[115] C F Amerasinghe, 'Presumptions and Inferences in Evidence in International Litigation' (n 92), 406.
[116] *XYZ vs Benin*, Application No. 059 of 2019, Judgment of 27 November 2020, para 113.

applicant was 'a lay, indigent and incarcerated person without the benefit of legal education or assistance'. It then relied on this observation to draw an inference by noting that 'these circumstances make it plausible that the applicant may not have been aware of the Court's existence and how to access it'.[117] As a result of this reasoning and inferring the applicant's lack of awareness about the African Court, it found the period of two years and eleven months taken to submit the case to be reasonable and the application therefore admissible. A similar approach was taken in *Kennedy Gihana & Others v. Rwanda* where the Court interpreted the respondent's failure to respond to the applicants' allegation that the State had revoked their passports as 'amount[ing] to the respondent State not having denied this claim'.[118] This logic eventually led to a finding of a violation of Article 12(2) of the Charter (freedom of movement). The Court has presumed uncontroverted claims as establishing relevant facts in other cases.[119]

From this discussion, it is clear that the African Court has relied on presumptions of fact or inferences to lessen the burden of proof on a party especially where the burden is difficult to discharge because of difficulties associated with presenting the required evidence. This flexibility by the Court exercised through the tools of 'presumptions' or 'inferences' has been applied not just in merits decisions but in admissibility and reparations decisions as well. The *Kijiji Isiaga* case (discussed above) illustrates application in admissibility decisions, where the applicant is relieved from the burden of proving factors such as indigence and lack of awareness about the Court. Inferences have also been used by the Court in reparations decisions as exemplified in the *Anudo Ochieng Anudo* case discussed earlier. Use of an inference in this case allowed the Court to take into account the difficulties that the applicant faced and could therefore not adduce the expected forms of evidence. Altwicker and Hansen have observed that one of the main functions of presumptions relates to situations of unavailable or insufficient factual information and in this regard they 'serve to overcome situations of information asymmetry or information inaccessibility'.[120] They further note that situations of information inaccessibility occur, for example, 'when the facts cannot be established because of the passing of time since the event or if the information is unavailable for legal reasons'.[121] Arguably, the decisions discussed in this section illustrate use of an equitable applicant-centred approach to evidence (through inferences) that allowed the Court an

[117] *Kijiji Isiaga v. Tanzania*, Application No. 032/2015, Judgment of 21 March 2018, para 55.
[118] *Kennedy Gihana & Others v. Rwanda (*n 59), para 86.
[119] See for example, *Kennedy Owino Onyachi & Charles John Mwanini Njoka vs Tanzania* (n 49) para 108; *Mgosi Mwita Makungu v. Tanzania*, Application No. 006/2016, Judgment on Reparations, 23 June 2022, para 48.
[120] T. Altwicker and A. E. Hansen (n 100),173.
[121] ibid.

opportunity to address the substance of the applicants' claims and which would have otherwise been dismissed on account of lack of sufficient evidence.

Chapters six and seven of the thesis further examine cases that missed the opportunity to apply such an approach in, respectively, admissibility and reparations decisions, resulting in dismissal of cases that may arguably have had merit.

4.6.2 Judicial notice

Another adjudicatory tool that impacts the burden of proof is the concept of judicial notice, which has been applied by the African Court. A summary of definitions of this concept and its purposes from reviewed literature is useful in appreciating application of this concept at the Court. Riddell and Plant have described judicial notice as 'the process by which a court may consider a well-known fact as being established without requiring the parties to produce evidence on it'.[122] It has also been termed as 'the cognizance taken by the court itself of certain matters which are so notorious or clearly established that evidence of their existence is deemed unnecessary'.[123] McCormick notes that the main effect of a court taking judicial notice of a fact 'is to excuse the party having the burden of establishing a fact from the necessity of producing formal proof of the fact by sworn witnesses and authenticated documents or objective evidence'.[124] The result of this, according to Kokott, 'is to allow the judge to establish facts without adhering to the strict rules and requirements of the law of evidence'.[125] She adds that 'no burden of proof issues arise relative to facts that are subject to judicial notice'.[126] The purpose of taking judicial notice of certain facts according to some authors is to expedite and simplify court proceedings, and thus pragmatism and efficiency motivate the need for the concept.[127]

Facts that are subject to judicial notice include those that are 'of common knowledge or public notoriety' as well as those which are 'self-evident in the circumstances of the particular case'.[128] Notably, it has been observed that taking judicial notice is not limited to undisputed facts and it is possible to take judicial notice of facts that can still be challenged by a party and which have been referred to as 'rebuttable facts'.[129] The African Court has taken judicial notice of different categories of facts. It has, for example, taken judicial notice of provisions in the domestic laws of

[122] Riddell & Plant (n 32) 137.
[123] V. S. Mani, *International Adjudication: Procedural Aspects* (n 24) 209, citing Phipson.
[124] Charles T. McCormick, 'Judicial Notice' (1952) 5 Vanderbilt Law Review 296, 296.
[125] Juliane Kokott (n 19) 30.
[126] ibid.
[127] Riddell & Plant (n 32) 138; V. S. Mani (n 24) 298; Torsten Stirner (n 66) 279.
[128] Riddell & Plant (n 32) 138.
[129] Riddell and Plant (n 32) 138. See explanation at footnote 226.

respondent States.[130] In *Yassin Rashid Maige v. Tanzania* it stated that it 'takes judicial notice of the fact that the respondent State's Constitution in Article 13(6)(e) proscribes torture, inhuman or degrading treatment or punishment'.[131] The Court has taken judicial notice of findings by domestic courts as it did in *Jebra Kambole v. Tanzania* as well as decisions of international tribunals as happened in *Bernard Mornah v. Benin & Others* where it took judicial notice of an Advisory Opinion by the ICJ.[132] In the latter case, the Court also took judicial notice of decisions by the UN and the AU.[133] Finally, in *African Commission on Human and Peoples Rights v. Kenya*, the Court took judicial notice of facts that had received wide media coverage and which therefore could 'safely be assumed to be common knowledge'.[134] In all these instances, the Court took judicial notice of the facts in issue on its own motion to support its further reasoning in the highlighted cases. Although the Court's Rules are silent on the concept, the new Practice Directions by the Court expressly provide that the Court 'shall take judicial notice of facts which are of common knowledge'.[135] There are similarities in how the African Court applies the concept and the two other regional human rights systems. The Rules of Procedure of the Inter-American Commission on Human Rights have a similar provision as they allow the Commission to 'take into account other information that is a matter of public knowledge'.[136] In one decision, the European Court took 'judicial notice of recent surveys'.[137]

In Chapter six of the thesis, I make the argument that application of the concept of judicial notice can, beyond its function of efficiency and expediting proceedings and as part of the pragmatism behind it, serve as another tool to advance an equitable applicant-centred evidentiary approach. This case is particularly made with regard to the issue of lack of awareness of existence of the Court as the reason for delayed filing of application. I suggest that in order to address the increasing number of applications found inadmissible on account of unreasonable delay where applicants claim lack of awareness, the Court could take judicial notice of the fact there is still limited awareness about the Court in most African States as a self-evident fact that has support in several studies as highlighted in Chapter two and elaborated further in Chapter six. This would eliminate the current demand by the Court that applicants should specifically prove lack of awareness about

[130] *Crospery Gabriel & Ernest Mutakyawa v. Tanzania*, Application No. 050/2016, Judgment of 13 February 2024, para 85.
[131] *Yassin Rashid Maige v. Tanzania*, Application No. 018/2017, Judgment of 5 September 2023, para 142.
[132] *Jebra Kambole v. Tanzania*, Application No. 018/2018, Judgment of 15 July 2020, para 40*; Bernard Mornah v. Benin & Others*, Application No. 028/2018 Order (Intervention) of 25 September 2020, para 20.
[133] *Bernard Mornah v. Benin & Others*, Application No. 028/2018 Judgment of 22 September 2022, para 187.
[134] *The African Commission on Human and Peoples' Rights v. Kenya,* Application No. 006/2012, Order (Intervention) of 4 July 2019, para 15.
[135] See Annexure on Evidence Matters in the Practice Directions of the Court adopted on 5 March 2024, para 10.
[136] See Article 43(1) of the Rules of Procedure of the Inter-American Commission on Human Rights.
[137] *Jabari v. Turkey*, ECHR Judgment of 11 July 2000, Application No. 40035/ 98, para 41.

the Court, a requirement that has proved to be a difficult hurdle to jump for most applicants in the more recent decisions by the Court.

4.7 Linking the application of the burden of proof to an equitable applicant-centred approach

The above discussions on how the African Court applies and distributes the burden of proof and its reliance on presumptions of fact and the taking of judicial notice illustrate the applicability and relevance of an equitable applicant-centred approach to evidence as argued for in the study. From the preceding analyses, it can be deduced that the overall initial burden is on the applicant but in specific circumstances this burden can be shifted to the respondent State. To advance the previous discussion in Chapter three on the model of procedural fairness applicable at the Court as related to evidence assessment, it can be argued that the Court has indeed applied an equitable applicant-centred approach in dealing with the issue of burden of proof. The cases discussed show that generally it will, in a sense, lessen the burden on the applicant by distributing it equitably when circumstances (and fairness) demand this. This has been supported by some authors as a progressive approach in adjudication of human rights cases. Bronwen Manby has suggested that the Court's interpretation of the burden of proof in the *Anudo Ochieng Anudo* case is an important contribution to international law on the issue of statelessness. She observes that in most cases, States prefer to assert that an individual acquired nationality irregularly instead of invoking formal deprivation procedures because this way they deal with minimal due process protections. Manby makes the argument that the African Court outlaws this circumvention of individual rights with its holding that where one already has official documents attesting citizenship, the onus is on the State to prove the person is not a citizen.[138] Similarly, Gautam Bhatia, in comparing the African Court's approach to burden of proof in the *Anudo* and *Penessis* cases with the position taken by the High Court of India, notes that while the African Court only places an *initial* burden on the individual to provide *prima facie* evidence of citizenship, the Indian High Court has required *absolute* proof from the individual because the relevant facts are within his or her knowledge. He proposes that Indian Courts can learn from the African Court's approach.[139]

The 'best practices' highlighted in this Chapter demonstrate that what the study advocates for in the form of an equitable applicant-centred approach to evidence has been tried and tested. Further,

[138] Bronwen Manby, 'Case Note: Anudo Ochieng Anudo vs Tanzania (Judgment) (African Court on Human and Peoples' Rights, App No. 012/2015, 22 March 2018)' (2019) 1 Statelessness & Citizenship Rev 170, 176.
[139] Gautam Bhatia, 'Proving Citizenship: Lessons from the African Court on Human and Peoples' Rights' 25 February 2020. Available at <https://indconlawphil.wordpress.com/2020/02/25/proving-citizenship-lessons-from-the-african-court-on-human-and-peoples-rights/#comments> (first accessed on 21 August 2021).

that this approach is justified by particular circumstances of applicants or demands of fairness. However, this approach which the study considers progressive in the context of human rights protection as shown in the Court's practices on shifting the burden of proof, is not consistently applied. In this regard, the flexibility on evidence that the Court applies in the cases highlighted is not replicated in all cases, even when the rationale relied on in its flexible jurisprudence (such as evidentiary difficulties faced by applicants) is present. This reality has been compounded by the study's findings that a rigid approach to evidence is making inroads in admissibility decisions and rigid practices are already dominant in decisions on compensation claims as analyses in Chapters six and seven reveal, respectively. Discussions in the two Chapters make the case for consistent application of the equitable applicant-centred approach to evidence can promote substantively fairer decisions by the African Court.

4.8 Summary

This Chapter has generally examined the rules of evidence that apply at the African Court and specifically zoomed in to clarify in a systematic way the meaning and application of the concept of burden of proof, a key pillar in the evidentiary practices of the Court. The general rule at the Court in this regard is informed by the maxim *actori incumbit probatio*, which according to the Court means that the burden to prove the merits of a case and justify claims thereof generally lies with the applicant. However, the Chapter has shown that the African Court will reverse or shift the burden to the respondent State under particular circumstances such as when the State has access to the information that an applicant needs to support their claims or when it controls the means of ascertaining an applicant's allegations. This flexibility by the African Court is also seen in the practices of other international human rights tribunals and, according to the reviewed literature, is informed by considerations of fairness and the endeavour to realise substantive justice. The Chapter has demonstrated how the tools of presumptions (of law and fact) and judicial notice discharge the burden of proof. Importantly, it has shown through selected cases that the Court uses presumptions of fact to lessen the burden of proof on applicants who face difficulties in obtaining required evidence for valid reasons. These selected practices by the Court which the study views as progressive and pro-human rights for permitting determination of claims on their substance notwithstanding the evidentiary difficulties that applicants face in particular circumstances. However, as subsequent Chapters will show, this flexibility on evidence is not applied consistently and there are emerging patterns of departure from the flexible approach in certain areas of the Court's decisions.

CHAPTER 5: Standards of Proof at the African Court

5.1 Introduction

This Chapter focuses on the application of standards of proof in cases before the African Court and builds on the previous Chapter in examining the core evidentiary practices of the Court. It argues that the Court applies fluctuating standards of proof depending on the facts of each case and while this phenomenon is not uncommon in international adjudication, it nonetheless has negative implications for human rights protection when this fluid application of standards of proof is not properly calibrated. Application of a high standard of proof, as the Chapter argues, risks inappropriate dismissal of claims that may have merit. To mitigate against such outcome, the Chapter proposes that an equitable applicant-centred evidentiary approach to questions of standards of proof can guide the Court towards substantively fairer and more consistent decisions. The Chapter is structured as follows. This introduction is followed by an overview in section 5.2 of practices on standards of proof in common law and civil law systems, which have both informed the African Court's approaches to the issue. Section 5.3 gives a summary of international practices on standards of proof, with the aim of painting a global picture that will inform and situate the Chapter's critique of practices at the African Court. In section 5.4, the Chapter descriptively and analytically delves into the Court's approaches to standards of proof in its decisions for an understanding of the state of play on the issue. Section 5.5 is constructive: it relies on the findings reached in the previous section to project how an equitable applicant-centred approach to application of standards of proof at the Court could look like. A summary of the Chapter is provided in section 5.6.

5.2 Common law and civil law traditions on standards of proof

The practices of the African Court on standards of proof, like other international courts and treaty bodies, are rooted in domestic traditions on the issue and these differ in common law and civil law legal systems. It is therefore worthwhile to provide an overview of these differences not only because the African Court consists of judges with common law and civil law backgrounds but also because the divide has a bearing on how the African Court applies standards of proof. However, before turning to these differences, an apt starting point is to briefly highlight some definitions of the term 'standard of proof'. One description of the term is that it 'relates to the quantum or degree

of proof'[1] while another author defines it as 'the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen'.[2] For a final example, the term 'standard of proof' has been described as one that

> marks a point somewhere along the line between two extremes: a mere conjecture at one end, and absolute certainty at the other. Proof furnished in support of a particular proposition must meet or surpass this point for a judicial finding in favour of the proposition to be made.[3]

In common law legal systems, four standards of proof have crystallised. The first one, which requires a low degree of satisfaction, is the *prima facie* standard. It simply requires that 'evidence produced is indicative of the proposition claimed'.[4] This standard 'means that the adjudicative body decides provisionally on the basis of evidence submitted by one party, mostly the applicant'[5] and in the international context it often applies at the admissibility stage.[6] The second standard is the preponderance of evidence, also known as the balance of probabilities. The most cited definition of this standard is that given by Lord Denning in *Miller v Minister of Pensions* where he stated:

> That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, then it is not.[7]

A third standard at common law is the stricter 'beyond reasonable doubt' standard which is applied in criminal cases. It demands 'a high degree of cogency' and means the 'evidence weights heavily in one direction'.[8] It requires that 'the proposition being presented is supported with evidence of a nature that there can be no reasonable doubt as to the factual validity of the proposition'.[9] While this standard does not require absolute certainty or 'proof beyond a shadow of doubt' as Lord Denning put it in *Miller v Minister of Pensions*[10], it requires that the proposition made is 'virtually indisputable, given the evidence'.[11] A fourth standard of proof falling between the preponderance

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[1] CF Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005), 232.
[2] P Kinsch, 'On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals' in G Venturini & S Bariatti (eds) *Diritti Individuali E Giustizia Internazionale, Liber Fausto Pocar* (2009), 427.
[3] K Del Mar, 'The International Court of Justice and standards of proof' in K Bannelier, T Christakis & S Heathcote (eds), *The ICJ and the Evolution of International Law The enduring impact of the Corfu Channel case* (2012), 98.
[4] JA Green 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58 *The International & Comparative Law Quarterly* 163, 166.
[5] R Wolfrum, 'Taking and Assessing Evidence in International Adjudication' in TM Ndiaye and R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (2007) 355.
[6] F Viljoen, 'Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms' in A Bogdandy & R Wolfrum (eds) *Max Planck Yearbook of United Nations Law* (Volume 8, 2004) at 55.
[7] *Miller v Minister of Pensions* (1947) 2 ALL ER 372, 373-4.
[8] Wolfrum (n 5), 354.
[9] Green (n 4), 167.
[10] *Miller v Minister of Pensions* (n 7), 373.
[11] Green (n 4), 167.

of evidence and the beyond reasonable doubt standards has also been articulated, often referred to as the 'clear and convincing evidence' standard. This exceptional standard applies in specific civil cases such as those related to *habeas corpus* proceedings, nationality immigration and psychiatric placement.[12] It has similarly been applied when a party claims the other has engaged in fraudulent conduct where the alleging party is 'required to prove the elements of fraud by clear and convincing evidence'.[13] To meet this standard, 'the party with the burden of proof must convince the arbiter in question that it is *substantially* more likely than not that the factual claims that have been made are true'.[14] The standard is commonly expressed in judgments as 'clear, cogent and convincing', 'clear, satisfactory and convincing', or 'clear and irresistible', among other similar phrases.[15] This standard has had application at the domestic level on the African continent. For example, the Kenyan Supreme Court has determined that in all election petitions in the country, 'an intermediate standard of proof, one beyond the ordinary civil litigation standard of proof on a balance of probabilities, but below the criminal standard of beyond reasonable doubt, is applied'.[16] The Supreme Court in the same case justified this intermediate standard as follows:[17]

> The rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation.

In the civil legal tradition, the standard is not based on probabilities or dependent on whether the matter is civil or criminal. The standard is a subjective one and the threshold is 'the conviction of the judge, based on the evidence submitted'.[18] This civil law approach has also been described as one where 'the judge is required to have a conviction or belief regarding the truth of the fact in issue'.[19] Some authors describe (in French) this level of conviction as '*l'intime conviction du juge*'[20] or

[12] Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer Law International, 1998) 19-20;S Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' 17. Available at https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf (accessed 24 July 2023).
[13] Graham C. Lilly, Daniel J. Capra & Stephen A. Saltzburg (eds), *Principles of Evidence* (West Academic Publishing 2019) 420.
[14] Green (n 4), 167.
[15] KM Clermont, 'Procedure's Magical Number Three Psychological Bases for Standards of Decision' (1986-1987) 72 Cornell Law Review 1115, 1119.
[16] *Raila Amolo Odinga & another v. Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, para 148.
[17] ibid, para 150.
[18] Amerasinghe (n 1), 233; Mojtaba Kazazi, *Burden of Proof and Related Issues-A Study on Evidence Before International Tribunals* (Kluwer Law International 1996) 324.
[19] Jorg Sladič & Alan Uzelac, 'Assessment of Evidence' in Ve Rijavec, T Keresteš, T Ivanc (eds) *Dimensions of Evidence in European Civil Procedure* (2016), 119.
[20] A Riddell & B Plant *Evidence before the International Court of Justice* (2009) 125.

'an inner, deep-seated, personal conviction of the judge'.[21] In a nutshell, if a judge in the civil law system considers that they are persuaded by an argument then the standard of proof has been met.[22]

To conclude, the reviewed literature indicates that international courts and tribunals usually do not articulate in detail the standard of proof applied in assessing evidence.[23] Related to this, there are propositions that 'the international regime appears to reflect the civil law tradition, in which all that is needed is that the court be persuaded, without reference to a specific standard'.[24] As will be demonstrated in this Chapter, the African Court has adopted a hybrid approach by administratively identifying the applicable standard of proof (preponderance of evidence) but in practice flexibly determining the degree of persuasion required without express reference to any specific standard of proof. This reality, as the Chapter will show, potentially complicates adjudication of human rights claims at the Court and is a cause for concern as inappropriate application of a high standard could lead to dismissal of justifiable claims. Importantly, section 5.4 will show that the Court has in some cases raised the standard of proof where potential findings and orders in favour of the applicant would require a high commitment by the State.

However, before examining the African Court's approach to the issue of the standard of proof, the next section with provide an overview of international practices on the same.

5.3 International practices on standards of proof

This section provides an overview of the approaches to standards of proof by the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the African Commission on Human and Peoples' Rights (African Commission) and the Human Rights Committee (HRC). I do this not for a comprehensive comparative analysis, which is beyond the scope of this Chapter and the thesis as a whole as explained in Chapter one, but to place the practices of the African Court in the context of what generally transpires in peer adjudicative bodies. The discussion of international practices on standards of proof will provide a basis for (1) propositions that the African Court is acting consistently with practices in other international courts in certain respects but not in others, (2)

[21] KM Clermont & E Sherwin 'A Comparative View of Standards of Proof' (2002) 50 American Journal of Comparative Law 243 at 246.
[22] Riddell & Plant (n 20)125.
[23] Amerasinghe (n 1), 232.
[24] EV Ospina, 'Evidence before the International Court of Justice' (1999) 1 *Journal of the International Law Association* 202, 203; Caroline E Foster, 'Burden of Proof in International Courts and Tribunals' (2010) 29 Australian Year Book of International Law 27-86, 33.

suggestions to emulate progressive approaches by other institutions and (3) arguments in favour of adopting unique practices given the African Court's context.

There is a suggestion that 'international courts and tribunals are, in general, reluctant to deal in depth with questions of evidence when rendering their judgments or opinions' and that 'they do not consider themselves obliged to explain which standard of proof they have used and how they reached conclusions on disputed facts'.[25] This section discusses this flexibility in international tribunals, beginning with the ICJ. Although in a strict sense the ICJ is not a human rights court, being mainly pre-occupied with resolving inter-state disputes, its approaches to standards of proof is akin to those of human rights courts and bodies and the African Court has regularly cited ICJ decisions to support its own reasoning. In view of this, a brief scan of practices at the ICJ on the issue of standards of proof is warranted. The ICJ articulates different standards of proof, even within one case, and some of the expressions that implicitly refer to the standard of proof in different cases include: 'no room for reasonable doubt', 'on the basis of a balance of evidence', 'on a balance of probabilities', 'with a high degree of probability', 'beyond possibility of reasonable doubt', 'free from any doubt', 'not sufficient…to constitute decisive legal proof', 'falling short of conclusive proof', among others.[26] Stirner suggests that the ICJ applies a 'contextualized standard of proof' and that the standard varies depending on specifics of each case.[27] He further notes that 'the applicable standard of proof correlates with the nature of the allegations made against the respondent state' which in practice means that alleged violations of the Genocide Convention, for example, are serious and require a high level of certainty.[28] One of the judges has, however, criticised the ICJ for lack of clarity on applicable standard of proof in the following words:

> Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court (who already will know they bear the burden of proof) as to what is likely to satisfy the Court… The principal judicial organ of the United Nations should […] make clear what standards of proof it requires to establish what sorts of facts.[29]

The ECtHR articulated the applicable standard of proof at the Court for the first time in the case of *Ireland v. the United Kingdom* noting that 'the Court adopts the standard of proof beyond

[25] Rüdiger Wolfrum, 'Taking and Assessing Evidence in International Adjudication' (n 5), 342-343.
[26] K Del Mar (n 3) 99; Riddell & Plant (n 20) 127; Ruth Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6 Law and Practice of International Courts and Tribunals 119, 124-129.
[27] T Stirner, *The procedural law governing facts and evidence in international human rights proceedings: developing a contextualized approach to address recurring problems in the context of facts and evidence* (Brill, 2021), 124-125.
[28] ibid 125.
[29] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ (6 November 2003) (2003) ICJ Reports 2003, Separate opinion of Judge Higgins, para 33.

reasonable doubt but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumption of fact'.[30] Importantly, the Court clarified in *Nachova and Others v. Bulgaria* that this standard is not similar to that applicable in criminal cases at the domestic level, the distinction being that:

> Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof.[31]

In the same case, and related to standard of proof, the ECtHR determined that the level of persuasion necessary for reaching a particular conclusion is 'intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake'.[32] In this regard, it can be observed that the ICJ and ECtHR seem to concur on application of a contextualised standard of proof. Further, the ECtHR has observed that in its approach to evidence and proof there are

> …no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions.[33]

Importantly, the European Court has also stated that in its determinations on proof it does take into account the difficulties that applicants may encounter in accessing evidence. In *Merabishvili v. Georgia*, the Court observed that 'it is sensitive to any potential evidentiary difficulties encountered by a party'.[34]

Turning to the IACtHR, the literature reveals a similarly flexible approach to application of standards of proof. Álvaro Paúl has pointed out that the Court rarely refers to standard of proof and where it has explicitly done so, this is attributable to mistranslation of English versions of its judgments. He adds that lack of reference to standard of proof at the Inter-American Court is explained by the strong influence from civil law tradition 'where this notion is largely absent'.[35] Discussions on standard of proof at the IACtHR often refer to the *Velásquez-Rodríguez* case where

[30] *Ireland v. the United Kingdom* ECHR (18 January 1978) App No. 5310/71, para 161.
[31] *Nachova and Others v. Bulgaria* ECHR (6 July 2005 - GC) App No. 43577/98 and 43579/98, para 147
[32] ibid.
[33] *El-Masri v. The Former Yugoslav Republic Of Macedonia* ECHR (13 December 2012) App No. 39630/09) para 151.
[34] *Merabishvili v. Georgia* ECHR (28 November 2017) App No. 72508/13 para 315.
[35] Á Paúl, 'In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights' (2012) 55 Revista Instituto Interamericano de Derechos Humanos 57, 60.

the Court appears to have articulated a distinct standard of 'proof in a convincing manner'.[36] The Court's standard has also been said to be somewhere between preponderance of evidence and proof beyond reasonable doubt.[37] Related to the applicable standard of proof, the Inter-American Court has determined that it also considers circumstantial evidence, indications and presumptions 'so long as they lead to conclusions consistent with the facts'.[38] Stirner notes that two important insights can be drawn from the *Velásquez-Rodríguez* case on the applicable standard of proof at the Court. First, that the Court avoids a rigid rule and retains some level of discretion and second, that this discretion is applied to modify the applicable standard of proof depending on the facts of each case.[39] Amerasinghe draws parallels between the ICJ and the IACtHR on the requirement of 'convincing evidence'. As regards the degree of certainty needed by both courts he observes that the evidence 'need not point to absolute certainty as such but must be convincing'.[40] It is important to note, however, that although the IACtHR rejected a rigid approach in the *Velásquez-Rodríguez* case, it still found that it 'must determine what the standards of proof should be in the instant case'.[41] Arguably, the Court implicitly distinguished useful flexibility from being indeterminate on the question of standard of proof, which this study argues is undesirable.

Regarding the African Commission, Rachel Murray has observed that the standard of proof is lower at the admissibility stage, that is, the claimant has to establish a *prima facie* case, although what constitutes this is not clear.[42] The Commission has however dismissed cases at the admissibility stage for failure to state which violations were suffered or for being vague, incoherent or lacking specificity.[43] At the merits stage, Murray points out that the Commission invokes different standards such as that 'allegations be valid and logical', that there is 'concrete or compelling evidence' and that 'there is evidence from all appearances'.[44] By the fact that some communications are declared admissible and eventually dismissed at the merits stage, Murray concludes that this suggests that 'something more is required than a *prima facie* case' for a claimant to succeed at the merits stage.[45] The issue of standard of proof at the admissibility stage was extensively argued upon

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[36] Amerasinghe (n 1), 239; R Murray, 'Evidence and Fact-finding by the African Commission' in Evans M & Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2008), 161.
[37] Amerasinghe (n 1), 239.
[38] *Godínez Cruz v. Honduras* IACHR (20 January 1989) Case No. 8,097 para 136.
[39] Stirner, (n 27) 138.
[40] Amerasinghe (n 1), 241.
[41] *Velásquez-Rodríguez v Honduras* IACHR (29 July 1988) Ser C No. 4 para 127.
[42] Murray 'Evidence and Fact-finding by the African Commission' (n 36), 159.
[43] ibid.
[44] Murray 'Evidence and Fact-finding by the African Commission' (n 36), 160.
[45] ibid 160; Also see F Viljoen & C Odinkalu *The Prohibition of Torture and Ill-treatment in the African Human Rights System: A Handbook For Victims And Their Advocates* (Vol. 3, 2014), 98, where the authors note the Commission requires at the admissibility stage 'some prima facie evidence of an attempt to exhaust local remedies'. Other authors note that 'the author of the Communication must definitively convince the Commission as to the veracity of the claims made therein'

in a Communication before the Commission in the case of *Mohammed Abdullah Saleh Al-Asad v. Djibouti*. In its inquiry on compliance with the admissibility condition under Article 56(2) of the African Charter (that Communications must be compatible with the Charter), the Commission determined that complainants only need to make out a *prima facie* case regarding 'compatibility *ratione materiae'*. This, according to the Commission, was because 'the alleged violations would be substantively revisited with more rigour at the merit stage'.[46] However, the Commission took the view that the complainant needed to 'conclusively substantiate' his case regarding 'compatibility *ratione temporis'*, 'compatibility *ratione personae',* and 'compatibility *ratione loci*'.[47] The threshold of proof here seems to be that of beyond reasonable doubt, an unusually high standard in considering admissibility.[48]

Lastly, the Human Rights Committee is said to apply 'something approximating to proof on a balance of probabilities rather than a beyond reasonable doubt standard' and further that 'there may be some flexibility within this standard depending on the seriousness of the allegations involved'.[49] Stirner observes that the Committee undertakes very limited fact-finding and a very high standard of proof would render the communication procedure ineffective and adds that it has refrained from adopting a specific standard but it does occasionally make reference to 'compelling evidence'.[50] A relevant observation here is that a similar criterion of 'compelling evidence' is applied as the standard of proof by the Working Group on Arbitrary Detention when it sits as a complaints body.[51]

A common thread from the international practices as seen above is discernible. International courts and treaty bodies do not favour a rigid approach to application of standards of proof. The nature of facts and allegations in a particular case determine the standard of proof to be applied. There are, nonetheless, notable distinguishing features. The ECtHR has adopted an often cited 'rule' on what the applicable standard is (beyond reasonable doubt) even while in practice insisting that the demanded standards of proof will vary depending on circumstances of each case. The IACtHR and the Human Rights Committee seem to have solidified an identifiable requirement

– for this see SR Leteipan & M Kamunyu 'Litigating Before The African Commission on Human and Peoples' Rights - A Practice Manual' (2017) a Publication by Equality Now, at 32.

[46] *Mohammed Abdullah Saleh Al-Asad v. Djibouti*, Communication 383/10, para 143.

[47] ibid paras 144-146.

[48] Highlighting of this decision does not, however, suggest that this is the established practice in all admissibility decisions by the Commission. Rather, it illustrates an instance when a higher standard of proof has been required.

[49] D McGoldrick cited in Y Tyagi *The UN Human Rights Committee, Practice and Procedure* (Cambridge University Press 2011), 543.

[50] Stirner (n 27) 143, 147.

[51] Viljoen, 'Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms' (n 6) 77.

for 'convincing evidence' even though this is not consistently required in all cases. The African Commission, for its part, does not seem to have one particular standard but rather a variety of terms used to refer to the applicable standard in each case. Kazazi has observed that 'the fact that the standard of proof is usually not discussed by international tribunals is not justifiable'.[52] This Chapter therefore argues (see section 5.5 below) that there is value in determining what the applicable standard of proof is and this applies both to when a tribunal has a general or well established rule on the standard to be applied and when standards are determined based on peculiarities of each case. With the above context in mind, the following section examines how the African Court applies standards of proof and how similar or different its practices are to international practices as highlighted above.

5.4 Applicable standards of proof at the African Court

On the face of it, the issue of the applicable standard of proof at the African Court appears settled because the Court has identified this as the 'preponderance of evidence' in one of its publications.[53] However, the said publication only addresses the standard of proof in reparations claims. Prior to adoption of the new Practice Directions in 2024 which clarify that the applicable standard is preponderance of evidence in all proceedings, there was silence on whether this standard was also applicable in admissibility and merits decisions. A word search for the phrase 'preponderance of evidence' or its equivalent, namely, 'balance of probabilities' in the four available African Court Law Reports covering judgments and orders of the Court from 2009 to 2020 reveals that the Court has not expressly used these phrases in any case.[54] This is the same for all decisions of the Court from 2021 to 2024 and my conclusion is that the formally declared or endorsed standard of proof at the African Court has not explicitly been referred to or analysed in the Court's case law. Instead, the Court has developed a practice of referring to some words and phrases that point to the Court determining the degree of persuasion expected, established or lacking in its analysis of evidence or expected proof. Notably, some literature suggests that reference to terms such as 'sufficiency' and 'reasonableness' of evidence by international courts has been understood to indicate that the standard being applied is preponderance of evidence.[55] In practice, as this section will demonstrate, the African Court not only uses such terms that allude to application of the preponderance of evidence standard but has also used others that suggest application of the lower *prima facie* standard,

[52] Mojtaba Kazazi (n 18) 325.
[53] Fact Sheet on Filing Reparation Claims (Revised October 2020), available on the Court's website.
[54] The reports can be found at https://www.african-court.org/wpafc/african-court-law-reports/ (accessed 24 July 2023).
[55] Wilkinson (n 12) 49.

the higher standard of 'clear and convincing evidence' and even required what seems like absolute or conclusive proof and therefore applied the beyond reasonable doubt standard. This section will show that applying a high standard of proof in the highlighted instances is detrimental to protection of human rights through the platform of the Court. The express and implicit application of these four standards is discussed below.

5.4.1 *Prima facie*

As seen earlier, the *prima facie* standard requires a low degree of satisfaction and indicative evidence of the proposition claimed suffices. Three cases illustrate application of this standard in admissibility decisions by the African Court, suggesting its preference to applying this lower standard at the admissibility stage. In the *Peter Joseph Chacha v. Tanzania* case, the Court seemed to have applied different standards of proof on two admissibility requirements, namely, compatibility with the AU Constitutive Act and the Charter on the one hand and exhaustion of local remedies on the other. On the first, the Court applied the *prima facie* standard, noting that the applicant's stated facts 'revealed a *prima facie* violation of his rights … therefore, the requirements of Article 3(1) of the Protocol and Article 56 (2) of the Charter [had] been met'.[56] On the requirement to exhaust local remedies, the Court relied on the decision of the African Commission in *Anuak Justice Council v. Ethiopia* where the Commission had faulted the complainant for not having provided 'concrete evidence or demonstrated sufficiently' that his apprehensions on the effectiveness of local remedies constituted a barrier to exhausting these remedies and that he was simply 'casting aspersions' based on 'isolated or past incidence'.[57] The Court has adopted this position by the Commission in other cases[58] and its references to 'concrete evidence' or 'sufficiency' of evidence suggest it may have required something more than a *prima facie* threshold.

A second example of a case in which the Court applied the *prima facie* standard is in *Leon Mugesera v. Rwanda*. This case appears to have established a general rule on the applicable standard of proof where it has to issue a default judgment for non-appearance by the respondent State. The Court noted that 'failure by one of the parties to appear before it does not exempt the applicant from having to prove his case, and adduce evidence, even if *prima facie*, to render the allegations credible'.[59] In the same case and on the question of exhaustion of local remedies, the Court

[56] *Peter Joseph Chacha v. Tanzania*, Application No. 003/2012, Ruling of 28 March 2014, para 123.
[57] *Anuak Justice Council v. Ethiopia,* Communication No. 299/05, para 58 cited in *Peter Joseph Chacha v Tanzania* (n 56), para 144. This position was also adopted by the Court in *Diakite Couple v. Mali*, Application 009/2016, Ruling of 28 September 2017) para 53; See also *Peter Joseph Chacha v Tanzania* (n 56), para 143 citing Communication 263/02 *Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v Kenya*.
[58] *Diakite Couple v. Mali* (n 57), para 53; See also *Peter Joseph Chacha v. Tanzania* (n 56), para 143 citing *Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v. Kenya* Communication 263/02.
[59] *Leon Mugesera v. Rwanda*, Application No. 012/2017, Judgment of 27 November 2020, para 44.

observed that when an applicant adduces *prima facie* evidence in support of claims of having exhausted local remedies, the burden of proof shifts to the respondent State. In the absence of evidence from the State to the contrary, the Court concluded that 'it [had] no reason to consider that the domestic remedies were not exhausted'.[60] The third example is in the Court's decision in *Kijiji Isiaga v. Tanzania* where the admissibility condition in question was whether the application was filed within reasonable time. In this case, the Court accepted a period of two years and 11 months as reasonable because the applicant was 'a lay, indigent and incarcerated person without the benefit of legal education or assistance' and these circumstances made it '*plausible* that the applicant may not have been aware of the Court's existence and how to access it'.[61] Some literature associates this plausibility test with the *prima facie* standard. Wolfrum, for example, suggests that when an international tribunal is applying the standard of *prima facie* evidence, it is in fact assessing 'whether the application meets a plausibility test on the basis of the evidence submitted in its support'.[62] A final note on the application of the *prima facie* standard at the African Court is that besides admissibility decisions as highlighted above, in cases where respondent States do not submit responses to applications, the African Court has adopted the position that if the applicant adduces *prima facie* evidence of a violation, the claim will succeed.[63]

5.4.2 Preponderance of evidence

Research on the ICJ's application of standards of proof shows that this Court uses terms such as 'sufficient', 'convincing' and 'conclusive' while referring to evidence and it has been noted that the terms are used 'indiscriminately to describe a fact or argument which [the Court] consider[s] to have been proven'.[64] A similar practice applies at the African Court where it has, for example, referred to the need for applicants to 'substantiate' claims, 'sufficiency' of evidence and 'satisfactory' explanations. From the cases highlighted below, I suggest that the different terms used by the Court in assessing whether the standard of proof has been met generally points towards application of the preponderance of evidence standard.

In *Alex Thomas v. Tanzania*, the Court established what can loosely be said to be the general rule regarding the threshold of proof needed to establish claims. It stated that 'general statements to the effect that a right has been violated is not enough. More substantiation is required'.[65] This has

[60] ibid, paras 33-34.
[61] *Kijiji Isiaga v. Tanzania*, Application No. 032/2015, Judgment of 21 March 2018, para 55.
[62] Wolfrum, 'Taking and Assessing Evidence in International Adjudication' (n 5), 355.
[63] *Armand Guehi v. Tanzania*, Application No. 001/2015, Judgment of 7 December 2018, para 133-134; *Leon Mugesera v Rwanda* (n 59) para 44.
[64] Riddell and Plant (n 20) 129.
[65] *Alex Thomas v. Tanzania*, Application No. 005/2013, Judgment of 20 November 2015, para 140.

been repeatedly cited in other cases.[66] Importantly, the respondent State equally does not get away with a general denial of the applicant's claims as seen in *Ingabire Victoire Umuhoza v. Rwanda* where the Court took note of the fact that 'the respondent did not refute each of [the] allegations but made a general denial that the allegations of violation of the right to defence are unfounded'.[67] The respondent State was subsequently found to have violated the applicant's right to defence under Article 7(1)(c) of the Charter. In addition, claims by applicants have been dismissed because they were 'not adequately substantiated'.[68] The Court has also found that there was failure to 'satisfactorily explain' the claims.[69] Another common expression by the Court pointing to the required standard of proof is with regard to 'sufficiency' of the evidence.[70] Three decisions illustrate use of this term to indicate the threshold of required evidence. While rejecting a claim for violation of the right to a fair trial in the *Thobias Mang'ara Mango* case, the Court found that 'the applicants [had] not provided sufficient evidence to show that the procedures followed by the domestic courts…violated their right to a fair trial..'.[71] Similarly in *Kijiji Isiaga v. Tanzania* it alluded both to the need to substantiate claims and sufficiency of evidence by pointing out that 'the mere allegation that the Court of Appeal did not properly examine the evidence supporting his conviction is not sufficient to find a violation of his right not to be discriminated. The applicant should have furnished evidence substantiating his contention'.[72] Finally, the Court in *Komi Koutche v. Benin* noted that 'the applicant challenges the efficiency of the entire judicial system of the respondent state without providing sufficient information to prove it'.[73] I observe here that the African Court has not elaborated what 'substantiation' or 'sufficiency' of evidence entails. However, use of these general terms is not limited to the African Court as Judge Buergenthal in his Separate Opinion in the *Oil Platforms* case at the ICJ noted as follows:

> One might ask, moreover, where the test of 'insufficient' evidence comes from …and by reference to what standards the Court applies it? What is meant by 'insufficient' evidence? Does the evidence have to be

[66] See similar holding in the following cases: *Dismas Bunyerere v. Tanzania*, Application No. 031/2015, Judgment of 28 November 2019, para 79; *George Maili Kemboge v. Tanzania*, Application No. 002/2016, Judgment of 11 May 2018, para 51; *Mgosi Mwita Makungu v. Tanzania*, Application No. 006/2016, Judgment of 7 December 2018, para 70; *Landry Angelo Adelakoun And Others v. Benin*, Application No. 012/2021, Judgment of 4 December 2023, para 41.
[67] *Ingabire Victoire Umuhoza v. Rwanda*, Application No. 003/2014, Judgment of 24 November 2017, para 97.
[68] *Kijiji Isiaga v Tanzania*, (n 61) para 86; *Majid Goa alias Vedastus v. Tanzania*, Application No. 025/2015, Judgment of 26 September 2019, para 78.
[69] *Amiri Ramadhani v. Tanzania*, Application No. 010/2015, Judgment of 11 May 2018, para 60.
[70] *Wilfred Onyango Nganyi & 9 Others v. Tanzania*, Application No. 006/2013, Judgment on Reparations of 18 March 2016, para 52; *Thobias Mang'ara Mango & Shukurani Masegenya Mango v. Tanzania*, Application No. 005/2015, Judgment of 11 May 2018, para 95; *Sébastien Germain Marie Aïkoue Ajavon v. Benin*, Application No. 062/2019, Judgment of 4 December 2020, para 203; *Kijiji Isiaga v Tanzania* (n 61)para 90.
[71] *Thobias Mang'ara Mango & Shukurani Masegenya Mango v Tanzania*, (n 70), para 95.
[72] *Kijiji Isiaga v Tanzania* (n 61) para 86; *Majid Goa alias Vedastus v Tanzania* (n 68) para 90.
[73] *Komi Koutche v. Benin*, Application No. 020/2019, Ruling of 25 June 2021, para 93.

> 'convincing', 'preponderant', 'overwhelming' or 'beyond a reasonable doubt' to be sufficient? The Court never spells out what the relevant standard of proof is.[74]

One way to explain the different expressions used by the Court to indicate the required standard of proof is that it uses varied language while assessing proof of facts specific to each case but all these phrases speak to one overall standard of proof that must be met for a party to ultimately succeed in their claims. For a majority of the decisions on merits, the Court appears to be applying the preponderance of evidence standard given the choice of words and the context in which the different expressions highlighted above are used. As earlier mentioned, use of terms such as 'sufficiency' of evidence has generally been understood to imply application of the preponderance of evidence standard.

While the African Court has not been explicit on the applicable standard of proof in decisions, it has clarified its position in one of its publications whose provisions were highlighted in Chapter four. The Court's *Fact Sheet on Filing Reparations* specifies that the applicable standard of proof is 'the preponderance of evidence' in considering reparations claims.[75] According to this publication, this means that 'the applicant carries the burden of providing proof to show that what has occurred is more probable than not'.[76] The Fact Sheet further clarifies that the African Court, as a human rights court, 'is not bound to apply the standard strictly, but like other regional human rights courts may remain flexible, allowing for the circumstances of each case to be considered and remaining sensitive to victim conditions of vulnerability affecting their access to evidence'.[77]

Besides the above-mentioned Fact Sheet, a comparative study commissioned by the Court on the law and practice of reparations for human rights violations also addresses the issue of standard of proof. The study found that some international criminal courts and human rights courts have found that 'the standard of proof required during the reparations phase is one of preponderance of the evidence'.[78] The study further clarifies that application of this standard means victims must show that it is more probable than not that they are entitled to reparations requested and that 'all aspects of reparations claims, including the victims' identities, the harm suffered, and causation,

[74] *Oil Platforms* case (n 29) Separate opinion of Judge Buergenthal, p. 286, para 41.
[75] Fact Sheet on Filing Reparation Claims (n 53) 6.
[76] ibid 6.
[77] As above.
[78] Comparative Study on the Law and Practice of Reparations for Human Rights Violations (2019) 32. Available at https://www.african-court.org/wpafc/wp-content/uploads/2020/11/Comparative-Study-on-the-Law-and-Practice-of-Reparations-for-Human-Rights-Violations.pdf (accessed 24 July 2023)

are subject to this standard'.[79] The study concludes, after a review of practices in a number of courts, that 'institutions with the power to impose binding judgments on reparations generally adopt one of two approaches with respect to the standard of proof, applying either a preponderance of the evidence standard or a flexible case-by-case approach'.[80]

5.4.3 Clear and convincing

The choice of words by the African Court in determining the level of proof required has also pointed towards application of the 'clear and convincing' evidence standard. As seen earlier, this intermediate standard is generally understood to be higher than the preponderance of evidence standard but lower than the beyond reasonable doubt standard. Chapter six of the thesis discusses in greater detail an emerging trend in the more recent admissibility decisions by the Court (2019-2024) where a stricter yet undefined standard of proof has been applied in assessing the admissibility condition of filing within reasonable time. The Court now demands specific proof of the grounds it previously accepted as constituting good justifications to explain delays in approaching the Court. For example, in *Godfred Anthony and Ifunda Kisite v. Tanzania*, it found that a delay of five years and four months was unreasonable, noting that 'although the applicants [were] also incarcerated and thus restricted in their movement, they [had] not asserted or provided any proof that they [were] illiterate, lay, or had no knowledge of the existence of the Court. The applicants [had] simply described themselves as indigent'.[81] In another case, *Livinus Daudi Manyuka v. Tanzania*, it found a delay of five years and six months to be unreasonable, pointing out that '…aside from the blanket assertion of indigence the applicant [had] not attempted to adduce evidence explaining why it took him five years and six months to file his application'.[82] Importantly, regarding standard of proof, the Court required what was a seemingly higher degree of persuasion (than, say, preponderance of evidence) by stating that 'in the absence of any *clear and compelling justification* for the lapse of five years and six months before the filing of the application, the Court finds that this application was not filed within a reasonable time'.[83] Similarly, in *Hamad Mohamed Lyambaka v. Tanzania* the Court concluded that in the absence of 'clear and compelling' justification, the delay of five years and 11 months was unreasonable.[84]

[79] ibid 32.
[80] ibid, 33.
[81] *Godfred Anthony and Ifunda Kisite v. Tanzania*, Application No. 015/2015, Ruling of 26 September 2019, para 48.
[82] *Livinus Daudi Manyuka v. Tanzania*, Application No. 020/2015, Ruling of 28 November 2019, para 54.
[83] ibid, para 55 (my emphasis).
[84] *Hamad Mohamed Lyambaka v. Tanzania*, Application No. 010/2016, Ruling of 25 September 2020, para 50.

In a confirmation that the Court indeed now applies a stricter or higher standard of proof in assessing compliance with the admissibility condition of filing cases within reasonable time, three dissenting judges in the *Igola Iguna v. Tanzania* case acknowledged the following:

> …the Court has taken into consideration circumstances such as imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal and the use of extraordinary remedies as relevant factors to consider whether the delay of an applicant in seizing the Court is justified. **This approach has allowed the Court to employ some flexibility. However, the Court has also, albeit implicitly, adopted a strict standard of proof** to the effect that the longer an applicant delays to file his application, particularly for periods of over five (5) years, the stricter the Court's demand for justification with sufficient substantiation.[85]

Application of a high standard of proof at the admissibility stage has been a contentious issue at the African Commission. An amicus brief by the Centre for Human Rights, University of Pretoria in the case of *Mohammed Abdullah Saleh Al-Asad v. Djibouti* rightly rejected the Commission's application of the beyond reasonable doubt standard at the admissibility stage (instead of the *prima facie* standard) in inquiring whether alleged violations had taken place in the territory of the respondent state (compatibility *ratione loci*) while assessing compliance with Article 56(2) of the Charter.[86] The higher standard of proof, it was argued, was especially unsuitable in an extraordinary rendition case where the State controlled the relevant evidentiary material.[87] Chapter six of the thesis demonstrates how a stricter standard of proof in admissibility decisions has made the African Court less accessible.

Use of terms and phrases that suggest application of a standard higher than the preponderance of evidence is not limited to admissibly decisions as seen above but has also applied in determining merits. One instance that can be highlighted in this regard is where applicants before the African Court allege that judges in national courts were biased. In the *Alfred Agbesi Woyome v. Ghana* case for example, the Court established the principle that 'the impartiality of a judge is presumed and *undisputable evidence* is required to refute this presumption'.[88] On a similar claim in the case of

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[85] *Igola Iguna v. Tanzania*, Application No. 020/2017 Judgment of 1 December 2022, Joint Dissenting Opinion of Justices Ben Kioko, Dennis Dominic Adjei and Tujilane Rose Chizumila, para 16-17 (my emphasis).
[86] Amicus Curiae Submission by the Centre for Human Rights, University of Pretoria and others in the case of *Mohammed Abdullah Saleh Al-Asad v Djibouti* (n 46) paras 17-19.
[87] ibid, para 19.
[88] *Alfred Agbesi Woyome v. Ghana*, Application No. 001/2017, Judgment (28 June 2019) para 128 (my emphasis in italics). Justice Niyungeko in his dissenting opinion in this case thought the majority expected the applicant to adduce impossible proof since 'he cannot access the deliberations of the Court which occur naturally in private session and are covered by the principle of confidentiality', see para 18 of the dissenting opinion of Judge Gerard Niyungeko; reference to 'undisputable evidence' is also made in regard to a similar claim in *Landry Angelo Adelakoun And Others v.*

Sébastien Germain Marie Aïkoue Ajavon v. Benin, the Court stated that 'the impartiality of a judge is presumed and […] *compelling evidence* is needed to rebut this presumption'.[89] In another case, *Fidele Mulindahabi v. Rwanda*, the applicant had claimed that two judges of Rwanda's Supreme Court were not impartial and the Court took the view that such claims 'must be *irrefutably proven* by the party alleging it'.[90] Closely related to this, the Court has also held that an applicant who claimed that Mali's Electoral Management Body had not compiled the electoral list in a transparent manner was required to adduce evidence 'corroborated by *irrefutable proof* '.[91]

The Oxford Dictionary of English definition of the term 'undisputable' is 'unable to be challenged or denied' and 'irrefutable' means 'impossible to deny or disprove' while 'compelling' means 'not able to be refuted'.[92] Given this choice of words by the African Court in reference to required level of proof, my argument is that the Court in these instances applies a higher standard of proof than preponderance of evidence. Use of phrases such as 'undisputable evidence', 'compelling evidence' and 'irrefutable proof' suggests application of a standard proximate to the beyond reasonable doubt standard. The alternative view is that at the very least, these phrases imply application of the intermediate standard of 'clear and convincing evidence', meaning a lower threshold than the beyond reasonable doubt standard but certainly something more than the preponderance of evidence applies. So far, no applicant at the Court has succeeded in the claim of a biased judicial officer in domestic proceedings and it thus appears that the threshold of 'undisputable evidence' or 'irrefutable proof' is a difficult one to meet and arguably explains the 100% failure rate by applicants on this claim.

In an interview with a judge of the Court, I asked whether the Court raises or lowers the standard of proof depending on the issue before the Court. The judge acknowledged that 'the standard possibly fluctuates' but added that the general understanding at the Court is that the applicable standard of proof is the balance of probabilities because matters before the Court are civil in nature (and not criminal).[93] This, however, is not a shared view among all judges. Another judge I interviewed took the view that the Court's standard of proof oscillated 'between preponderance of evidence and convincing proof' and that the standard applied 'depends on what the issue is, the

Benin, Application No. 012/2021, Judgment of 4 December 2023, para 40 and in *Amini Juma v. Tanzania*, Application No. 024/2016, Judgment of 30 September 2021, para 113.

[89] *Sébastien Germain Marie Aïkoue Ajavon v Benin*, Application No. 062/2019, Judgment (4 December 2020) para 293 (my emphasis in italics).

[90] *Fidele Mulindahabi v. Rwanda*, Application No. 004/2017, Judgment of 26 June 2020, para 70 (my emphasis).

[91] *Oumar Mariko v. Mali* Application No. 029/2018, Judgment (24 March 2022) para 153 (my emphasis).

[92] Angus Stevenson (ed), *Oxford Dictionary of English* (3rd edn, OUP, 2010).

[93] Interview with Judge No. 1 of the African Court (Arusha, 22 March 2022).

claimed violations as well as what is prayed for by the applicants'.[94] A third judge while acknowledging application of the 'clear and convincing' standard listed five factors that determine whether a 'higher' or 'lower' standard of proof will be applied at the Court. According to this judge:

> In some instances, the Court has had to use clear and convincing evidence such as when a party is disputing the other party's submissions given that most proceedings before the Court involve the applicant merely stating a fact or allegation and respondent having to rebut; accordingly, whether the Court applies a lower or higher evidentiary standard usually depends on i) whether there is a dispute between the parties on an issue; ii) if the case is being considered *ex parte* and may lead to a default judgment; iii) if the allegations are serious and may lead to findings and orders that will involve high commitments for the respondent; iv) if the issues arising are sensitive or relate to matters that touch on critical issues involving the internal operation of the state; v) whether the case is complex.[95]

As with admissibility decisions, the Court seems to apply more than one standard of proof in merits decisions and this was confirmed by feedback from my interviews at the Court. The above views by the judge suggest that the Court applies a stricter standard when it considers claims to be more consequential (for the State) in their nature, such as allegations of a biased domestic court or electoral management body as seen above. This proposition is supported by the observation made by the Court in the *Alfred Agbesi Woyome* case where it stated that:

> whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding.[96]

While requiring more cogent proof for what it considers to be more 'serious' claims is reasonable and consistent with international practice, I suggest that it would be helpful to litigants if the African Court was more explicit on when it raises the standard of proof and for what types of claims, even if this is done within the facts of each decision. Related to this, I contend that part of its case management should entail a routine of asking for additional evidence where such claims

[94] Interview with Judge No. 2 of the African Court (Arusha, 24 March 2022).
[95] Interview with Judge No. 6 of the African Court (Arusha, 23 May 2022). This judge shared written responses after the oral interview. This response is lifted from the written answers to a question on standards of proof.
[96] *Alfred Agbesi Woyome v. Ghana* (n 88) para 128. The Court was citing Okpaluba & Juma 'The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa' (2011) 14(7) *Potchefstroom Electronic Law Journal* 261.

are made, before a final determination on whether the anticipated cogent proof establishes the claim. I elaborate on this suggestion further in section 5.5.

A similarly higher standard of proof seems to be applied by the Court in cases where the applicant prays for release from prison as part of their reparations claims. In *Alex Thomas v. Tanzania* the Court observed that 'an order for the applicant's release from prison can be made only under very specific and/or compelling circumstances'.[97] This position was restated in *Mohamed Abubakari v. Tanzania*, where the Court again declined to grant an order for release of the applicant from prison, stating that 'such a measure could be ordered by the Court itself only in special and compelling circumstances'.[98] One author has noted that the Court has 'only provided small insights into what would constitute special and/or compelling circumstances' and as a result inadvertently 'created a hierarchy of fair trial rights in Article 7'.[99] This is because it finds some violations under Article 7 (such as failure to provide accused persons with legal representation or be tried within reasonable time) not to constitute special or compelling reasons to warrant orders that applicants be released from prison and finds this threshold met in other violations (such as denial of right of appeal).[100] In an interview with an officer of the Court, I asked why the Court did not order release of applicants in the *Alex Thomas* and *Mohamed Abubakari* cases and the response was that 'the Court thought it would have been going too far to order a release'.[101] This perhaps shows the convergence of legal and extra-legal considerations in determining what standard of proof to apply. Notably, the Court has in more recent decisions ordered release of applicants having found that they had established the 'special and compelling' circumstances such as detention for six years after conclusion of prison term[102] and failure to avail certified copies of proceedings that prevented an applicant from lodging an appeal for 20 years.[103] From the decisions discussed above, it is clear that for an applicant to be successful in some types of claims or requests for orders on some specific types of reliefs, they must prepare to meet the 'clear and convincing evidence' standard and which essentially entails proving extraordinary circumstances. There is little doubt, in my view, that the Court in such circumstances employs a higher standard than the preponderance of evidence standard.

[97] *Alex Thomas v Tanzania* (n 65) para 157.
[98] *Mohamed Abubakari v. Tanzania*, Application No. 007/2013 Judgment of 3 June 2016, para 234.
[99] Misha Ariana Plagis, 'The Makings of Remedies: The (R)Evolution of the African Court on Human and Peoples' Rights' Remedies Regime in Fair Trial Cases' (2020) 28 African Journal of International and Comparative Law 45, 68.
[100] ibid.
[101] Interview with Registry Member No. 4 of the African Court (Arusha, 12 April 2022).
[102] *Robert John Penessis v. Tanzania,* Application No. 013/2015, Judgment of 28 November 2019, paras 163-164.
[103] *Mgosi Mwita Makungu v Tanzania* (n 66) paras 84-86.

A concluding note to the discussion in this section is that based on the Court's decisions and interview data, it can be inferred that one of the reasons for the Court's application of a stricter standard of proof such as 'clear and compelling evidence' is to cater to State's interests or concerns. A judge I interviewed (cited earlier) pointed out two factors that inform whether a higher or lower standard of proof is applied and which justify this inference. According to this judge, the Court's choice depends on whether the finding or order 'will involve high commitments for the respondent' and whether the issues are 'sensitive or relate to matters that touch on critical issues involving the internal operation of the State'.[104] In another interview, a Registry member faulted the Court's deference to the State for not having ordered release of applicants even when this would have been justified. The member observed as follows:

> By the time the Court first agreed that it has the power to order release of someone who had wrongfully been detained in *Mgosi Mwita*, it had two to three very good candidates in terms of cases where it could have made those orders. But it labours to say all sorts of things and saying 'we leave it to the discretion of the State'.[105]

In view of the above, one could argue that when the stakes are high (for the State), the Court has in some cases resolved the competing interests of an applicant and the State in favour of the latter, regardless of the fact that there is overwhelming evidence for a finding in favour of the applicant. Even when the Court has found the threshold of 'clear and convincing evidence' to be met, this appears to be reserved for cases where there is evidence of extraordinary circumstances and brazen disregard for procedural rights. It is suggested that this evidentiary stance by the Court is in need of reform. Section 5.5 gives some insights as to how an equitable applicant-centred approach to application of standards of proof could look like and importantly, lead to fairer decisions by the Court.

5.4.4 'Higher' but unarticulated standard in reparations proceedings

Information from interviews conducted with judges and registry staff suggests that there are instances when the Court requires absolute or conclusive proof in support of certain claims, particularly in reparations decisions. The Court's approach to evidence matters in reparations claims is discussed in greater detail in Chapter seven, but this section highlights interview data that points to the application of a 'higher' but undefined standard of proof. One of the judges I interviewed held the view that, in practice, the Court expects applicants to meet a higher standard

[104] Interview with Judge No. 6 of the African Court (Arusha, 23 May 2022).
[105] Interview with Registry Member No. 2 at the African Court (Arusha, Tanzania, 15 August 2023).

of proof in reparations claims but it 'has not defined what kind of higher standard it is'. According to the judge, this is particularly the case because 'unless there is a document, the Court tends to say there is no proof'.[106] Similar views were expressed by a member of the Registry who observed as follows:

> If it is emerging that there is more than one standard of proof, this is based on the circumstances of each case, each applicant and the subject matter of the case. If you are dealing with procedural issues for example, that would be a different standard as opposed to dealing with merits or provisional measures. And I think the more stringent one is related to reparations particularly the pecuniary aspects.[107]

There was also the view that the level of the standard of proof applied is incremental and depends on the stage of the proceedings. A different member of the Registry whom I interviewed expressed this view:

> The standard increases depending on the stage. In [considering] jurisdiction, the Court is not very strict. It simply looks at whether, say on material jurisdiction, has the applicant mentioned any violation. Even if you do not cite any of the provisions of any international instruments, the mere fact that you have mentioned that your right has been violated is enough. In admissibility, the Court insists that you show you have exhausted local remedies. To prove this, [applicants need to] show judgments up to the highest court to prove that [they] have exhausted local remedies. In merits, where the real allegations are being considered, the Court adopts a stricter standard. And then in reparations, especially when claiming pecuniary reparations, the Court insists on you proving certain things like expenditures, receipts and things like that. So the standard becomes steeper as you move towards issues of reparations.[108]

From the above reflections by those at the Court it remains unclear, to use their words, what the 'higher', 'stringent' or 'steeper' standard is. The *Wilfred Onyango Nganyi* case perhaps gives a pointer to how this raised standard applies in actual cases. The Court found that a business contract, business licence or delivery notes are not sufficient proof of loss of income and that applicants ought to also submit further evidence such as bank statements or tax certificates to prove income earned from business.[109] It rejected the applicants' reasons for not availing required evidence, namely, that 'receipts were misplaced due to long passage of time', finding that this explanation

[106] Interview with Judge No. 1 of the African Court (Arusha, 22 March 2022).
[107] Interview with Registry Member No. 6 of the African Court (Arusha, 30 May 2022).
[108] Interview with Registry Member No. 4 of the African Court (Arusha, 12 April 2022).
[109] *Wilfred Onyango Nganyi & 9 Others v. Tanzania* (n 70) paras 30-43.

was 'not sufficient proof'.[110] My contention is that if the Court was guided by the measure that a fact is established if it is 'more probable than not' it should have found that the applicant who presented a business contract, licence and delivery notes as evidence was more likely than not earning income from it. This would arguably be a more equitable approach to evidence because the applicant made the plausible argument that he lost evidence owing to his long stay in prison. By rejecting the applicant's claim for loss of income in these circumstances and being very particular on required documentary proof, the Court was applying the higher 'clear and convincing' standard. One could even argue that it implicitly made use of the 'beyond reasonable doubt' standard by demanding conclusive proof.

One author has suggested that the Court's approach to evidence in considering claims for reparations is in need of reform. He proposes that the Court should review its approach to standards of proof in reparations claims and observes that:

> …the unsuccessful claims for reparation, however, may be a call for the Court to relax its standards of proof for material damages or the filial link between the indirect victim and the applicant. After several years behind bars, it may be impracticable to certain applicants to adduce documentary proof. The Court may resort to a case-by-case analysis of reparation claims in each case taking into account the particularities of the case and the situation of the complainant.[111]

The dissenting opinion in *Joseph John v. Tanzania* by Justice Chafika gives an idea of how this suggested relaxation of the standard of proof in reparations decisions could look like. In this case, she observed as follows

> …the Court dismissed the request for reparation on the ground that the applicant did not prove his relationship with the alleged victims. It is for this reason that I make this Opinion which restates my consistent position as regards the issue of evidence not filed by the parties, especially the applicant. It is my position that the Court must always compel the parties to file documents in support of the alleged violation of rights, instead of simply dismissing the request without first trying to use its power to have the parties file the documents.[112]

[110] ibid para 52.
[111] TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and lessons' (2021) 21 African Human Rights Law Journal 1230, 1246.
[112] *Joseph John v. Tanzania*, Application No. 005/2018, Dissenting Opinion (22 September 2022) para 1-2. As the Judge rightly points out, Rule 51 and 55 of the Court's Rules allows the Court to be proactive in requiring evidence from parties.

Justice Chafika is essentially calling for a more proactive African Court on the question of evidence, which would translate to the Court exhausting its administrative mechanisms in management of cases (to request for more evidence) before dismissing claims for lack of evidence or failure to adduce sufficient evidence. This in my view is a good example of an equitable applicant-centred approach to application of the standard of proof by adoption of a measure that ensures the standard is not an impossible one to meet for most applicants. If such an approach is consistently applied, I suggest that more reparation claims would be determined on the basis of evidence rather than lack of evidence. This is particularly the case where applicants can produce the evidence required by the Court, if directed to do so, and in the process avoid dismissing claims for lack of evidence.

5.5 How could an equitable applicant-centred approach to standards of proof look like?

With the above discussion of the African Court's practices of applying fluctuating standards of proof, this section sums up some propositions on why clarity on applicable standards of proof at the Court matters. I also suggest two ways in which this clarity and fairness (particularly from the applicant's standpoint) in applying standards of proof can be enhanced and in a more coherent and principled approach. As the African Commission has observed, 'pitching the appropriate standard of proof is germane to the validity of the conclusion to be derived'.[113] The reviewed literature equally supports the need for clarity on the issue. Wolfrum notes that while being explicit on the standard of proof does not rid judgments of subjectivity, 'identifying the standard of proof and explaining why a particular conclusion was reached provides for more transparency and forces the adjudicating body to deal with this point intensively in its deliberations'.[114] Roberts has observed that the flexibility favoured by international human rights courts on questions of the burden and standard of proof is a welcomed feature because it allows them to 'adjust their standards to the distinctive features of each individual case' and therefore avoid dismissing cases on formal technicalities. However, he adds that lack of clarity on applicable standards makes it possible for 'claims to be inappropriately dismissed, should the deciding body not take fully into account externally-imposed limitations on the evidence a claimant is able to bring forward'.[115] In his view, greater clarity would avoid 'more disparate range of results' from these courts and 'ensure

[113] *Mohammed Abdullah Saleh Al-Asad v. Djibouti* (n 46) para 142.
[114] Wolfrum, 'Taking and Assessing Evidence in International Adjudication' (n 5), 355.
[115] Christopher Roberts, 'Reversing the burden of proof before human rights bodies' (2021) 25 The International Journal of Human Rights, 3.

fairer and more consistent outcomes'.[116] In view of the above arguments, which I agree with, this study makes two proposals with regard to standards of proof at the Court which suggest how the African Court could apply an equitable applicant-centred approach to the issue. These proposals are also reflected in the new practice Directions adopted by the Court in March 2024 (which are a product of this study).

First, the study proposes that the Court should consistently take into account difficulties applicants face in accessing evidence, especially in reparations claims, and calibrate the applicable standard of proof accordingly. As feedback from my interviews with some judges and officers at the Court showed, a strict approach to evidence applies in reparations claims and in most cases applicants without supporting documents are unsuccessful in their claims. Practices at the Inter-American Court where flexibility has, for example, extended to awarding reparations on condition that missing evidence is provided to relevant authorities *after* the judgment can inspire the African Court.[117] To the Court's credit, it has exercised flexibility in some reparations decisions where applicants had difficulties accessing evidence.[118] However, inconsistencies in this regard still require the Court's attention.[119] The new Practice Directions provide that a party who cannot adduce documentary evidence is allowed to provide an explanation for the unavailability of documentary evidence and give oral evidence instead. In addition, there is clarification that the Court can 'take into consideration the difficulties experienced by a party in obtaining evidence in support of their claims'. It can also waive the requirement to adduce evidence if there is an unreasonable burden to produce such evidence or where loss or destruction of documentary evidence is shown to have likely occurred.[120]

Second, it is suggested that the Court should clearly communicate its evidence requirements in each case to make it possible for applicants to prepare to meet the fluctuating standards of proof, whether this is with regard to a particular stage of adjudication or specific claims in a case. In this respect, the study supports the minority view by Justice Chafika (discussed earlier) urging proactivity by the Court in calling for additional evidence where this is required. Rule 51 of the Court's Rules provides that 'during the course of the proceedings and at any other time the Court

[116] ibid 15.
[117] *Case of the Caracazo v. Venezuela,* IACHR, Reparations and Costs (29 August 2002) para 73; *Case Of Gomes Lund Et Al. ("Guerrilha Do Araguaia") v. Brazil* IACHR, Preliminary Objections, Merits, Reparations, and Costs (24 November 2010) para 120.
[118] *Mgosi Mwita Makungu v. Tanzania*, Application No. 006/2016, Judgment on Reparations of 23 June 2023, para 32; *Anudo Ochieng Anudo v. Tanzania*, Application No. 012/2015, Judgment on Reparations, 2 December 2021, para 44.
[119] Chapter 7 discusses these inconsistencies in greater detail.
[120] See paragraphs 11-13 in the Annexture on Evidence Matters in the Court's Practice Directions, 2024.

deems it appropriate, call upon the parties to file any pertinent document or to provide any relevant explanation'. I suggest that given the existence of this Rule, a pro-human rights approach for the Court should be to call for more or specific evidence in every case before it is dismissed for lack of (sufficient) evidence. Commendably, the Court occasionally does this[121] but has not done so consistently. It is important to note that data gathered in interviews during my fieldwork aligns with the identified need to clearly communicate evidence requirements. When I asked a Registry official about what the Court could improve on regarding evidence issues, the response was as follows:

> The Court should give more information to the parties on what is expected. We have tried to do that in terms of availing that study on comparative study on reparations, the reparations factsheet. But maybe we need to break it down some more. That will help the supply side of the information that the Court now has to deal with... The main problem comes from the parties, they don't supply sufficient information or it is not properly set out or argued... So we need to give parties more information in terms of what they are supposed to submit.[122]

In the new Practice Directions issued by the Court, there is an attempt to address the challenge identified above. The document has an elaborate but non-exhaustive list of examples of evidence that the Court accepts to support various claims. The document also reiterates the provisions of the Rules of Court that it may on request by a party or its own motion re-open pleadings to receive additional evidence.[123]

A concluding note on the proposals made is a reality check that is well captured in the observation by Kazazi who points out that the difficulty with the subject of standards of proof in international adjudication 'arises from the fact that in the final analysis the issue, being a subjective measure, is discretionary and subject to human judgment [and] what is acceptable for one person is not necessarily the same for another'.[124] Therefore, the two suggestions made here are by no means exhaustive nor are they the ultimate fix for the fluidity and subjectivity associated with applying standards of proof in adjudication at the African Court or indeed any other court. They could, however, be a useful starting point to fairer and more consistent jurisprudence from the Court.

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[121] See for example, *Anaclet Paulo v. Tanzania*, Application No. 020/2016, Judgment on Merits and Reparations of 21 September 2018, para 16; *Thobias Mang'ara Mango* (n 70), para 8.
[122] Interview with Member 6 of the Registry on 30 May 2022 in Arusha, Tanzania.
[123] Paragraph 25 of the Practice Directions.
[124] Mojtaba Kazazi (n 18), 325.

5.6 Summary

This Chapter set out to examine the practices of the African Court on standards of proof, a subject that is relatively under-researched. It has shown that the Court implicitly applies varying standards and which have to be inferred from the various expressions used by the Court. However, this reality contradicts the legal fiction that the preponderance of evidence is the applicable standard. Placed in the context of international practices, the Chapter has demonstrated that the African Court's approaches are by and large consistent with practices in peer institutions where facts and allegations in each case determine the standard to be applied. The Chapter has highlighted practical implications of the Court's fluidity in applying standards of proof, including uncertainty as to what threshold of proof will suffice for some claims where the Court implicitly applies a higher standard with demands for more cogent proof. Additionally, more reparations claims are dismissed where specific documentary proof is not adduced and this is in line with a general consensus among judges and officers interviewed who acknowledge existence of a particularly strict approach to evidence (or a higher standard of proof) in reparations claims. To address some of these negative implications, the Chapter has discussed two proposals on how an equitable applicant-centred approach to the concept of standard of proof could look like. The first is that the Court should consider exercising greater sensitivity to the difficulties that some applicants have in accessing evidence. The second is to clearly communicate its evidentiary requirements to the parties in the course of proceedings, a measure that would particularly be helpful to applicants. The study contends that these proposals, now incorporated in the recently adopted Practice Directions, hold the promise of fairer and more consistent decisions from the Court if the clarity they have introduced is capitalized on by all parties, including the Court.

CHAPTER 6: How long is (not) too long before filing an application at the African Court? Tracing the evolution of the evidentiary approach in this inquiry and its impact on access

6.1 Introduction

An applicant wishing to litigate a human rights claim at the African Commission or the African Court is required to demonstrate that their communication or application meets the seven admissibility conditions set in Article 56 of the African Charter.[1] The applicant shoulders the initial burden of establishing compliance with all the seven conditions, but the respondent State is also required to substantiate its objections to admissibility. In practice, respondent States most often raise objections to admissibility for alleged non-compliance with two conditions, namely, non-exhaustion of local remedies [Article 56(5)] and failure to submit applications within reasonable time after exhaustion of local remedies [Article 56(6)]. Regarding the former, the inquiry by the Court has often revolved around whether the applicant was heard by the highest domestic court. Given that the Court has established which the highest court in particular respondent States is, it has in most cases routinely dealt with the question of whether local remedies have been exhausted or not and done so with relative ease. In this Chapter, I take particular interest in the latter of the two conditions - examining how the African Court interprets Article 56(6) of the Charter to assess compliance with the requirement to submit applications within reasonable time after exhausting local remedies. This focus is informed by two reasons. First, while examination and interpretation of the other six conditions has resulted in jurisprudence that is largely settled, the Court's assessment of reasonableness of time taken to file applications remains fluid and contentious. The second reason for the narrowed focus is that there is an increase in the number of applications found inadmissible because of undue delay in filing them and the approach to evidence (which I problematise) is the main reason behind this development. Stated differently, out of the seven admissibility conditions, the Court's treatment of evidence in assessment of compliance with Article 56(6) has, based on my case law analysis and review of interview data, generated the most controversy and had the most consequential impact on access to the Court in the recent past.

To develop my arguments in the Chapter, I have analysed all the Court's decisions on admissibility from 2013 when the Court issued its first decision on merits to September 2024. My examination

[1] With respect to the African Court, the admissibility conditions in the Charter are restated in Rule 50(2) of the Court's Rules

raises the concern that the African Court's approach to evidence in interpreting reasonableness of time taken to approach it is increasingly restricting access to the Court. This has compounded an already complex path to accessing the Court as other research shows.[2] The Court's practices on admissibility and the enabling legal framework are relatively well studied.[3] However, evidentiary practices in this area and their link with accessibility of the African Court in general remains under-researched. By focusing on the Court's assessment of compliance with Article 56(6) of the Charter from an evidence standpoint, this Chapter contributes to the filling of this gap. Chapter two of the thesis discussed in greater detail the challenges related to accessing the African Court. In view of that background, I contend in this Chapter that it should cause concern if the Court's interpretation approaches further complicate this reality. Discussions in this Chapter suggest that the Court's assessment of evidence while determining reasonableness of time taken to file cases should be informed by this context if it is to arrive at fairer decisions.

In terms of structure, this introduction is followed by a discussion of the rationale for the admissibility rule on filing within reasonable time in section 6.2 while section 6.3 examines how the African Commission, established prior to the Court, has interpreted reasonableness of time and how its approach has evolved in a strikingly similar way to that of the Court. Section 6.4 then studies the jurisprudence of the Court in interpreting and applying Article 56(6) of the Charter before providing, in section 6.5, a summary of the evidentiary difficulties faced by applicants in establishing reasonableness of time taken to submit applications. Section 6.6 shows how evidentiary practices on Article 56(6) have affected access to the Court after which I suggest a different approach to evidence assessment in section 6.7. A summary of the Chapter is provided in section 6.8.

6.2 Why must applications be filed within a reasonable time?

To start off the discussion on interpretation and application of Article 56(6) and the related evidentiary approaches, this section examines the rationale behind the rule requiring applicants to file applications within reasonable time after exhaustion of local remedies.

[2] See discussions in Chapter two.

[3] Some of the examples include: Solomon Ebobrah, 'The Admissibility of Case before the African Court on Human and People's Rights: Who Should Do What' (2009) 3 Malawi LJ 87; Lilian Chenwi, 'Exhaustion of Local Remedies Rule in the Jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 Human Rights Quarterly 374; Mwiza Jo Nkhata, 'Res Judicata and the Admissibility of Applications before the African Court on Human and Peoples' Rights: A Fresh Look at Dexter Eddie Johnson v. Republic of Ghana' (2020) 19 Law & Practice of International Courts and Tribunals 470; Mwiza Jo Nkhata 'What counts as a 'reasonable period'? An analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications' (2022) 6 African Human Rights Yearbook 129-153.

The Charter, the Court Protocol and Rules of the Court have provisions which, read jointly, provide the legal basis for the admissibility rule on timely filing. Article 6(2) of the Court Protocol provides that it 'shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter'. Article 56 of the Charter, drafted before the creation of the Court, refers to the African Commission and lists the admissibility conditions to be met before communications are considered by the Commission. Specifically, Article 56(6) provides that communications shall be considered if they 'are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter'. One author, Ebobrah, has suggested that the second limb of Article 56(6) is redundant because 'if the Commission is already seized of the matter, it would mean that the communication has been admitted'.[4] Viljoen has however explained that the Commission has established a distinct process of 'seizure' before considering the admissibility of a complaint.[5] Related to this, Rule 50(2)(f) of the Court's Rules which derives from the provisions of Article 56(6) of the Charter adopts a differently worded version of the same admissibility condition by providing that applications filed before the Court must be 'submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter'.

The requirement of timeous filing of applications cuts across all three regional human rights systems. All have legal provisions that anchor this admissibility condition and have explained the reason behind the rule. While the African Charter does not specify the exact time within which to file an application after exhausting local remedies, specific periods are provided in the European and Inter-American systems. Under Article 35(1) of the European Convention on Human Rights, the ECtHR only admits applications filed 'within a period of four months from the date on which the final decision was taken'. This is a recent reduction in time as prior to 1 February 2022 the period was six months.[6] The ECtHR has determined that the rationale for the time-limit under Article 35 of the European Convention is 'to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities

[4] Ebobrah (n 3), 97.

[5] Frans Viljoen, 'Communications under the African Charter: Procedure and Admissibility' in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd Edition, CUP 2008), 77-78. See also Françoise Hampson, Claudia Martin & Frans Viljoen, 'Inaccessible apexes: Comparing access to regional human rights courts and commissions in Europe, the Americas, and Africa' (2018) Vol. 16 No. 1 International Journal of Constitutional Law 161, 170 and Rule 109 of the Commission's Rules (2020).

[6] See Article 4 of Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms that came into force on 1 August 2021 and reduced the time to four months starting from 1 February 2022.

and other persons concerned from being kept in a state of uncertainty for a long period of time'.[7] It further observed that the rule 'marks out the temporal limit of the supervision exercised by the Court and signals, both to individuals and State authorities, the period beyond which such supervision is no longer possible'.[8] The legal certainty justification given by the European Court is however open to challenge and one could argue that the real reason behind the time limit is to manage the high number of cases submitted to the Court (a challenge that is absent at the African Court). In any event, it is difficult to justify reduction of the filing period from six to four months based on the quest for legal certainty.

Under the American Convention on Human Rights, a petition or communication may be lodged with the Inter-American Commission 'within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment'.[9] The Commission has found that 'the principles underlying the inter-American system of human rights certainly include legal certainty, which is the basis for the six-month rule…'.[10] The African Court in *Godfred Antony and Ifunda Kisite v. Tanzania* seemed to endorse submissions made by the respondent State in the *Nobert Zongo* case where it was submitted that the purpose of the rule requiring filing within reasonable time is 'guaranteeing the integrity of the judicial system, by ensuring that the authorities and other concerned persons are not kept in a situation of uncertainty for a protracted period'.[11] The African Commission has found that the aim of the time limit under Article 56(6) 'is to make a party complaining of a wrong done by a State, to be vigilant and to discourage tardiness from prospective complainants'.[12]

From the above, it is evident that all the three regional systems are motivated by the need for legal certainty in enforcing the rule on filing within specified periods or determining the reasonableness of time taken to submit an application. In this Chapter, I question whether the quest for legal certainty in the African Court's admissibility decisions on Article 56(6) is being pursued at the expense of not substantively examining human rights claims and, if this is the case, where the

[7] *Mocanu and Others v. Romania* App nos. 10865/09, 45886/07 and 32431/08, (ECHR GC, 17 September 2014) para 258.
[8] ibid
[9] Article 46(1)(b).
[10] *Gaybor Tapia and Colon Eloy Muñoz v. Ecuador*, Case 943-04, Report No. 100/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.127 Doc. 4 rev. 1 (2007), para 20.
[11] *Godfred Anthony and Ifunda Kisite v. Tanzania,* Application No. 015/2015, Ruling of 26 September 2019, para 45 where the Court was also citing para 107 in *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, Application No. 013/2011, Ruling on Preliminary Objections of 21 June 2013. Para 107 of the *Nobert Zongo* case was reiterating what the respondent State had submitted.
[12] *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05, para 79.

balance can be struck in these two competing interests.[13] Relevant to this, Garrity-Rokous and Brescia observe that admissibility procedures are the most important method through which regional human rights tribunals try to 'balance individual rights and political unity considerations'.[14] In this regard, they argue, admissibility rules allow human rights tribunals to do two things: (1) discard claims beyond their competence and in the process eliminate politically difficult claims and (2) delay petitioners who have not exhausted domestic remedies and thus avoid intruding upon State sovereignty and emphasise that member States have the responsibility to address potential human rights violations within their borders. They further argue that if these 'political unity goals' that are inherent in admissibility rules are taken to an extreme they can 'undermine the legitimacy of the human rights systems by discouraging individual victims from pursuing claims in human rights courts'.[15] Discussions in this Chapter will show that this concern is becoming a reality at the African Court.

Before diving into the Court's practices on assessing the reasonableness of time taken to file applications and related evidence questions, a brief look at the approaches taken by the African Commission is necessary. This is because of the complementary relationship with the Court and the fact that the Commission, in existence long before establishment of the Court, has over this period adapted its position on the issue in similar ways to how the Court has more recently done.

6.3 Interpretation of Article 56(6) by the African Commission

The jurisprudence of the African Commission on the admissibility condition of submitting communications within reasonable time after exhaustion of local remedies has evolved with time. In an edited volume that examined the practices of the Commission in the period between 1986 and 2006, one of the conclusions was that 'the African Commission [had hitherto] not interpreted the relative flexible standard of 'reasonable period' to the detriment of any author'.[16] This however changed in November 2008 when the Commission rendered its decision in the case of *Michael Majuru v. Zimbabwe*. In this matter, while referring to practices of the Inter-American Commission and the European Court on timelines for filing, the African Commission observed that 'six months seem to be the usual standard'. However, the Commission added that 'where there is good and

[13] Also useful to note, there are no time limits within which Individual Communications must be submitted to various UN Human Rights Treaty Bodies and the arguments for legal certainty need to be nuanced by the fact that the UN human rights complaints system has remained functional even without prescribed timelines for filing. See list of admissibility conditions for Individual communications at https://www.ohchr.org/en/treaty-bodies/individual-communications#theadmissibility (accessed 16 August 2024).

[14] Gates Garrity-Rokous & Raymond H. Brescia, 'Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals' (1993) 18 Yale Journal of International Law 559, 592.

[15] ibid.

[16] Viljoen, 'Communications under the African Charter: Procedure and Admissibility' (n 5), 125.

compelling reason why a complainant could not submit his/her complaint for consideration on time, [it] may examine the complaint to ensure fairness and justice'.[17] The complainant had argued that he delayed approaching the Commission because he had been forced to flee his country. While acknowledging that the complainant may have needed time to settle, the Commission found the communication inadmissible and stated that 'twenty-two months after fleeing the country is clearly beyond a reasonable man's understanding of reasonable period of time'.[18] One criticism of this decision is that 'the holding appears to have contradicted a rights-based approach to the timeliness inquiry'.[19]

In another decision delivered in November 2009, *Darfur Relief and Documentation Centre v. Sudan*, the African Commission was influenced by the timelines applied by the Inter-American Commission and the European Court in finding a period of two years and five months to constitute unreasonable delay. It first observed that Article 60 and 61 of the Charter allow it to 'draw inspiration from international law on human and peoples' rights'.[20] The Commission then noted that 'the complainant submitted [the] communication way beyond a time which could be considered reasonable, looking at the European Court and the Inter-American Court jurisprudence'.[21] Additionally, the Commission has on the basis of lack of 'good and compelling' reasons declared other communications inadmissible for delays of 15 months[22], 31 months[23], 34 months[24] and two years[25]. A relevant point to make here is that some of the periods that the Commission finds to constitute inordinate delay are shorter than periods that national courts permit for bringing cases to court, including against the State. For example, in Ghana, Kenya and South Africa, contractual disputes can be brought to Court within 6 years from the date the cause of action accrued and within three years for actions in tort. In view of this, finding periods such as 15 months or 22 months to constitute inordinate delay does not reflect, loosely stating it, an 'African consensus' as to what constitutes unreasonable delay before filing a complaint, including against the State.

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[17] *Michael Majuru v. Zimbabwe* Communication 308/05, para 109.
[18] ibid para 110.
[19] The International Federation for Human Rights (FIDH), *Admissibility of complaints before the African Court: Practical Guide* (June 2016), 28.
[20] *Darfur Relief and Documentation Centre v. Sudan* (n 12), para 76.
[21] ibid para 78.
[22] *Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, Communication 386/10 (ACmHPR, February 2013), para 77.
[23] *Priscilla Njeri Echaria (represented by Federation of Women Lawyers-Kenya and International Center for the Protection of Human Rights) v. Kenya*, Communication 375/09, para 61.
[24] *Lawyers for Human Rights (Swaziland) v. The Kingdom of Swaziland*, Communication 414/12 (ACmHPR, July 2013), para 45.
[25] *ARTICLE 19 and others v. Zimbabwe,* Communication 305/05, paras 94-96.

From the reviewed literature, there seems to be agreement that the Commission now applies a strict construction of reasonableness of time. Viljoen and Odinkalu, writing in a publication updated in 2014, pointed out that the African Commission was 'moving towards a more restricted application of the reasonable time requirement under Article 56(6) of the Charter'.[26] On the same issue, Hampson *et al* , writing in 2018, argue that 'although the Commission … still adopts a case-by-case analysis, it does appear that its previously more flexible approach has become more rigid'.[27] They contend that given Africa's context (low levels of legal literacy and low visibility and awareness of the African human rights system), 'any trend of the African Commission interpreting the "unreasonableness" standard that elevates the time periods in the two other systems to some form of a yardstick for Africa should […] be resisted'.[28] I fully agree with them. In the sections that will follow, I demonstrate that the African Court has taken a similar path to that of the Commission. The Court began with a flexible approach in interpreting reasonableness of time under Article 56(6) but is now increasingly rigid in applying this rule and has found more applications inadmissible for lack of evidence to justify delays in filing cases.

6.4 The African Court's jurisprudence on application of Article 56(6)

6.4.1 Settled principles

Some general principles or guidelines have crystallised from the decisions of the Court while assessing compliance with Article 56(6) of the Charter. First, as already mentioned, the Charter does not specify a period within which an application must be submitted after exhaustion of local remedies and in view of this the Court determined in the *Nobert Zongo* case that 'the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis'.[29]

Second, the Court has implied that it follows a particular sequence in assessing the admissibility requirements. In *Ramadhani Issa Malengo v. Tanzania*, although the respondent State had objected admissibility on the ground of unreasonable delay and had not raised the issue of non-exhaustion of local remedies, the Court considered the latter first. The justification given for this was that 'an

[26] Frans Viljoen & Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights System: A Handbook for Victims and their Advocates* (OMCT Handbook Series Vol. 3), 100.
[27] Hampson et al (n 5), 173.
[28] ibid
[29] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso* (n 11), para 121.

adverse finding as to the exhaustion of local remedies would render the exercise of determining whether the application was filed within a reasonable time superfluous'.[30]

Third, regarding the burden of proof, the Court often states that it 'has adopted the general law principle of *actori incumbit probatio* by which anyone who alleges a fact must prove it'.[31] The applicant has the initial burden of proving that the application is admissible by establishing that all admissibility conditions have been met. However, as discussed in Chapter four, there is now consistent clarification by the Court that it will reverse the burden of proof where facts are under the control of the State, provided the applicant has adduced *prima facie* evidence to support the allegations.[32] Although this is mostly stated while considering the merits of applications, the same principle has also been applied at the admissibility stage.[33] Notably, while the applicant bears the burden of proving that an application was filed within reasonable time, the Court has in a number of decisions clarified that where the period in question is 'relatively short' then it is considered 'manifestly reasonable'.[34] In such cases, the applicant is not required to prove that the time was reasonable. The challenge with this reasoning, however, is that it does not offer guidance to (prospective) parties on whether justification for time taken is required given that periods ranging from 14 days, nine months, one year and two months, one year and six months have all been found to be 'manifestly reasonable'.[35]

Building on the above general guidelines by the Court, trends from case law that are more specific to evidence issues in the application of Article 56(6) are discussed next.

6.4.2 Proving justifications for delayed filing

In this section, I discuss what the African Court accepts or demands from applicants as evidence to justify the length of time taken to approach the Court. The discussion follows a temporal trail of the admissibility decisions by the Court and demonstrates that there is a stark difference between the Court's approach to evidence in its earlier case law (2013-2018) and its more recent decisions (2019-2024). I demonstrate that the earlier decisions were guided by a flexible approach

[30] *Ramadhani Issa Malengo v. Tanzania* Application No. 030/2015, Ruling on Jurisdiction and Admissibility of 4 July 2019, para 38.
[31] *Robert John Penessis v. Tanzania* Application No. 013/2015, Judgment of 28 November 2019, para 91.
[32] *Leon Mugesera v. Rwanda*, Application No. 012/2017, Judgment of 27 November 2020, para 33.
[33] *Jebra Kambole v Tanzania* Application No. 018/2018, Judgment of 15 July 2020, para 48-50.
[34] *Baedan Dogbo Paul And Baedan M'bouke Faustin v. Côte D'ivoire*, Application No. 019/2020, Judgment of 5 September 2023, see para 61 where this reasoning was applied to find one year, two months and 25 days reasonable. The same reasoning is applied in *Niyonzima Augustine v. Tanzania*, Application No. 058/2016, Judgment of 13 June 2023, para 56-58 to find a period of nine months and eight days manifestly reasonable. In *Symon Vuwa Kaunda And Others v. Malawi*, Application No. 013/2021, Judgment of 5 September 2023 at para 34-35, a period of 14 days was found to be manifestly reasonable.
[35] See cases in the above footnote. Also see *Mulokozi Anatory v. Tanzania*, Application No. 057/2016, Judgment of 5 September 2023 at para 51 where a period of one year, six months and 23 days was found to be manifestly reasonable.

to evidence questions in assessing reasonableness of time taken to file applications and that more recently, the Court has adopted a strict or rigid approach. I argue that the latter approach undermines the Court's and the African Charter's main purpose of substantively protecting human rights. A related consequence of this shift in the Court's approach to evidence is that it has engendered inconsistency in the jurisprudence of the Court. I conclude by exploring some of the dissenting opinions to the stricter approach and the alternatives they offer.

The first decision on the merits was issued by the African Court in June 2013 and for a decade now, the Court has accepted a range of explanations and reasons for delayed filing from applicants. These have included the fact that an applicant was: waiting for implementation of decision of domestic courts, imprisoned, lay, without legal representation, indigent, illiterate, unaware of the Court's existence, intimidated and in fear of reprisals and attempting to pursue extra-ordinary remedies. As I will illustrate from several decisions, the Court was initially quite liberal and flexible in assessing these circumstances or claims from applicants, but recent jurisprudence indicates that it now strictly requires specific proof of these explanations from applicants. The result has been that applications that would have been found admissible in the earlier days of the Court have been declared inadmissible in the Court's current approach to evidence. I begin this discussion with a summary of cases where the Court has applied a flexible approach to evidence.

a) A flexible beginning

The Court had to deal with an objection to admissibility on the basis of unreasonable delay in filing an application in its first decision on merits in the *Christopher Mtikila v. Tanzania* case decided in 2013. The respondent State had contended that there was an inordinate delay in filing the application, but the Court did not agree. It found that after the final domestic court's decision 'the applicants were entitled to wait for the reaction of parliament to the judgment' and therefore the period of 360 days between the date of the domestic judgment and filing of the application at the African Court 'was not unreasonably long'.[36] In the same year, in the *Nobert Zongo* case, the Court established what can be regarded as the general rule, that 'the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis'.[37] It then found that the application, which had been filed after three and a half years, was submitted within reasonable time. The Court justified this conclusion by observing that 'the applicants may have needed more time to reflect on the suitability of submitting an application' and further that the 'three-year time frame [would] not affect the ability of the Court to establish

[36] *Reverend Christopher R. Mtikila v. Tanzania* Application No. 11/2011, Judgment of 14 June 2013, para 83.
[37] *Nobert Zongo* case[Preliminary Objection] (n 11), para 121.

the relevant facts relating to the matter'.[38] This last consideration has not been applied in any subsequent decision on the issue of reasonableness of time. A legal officer I interviewed rejected this approach of considering whether relevant facts can still be established regardless of time taken to file the case. The officer argued that given that admissibility is assessed before merits 'a court should be very cautious in taking a peep at the merits to resolve a pre-merits question'.[39]

The next decision on admissibility that substantively dealt with the question of reasonableness of time was *Alex Thomas v. Tanzania* (2015) where the applicant had taken three years and five months to file the application. The Court found the facts that the applicant was lay, indigent, incarcerated and had attempted to use extra-ordinary measures 'constitute sufficient grounds' to explain the time taken to submit his application.[40] These grounds were also accepted as sufficiently explaining delayed filing in *Mohamed Abubakari v. Tanzania* (2016) where the period in question was three years and three months. The Court observed that given that the applicant was in prison, was indigent, could not afford a lawyer and had no legal representation in domestic courts, was illiterate and unaware of the existence of the Court because of its 'relatively recent establishment', were all circumstances that 'justify some flexibility in assessing the reasonableness of the timeline for seizure of the Court'.[41]

The Court followed the above trend in 2017 in the *Kennedy Owino Onyachi* case where again it found a period of seven months taken by one applicant in the case to be reasonable because he was a 'lay, incarcerated and indigent person with no legal assistance'.[42] For the other applicant in the same case, it found a period of three years and two months to be reasonable because he was a 'lay, incarcerated and indigent person without the benefit of legal education and legal assistance'.[43] In *Christopher Jonas v. Tanzania*, also decided in 2017, the Court relied on its findings in the *Mohamed Abubakari* case to find that the applicant was in a similar situation and found a period of five years and one month to be reasonable.[44] In 2018 the Court delivered six judgments that were consistent with the previous decisions highlighted above. A common thread in these cases was that they were all filed by incarcerated applicants against Tanzania. In *Kijiji Isiaga v. Tanzania*, the Court accepted a period of two years and 11 months as reasonable because the applicant was 'a lay, indigent and incarcerated person without the benefit of legal education or assistance'. According to the Court,

[38] ibid para 123.
[39] Interview with Registry Member No. 2 at the African Court (Arusha, 15 August 2023).
[40] *Alex Thomas v. Tanzania*, Application No. 005/2013, Judgment of 20 November 2015, para 74.
[41] *Mohamed Abubakari v. Tanzania* Application No. 007/2013, Judgment of 3 June 2016, para 92.
[42] *Kennedy Owino Onyachi and Charles John Mwanini Njoka v. United Republic of Tanzania,* Application 003/2015, Judgment of 28 September 2017, para 67.
[43] ibid para 68.
[44] *Christopher Jonas v. Tanzania*, Application No. 011/2015, Judgment of 28 September 2017, para 53-54.

these circumstances made it 'plausible that the applicant may not have been aware of the Court's existence and how to access it'.[45] The same grounds were relied on in *Nguza Viking v. Tanzania* to find a period of one year and three months to be reasonable.[46] In *Thobias Mango & Another v. Tanzania*, the Court relied on the fact of incarceration of the applicants to find that they 'may not have been aware of the existence of the Court or how to approach it' and found four years and eight months taken to file the application as reasonable.[47] In *Minani Evarist v. Tanzania*, it was held that a period of three years and seven months was reasonable given that the applicant was lay, indigent, imprisoned and had attempted to exhaust an extra-ordinary remedy.[48] The attempt to exhaust an extra-ordinary remedy was also the basis for finding a period of 11 months reasonable in *Armand Guehi v. Tanzania*.[49] Lastly, the Court again relied on the facts of being lay, indigent and incarcerated to find the period of one year taken by the applicant in *Diocles William v. Tanzania* to be reasonable.[50]

The above flexibility in the decisions of the Court from 2013 to 2018 appears to have been abandoned by the Court as seen from its decisions since 2019 and this shift is discussed in the next section.

b) Demand for specific proof since 2019

Two decisions on admissibility issued by the Court in 2019 signaled a change in approach to the Court's analysis of reasonableness of the time taken to file applications, and evidence questions were at the heart of this change. In the first case, *Godfred Anthony & Another v. Tanzania*, the Court had to determine whether a period of five years and four months was reasonable for purposes of admitting the application. Before coming to its conclusion, the Court first recalled that in its previous decisions, it had taken into consideration the fact that applicants were imprisoned, lay, indigent, illiterate, unrepresented and unaware of the Court's existence in allowing lengthy delays before submitting applications.[51] The Court then acknowledged that applicants in this case were 'also incarcerated and thus restricted in their movement'. However, unlike its previous decisions, it added that the applicants '[had] not asserted or provided any proof that they [were] illiterate, lay,

[45] *Kijiji Isiaga v. Tanzania* Application No. 032/2015, Judgment of 21 March 2018, para 55.
[46] *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. Tanzania*, Application No. 006/2015, Judgment of 23 March 2018, para 61.
[47] *Thobias Mang'ara Mango & Shukurani Masegenya Mango v. Tanzania* Application No. 005/2015, Judgment of 11 May 2018, para 55.
[48] *Minani Evarist v Tanzania,* Application No. 027/2015 Judgment of 21 September 2018, para 45.
[49] *Armand Guehi v. Tanzania*, Application No. 001/2015, Judgment of 7 December 2018, para 56.
[50] *Diocles William v. Tanzania*, Application No. 016/2016, Judgment of 21 September 2018, para 52.
[51] *Godfred Anthony and Ifunda Kisite v. Tanzania* (n 11), para 46.

or had no knowledge of the existence of the Court'. It further noted that the applicants '[had] simply described themselves as indigent'.[52]

Interestingly, although the Court has previously found an application for review of final decisions by the Court of Appeal in cases against Tanzania to be an extra-ordinary remedy that does not have to be pursued or exhausted before approaching the African Court, it takes into consideration the fact that applicants in this case had not filed for review of final judgments.[53] The Court then concluded that although it had previously considered the 'personal circumstances' in determining reasonableness of time taken to file applications, applicants in this case had not adduced 'any material evidence on the basis of which the Court can conclude that the period of five years and four months was a reasonable period'.[54] An observation to be made here is that while the Court attempts to 'distinguish' this case from previous ones, there is no clarity from this attempt. The Court fails to acknowledge that even in previous cases where factors such as being lay, indigent, illiterate or unaware of the Court's existence informed a permissive approach in determining reasonableness of time, applicants were not specifically required to prove these factors. In other words, the judgments do not show that applicants adduced proof of these factors and which proof the Court then found to be sufficient.

The second case decided in 2019 that followed this apparent change of approach is *Livinus Daudi Manyuka v. Tanzania*. Again, the Court started with the observation that there is a 'non-exhaustive list of circumstances' that it has considered in determining reasonableness of time taken before filing an application.[55] Although the applicant in this case had pleaded that he was indigent, incarcerated and 'a peasant', the Court took the position that this was a 'blanket assertion of indigence' and the applicant '[had] not attempted to adduce evidence explaining why it took him five years and six months to file his application'.[56] The Court also distinguished this case from previous ones where it accepted lengthy periods as reasonable by noting that the applicant in this case had legal representation in domestic courts. It then concluded that 'in the absence of clear and compelling justification', five and a half years was an unreasonable delay for purposes of Article 56(6) of the Charter.

[52] ibid para 48.
[53] ibid para 49.
[54] ibid.
[55] *Livinus Daudi Manyuka v. Tanzania* Application No. 020/2015, Ruling of 28 November 2019, para 50. The Court listed these as: : imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the court, intimidation and fear of reprisals and the use of extraordinary remedies.
[56] *Livinus Daudi Manyuka v. Tanzania* (n 55) para 54.

I make two observations regarding this decision. First, on the same day that the Court delivered this judgment, it also decided the matter of *Ally Rajabu and Others v. Tanzania*. In the latter case, the applicants had pleaded being 'lay, indigent and incarcerated persons'[57] and the Court in accepting this simply 'notes' that 'in the case at hand, the applicants are lay, indigent and incarcerated'. It is not clear why the Court rejects the claim of indigence as a 'blanket assertion' in the *Livinus Daudi Manyuka* case but accepts the same claim in *Ally Rajabu* without having tasked the applicants to specifically prove the claim. The second observation is that the Court gave weight in the *Livinus Daudi Manyuka* case to the fact that the applicant had legal representation in domestic courts and this informed the finding that the period in question was unreasonable. While it is unclear what assumptions the Court was working with in doing this, as my literature review in Chapter 2 showed, lack of awareness about the existence and operations of Court (and the African human rights system in general) affects both the general public and lawyers in Africa. Therefore pegging reasonableness of time to the fact of legal representation in my view amounts to an acontextual interpretation of Article 56(6) of the Charter, which is undesirable.

Two decisions in 2020 followed the above script. In *Chananja Luchagula v. Tanzania*, to explain a delay of 6 years and 3 months, the applicant had asserted that he was 'an indigent person, a layman in matters of law, a person without legal assistance, incarcerated and subject to restrictions'.[58] In determining the issue, the Court observed that 'failure to file an application within a reasonable time due to indigence and incarceration must be proven and cannot be justified by blanket assertions or assumptions'. The Court held that although the applicant was incarcerated at the time of filing the application, he had 'not provided evidence to support his claim of indigence and that he was subject to restrictions'.[59] It found the application inadmissible. What this decision clarified is that the Court expects indigence to be proven. However, the kind of evidence that would satisfy the Court in this regard is not clear.

The second relevant case delivered in 2020 was the *Hamad Mohamed Lyambaka v. Tanzania* where the Court while acknowledging that the applicant was incarcerated nonetheless found that 'there [was] no proof that his incarceration constituted an impediment to the timely filing of the application'. The Court held that in the absence of 'clear and compelling' justification, the delay of five years and 11 months was unreasonable.[60] An important point to make here is that in cases where the Court previously adopted a more flexible approach, it made presumptions (from the

[57] *Ally Rajabu and Others v. Tanzania* Application No. 007/2015, Judgment of 28 November 2019, para 47.
[58] *Chananja Luchagula v. Tanzania* Application No. 039/2016, Ruling of 25 September 2020, para 51.
[59] ibid para 59.
[60] *Hamad Mohamed Lyambaka v. Tanzania*, Application No. 010/2016, Ruling of 25 September 2020, para 50.

fact of incarceration) that applicants were 'limited in their movement' and 'with limited access to information'.[61] However, there is a noticeable change in this case as the Court demanded more from applicants, namely, evidence of how imprisonment affected timely filing. In doing this, the Court has not articulated justifications for this stricter approach that potentially limits access to the Court by a vulnerable category of applicants.

In 2021, the Court delivered three decisions that adopted the same approach as above. In the *Yusuph Hassan v. Tanzania* case, it reiterated that 'even for lay, incarcerated or indigent applicants they should demonstrate how their personal situation inhibited them from filing their applications promptly'.[62] The Court concluded that the applicant had not provided evidence of this and therefore a delay of five years and 8 months was unreasonable. On the same day, the Court also decided the *Yusuph Said v. Tanzania* case where in declaring the application inadmissible for an unreasonable delay (eight years) it held that 'the applicant did not indicate how his incarceration impeded him in filing his application earlier than he did'.[63] The third relevant decision in 2021 was *Layford Makene v. Tanzania* where the Court observed that even lay, indigent and incarcerated applicants have 'a duty to demonstrate' how their personal situation prevented timely filing. In the absence of such evidence or 'cogent explanations', the Court found a period of six years and two months to constitute unreasonable delay.[64]

Finally, in 2022, there were four decisions that aligned with previous cases as discussed above while providing a more nuanced approach to issue of undue delay. In *Rajabu Yusuph v. Tanzania*, the question was whether 7 years and 7 months constituted an unreasonable delay in filing the application. Compared with other cases, the applicant had a rather novel argument. He contended that the Court, its Protocol, its Rules, and Practice Directions were all unknown at Uyui prison where he was being held. He added that he had filed his application four months after the first application originating from that prison was submitted to the African Court and therefore within reasonable time after becoming aware of the Court's existence. The Court indeed confirmed that the first application from an applicant held at Uyui prison was received at the Court four months prior to the filing of this present case. It however found that the argument was 'insufficient to persuade the Court that the applicant diligently pursued his case and that he was not in a position to know about the Court' prior to submission of the first application from that prison. It concluded

[61] See for example, *Amiri Ramadhani v. Tanzania*, Application No. 010/2015, Judgment of 11 May 2018, para 50; *Steven John Rutakikirwa v. Tanzania* Application No. 013/2016, Judgment of 24 March 2022, para 48; *Dismas Bunyerere v. Tanzania* Application No. 031/2015, Judgment of 28 November 2019, para 47.
[62] *Yusuph Hassan v. Tanzania* Application No. 29/2015, Ruling of 30 September 2021, para 80.
[63] *Yusuph Said v. Tanzania* Application No. 011/2019, Ruling of 30 September 2021, para 44.
[64] *Layford Makene v. Tanzania* Application No. 028/2017 Ruling of 2 December 2021, para 48.

that in the interest of legal certainty, it 'cannot continue to extend what can be considered as reasonable time without decisive elements that are sufficiently proven'.[65] It declared the application inadmissible because of the applicant's failure to provide 'compelling arguments and sufficient evidence' to demonstrate that his 'personal situation' prevented timeous filing.[66] This decision demonstrates how onerous it is for applicants to specifically prove lack of awareness of the existence of the Court as the justification for delayed filing. I propose that the Court should consider alternatives to requiring such proof, such as through use of presumptions and taking judicial notice of certain facts like lack of awareness. I elaborate on this proposal in section 6.7 of the Chapter.

In the second case decided in 2022 (*John Martin Marwa v. Tanzania),* the period in question was 6 years. The Court relied on its previous decisions in *Layford Makene*, *Hamad Mohamed Lyambaka*, *Godfred Anthony* and *Chananja Luchagula* (all discussed above) to find that despite incarceration, the applicant had not adduced evidence of how his personal situation prevented him from approaching the Court timely.[67] This decision shows the Court's attempt to consolidate its jurisprudence on this issue with these more recent decisions that emphasize on specific proof of the grounds pleaded to explain delayed filing of applications. The third relevant judgment in 2022, *Hussein Ally Fundumu v. Tanzania*, followed the same structure as in *John Martin Marwa*. The Court cited its previous decisions before concluding that although the applicant was 'incarcerated and restricted in his movements', he had not provided 'arguments or evidence' showing his personal situation prevented timely filing.[68] The Court then found six years and 10 months to be an unreasonable delay and declared the application inadmissible. The same formulation is applied in *Abdallah Sospeter Mabomba & Others v. Tanzania* to find that a delay of seven years and two months was unreasonable.[69]

The above summary of decisions by the Court from 2019 to 2022 points to a shift in the jurisprudence of the Court when contrasted with its approach in decisions delivered between 2013-2018. In the more recent cases, the Court has adopted a strict approach to evidence and requires applicants to demonstrate by way of more specific evidence or arguments as to why they took the particular time in question to file applications. This temporal analysis of the Court's decisions on Article 56(6) of the Charter is however not perfectly clear-cut. There have been some decisions

[65] *Rajabu Yusuph v. Tanzania*, Application No. 036/2017 Ruling of 24 March 2022, para 71.
[66] ibid para 72.
[67] *John Martin Marwa v. Tanzania*, Application No. 021/2017, Ruling of 22 September 2022, para 41.
[68] *Hussein Ally Fundumu v. Tanzania,* Application No. 016/2018, Ruling of 22 September 2022, para 59.
[69] *Abdallah Sospeter Mabomba & Others v. Tanzania,* Application No. 017/2017 Ruling of 22 September 2022, paras 48-54.

post 2019 that still adopt a relatively flexible approach to evidence on the factors that the Court has previously acknowledged as sufficiently explaining considerable delays in filing.[70] However, these decisions are outliers as a majority of the decisions after 2019 have adopted the stricter approach to evidence. Two decisions in late 2022 further demonstrate that the Court is still undecided on whether to go back to its flexible past or embrace its presently strict evidentiary approach to applying Article 56(6). I discuss these cases next.

c) A court at a crossroads

Two decisions on admissibility delivered on 1 December 2022 show that the Court's assessment of reasonableness of time and evidence requirements on the same remains unsettled, especially given the relatively high number of dissenting judges (three) in each case. I suggest that these two decisions warrant deliberate reflection by the Court on how future admissibility decisions (on reasonableness of time) should look like. One case retains the stricter approach adopted since 2019 while the other applies the previously more flexible approach. While the rationale for the admissibility rule on timely filing is to promote legal certainty as discussed earlier, the position of the Court as these two cases show is, to the contrary, uncertain. In the first case, *Hamisi Mashishanga v. Tanzania*, the applicant made a similar argument to the one submitted in *Rajabu Yusuph* (discussed earlier) where he contended that although his application was submitted 7 years after exhausting local remedies, he had filed the case within reasonable time because he approached the Court two months after becoming aware of the Court's existence. He claimed that the Court was unknown to inmates at Uyui prison and he first became aware of the Court when the first application by an applicant held at that prison was filed at the African Court. He then filed his application two months after this event and he urged the Court to find that he did so within reasonable time. The Court first observed that the applicant was in 'a comparable situation' to when it has previously found it justified to have 'some flexibility in assessing the reasonableness of the timeline for seizure of the Court'.[71] This was so because he was incarcerated, unrepresented in domestic courts and claimed to be unaware of the Court's existence. The Court then recalled that a similar argument had been canvassed in the *Rajabu Yusuph* case and just as it had been unconvinced by the argument then, it was also not convinced in the present case as the applicant failed to provide 'compelling

[70] See *Ally Rajabu And Others vs Tanzania* (n 57); *Steven John Rutakikirwa v. Tanzania* (n 61); *Sadick Marwa Kisase v. Tanzania,* Application No. 05/2016 Judgment of 2 December 2021; *Job Mlama & 2 Others v. Tanzania,* Application No. 019/2016 Judgment of 25 September 2020 and *Igola Iguna v. Tanzania* Application No. 020/2017 Judgment of 1 December 2022.

[71] *Hamisi Mashishanga v. Tanzania,* Application No. 024/2017, Ruling of 1 December 2022, para 70-71.

arguments and sufficient evidence to demonstrate that his personal situation prevented him from filing the application in a timelier manner'.[72]

Three judges disagreed with the majority decision to declare the application inadmissible. Notably, this was an increased number of dissenting views because in *Rajabu* there was only one dissenting opinion, even though the arguments by applicants in both cases were the same. Justice Bensaoula Chafika noted as follows:

> What saddens me in relation to the consistency of the Court's jurisprudence is that, in some rulings, the Court considered that "the personal situation of the applicants", especially the fact that they are lay people in law, indigent and incarcerated, constitutes sufficient grounds to grant rather long time-limits as reasonable time to seize this Court… However, in other judgments, … the Court states the opposite, because, despite the presence of the above-mentioned particulars, the Court declared that the applicants are required to show how their "personal situation" prevented them from filing their application within a shorter period of time… At no point in these previous judgments did the Court demonstrate what more it expected from the applicant in terms of "personal situation".[73]

The second dissenting opinion was by Justice Dumisa Ntsebeza who pointed out that 'the applicant [had] met the threshold of circumstances that the Court has previously considered as reasonable grounds for seizing the Court under what would ordinarily be considered as an unreasonable time'.[74] Regarding evidence, while Justice Chafika had wondered 'what more is expected from the applicant' to demonstrate how the personal situation affected timely filing, Justice Ntsebeza was convinced by the applicant's justification of not being aware of the Court's existence. He stated that he '[could not] conceive the kind of additional evidence [the] Court would require from the applicant to satisfy itself that he really did not know about the existence of this Court at the time'.[75] The third dissenting opinion was by Justice Rafaâ Ben Achour who found the applicant to have argued 'quite plausibly' that he was unaware of the Court's existence until the first application from Uyui prison had been filed at the African Court. In all the three dissenting opinions, there was an interesting commonality. All the three judges borrowed the logic applied in an earlier decision where the Court had stated, based on facts in that case, that the years between 2007 and 2013 were 'the early years of the Court's operation' and that members of the public were unaware of the Court's operations.[76] Relying on this statement, Justice Chafika thought

[72] ibid para 72.
[73] *Hamisi Mashishanga v. Tanzania*, (n 71) Dissenting Opinion by Bensaoula Chafika, paras 7-9.
[74] *Hamisi Mashishanga v. Tanzania*, (n 71)Dissenting Opinion by Dumisa B. Ntsebeza, para 5.
[75] ibid para 5.
[76] *Sadick Marwa Kisase v. Tanzania* (n 70) para 52.

that in the present case the period between 2010 when Tanzania deposited the Declaration allowing filling of applications by individuals and 2013 when the final decision by the domestic court was rendered (3 years) should be deducted from the computation of time. Justice Ntsebeza thought that this previous statement by the Court 'implied' that in the present case, the three years should be deducted while Justice Ben Achour wholly relied on that previous statement by the Court to find that the present application should have been found admissible.

The second case delivered on 1 December 2022, *Igola Iguna v. Tanzania*, demonstrates that the African Court remains at pains in settling on a consistent approach to the issue of reasonableness of time and on what needs to be proved or not proved in that regard. Remarkably, the minority view in *Hamisi Mashishanga* now became the majority view in *Igola Iguna*, both decisions being delivered on the same day. The majority decision in the *Igola Iguna* case observed that 'the period between 2007 and 2013 were the formative years of its operation'. The Court then proceeded to hold that the period to be assessed was 'between 2013, when the public would be expected to have become aware of the Court and 2017, the year when the application was filed'.[77] This was a significant finding by the Court because it was essentially, and for the very first time, defining with exactitude when the general public 'became aware' of the Court, a hitherto grey area left to the discretion of the Court. Instead of calculating the period of delay from 2010 when Tanzania allowed direct access to the Court (and thus find 7 years), the Court started the count from 2013, which meant a delay of 4 years and which it found to be reasonable. The majority go further to endorse the Court's 2013-2018 jurisprudence by noting that the applicant was self-represented and incarcerated and as a consequence the applicant:

> was therefore limited in movement and with limited flow of information which this Court has held in previous similar instances could cause delays in filing applications… This situation of seclusion from the general population has without any doubt caused the applicant to be cut off from possible information flow, and be restricted in his movements. The Court notes that these extenuating factors mitigate in his favour.[78]

Three judges (Justices Ben Kioko, Tujilane Chizumila and Dennis Adjei) did not agree with the above findings and wrote a joint dissenting opinion. The three first noted that they had differed with the majority 'in order to ensure consistency in the decision of the Court, even though [they] strongly believe that a human rights court should as much as possible understand and take into

[77] *Igola Iguna v. Tanzania* (n 70), para 34.
[78] *Igola Iguna v. Tanzania* (n 70), para 38.

account the challenges faced by applicants'.[79] They then took issue with the majority decision for determining an exact period when the public became aware of the Court, noting as follows:

> what is disturbing is that the Court is fixing a specific date (year and not month) when the public should be presumed to have become aware of the existence of the Court without offering any empirical evidence to that effect.[80]

The three judges further acknowledged that indeed the Court has previously ruled that the period between 2007 and 2013 the general public in Tanzania did not know of its existence and that the period should 'be given to them as a moratorium'. Oddly, as relates to evidence, they add that '…an applicant who does not prove that he did not know about the existence of the Court would not benefit from the moratorium'.[81] As I am arguing in this Chapter, the Court has shifted from its previously flexible approach in assessing reasonableness of time and related proof to a stricter approach demanding more specific evidence to justify delays and this joint dissenting opinion confirms my thesis. The three judges found that:

> the Court has taken into consideration circumstances such as imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal and the use of extraordinary remedies as relevant factors to consider whether the delay of an applicant in seizing the Court is justified. **This approach has allowed the Court to employ some flexibility. However, the Court has also, albeit implicitly, adopted a strict standard of proof** to the effect that the longer an applicant delays to file his application, particularly for periods of over five (5) years, the stricter the Court's demand for justification with sufficient substantiation.[82] (emphasis in bold added)

In their conclusion, the judges contend that the majority decision departed from the Court's 'established jurisprudence' by finding the application admissible and in their view seizing the Court 7 years later 'without any justification cannot be considered reasonable in the understanding of a reasonable man'.[83] According to them, the Court is at liberty to depart from its own jurisprudence but 'such departure must be warranted by cogent reasons and necessitated by the peculiar circumstances of the case'. In the absence of such reasons, their argument goes, 'the majority's position risks causing unjustified jurisprudential inconsistency and hence, gravely jeopardize legal certainty'.[84] While this call sounds reasonable, my argument is that the Court is not really 'departing'

[79] *Igola Iguna v. Tanzania* Joint Dissenting Opinion of Justices Ben Kioko, Dennis Dominic Adjei and Tujilane Rose Chizumila, para 2.
[80] ibid para 3.
[81] ibid para 13.
[82] ibid para 16-17.
[83] ibid paras 3 and 24.
[84] ibid para 25.

from its jurisprudence but, in this case, it is actually reverting to its flexible jurisprudence that it abandoned since 2019 as seen in a majority of its recent admissibility decisions.

The appropriateness of applying this seemingly stricter standard of proof as observed by the dissenting judges is, in my view, questionable in assessing admissibility (a preliminary stage of the adjudication) and arguably results in the African Court being less accessible to applicants, including the most vulnerable such as prisoners. A relevant observation here is that, just as the three dissenting judges note in the *Igola Iguna* case, another author and who is based at the Court points out the emerging pattern where the Court finds periods above five years or thereabouts to constitute undue delay.[85] Based on these insiders' perspectives, one could argue that the Court instrumentally applies a higher standard of proof not necessarily for or only based on legal reasons but to also give effect to an unwritten institutional policy to cap the period considered reasonable to seize the Court to five years after exhaustion of local remedies. This conclusion is supported by the brief analysis of the Court's current position in the next section.

d) The current position and political underpinnings behind the shift in evidentiary approach

The flexibility exercised by the Court in the *Igola Iguna* case in 2022 was short-lived. The Court's position in this case to recognise the period between 2007-2013 as its 'formative years' and therefore excluded from computation of time taken to file applications (particularly those against Tanzania) was only applied in three decisions issued in June 2023.[86] This reasoning allowed the Court to find the periods in question to have been reasonable. Three judges issued a joint dissenting opinion in each of these cases and one of their main reasons for disagreeing with the majority was the need to take State interests into consideration. They observed that:

> A person should not be permitted to keep a State in an uncertain situation as to whether a person whose case was heard by a domestic court would seek relief from a continental or regional court for human rights violations or not.[87]

The three judges also faulted the majority decisions in these cases for taking into consideration (while assessing reasonableness of time) the fact that applicants were on death row and that this meant that they were 'secluded from the general population' that restricted information flow and

[85] MJ Nkhata 'What counts as a 'reasonable period'? an analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications' (n 3) 151.
[86] These are: *Matoke Mwita and Masero Mkami v. Tanzania*, Application No. 007/2016, Judgment of 13 June 2023, para 41-45; *Thomas Mgira v. Tanzania*, Application No. 003/2019, Judgment of 13 June 2023, para 47-48; *Umalo Mussa v Tanzania*, Application No. 031/2016, Judgment of 13 June 2023, para 51-55.
[87] Joint Dissenting Opinion of Justices Ben Kioko, Tujilane Chizumila and Dennis Adjei in *Matoke Mwita and Masero Mkami v. Tanzania* (n 86)para 12.

their movements. The three argued that there were other cases where applicants on death row did not benefit from this reasoning and had their applications declared inadmissible for unreasonable delay.[88]

These dissenting views seem to have influenced the Court's quick change of approach as the reasoning in *Igola Iguna* was abandoned shortly after in the three decisions issued in September and November 2023.[89] In these three decisions, the Court returned to its post-2019 jurisprudence where it requires applicants to prove how factors such as being lay, incarcerated, unaware about the Court's procedures and indigent prevented timely filing. Without explaining its departure from the reasoning in *Igola Iguna*, the Court also stopped deducting the years between 2007-2013 from computation of time taken to submit applications to the Court and the result was that these three applications were declared inadmissible. The Court has retained this position in 2024 with one decision delivered in June 2024.[90] Notably, since the Court abandoned the position in *Igola Iguna* with the September-November 2023 decisions and the June 2024 decision, it has found all applications submitted within five years of exhausting local remedies to have complied with Article 56(6). In the same period, the only applications found inadmissible on account of unreasonable delay are the abovementioned cases and which have one factor in common – they were filed after periods longer than five years.[91]

Further, in some cases where the period in question was below five years and which applications the Court found to be admissible, the three dissenting judges (noted above) did not object to consideration of the fact that the applicants in those cases were on death row while assessing reasonableness of time. This despite their clear objection to this consideration in cases where the period under consideration was above five years. The long and short of this is my conclusion that currently the African Court is *de facto* guided by a five-year rule as the longest an applicant can take to submit an application even though the *de jure* position is the open-ended requirement to file applications within reasonable time. To develop this five-year rule, the Court has used the issue of evidence as the tool for determining the timeliness of submitted applications by being flexible on

[88] Joint Dissenting Opinion of Justices Ben Kioko, Tujilane Chizumila and Dennis Adjei in *Thomas Mgira v. Tanzania* (n 86), para 19; Joint Dissenting Opinion of Justices Ben Kioko, Tujilane Chizumila and Dennis Adjei in *Umalo Mussa v Tanzania* (n 86), para 17-28.

[89] *Leonard Moses v. Tanzania*, Application No. 033/2017, Ruling of 5 September 2023; *Haruna Juma v. Tanzania*, Application No. 034/2016, Ruling of 7 November 2023; *Maulidi Swedi alias Mswezi Kalijo v. Tanzania*, Application No. 026/2017, Ruling of 7 November 2023.

[90] *Kabalabala Kadumbagula and Daud Magunga v. Tanzania*, Application No. 031/2017, Judgment of 4 June 2024. See para 58-64 where the Court finds that the claim of the first applicant was inadmissible because of a delay of 7 years, five months.

[91] The period in question in *Leonard Moses v. Tanzania* (n 89) was seven years, in both *Haruna Juma v. Tanzania* (n 89) and *Maulidi Swedi v. Tanzania* (n 89), it was six years.

evidence questions (e.g. through presumptions of fact) when the application is filed within five years (as seen in the 2013-2018 case law) and being strict or rigid on evidence (as seen from 2019) when the application under consideration is filed five years after exhausting local remedies. By defining a specific timeframe (five years) within which an application should be filed, through the aid of a strict approach to evidence, the African Court has arguably contradicted the intention of the drafters of the African Charter who chose not to be prescriptive on the issue.

During fieldwork at the Court, my interviewees concurred with this study's proposition that there had been a deliberate change of approach to assessment of compliance with Article 56(6) and related evidence questions. Reasons given for this shift varied. One legal officer explained the initially flexible approach to evidence (when there were still few cases to deal with) as the Court's attempt at 'over-reaching to try and get some business to keep itself busy'.[92] A judge spoke of the Court being more 'accommodating' at the start and in the judge's words:

> At the beginning when the Court was established, being a human rights court, the Court was more accommodating. In being so accommodating, there were some decisions that, in retrospect, were not very balanced. Especially on reasonableness of time.[93]

A second legal officer recalled that following the Court's rejection of proposals to adopt specific timelines for filing applications as happens in the two other regional human rights courts, it resolved to 'deal on a case by case basis but making sure there is some strictness in determining reasonableness of time'.[94] A third legal officer noted that there should have been a basis for the Court's shift but instead 'it look[ed] like [the Court] just woke up one day in 2019 and said [it] need[ed] to be more strict'.[95] There was also the view that some of the arguments by applicants were no longer tenable. For example, on the contention that an applicant delayed approaching the Court because of lack of awareness about it, one officer argued that this was a 'time-bound argument' that could not hold with passage of time when it would be assumed the Court is known.[96] This contention could be challenged, in my view, with the argument that awareness is not linear and does not necessarily follow with passage of time but rather depends on how deliberate the Court itself and other stakeholders such as States are in popularizing the institution among the African citizenry. As noted in Chapter three, an important observation made by one judge in an interview suggested that State interests had informed the 2019 shift. The judge noted that some States had raised concerns that the Court was 'giving a very big leeway' in assessment

[92] Interview with a Registry Member No. 2 at the African Court (Arusha, Tanzania, 15 August 2023).
[93] Interview with Judge No. 3 of the African Court (Arusha, Tanzania, 6 September 2023).
[94] Interview with Registry Member No. 4 at the African Court (Arusha, Tanzania, 30 August 2023)
[95] Interview with Registry Member No. 3 at the African Court (Arusha, Tanzania, 23 August 2023)
[96] Interview with Registry Member No. 2 at the African Court (Arusha, Tanzania, 15 August 2023)

of reasonable time and further that there was now a push by some judges at the Court contending that it should 'remember that there are two parties and [it] cannot just go on the side of one and not the other'.[97] This position was confirmed by yet another legal officer who identified three factors for the Court's shift of approach to evidence. First, according to this officer, the change can be explained by the fact that some 'technical judges' had joined the bench and some legal officers were now 'picky about the issue', a development that would 'only strengthen the Court's position on evidence and on the issue of filing within reasonable time'.[98] Second, that the Court has done 'a lot of self-interrogation' following the withdrawals of Article 34(6) declarations by some States and the Court's acknowledgement that 'those who had called for self-interrogation earlier were right'.[99] Lastly, the officer attributed the shift to 'normal progress', arguing that 'in the initial years we were more flexible in favour of the applicant, but now that we are well-established, the applicant should know'.[100] All the above views suggest that the Court is currently leaning in favour of an *equal approach* that seeks to balance the parties' interests in assessing compliance with Article 56(6) and related evidence questions in this assessment.

In the next section, I sieve out the evidence-related issues that require the Court's attention and reform as informed by the analysis done above. I particularly point out the difficulties associated with the Court's strict approach to evidence since 2019 and which invite application of an equitable applicant-centred approach to evidence if the Court is to arrive at more substantively fair decisions.

6.5 Evidentiary difficulties faced by applicants

Most of the case law on assessment of reasonableness of time taken to seize the African Court involves applications against Tanzania. As has been seen in the preceding discussions, the status of the applicant is often the determining factor in assessing reasonableness of time.[101] Tanzanian applicants have either pleaded or the Court has inferred from filed documents that they were lay, illiterate, incarcerated, unrepresented and unaware of the Court's existence as some of the grounds justifying the delay in question. While these factors have been considered by the Court on a case-by-case basis where Tanzania was the respondent State, the Court has invoked the same factors in decisions where other respondent States were involved. In the *Mulindahabi Fidèle v. Rwanda* case for example, the Court found a relatively shorter period of two years and nine months as constituting

[97] Interview with Judge No. 1 of the African Court (Arusha, Tanzania, 7 September 2023).
[98] Interview with Registry Member No. 5 at the African Court (Arusha, Tanzania, 24 August 2023)
[99] ibid.
[100] ibid.
[101] The Court also does take into consideration the conduct of the respondent State or its officials. See *Fidèle Mulindahabi v. Rwanda*, Application 011/2017 Ruling of 26 June 2020, para 41.

unreasonable delay and declared the application inadmissible. After recalling the usual factors it has considered in cases against Tanzania, the Court found that 'the applicant was not imprisoned or subject to any restriction of movement after the exhaustion of local remedies, nor was he indigent, and his educational background…made him aware of the existence of the Court'.[102] With this decision, the Court was in my view suggesting that the grounds or factors that have concretised in cases against Tanzania have universal application and are expected to be pleaded and proven. This is problematic because the Court as a general rule applies a case-by-case approach and it appears inappropriate to extrapolate these factors in cases where they may not be relevant.

On the face of it, establishing proof of some of these factors is straightforward and uncontroversial, for example, the fact of being 'lay', 'unrepresented' and 'incarcerated'. It is, however, not clear from the decisions of the Court whether applicants, beyond pleading the same, provide other evidence to prove these claims. The Court seems to 'establish' these facts as existing by general reference to the application or based on the fact that the respondent State does not dispute such statuses of applicants.[103] In one instance, it 'notes' that the applicant is 'lay, indigent and incarcerated person without counsel', this notwithstanding that the applicant had not pleaded this and had relied on a different reason (pursuit of extra-ordinary remedy) to explain the delay in filing the application.[104] Further, specific proof is now demanded to support claims that were not contentious prior to 2019. Currently the Court requires applicants to demonstrate how their 'personal situation' (such as being lay, unrepresented and incarcerated) prevented timely filing. The challenge with this requirement is that there is lack of clarity on what more needs to be proven for an applicant to succeed. The Court has not shed light on what is expected even when there has been opportunity to do so, particularly when it rejects these claims by applicants as being 'insufficient' or not providing 'cogent reasons' as earlier discussed. The more recent dissenting opinions on admissibility decisions and particularly on the question of reasonableness of time have faulted majority decisions for not specifying what more is required of applicants.

The requirement to prove indigence and lack of awareness about the existence of the Court is even more complicated from an evidence standpoint. Regarding the issue of indigence, whereas this factor initially informed the Court's findings on reasonableness of time without strict insistence on evidence, the Court currently rejects 'blanket assertions' of indigence and expects specific proof of the same. It is not clear from the decisions of the Court what kind of evidence it anticipates should accompany the claim of indigence. Although it remains trite law that an applicant should

[102] ibid para 45.
[103] *Kijiji Isiaga v. Tanzania* (n 45), para 55.
[104] *Minani Evarist v. Tanzania* (n 48), para 41 and 45.

approach a court of law with evidence to support their claim, I suggest that the Court is obligated to shed light on what kind of evidence will pass muster, especially when lack of evidence is the basis for an increase in the number of cases found inadmissible.

Peeking at practices elsewhere, in determining cases on the right to legal assistance, the ECtHR has had to examine financial situations of individuals and determine whether or not they are of 'sufficient means', although this term is not defined in its case law.[105] In *Ognyan Asenov v. Bulgaria* the ECtHR held that 'it is not contrary to the Convention that the burden of proving a lack of sufficient means should be borne by the person who pleads it' and that to have a full picture of the applicant's overall financial situation it expected evidence of his 'assets, liabilities and income'.[106] The Court has also accepted a 'statement of means' and certificates from domestic tax authorities that relate to assets and income as evidence of lack of sufficient means.[107] For the ECtHR, the position is that one does not have to prove 'beyond all doubt' that they lack sufficient means and it is sufficient that there are 'some indications' that this is so.[108] Drawing inspiration from the ECtHR, I suggest that there should similarly be an elaboration by the African Court, within its decisions or administratively such as through Practice Directions on what applicants should submit as proof of indigence. Such elaboration must of necessity take into account the African context and what ordinary people, most of whom earn their living in an informal economy, can adduce to establish indigence. The other alternative of not requiring specific evidence of indigence and using presumptions of facts instead is discussed in more detail in section 6.7.

Proving 'lack of awareness' of the existence of the Court also places an arduous burden on the applicant. Before the shift in the Court's approach in 2019, the Court presumed lack of awareness from the fact of incarceration.[109] Currently, the Court requires more specific proof of the lack of awareness.[110] As seen earlier, even when applicants have made the plausible argument that they became aware of the Court when fellow inmates filed applications at the Court and they did the same soon after, the Court has not been convinced. The difficulty in proving with certainty the 'lack of awareness' partly stems from the fact that applicants are required to prove a negative fact. One international tribunal has noted that 'the evidence of negative facts can hardly ever be given

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[105] Panayotis Voyatzis, 'The Right to Legal Assistance Free of Charge in the Case law of the European Court of Human Rights' (2012) 1 Cyprus Human Rights Law Review 42, 46.
[106] *Ognyan Asenov v. Bulgaria,* App No. 38157/04 Judgment (ECHR, 17 February 2011), para 47.
[107] *Pakelli v. Germany* App No. 8398/78 Judgment (ECHR, 25 April 1983), para 34.
[108] DJ Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Right*, (2nd edn, OUP 2009), 317 discussing the test set in *Pakelli v. Germany* (n 101).
[109] See for example, *Amiri Ramadhani v. Tanzania* (n 61), para 50; *Steven John Rutakikirwa v. Tanzania* (n 61), para 48. *Dismas Bunyerere v. Tanzania* (n 61), para 47.
[110] See, for example, para 48 of *Godfred Anthony and Ifunda Kisite v. Tanzania* (n 11) where the Court required specific proof that the applicant 'had no knowledge of the existence of the Court'.

in an absolutely convincing manner'.[111] It has also been suggested that ICJ's acknowledgement of the difficulty in proving a negative in the *Nicaragua* case 'indicates that threshold of the standard of proof may be lowered in such cases'.[112] My suggestion, which I elaborate on further in the section 6.7, is that presuming or taking judicial notice of the fact that there's a general lack of awareness about the Court on the continent is a fairer alternative to requiring specific proof of lack of awareness.

Before turning to suggestions on alternatives that can address the difficulties highlighted above, I examine how the African Court's approach to evidence as discussed has impacted access to the Court.

6.6 Evidentiary practices on Article 56(6) and their impact on access to the Court

Reviewed literature suggests that requiring complainants to meet certain admissibility conditions is a necessary feature of international human rights adjudication. Viljoen notes that such conditions '[serve] as a screening or filtering mechanism between national and international institutions'.[113] This is because individuals' complaints against States should first be settled or attempted to be settled at the national level since 'a dispute needs to be of a specific nature or character for it to proceed to the international level'.[114] In the absence of such a filter, international institutions would likely be overwhelmed by cases.[115] The FIDH manual on admissibility of complaints at the Court points out that 'many cases [are] declared inadmissible every year, and many more [are] likely not even brought due to uncertainty as to admissibility requirements and fears the admissibility hurdle will prove impossible to overcome'.[116] It follows that an overly strict approach in considering admissibility of applications at the African Court would have a negative impact on its accessibility. Statistics on cases at the African Court, as I illustrate below, suggest that the Court is increasingly less accessible, which negates the Court's mission of strengthening human rights protection in Africa. Importantly, I make the point that this negative development has a correlation with how

[111] *Mexico City Bombardment Claims (Great Britain) v. United Mexican States*, Reports of International Arbitral Awards, Decision No. 12, 15 February 1930, para 6.
[112] Rüdiger Wolfrum 'Taking And Assessing Evidence In International Adjudication' in Tafsir Malick Ndiaye & Rüdiger Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff Publishers 2007), 353 (and at footnote 35).
[113] Frans Viljoen, 'Communications under the African Charter: Procedure and Admissibility' (n 5), 88.
[114] ibid
[115] ibid
[116] FIDH (n 19), 8.

the Court is dealing with evidence questions in assessing reasonableness of time as already discussed.

Article 31 of the Court Protocol requires the Court to submit to the Assembly of Heads of State and Government of the African Union an annual report on its work. A review of the activity reports by the Court for the last five years (2018-2022) shows a general decline in the number of new applications being filed at the Court.[117] There were 29 applications filed in 2018, 54 applications filed in 2019, 40 applications in 2020, 17 applications in 2021, 7 applications in 2022 and 10 in 2023. Some of the factors that possibly explain this decline is the withdrawal of the declaration allowing direct access to the Court by Tanzania, against whom most applications had previously been submitted. This withdrawal was made in 2019 but it took effect in 2020.[118] The Covid-19 pandemic could also have contributed to the drop in number of applications filed, particularly for the year 2020. In the same five-year period, there has equally been a steady increase in the number of rulings on jurisdiction and admissibility that dismissed applications, the bulk of which were on account of failure to meet the admissibility requirements on exhaustion of local remedies and unreasonable delay in seizing the Court. The numbers in this regard are 7 rulings in 2018, 8 rulings in 2019, 8 rulings in 2020, 12 rulings in 2021, 21 rulings in 2022 and 8 rulings in 2023. [119] From these rulings, there is a notable increase in the number of applications found inadmissible because of unreasonable delay when compared to the period prior to 2019. In terms of actual numbers, in the years between 2013 – 2018, the Court did not dismiss any application as inadmissible on the ground of unreasonable delay. However, in the period between 2019-2024, it has declared 17 applications inadmissible because of unreasonably delay in seizing the Court.[120]

These numbers demonstrate that between 2019-2024 and which I have shown was also the period the Court adopted a stricter approach to evidence in assessing reasonableness of time corresponds with an increase in the number of cases found inadmissible on this ground. Stated differently, this shift in approach to evidence in assessing reasonableness of time in admissibility decisions has made the African Court less accessible. Notably, this restricted access is not fully accounted for by these numbers because there is the possibility that some potential applicants have been

[117] These reports are all available in the Court's website at https://www.african-court.org/wpafc/activity-report/ (accessed 30 May 2023).
[118] *Ghati Mwita v. Tanzania* Application 012/2019 Ruling on Provisional Measures of 9 April 2020, para 5.
[119] Numbers available in the annual activity reports of 2018-2023, all available on the Court's website.
[120] Two cases in 2019 [*Godfred Anthony & Another* (n 11), *Livinus Daudi Manyuka* (n 55)], three cases in 2020 [*Hamad Mohamed Lyambaka* (n 60), *Chananja Luchagula* (n 58) and *Fidèle Mulindahabi* (n 101))], three cases in 2021 [*Yusuph Hassan* (n 62), *Layford Makene* (n 64) *and Yusuph Said* (n 63)], five cases in 2022 [*Hussein Ally alias Fundumu* (n 68), *Rajabu Yusuph* (n 65), *Hamisi Mashishanga* (n 71), *John Martin Marwa* (n 67), *Abdallah Sospeter Mobomba & Others* (n 69)], three cases in 2023 [*Leonard Moses v. Tanzania* (n 89); *Haruna Juma v. Tanzania*, (n 89); *Maulidi Swedi alias Mswezi Kalijo v. Tanzania*, (n 89) and one case as at June 2024 [*Kabalabala Kadumbagula and Daud Magunga v. Tanzania*,(n 90)].

discouraged or advised against filing in view of the emerging trend in the jurisprudence of the Court on Article 56(6) of the Charter. The trend shown by the above statistics, compounded by the challenges related to accessing the African Court that were discussed in Chapter two, are sufficient to warrant a different approach to evidence by the Court. In the next section, I discuss some of the alternatives that the Court can consider.

6.7 An equitable applicant-centred evidentiary approach to assessing reasonableness of time

This study suggests that the African Court ought to interpret reasonableness of time under Article 56(6) of the Charter through an equitable applicant-centred approach to procedural fairness in general and to evidence issues specifically. Based on this, I propose three ways in which the Court can proceed differently in assessing reasonableness of time and related evidentiary requirements on the issue. These alternatives can, in my view, result in more applications being heard and determined on their substance and in a more consistent manner. The default outcome would be fairer and more just admissibility decisions and a more accessible African Court for applicants who for one (valid) reason or the other, are unable to approach the Court timeously.

6.7.1 On proving indigence

First, on requiring applicants to establish indigence, it is my argument that the African context necessitates an adapted approach to proof. The conventional ways of establishing proof of lack of sufficient means applicable in the global north such as evidencing assets, liabilities and income as the ECtHR has anticipated or providing proof of public benefits or government entitlements that are based on indigency such as food stamps and public housing as happens in the United States is not replicable in most African countries.[121] This is particularly so because of the informal nature of income generation that is the reality for many people on the continent and non-existence of structured social assistance by the State in most African countries. It is possibly because of these challenges that the African Court initially presumed indigence from other circumstances that applicants found themselves in such as being incarcerated and not having afforded legal representation in proceedings before domestic courts. The requirement to specifically prove indigence as seen in decisions of the Court since 2019 therefore made it more difficult and not

[121] See, for example, the 'Statement of Inability to Afford Payment of Court Costs or an Appeal Bond' that has to be completed by indigents as required by the Supreme Court of the State of Texas. Available at https://www.txcourts.gov/media/1435953/statement-final-version.pdf (accessed 1 June 2023).

easier for applicants to establish this claim. Arguably, this was not a pro-human rights shift in furtherance of the purpose of the Court and the African Charter.

My suggestion in this regard is that the Court should revert to applying presumptions on the question of indigence as it did previously. In the alternative, I recommend that applicants approaching the Court should from the very start be guided on the kind of evidence to file in support of their claims of indigence as the reason behind delayed seizure of the Court. A practical solution here could be to require applicants to complete a statement of means that would, *inter alia*, provide details of formal and informal income and assets, if any. The Court can then give appropriate weight to such statements and any rebuttals by the respondent State on the content of the statement. In addition, drawing appropriate inferences in favour of applicants where the State does not refute claims of indigence in the statement of means would be a fairer distribution of the burden of proof. This especially given that the State has custody of records of income (from taxation records for example) and property owned by individuals.

6.7.2 On proving lack of awareness

Second, I suggest that the Court could adopt alternatives to requiring proof of 'lack of awareness' of the existence of the Court. Again, there was wisdom in the earlier jurisprudence of the Court that presumed this lack of awareness from the fact of incarceration as this then avoided the need to prove the negative fact of 'lacking awareness', a difficult endeavour as noted earlier. An analysis of the Court's annual reports submitted to the Assembly reveals that lack of awareness about the Court should not be controversial. All annual reports from 2013 when the Court issued its first decision on merits to the most recent one for 2023 note that the Court has undertaken promotional activities every year that are aimed at 'raising awareness among stakeholders, about its existence and activities'. Similarly, these reports show that the Court acknowledges as a challenge that there is 'lack of awareness' or 'inadequate awareness' about the Court. It is therefore perplexing that the Court on the one hand consistently informs the Assembly that lack of awareness is a challenge facing the Court and on the other hand rejects the claim of lack of awareness when made by applicants in proceedings before it. To avoid this contradiction, my suggestion is that the Court should take judicial notice of this fact. As highlighted in the discussions in Chapter four, 'the principal effect of the use of the doctrine of judicial notice is to excuse the party having the burden of establishing a fact from the necessity of producing formal proof of the fact by sworn witnesses and authenticated documents or objective evidence'.[122]

[122] Charles T. McCormick, 'Judicial Notice' (1952) 5 Vanderbilt Law Review 296, 296.

In view of this, the African Court should take judicial notice (or, alternatively, invoke a rebuttable presumption) of the fact that there is still lack of awareness about the existence and activities of the African Court for the vast majority of individuals and lawyers across the continent. This challenge is particularly acute among vulnerable categories of applicants at the Court such as those in prison and from whom the Court has demanded proof of their claims of lack of awareness about its existence. One potential concern with this proposal is that this could open the floodgates to a host of new cases at the Court, especially if applicants only need to claim lack of awareness as the reason for delayed filing of their cases. However, given that reasonableness of time taken to file is only one of seven admissibility conditions, including the need to exhaust local remedies, the possibility that taking judicial notice of widespread lack of awareness about the Court as suggested here would overwhelm the Court with cases is remote. This is particularly so for a Court that only received ten new applications in 2023. Applying this doctrine of judicial notice or invoking a rebuttable presumption of the fact of lack of awareness would also avoid the controversy introduced in the *Igola Iguna* case where the Court essentially drew an exact timeline when the public supposedly 'became aware' of the Court's existence and did so without empirical evidence as challenged by the dissenting judges.[123]

Even with the above proposition, there is still a need to address the valid question of how the Court can ensure that the Charter's requirement to file applications within reasonable time is not rendered meaningless if it is to accept arguments by all applicants who plead lack of awareness about the Court as the justification for delay. In my view, the main beneficiary of the rule on timely submission of cases is the State, given the need to avoid prolonged uncertainty on whether a State will be subjected to international adjudication after conclusion of domestic legal proceedings. States are however obliged under Article 1 of the African Charter to adopt legislative or other measures to give effect to the rights in the Charter. The Human Rights Committee, while interpreting an equivalent provision in the ICCPR(Article 2), observed that 'it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large'.[124] This interpretation arguably applies with regard to the African Charter and my contention is that given the obligation to create awareness on the rights in the Charter, which include enforcement mechanisms such as the African Court, States should be allocated a share in the burden of establishing whether there is lack of awareness when this is the

[123] There is also the difficult question of what is to be made of decisions where the Court did not 'deduct' the early years of the Court from the computation of time as it did in the *Igola Iguna* case.
[124] Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 1326 May 2004, para 7.

justification raised by an applicant.[125] In other words, I suggest that after an applicant has adduced *prima facie* evidence of lack of awareness about the African Court, the burden of proof should be reversed or shifted to the State to prove measures taken to create awareness about the Court. This distribution of the burden of proof in considering admissibility of applications would, overall, enhance the fairness of proceedings at the African Court.

6.8 Summary

Chapter two showed that there are factors within the African Court's operating context that make accessing the Court a challenging endeavour and this Chapter has demonstrated that its approach to evidence in determining admissibility has exacerbated this challenge. All three regional human rights systems are driven by the objective of legal certainty (or so they say) in applying the admissibility rule on timely submission of cases. Based on the analysis in this Chapter, I have made the case that legal certainty should not be achieved at the expense of what is arguably the greater good of substantively protecting human rights. The Chapter has shown a drastic change in the Court's evidentiary approach in its interpretation and application of Article 56(6) of the Charter since 2019. Fieldwork data suggests that this shift was motivated by a variety of factors, which notably include consideration of State interests. The analysis demonstrates that the strict approach to evidence in the Court's more recent decisions has brought with it difficulties of adducing specific evidence of some claims as required by the Court, such as proof of indigence and lack of awareness about the Court. The result, as statistics from the Court show, is that more cases have in the recent past been declared inadmissible because of undue delay in seizing the Court and the Court is as a result generally less accessible. To address this, suggestions have been made for the Court to consider use of presumptions as it previously did to establish facts such as indigence or apply the doctrine of judicial notice to avoid requiring proof altogether on facts such as 'lack of awareness' about the Court. The bottom line is that based on current evidentiary practices by the Court in applying Article 56(6) of the African Charter, a significant number of applicants have not had their day in court. Equally concerning, potential applicants may read the room and shy away from the Court. The analysis in the Chapter has shown that this need not be the case and there are other approaches to evidence with the potential to reverse this negative trend in the jurisprudence of the African Court.

[125] Article 25 of the African Charter places on State parties the 'duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms' in the Charter and 'to see to it that these freedoms and rights as well as corresponding obligations and duties are understood'. This obligation arguably extends to creating awareness on protection mechanisms like the African Court established to protect rights in the Charter.

CHAPTER 7: Compensation Claims at the African Court: Reconciling the Flexible and Rigid Approaches to Evidence

"It could be useful if the Court was a bit more flexible on reparations. Otherwise for material claims, very few people will be able to substantiate to the standard that is currently in existence." [1]

7.1 Introduction

This Chapter discusses the salient evidentiary issues in the decisions of the African Court on requests for reparations, an important stage of the Court's proceedings that seeks to right the wrongs against applicants and victims following establishment of violations. A judge at the Court observed in an interview that 'evidence challenges are most pronounced in reparations' and that the judges 'tend to actually have more debates on reparations than anything else'.[2] The African Court can grant reparations in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. However, for purposes of discussing the Court's evidentiary practices in reparations decisions, this Chapter primarily focuses on approaches to evidence in determining compensation claims as the case study. The African Commission has underscored the significance of compensation by observing that it 'remains committed to the fundamental principle of compensation on the basis that the series of rights guaranteed by the African Charter would be an empty proclamation if it was not backed by the guarantee of a right to restitution or compensation in the event of violation'.[3] Review of case law in the study suggests that decisions on compensation claims have generated the most controversy and inconsistencies on evidence questions. Compensation for moral and material injury is perhaps the most regularly sought form of reparations in applications by individuals, particularly by Tanzanian applicants in custody and which cases form the bulk of the Court's jurisprudence on reparations.[4] Common claims for compensation include damages for moral injury such as from distress and psychological anguish as a result of established violations and material damages for loss of income, loss of business or future earnings, costs incurred for legal services, among others. In view of this, zooming in on the Court's evidentiary approaches in considering compensation claims is sufficiently representative to permit a general understanding of evidence assessment in reparations proceedings.

[1] A quote from an interview with Registry Member No. 2 at the African Court (Arusha, Tanzania, 15 August 2023).
[2] Interview with Judge No. 1 of the African Court (Arusha, 22 March 2022).
[3] *Mamboleo M. Itundamilamba v. Democratic Republic of Congo,* Communication 302/05, 23 April 2013, para 133.
[4] The Court has established a practice of categorising compensation claims as 'pecuniary reparations' and the four other forms of reparations as 'non-pecuniary reparations'. For a discussion on evidence issues arising from requestions for restitution (particularly prayers to be released from prison by incarcerated applicants), see Chapter Five on standards of proof where I concluded that the Court raises the standard of proof in examining such requests.

The discussions focus on what the study deduces are two distinct approaches to evidence by the Court where it oscillates between an occasional equitable and applicant-centred approach defined by flexibility in evidence requirements and the more dominant strict approach defined by the Court's stringent requirement that claims for compensation need to be supported by specific documentary evidence to succeed. Through a scrutiny of all reparations decisions by the Court from the first reparations judgment in 2014 to the most recent decisions as at September 2024, the Chapter demonstrates how this twin approach to evidence engenders inconsistencies in the Court's case law. Based on this case law analysis, review of relevant literature, interview data and lessons from international practices on reparations, it argues that the Court should rethink the more dominant rigid approach that is partly motivated by the Court's deliberate effort to cater to States' concerns or interests while considering evidence. In this regard, the Chapter sets out why an equitable applicant-centred approach to evidence in compensation claims is preferable and how it can be applied in practice. It contends that the suggested approach could aid the Court in minimizing the inconsistencies and substantive inaccuracies resulting from dismissal of claims that possibly have merit because of the strict requirement of documentary evidence.

The Chapter is structured as follows: section 7.2 gives a summary of the international legal framework on reparations for human rights violations that is also relevant to the African context. Section 7.3 then provides an overview of some of the principles the African Court has developed over time with regard to reparation claims, including on evidence. Section 7.4 outlines the Court's guidance on evidence issues in reparation claims as found in one of its publications and in the case law. Section 7.5 delves into the two approaches to evidence in reparations. Section 7.6 scans international practices on evidence in reparation claims and relates these with decisions of the African Court. Section 7.7 makes the case for an equitable applicant-centred evidentiary approach in determining compensation claims. Section 7.8 addresses the challenge of inconsistency in the Court's decisions and how this can be mitigated before providing a summary of the Chapter in section 7.9.

7.2 A summary of the international legal framework on reparations

It would make a mockery of human rights if there were no consequences for their violations and this makes the right to an effective remedy particularly crucial to the protection of human rights. At the international level, this right is provided for in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and the Human Rights Committee has determined that reparations are 'central to the efficacy of Article 2(3)' and that without reparations for violations

'the obligation to provide an effective remedy…is not discharged'.[5] The African Court, while noting that the African Charter does not expressly provide for the right to a remedy, has observed that this right 'derives from the obligation set out in Article 1 of the Charter to establish judicial or other such mechanisms to address alleged breaches of substantive rights protected in the Charter'. The Court has additionally noted that the right is 'reinforced' by a joint reading of Articles 1 and 7(1)(a) on State obligations under the Charter and the right to have one's cause heard, respectively.[6] The African Commission had arrived at the same position earlier, observing that Article 7 is not limited to rights of arrested and detained persons as it also 'encompasses the rights of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief'.[7]

The Court Protocol mandates it to 'make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.[8] This provision is further elaborated on in Rule 40(4) of the Court's Rules which requires supporting documents and evidence in relation to requests for reparations submitted together with or after the main application. A study commissioned by the African Court identified 'five internationally recognised forms of reparations', namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'.[9] The right to an effective remedy and these forms of reparations are also anchored in several other international and regional human rights instruments.[10] Notably, one of the key instruments on the right to remedy and reparations is the U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[11] This instrument elaborates on the

[5] UN Human Rights Committee (HRC), General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html [accessed 16 February 2023]

[6] *Harold Mbalanda Munthali v. Malawi*, Application No. 022/2017, Judgment on Merits and Reparations, 23 June 2022, paras 101-102.

[7] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, para 213.

[8] Article 27(1) of the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[9] African Court on Human and Peoples' Rights, 'Comparative Study on the Law and Practice of Reparations for Human Rights Violations' (2019), 46. See also Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, 'Reparations for the Violation of the Right to Freedom of Expression in the Interamerican System', OEA/Ser.L/V/II. CIDH/RELE/INF.5/12, 30 December 2011, para 9.

[10] See article 8 of the Universal Declaration of Human Rights, Articles 9(5) and 14(6) of the ICCPR, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Articles 5(5), Article 39 of the Convention of the Rights of the Child, Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance, Article 14 of the Convention against Torture and other forms of Cruel and Inhuman and Degrading Treatment, Article 4(2)(f) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Articles 25, 68 and 63(1) of the American Convention on Human Rights, articles 13, 41 of the European Convention on Human Rights, Article 16 of the Arab Charter on Human Rights and article 21(2) of the African Charter on Human and Peoples' Rights.

[11] Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation (accessed 17 February 2023).

abovementioned forms of reparations and clarifies that: (1) *restitution* should restore the victim to the original position before the violation and measure in this regard include restoration of liberty, return to one's place of residence, restoration of employment and return of property; (2) *compensation* should be provided for any economically assessable damage resulting from violations such as physical or mental harm, lost opportunities such as employment and education, material damages and loss of earnings, moral damage and costs for legal, medical and psycho-social services; (3) *rehabilitation* includes medical and psychological care as well as legal and social services; (4) *satisfaction* includes verifying facts and disclosure of truth, searching for the whereabouts of the disappeared, a public apology, judicial and administrative sanctions against violators; and (5) *guarantees of non-repetition* include measures such as reviewing and reforming laws contributing to violations, training of law enforcement officials and strengthening independence of the judiciary.[12] Another relevant document at the international level is the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.[13] Equally relevant to reparations in the African context is the African Commission's General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment.[14] The Commission has adopted other instruments that address reparations.[15] Notably, while both the UN Guidelines and General Comment No. 4 have usefully defined the nature and scope of the right to a remedy and the forms of reparations, they totally omit evidentiary issues in relation to reparation claims.

In applying some of the instruments highlighted above, a number of principles have concretised from the Court's practices and I give an overview of these principles in the next section.

7.3 Some established principles on reparations at the African Court

The African Court delivered its first judgment on reparations in 2014 and for a decade now the Court has developed its jurisprudence in this area considerably. A review of its reparations judgments shows that a number of principles, some general on reparations and others specific to evidentiary issues, have solidified and this section provides a summary of the key principles. On

[12] ibid, paras 19-23.
[13] Appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two. Available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 30 July 2024). The Draft Articles were cited by the African Court in the *Nobert Zongo* case, see paras 21, 24, 26 and 29.
[14] Available at https://atlas-of-torture.org/en/entity/zz3mqwhy7gc?page=1 (accessed 16 February 2023)
[15] See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa - Robben Island Guidelines, para 50; ACHPR/Res.111 (XXXXII) 07: Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence.

the general principles, first, the Court has taken a similar position to that of the PCIJ[16] in holding that the purpose of reparations 'is *restituo in integrum*, which is to place the victim, as much as possible, in the situation prior to the violation, not richer or poorer'.[17] Second, the Court has repeatedly determined that establishing a violation of the African Charter is not sufficient, per se, for reparation to accrue.[18] There must be, in addition, a causal link between the wrongful act that has been established and the alleged prejudice.[19] Third, in assessing reparations claims the Court has numerously stated that it takes into account the principle that a State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim.[20] Fourth, the Court has identified forms of reparation to include 'restitution, compensation and rehabilitation of the victim, satisfaction and measures to ensure non-repetition of the violations'.[21] Lastly, in the *Mtikila* case, the Court considered measures of satisfaction, although the applicants had not sought this form of reparations. It did so on the basis that this was permitted under Article 27 of the Court Protocol and 'the inherent powers of the Court'.[22] This position of the Court, however, seems to have been reversed in the *Konate* case where the applicant had sought compensation for medical expenses but quoted a lesser amount than the total amount reflected in the supporting evidence (receipts). The Court awarded the lesser amount claimed and took the position that since it 'cannot rule *ultra petita*' it would 'limit itself to the amount claimed'.[23] One author has argued, and I agree, that the earlier decision in *Mtikila* was 'pro-victim or applicant' and a more progressive interpretation of the Court's remedial competence as it gave full effect to the

[16] See *Alex Thomas v. Tanzania*, Application No. 005/2013, Judgment on Reparations of 4 July 2019, para 12 where the Court cites: PCIJ, Chrozow Factory Case, *Germany v. Poland*, Jurisdiction, Determination of Indemnities and Merits, Rec 1927, p 47 where it was held that the aim is to 'as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed'.; *Mohamed Abubakari v. Tanzania*, Application No. 007/2013, Judgment on Reparations, 3 June 2016, para 20.

[17] *Lucien Ikili Rashidi v. Tanzania*, Application No. 009/2015, Judgment (Merits and Reparations) of 28 March 2019, para 118; *Wilfred Onyango Nganyi and 9 Others v. Tanzania*, Application No. 006/2013, Judgment (Reparations) of 4 July 2019, para 16.

[18] The exception to this general rule is in compensation claims for non-pecuniary (moral) damage which does not have to be proved.

[19] *Reverend Christopher R. Mtikila v. Tanzania*, Application No. 11/2011, Judgment on Reparations, 13 June 2014, para 31; *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013 Judgment on Reparations, 3 June 2016, para 46. *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*, Application No. 013/2011, Judgment on Reparations, 5 June 2015, para 24.

[20] *Mohamed Abubakari v. Tanzania*, (n 16), para 19; *Alex Thomas v. Tanzania*, (n 16), para 11; *Ingabire Victoire Umuhoza v. Rwanda*, Application No. 003/2014, Judgment on Reparations, 7 December 2018, para 19.

[21] *Christopher Jonas v. Tanzania*, Application No. 011/2015, Judgment on Reparations, 25 September 2020, para 16; *Ingabire Victoire Umuhoza vs Rwanda* (n 20), para 20; *Mohamed Abubakari v. Tanzania* (n 16), para 21. The Court's Factsheet on Filing Reparations Claims has included an additional item of 'costs' in the list of forms of reparations, see page 7.

[22] *Reverend Christopher R. Mtikila v. Tanzania*, (n 19), para 44.

[23] *Lohé Issa Konaté v. Burkina Faso* (n 19) para 50.

power of the Court to grant 'appropriate' orders to remedy a violation as allowed under Article 27 of the Court Protocol.[24]

Some evidence-specific principles have also concretised from the decisions of the Court and some examples in this respect are useful. Before the Court can address proof questions in relation to material loss, the applicant is required to establish the causal link between the established violation and the alleged material prejudice.[25] In practice, establishment of the causal link is implied in all instances where the Court proceeds to examine evidence as neither the applicants nor the Court explicitly address or articulate the issue in most cases. However, the Court is explicit about instances when applicants have *not* established causation. According to a study commissioned by the Court, causation means a court must not only find that a human rights violation was committed but also that the harm alleged by the victim resulted from that particular violation.[26]

Besides requiring the applicant to establish a causal link between the violation found and the alleged prejudice, the Court has held that the burden of proof is on applicants to justify their prayers, particularly for material damages.[27] With regard to moral damages, the Court's position is that it presumes there is prejudice whenever a violation is established and the applicant is therefore not required to prove moral prejudice.[28] Still on moral damages, the Court also presumes moral prejudice for indirect victims and this presumption specifically applies to spouses, parents and children. However, while applicants are not required to prove moral prejudice for the three categories of indirect victims, they are required to provide evidence of their relationship with spouses or filiation to the parents and children.[29] For other categories of indirect victims such as brothers and sisters, the applicant must adduce both proof of filiation and the moral prejudice suffered.[30] The Court has further clarified that for this category of indirect victims, the applicant 'must demonstrate and prove that he or she was responsible for their welfare and provided for

[24] Tarisai Mutangi,'Tracing the developing reparations jurisprudence of African Court on Human and Peoples' Rights as reflected in its first cases of Mtikila, Zongo and Konate in Alejandro Fuentes & Annika Rudman (eds) *Human Rights Adjudication in Africa: Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems* (PULP 2023), 17, 24.
[25] *Lohé Issa Konaté v. Burkina Faso* (n 19) para 15.
[26] Comparative Study on the Law and Practice of Reparations for Human Rights Violations (n 9), 34.
[27] *Reverend Christopher R. Mtikila v. Tanzania*, (n 19) para 31 & 40; *Kennedy Gihana v. Rwanda*, Application No. 017/2015, Judgment on Merits and Reparations, 28 November 2019, para 139.
[28] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*,(n 19) para 55; *Ally Rajabu And Others vs Tanzania*, Application No. 007/2015 Judgment on Merits and Reparations, 28 November 2019, para 136; in the same case, at para 61, the Court adopted the Inter-American court's position that the quantum of damages for moral prejudice is determined based on judicial discretion and the principle of equity.
[29] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*,(n 19) para 54; *Lucien Ikili Rashidi v. Tanzania,* (n 17),para 135.
[30] *Gozbert Henerico v. Tanzania*, Application No. 056/2016, Judgment on Merits and Reparations, 10 January 2022, para 192 & 195.

them, such that the violations against the applicant also adversely impacted their social situation'.[31] A final and important highlight on applicable evidence principles was the finding in the reparations decision in the *Zongo* case where the Court observed that pursuant to Article 26(2) of the Court Protocol, it is guided by 'the principle of free admissibility of evidence'. It added that the implication of this principle is that the Court is 'not limited by internal restrictive rules of law with regard to admissible evidence'.[32] This finding has been interpreted as meaning that 'the Court is the master of the evidentiary procedure' and is not 'hamstrung by rules of national law or other strict approaches'.[33]

Besides these pronouncements on evidence in decided cases, the Court has further issued a publication that gives guidance on preparing and filing reparations claims. I highlight its provisions on evidence next.

7.4 The Court's guidance to applicants on evidence in reparation claims

As highlighted in Chapter four, the African Court has adopted a 'Factsheet on Filing Reparations Claims' which defines key terms in relation to reparations claims, guides applicants on the forms of reparations available and the evidentiary standards applicable when making a determination on reparations.[34] The key provisions on evidentiary standards for reparations claims in this Factsheet are: (1) the burden of proof lies with the applicant but it may shift to the respondent State when the applicant demonstrates that the State has more or exclusive access to information about the case, (2) the standard of proof to be met is the preponderance of evidence where the applicant has to show that what is alleged to have occurred is more probable than not, (3) this standard of proof is not applied strictly and the Court is flexible, 'allowing for the circumstances of each case to be considered and remaining sensitive to victim conditions of vulnerability affecting their access to evidence', (4) regarding forms of evidence, the Court has 'wide latitude to admit and consider a broad array of evidence relevant to the question of reparations' and that it may rely on 'all forms of evidence', (5) in allowing and considering evidence, the Court is guided by 'the principles of equity, fairness and reasonableness' but for material loss 'an applicant is required to adduce specific evidence of the precise loss that he/she has suffered'.[35] This last issue (adducing specific evidence) is a key concern in the discussions in this Chapter where I argue that the Court has over-

[31] *Anudo Ochieng Anudo v. Tanzania*, Application No. 012/2015, Judgment on Reparations, 2 December 2021, para 80.
[32] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*,(n 19) para 52.
[33] Tarisai Mutangi (n 24), 20.
[34] Fact Sheet on Filing Reparation Claims, Adopted During The Fifty-Third Ordinary Session of The African Court on Human And Peoples' Rights, Arusha, Tanzania 10 June – 5 July 2019 (Revised October 2020). Available at https://www.african-court.org/wpafc/forms-for-parties-2/ (accessed 16 February 2023).
[35] ibid, 6 -7.

emphasized it and has missed opportunities to decide more claims on the basis of equity, fairness and reasonableness.

Regarding the forms of evidence that the Court accepts in support of reparations claims, as noted above, the Factsheet states in general terms that 'all forms of evidence' are admissible. During my interviews at the Court, I sought to understand from respondents whether there were some forms of evidence with greater probative value than others. There was general agreement that documentary evidence is preferred. One judge noted that 'documentary evidence has more probative value because it is difficult to disprove' and informed me that in cases where documentary evidence such as medical reports contradict each other, this has been resolved through oral evidence.[36] This view on preference for documentary evidence was further nuanced by the observations of a member of the Registry who noted that documents from State agencies were given greater weight. While noting that there wasn't necessarily a hierarchy on forms of evidence and the probative value attached to them, the member observed that 'government or public notices and other official documents are given the presumption of authenticity'.[37]

The Court has in its decisions spelt out some specific forms of evidence it anticipates in support of certain claims. For applicants claiming moral damages for their spouses, it requires a marriage certificate to prove the spousal relationship and to prove filiation to children the Court requires birth certificates. For parents, the relationship to the applicant should be supported by an 'attestation of paternity or maternity'.[38] A common request by incarcerated applicants alleging violation of their right to a fair trial is an order by the African Court for their release from prison. The Court's jurisprudence on this has seen some form of progression over time, from initially rejecting such requests because applicants failed to demonstrate clear and compelling reasons for such orders, to defining what constitutes clear and compelling circumstances to, more recently, ordering release of applicants. One author has likened this to both an evolution and revolution in the remedies granted by the Court in fair trial cases.[39] The Court has also, on its own motion, requested for and relied on independent expert submissions.[40] Where applicants claim pecuniary loss such as loss of income or future earnings, to prove existence of a business in relation to the said income, the Court has stated that it would require documents such as a business licence,

[36] Interview with Judge No. 1 of the African Court on 22 March 2022 in Arusha, Tanzania.
[37] Interview with Registry Member No. 6 of the African Court (Arusha, 30 May 2022).
[38] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*,(n 19) para 54; *Anudo Ochieng Anudo v. Tanzania*, (n 31), para 79.
[39] Misha Ariana Plagis, 'The Makings of Remedies: The (R)Evolution of the African Court on Human and Peoples' Rights' Remedies Regime in Fair Trial Cases' (2020) 28 African Journal of International and Comparative Law 45, 52-65.
[40] *African Commission on Human and Peoples' Rights v. Kenya*, Application No. 006/2012, Judgment on Reparations, 23 June 2022, para 18.

payment receipts, business contracts and registration with revenue authorities.[41] To prove actual income from a business, it accepts evidence such as bank statements, tax certificates, accounting records, bank transaction records and balance sheets.[42] It is not enough for an applicant to rely on a document that proves existence of a business to support a claim for loss of income.[43] I will argue in this Chapter that this position of requiring additional evidence to prove loss of income has not only been inconsistently but also inappropriately applied in some cases.

7.5 The two approaches to evidence in compensation claims

This section will demonstrate that the African Court blows hot and cold in its undertaking to be guided by equity, fairness and reasonableness in considering evidence in reparation decisions (as seen in the Factsheet discussed earlier). In doing this, examples are given of when the Court keeps its word by applying an equitable or flexible evidentiary approach and when it resorts to strictly requiring documentary proof if applicants are to succeed in their claims. Importantly, the discussions will show that the latter approach, which the study argues is in need of reform, is the dominant approach.

7.5.1 Highlights of the flexible jurisprudence

The African Court first indicated its preference for a flexible approach in assessing evidence in compensation claims in the *Nobert Zongo* case, one of its earliest decisions. It observed in this case that it was 'not limited by internal restrictive rules of law with regard to admissible evidence. It may therefore decide that a type of evidence required under domestic law is not necessarily required before it as an international court'.[44] This flexibility was at play in the *Mohamed Abubakari* case where the applicant had sought compensation for moral damages to his wife as an indirect victim. His challenge, however, was that he was not formally married to his wife and therefore could not produce a marriage certificate to prove the spousal relationship. The African Court took the view that there exists common law marriages 'where a couple is considered married legally without formally registering their relationship as a civil or religious marriage'.[45] In addition to this presumption of marriage, the Court also noted that the applicant's name and that of his partner were indicated in his child's birth certificate as the father and mother to the child and that this 'clearly established a link' between the applicant and his partner.[46] The Court took the same stance

[41] *Lucien Ikili Rashidi v. Tanzania* (n 17), para 125; *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. Tanzania*, Application No. 003/2015 Judgment on Reparations of 30 September 2021, para 30.
[42] *Wilfred Onyango Nganyi & 9 Others v. Tanzania*, (n 17), para 32; *Anudo Ochieng Anudo v. Tanzania,* (n 31) para 44.
[43] *Wilfred Onyango Nganyi & 9 Others v. Tanzania*, (n 17) para 32.
[44] *Beneficiaries of the Late Norbert Zongo & Others v. Burkina Faso*,(n 19) para 52.
[45] *Mohamed Abubakari v. Tanzania*, (n 16), para 62.
[46] ibid.

in *Anudo Ochieng Anudo* noting that although the conventional way of evidencing an employment relationship is through providing an employment contract, copies of salary payment slips were 'sufficient evidence of an employment relationship' (in the absence of an employment contract).[47] These are good examples (among others[48]) of the Court using circumstantial evidence to circumvent the absence of direct evidence. The challenge, however, is that the Court does not extend this magnanimity to all cases where applicants are in similar circumstances.

An equally flexible approach was adopted in *Mgosi Mwita Makungu v. Tanzania* where the Court took note of the fact that the applicant had 'prayed for flexibility due to difficulty of obtaining documentation to support his claim that he managed a farming business and earned an income from it' and that 'his prayer [was] based on the fact [that] a long time that has elapsed since his incarceration'.[49] The Court further observed that the applicant had not provided evidence of the nature of his farming business, actual or estimated income and that such evidence is of a private or confidential nature and thus accessible only to the applicant. Importantly for purposes of this discussion, the Court pointed out that 'the applicant's situation, being incarcerated, means that there would be a real difficulty to access the said documents which are of a private or confidential nature. In view of this, the Court deems it fit to adopt a flexible approach'.[50] It then awarded the applicant damages for material prejudice suffered for loss of income, basing the calculations on the respondent State's monthly minimum wage. The Court has summed up how it deals with situations where applicants face evidentiary difficulties in the more recent decision in *ACmHPR v. Kenya* where it stated:

> [A]ll material loss must be specifically proved. In insisting on proof of material loss, however, the Court is alive to the fact that victims of human rights violations may face challenges in collating evidence in support of their claims for various reasons. As such, the Court proceeds on a case by case basis paying attention to the consistency and credibility of the applicant's assertions in the light of the whole application.[51]

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[47] *Anudo Ochieng Anudo v. Tanzania* (n 31), para 34.

[48] See, for example, *Lucien Ikili Rashidi v. Tanzania,* (n 17),paras 135-137, where the Court accepted the applicant's listed partner as the wife based on the fact that his claim that she was his wife was 'expressly and consistently acknowledged by the Respondent State in its submissions' and also because she was acknowledged as such in the domestic court's proceedings; The Court also relied on circumstantial evidence(birth certificate details) to establish a marital relationship in *Thobias Mang'ara Mango & Shukurani Masegenya Mango v. Tanzania*, Application No. 005/2015, Judgment on Reparations of 2 December 2021, para 90.

[49] *Mgosi Mwita Makungu v. Tanzania*, Application No. 006/2016, Judgment on Reparations, 23 June 2022, para 31.

[50] ibid*,* para 32.

[51] *ACmHPR v. Kenya,* (n 40), para 60.

The above position is a reasonable one, except that not all decisions are inspired by this equitable and applicant-centred flexibility even when facts are similar to those in the cases highlighted above. Some decisions are highlighted in the next sub-section to illustrate this point.

7.5.2 Rigid evidentiary approaches and the challenge of inconsistencies

The Court's overall approach to reparations has been described by one author, Tala Fomba, as 'intended to act as balancing role, that is, to satisfy the parties to the proceedings on an equal basis'.[52] He further describes the Court's examination of evidence in its reparations decisions as 'very particular about the documents produced by the parties' as well as being 'fastidious in its examination of the evidentiary documents submitted to it'.[53] My interview data confirms Fomba's take on the Court's approach. One of the questions I posed to judges and Registry staff at the African Court was whether they agreed with my preliminary finding that the Court rigidly (and inappropriately) requires documentary proof in most of its decisions on compensation claims. The responses were unanimous that what the study refers to as a strict or rigid approach to evidence where the Court insists on documentary evidence to support compensation claims is the dominant approach. Importantly, interviewees disclosed that consideration of State interests or concerns is one of the key factors informing the Court's choice of a strict evidential approach in determining compensation claims. One of the judges talked of the Court applying a higher standard of proof in reparations claims because it 'has to balance interests of both sides'.[54] A second judge, in explaining the Court's strict insistence on supporting documentary evidence for reparations claims talked of the Court's need to be 'careful not to simply take the applicant's word on reparations' because 'the respondent is paying out of taxes from the people'.[55] These takes by the judges also had support within the Registry. One member confirmed that consideration of State interests has informed the strict or rigid evidentiary approach in compensation claims. He made this observation:

> A court like ours has to be careful and cautious in its orders because it is for the state to implement its decisions. If you abuse your power in ordering damages, there will be reluctance to implement. It cannot be a random exercise of assessing quantum of damages. The court must be particular on evidence questions in reparations claims because the outcome may lead to a sanction on the state. And the whole point of reparations in international law is not to punish the state. For us to reach

[52] JJ Tala Fomba, 'The notion of fairness in reparation litigation before the African Court on Human and Peoples' Rights' (2023) 7 African Human Rights Yearbook 52, 63.
[53] ibid, 68,69.
[54] Interview with Judge No. 3 of the African Court on 23 March 2022 in Arusha, Tanzania.
[55] Interview with Judge No. 1 of the African Court on 22 March 2022 in Arusha, Tanzania.

> a point where we punish the state moneywise, we need to be sure of what we are doing. That the applicant is not fooling the court.[56]

These views from the Court's insiders are reflected in the decisions of the Court and a few are highlighted below to illustrate this.

The language used by the Court in the *Ingabire Victoire Umuhoza v. Rwanda* case was indicative of a strict approach to assessing evidence of material prejudice. It noted in this case that:

> the request for reparation of material prejudice arising from the violation of a human right must be substantiated by evidence, and where several prayers have been made, each of these must be accompanied by probative supporting documents and buttressed by explanations establishing the link between the expenditure or material loss and the violation.[57]

This seemingly strict approach that requires specific evidence to grant requested reparations claims is also seen in the later case of *Wilfred Onyango Nganyi & 9 Others v. Tanzania*. The applicants in the case had, among other claims, prayed for costs incurred in legal fees during domestic proceedings. The Court however took issue with the fact that they did not provide supporting documents and notably, rejected their explanation that receipts were lost due to long passage of time. It held that the 'explanation provided is not sufficient proof and the claim for these expenses is therefore dismissed'.[58] To further illustrate the centrality of adducing specific proof in this case, the Court went on to hold that 'with respect to expenses that were proved by proper documents such as receipts or equivalent documents, compensation is warranted' and awarded damages.[59] It is difficult to distinguish the applicant's explanation in this case and which the Court rejects from the explanation given by applicant in the *Mgosi Mwita Makungu* case that he had difficulty in obtaining documentation to support the claim for loss of income from business (discussed above) and which the Court accepts. Arguably, the *Wilfred Onyango Nganyi* case provided the perfect opportunity for the Court to award damages in equity because it was evident from the domestic proceedings that the applicants had legal representation and therefore they must have incurred some expenses, even if they had no evidence to prove it. In this case, I note that the uncertainty created by lack of direct evidence is resolved in favour of the State even in a situation where the applicant's claim is not totally unfounded as was the case here. Related to this, it is important to note that the Court in *Ingabire Victoire Umuhoza v. Rwanda* awarded damages in equity for legal fees incurred. It held: 'the fees paid to lawyers … were not substantiated in a fees agreement. The Court

[56] Interview with Registry Member No. 5 at the African Court (Arusha, Tanzania, 24 August 2023).
[57] *Ingabire Victoire Umuhoza v. Rwanda* (n 20), para 36.
[58] *Wilfred Onyango Nganyi & 9 Others v. Tanzania*, (n 17) para 52.
[59] ibid, para 53.

however holds that the applicant must have incurred these expenses for the purposes of her defence'.[60]

While other contradictions such as the above exist, I provide a final illustration of the inconsistencies of this twin approach to evidence. As mentioned earlier, there is now a well-established general principle in the Court's practices, and which was reaffirmed in the *Mgosi Mwita Makungu* case, decided on 23 June 2022, that moral prejudice for indirect victims is always presumed but 'reparation is granted only when there is evidence of the relation between spouses or the filiation with an applicant'.[61] This position can be contrasted with that taken in the *Harold Mbalanda Munthali v. Malawi* case, also decided on 23 June 2022. The Court in the latter case took a view that contradicts its position in the former, both determined on the same date, when it found that the 'close relationship between the deceased (the applicant's father) and the claimants [was] established based on the list of dependants provided in the written submissions of the applicant, which he reiterated during the public hearing'.[62] The contradiction here is rather obvious, in one case proof of relationship with the applicant is required and in another simply submitting a list of names is sufficient. Related to this, the Court has previously stated that providing a list in such cases is not enough. In *Lèon Mugesera v. Rwanda*, it stated that 'as a general rule, for indirect victims to be entitled to reparation, they must prove their marital status or filiation to the applicant… it is not sufficient to simply list the alleged indirect victims'.[63] It has adopted this position in other cases as well.[64]

Dissenting opinions have also flagged the inconsistent approach to evidence in the Court's decisions on compensation claims and this is perhaps best illustrated in the joint dissenting opinion of three judges in the *Anudo Ochieng Anudo* case. In this case, in awarding damages, the majority decision adopted a flexible evidentiary approach and took note of the difficulties the applicant faced in adducing evidence, having been expelled from the territory of the respondent State and therefore 'the normal standard of material evidence [could not] be applied to him strictly'.[65] Regarding this position by the majority, the three dissenting judges observed as follows:

> in its previous judgments the Court dismissed the allegations of applicants, even when they were incarcerated, on the grounds that they did not adduce evidence of the material harm they allegedly

[60] *Ingabire Victoire Umuhoza v. Rwanda* (n 20), para 44.
[61] *Mgosi Mwita Makungu v. Tanzania* (n 49), para 56.
[62] *Harold Mbalanda Munthali v. Malawi*, (n 6), para 138.
[63] *Lèon Mugesera v. Rwanda*, Application No. 012/2017, Judgment on Merits and Reparations, 27 November 2020, para 148.
[64] See, for example, *Andrew Ambrose Cheusi v. Tanzania*, Application No. 004/2015, Judgment on Merits and Reparations, 26 June 2020, para 158-159.
[65] *Anudo Ochieng Anudo v. Tanzania* (n 31), para 44.

> suffered, although their situation did not allow them to have access to evidence in support of their allegations.[66]

The dissenting opinion further notes that 'it is regrettable that the Court did not apply its own jurisprudence, hitherto consistent, in the instant case'.[67] This take, in my view, can be understood to mean that the three judges consider strict proof of compensation claims (with documentary evidence) to be the default and long-standing position of the Court with regard to establishing material prejudice. This deduction is supported by fieldwork data. When I questioned one judge on whether the Court applies a higher or stricter standard of proof in reparations decisions, the response was that the African Court 'has been quite strict without actually saying the standard (of proof) applied is balance of probability'. The judge further added that 'maybe we [the Court] require a higher standard without saying so. But we have not defined what kind of higher standard it is'. Notably, this judge observed that 'unless [the Court] has a document it tends to say there is no proof'.[68] This view was affirmed and its justification elaborated on in an interview with another judge who observed as follows:

> In reparations, the Court requires a higher standard of proof and it has to balance interests of both sides. To have a practice of easily accepting claims without proof will open doors for frivolous claims. This is because the idea of reparations is not to enrich the applicants but restore them to their original position or state. There is a big challenge for the Court when applicants do not support claims with evidence as the Court is now invited to speculate, a role that it should not play.[69]

However, this study takes the view that limiting the means of proof to documentary evidence is a problematic approach by the Court that requires rethinking. This is particularly so in the context of the African Court where the majority of applicants, especially those from Tanzania, are prisoners processing their applications at the African Court while in custody. Such applicants, especially those serving long sentences, are likely to have difficulties producing documentary evidence. A member of the Registry conceded that indeed proof in compensation claims at the Court has been equated to documentary proof. In the words of this member:

> In claims for material prejudice, the rule is that you should strictly prove what you lost and what you are claiming … And if you look at the way the Court puts it, it seems to suggest that proof

[66] *Anudo Ochieng Anudo v. Tanzania*, Application No. 012/2015, Joint Dissenting Opinion, 2 December 2021, para 28.
[67] ibid, para 29.
[68] Interview a Judge No. 1 of the African Court (Arusha, 22 March 2022).
[69] Interview with a Judge No. 3 of the African Court (Arusha, 23 March 2022).

> amounts to documentary proof. It might not have come out explicitly but that is the clear insinuation.[70]

The question that follows from the above description of the Court's practices and views from actors within the Court is what we are to make of the situation. The rigidity evident in some of the evidentiary practices highlighted above and which contradicts its jurisprudence that has developed through its infrequent flexible approach to evidence requires the Court's attention. The main justification for this call is the real possibility that the Court has dismissed many compensation claims that have merit because of its rigid evidentiary approach. Section 7.7 gives suggestions on how the Court could reform by embracing a more equitable approach and de-emphasise the need for specific documentary evidence where this is inappropriate and thus limit substantively inaccurate findings in compensation claims. Before that, the next section provides a scan of international practices in reparations claims that will help to situate and back the proposals I make.

7.6 International evidentiary practices in reparations claims

In this section, I will make the point that flexible application of evidentiary standards in reparations claims while bearing in mind the difficulties that victims of violations may encounter in efforts to produce evidence of harm suffered is generally the norm in international courts, tribunals and mass claims mechanisms. Examples from decided cases by some of these bodies will also show that they apply a lower standard of proof in reparations claims than the one they apply in merit proceedings. The highlights from the discussion on international practices then provides the basis for urging the African Court to pay closer attention to its various decisions where documentary proof is strictly and rigidly required and which decisions, when viewed collectively, shows a pattern of an inflexible approach to evidence.

Various international tribunals and mass claims reparations programs have adopted relaxed evidentiary standards both within their rules and/or decisions in determining reparation claims. It has been noted that in compensation claims programmes, three factors make it difficult or impossible for claimants to substantiate their claims: (1) circumstances under which the violation or loss occurred such as victims whose personal belongings are destroyed, (2) passage of time that makes it harder for victims, survivors or their relatives to gather information necessary to substantiate a claim, (3) the nature of the violation such as where personal statements are the only

[70] Interview with Registry Member No. 2 at the African Court (Arusha, Tanzania, 15 August 2023).

evidence available to substantiate the violation in question.[71] Tribunals have addressed such evidentiary difficulties by 'relaxing the evidentiary requirements in favour of claimants'.[72] A few examples of this relaxation of standards of proof are helpful. The Claims Resolution Tribunal (CRT) of the Holocaust Victim Assets Litigation (now closed) had in its governing rules a provision allowing for 'the standard of plausibility' where a claimant was required to 'demonstrate that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the claimed Account'. The provision also required the CRT to 'at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long period of time that [had] elapsed since the opening of the Accounts'.[73] A second example is from the International Commission on Holocaust Era Insurance Claims (ICHEIC) which adopted relaxed standards of proof that required three things from companies: (1) not to reject any evidence as being insufficiently probative of any fact necessary to establish the claim if the evidence provided is plausible in the light of all the special circumstances involved, (2) not to demand, unreasonably, the production of any document or other evidence which, more likely than not, has been destroyed, lost or rendered inaccessible to the claimant and (3) to consider all information submitted by the claimant.[74] Lastly, one of the evidence rules guiding the United Nations Compensation Commission pegged the standard of proof on the value of the claim and provided that for smaller compensation claims (below USD 20,000) 'a lesser degree of documentary evidence ordinarily will be sufficient'.[75]

While these examples are drawn from quasi-judicial institutions, it is useful to note that their practices have been acknowledged (and have possibly informed decisions) in judicial proceedings. The International Criminal Court (ICC), for example, has noted that:

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[71] Heike Niebergall, 'Overcoming Evidentiary Weaknesses in Reparation Claims Programmes' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill Nijhoff 2009), 221-222.

[72] ibid, 223.

[73] Claims Resolution Tribunal (CRT) of the Holocaust Victim Assets Litigation, Rules Governing the Claims Resolution Process (as amended), Article 17. Available at https://www.crt-ii.org/_pdf/governing_rules_en.pdf (accessed 1 March 2023).

[74] Holocaust Era Insurance Claims Processing Guide, ICHEIC, (1st edn, June 22, 2003) 20-21. Available at https://icheic.ushmm.org/pdf/ICHEIC_CPG.pdf (accessed 1 March 2023); see also ICHEIC, 'Standards of Proof' (15 July 1999), 2. Available at https://icheic.ushmm.org/pdf/ICHEIC_SP.pdf (accessed 1 March 2023).

[75] United Nations Compensation Commission, UNCC Provisional Rules for Claims Procedures, UN Doc. S/AC.26/1991/10, 26 June 1992, article 35(2)(c). Available at https://uncc.ch/sites/default/files/attachments/S-AC.26-DEC%2010%20%5B1992%5D.pdf (accessed 1 Mach 2023).

> Many reparations programmes dealing with mass claims have also adopted flexible evidential standards based on a "plausibility test" in order to accommodate the situation of the victims, who usually have difficulties in providing the documentation that is required.[76]

Some authors have suggested that due to the difficulties associated with establishing causation, international courts such as the ICC should consider emulating approaches by 'certain mass claims resolution bodies' whose use of the plausibility standard 'as the applicable standard of evidence (or another, more 'relaxed' standard of proof) may serve as a useful precedent'.[77] Even at the African Court, I suggest that it would be appropriate to draw inspiration from some of these approaches. For example, where an applicant is able to prove existence of a business but not actual income from the business, it would be logical in my view to consider whether it is plausible that they nonetheless earned some income from the business and award damages in equity. At the moment, the prevalent practice is to require applicants to adduce specific proof of income, without which claims for lost income or earnings are dismissed by the Court. Building on the above examples from international reparations programmes, I now turn to evidentiary approaches by international judicial bodies with a focus on the ICC, ICJ, IACtHR and ECtHR. A notable omission in this overview is the African Commission which has adopted the practice of addressing most reparation requests briefly in its final orders and without detailed analysis. The Commission also often leaves details of, say the amount of compensation, to be determined by the respondent State 'in accordance with the applicable domestic law'.[78] As a report has noted, this practice 'does not allow for an analysis of the type of evidence required to prove harm incurred in support of specific claims of reparation'.[79] One author has also pointed out that the Commission '[does] not [match] the remedy to the particular right that has been violated' and that as a result it is often unclear how it is addressing each violation and has sometimes omitted granting remedies to some violations.[80]

To start with, the International Commission of Jurists has developed a 'Practitioners' Guide' on the right to a remedy and reparation and which summarises key principles guiding determination of reparation claims from the jurisprudence of UN human rights treaty bodies, the ECtHR, the

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[76] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129-AnxA, Order for Reparations (amended), 3 March 2015, see footnote 37.
[77] Marc Henzelin, Veijo Heiskanen and Guenael Mettraux, 'Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes' (2006) 17 Criminal Law Forum 317, 328.
[78] See, for example, *Agnes Uwimana-Nkusi & Saidati Mukakibibi v. Rwanda,* Communication 426/12, para 222(iv)(b).
[79] REDRESS, *Reaching for Justice: The Right to Reparation in the African Human Rights System*, (October 2013), 24. Available at: https://www.refworld.org/docid/528343bf4.html [accessed 19 March 2023]; It is relevant to note that under the African Commissions revised Rules (2020), Rule 121 now allows the Commission to deter determination of reparations and it may receive additional submissions or hold a separate oral hearing on reparations.
[80] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019), 43.

IACtHR and the African Commission.[81] As regards evidence in reparation claims (specifically for lost earnings), this Guide notes that 'international jurisprudence has not hesitated to award compensation for lost earnings only because of lack of evidence about the actual earnings. Where evidence has been insufficient, it has awarded compensation on the basis of an assessment in equity'.[82] It further notes a common practice from the jurisprudence of the institutions under study that:

> If the existence of material damage can be demonstrated, the award does not depend on whether the victim can give detailed evidence of the precise amounts, as it is frequently impossible to prove such exact figures. In the absence of detailed information, compensation is granted on the basis of equity.[83]

In a view that concurs with the above position, Zegveld has pointed out that 'international courts have taken a more flexible approach towards the required evidence of the harm suffered by victims' and that based on the legal frameworks and case law of these courts 'the burden of proof resting on victims may turn out not to be that heavy'.[84] Illustrations from selected cases determined by international courts support this assertion. The ICC, in *The Prosecutor v. Thomas Lubanga Dyilo*, observed that 'given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of "beyond a reasonable doubt", should apply'.[85] Similarly, in *The Prosecutor v. Germain Katanga*, the ICC held that in determining the standard of proof applicable to reparation proceedings it 'has regard to the features of the case, specifically the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances'.[86] In the *Ahmadou Sadio Diallo* case, the ICJ noted that 'despite the shortcomings in the evidence related to the property listed on the inventory' the Court was convinced that DRC's unlawful conduct 'caused some material injury' to the victim. It then concluded that it was 'appropriate to award an amount of compensation based on equitable considerations', supporting

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[81] International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide* (Revised Edition, 2018). Available at https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf (accessed 6 February 2023).
[82] International Commission of Jurists (n 81), 184.
[83] ibid, 284.
[84] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts' (2010) 8 Journal of International Criminal Justice 79, 104.
[85] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129-AnxA, Order for Reparations (amended) 3 March 2015, para 22.
[86] *The Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07, Order for Reparations, 24 March 2017,para 47.

this decision by pointing out that the ECtHR and the IACtHR 'have followed this approach where warranted'.[87]

The IACtHR has also adopted a flexible approach to evidence in reparation claims and all adjudication at the Court generally. In *Perozo et al. v. Venezuela*, the Court observed as follows:

> International courts are deemed to have authority to appraise and assess evidence following the rules of logic and based on experience, and has always avoided rigidly setting the quantum of evidence required to reach a decision. Circumstantial or indirect evidence or inference may be used, as long as solid conclusions regarding the facts can be inferred from such evidence.[88]

The Court had in a previous reparations decision affirmed that in evaluating evidence it is guided by 'sound discretion' and further that it 'has always avoided making a rigid determination of the amount of evidence required to support a judgment'.[89] As mentioned in the discussions on standards of proof in Chapter five, in what perhaps underscores the flexible approach to evidence in considering reparation claims, the IACtHR has ordered for compensation to be paid to indirect victims by the State within 24 months after delivery of judgment on condition that they will have submitted the hitherto unavailable evidence of their relationship to the victims.[90]

There is also an example of the ECtHR taking a relaxed approach to evidence in reparations claims as seen in the *Selçuk and Asker v. Turkey* case where the Court noted that while the applicants had not substantiated their claim as to the value and quantity of property destroyed by State agents with documentary evidence, 'the Court's assessment of the amounts to be awarded must, by necessity, be speculative and based on principles of equity'.[91] The ECtHR has followed this approach in other cases.[92] I hasten to add here that these examples from other courts are neither exhaustive nor are they given here to suggest that these courts are doing better or are more consistent than the African Court in their approaches to evidence in reparations. Shelton has in fact pointed out that generally the ECtHR's 'awards for pecuniary losses are far less common than non-pecuniary because of the Court's strict requirements of causality and proof'.[93] She further

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[87] *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment of 19 June 2012, I.C.J. Reports 2012, p. 324, para 33.
[88] *Case of Perozo et al. v. Venezuela* Judgment of 28 January 2009 (Preliminary Objections, Merits, Reparations, and Costs), para. 112
[89] *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala*, Judgment of 25 May 2001 (Reparations and Costs), para 51.
[90] *Case of the Caracazo v. Venezuela* Judgment of August 29, 2002 (Reparations and Costs), para 73; *Case Of Gomes Lund Et Al. ("Guerrilha Do Araguaia") v. Brazil* Judgment Of November 24, 2010 (Preliminary Objections, Merits, Reparations, and Costs), para 120.
[91] *Case of Selçuk and Asker v. Turkey*, (12/1997/796/998-999), Judgment 24 April 1998, para 106;
[92] *Case of Lupsa v. Romania* (Application No. 10337/04) Judgment 8 June 2006 para 70-72 and *Case of Ipek v Turkey*, (Application no. 25760/94) Judgment of 17 February 2004, para 227.
[93] Dinah Shelton, *Remedies in International Human Rights Law*, (3rd edn, OUP 2015) 357.

notes that the ECtHR 'is not consistent with regard to its requirements of proof, especially in procedural cases'.[94] The aim of highlighting decisions by other regional and international courts, therefore, is to make the point that where context permits there is a good case for urging the African Court to follow a flexible approach as peer international tribunals have done. Inspiration for the African Court from progressive international practices, which is permitted under Articles 60 and 61 of the Charter, is particularly relevant now when the Court is increasingly looking inward at its existing decisions in building on or reinforcing its jurisprudence. One of the judges I interviewed, while speaking about the influence of other courts' jurisprudence, observed that 'the African Court's approach to case law has dramatically shifted from a liberal perspective of free jurisprudential trade with other international courts to an introspective approach as the Court enlarges its case law basket'.[95] However, as the above overview of international practices on reparations has shown, pro-applicant/victim flexibility on evidence is generally speaking the rule of thumb. For this reason, there is a good case in urging the African Court to relook at its strict approach to evidence in compensation claims that appears to be going against the grain of international practices on the issue.

In the next section, I discuss some of the evidentiary approaches and adjudicatory tools the African Court could possibly adopt to rid itself of what seems to be an undesirable rigidity in its evidence requirements in determining compensation claims.

7.7 An equitable applicant-centred evidentiary approach to determining compensation claims

The point of departure in the discussion and suggestions that will follow is to note that it is not my argument that the African Court should, as one judge at the Court cautioned, take the applicant's word for it in determining reparation claims. To the contrary, the Court Protocol mandates it to receive written and oral evidence and that the Court 'shall make its decision on the basis of such evidence'.[96] Based on this, the Court may justifiably dismiss compensation claims for lack of supporting evidence in some circumstances. For example, in *Alex Thomas v. Tanzania*, the applicant had merely pleaded that he was a businessman and had sought damages amounting to USD 55 890 for 'loss of income and life plan'. In dismissing this claim, the Court, *inter alia*, observed that the applicant had 'neither elaborated on his occupation nor provided evidence of

[94] ibid, 358.
[95] Interview with a Judge No. 6 of the African Court (Arusha, 23 May 2022).
[96] Article 26(2) of the Court Protocol.

his earnings before his arrest'.[97] It rejected a similar request in *Mohamed Abubakari v. Tanzania*. In this case, the applicant had also sought compensation totaling to USD 652, 778 for 'loss of income and life plan' and the Court dismissed this because his claims that he was a businessman prior to his arrest and sentencing were 'not supported by evidence'.[98] One can appreciate the Court's rejection of requests to award such significant sums based only on a submission that the applicant was a businessman without an attempt to support such claim. During my fieldwork at the African Court, I handled case files that only had a thinly drafted application, supported by copies of proceedings in domestic courts and nothing more. Requests for compensation in such applications, one can argue, are appropriately dismissed. It is useful to note, however, that from my experience at the Court, such applications came mostly from unrepresented applicants and there is therefore the question of whether a different approach to evidence is warranted in view of this reality and this is an issue I discuss further in this section.

I suggest that there is room for expanding the Court's flexibility through an equitable applicant-centred approach to evidence in compensation claims in four ways and which would result in fairer outcomes. I discuss these ideas next.

7.7.1 A more proactive court on evidence

A legitimate question that could be asked regarding the ongoing practice of dismissing a high number of compensation claims for lack of evidence is this: for all instances when the Court finds that there is no evidence to support a claim, are applicants aware of the required evidence and does the Court avail them an opportunity to adduce evidence before dismissing a claim on the ground of lack of sufficient proof? One judge of the Court, Justice Bensaoula Chafika, has consistently answered this question in the negative in several dissenting opinions. She has based her position on the Court's Rules and specifically Rule 51 and Rule 55.[99] Rule 51 stipulates that 'the Court may, during the course of the proceedings and at any other time the Court deems it appropriate, call upon the parties to file any pertinent document or to provide any relevant explanation. The Court shall formally take note of any failure to comply'.[100] Rule 55 that addresses measures for taking evidence provides that 'the Court may, of its own accord or at the request of a party, obtain any evidence which in its opinion may provide clarification of the facts of a case'. In *Andrew Ambrose*

[97] *Alex Thomas v. Tanzania*, (n 16) paras 19-20, 26-27.
[98] *Mohamed Abubakari v. Tanzania*, (n 16), paras 34-36.
[99] Reference here is to the current Rules of the Court, adopted 1 September 2020. These were rule 41 and rule 45 of the previous Rules.
[100] Related to this Rule, the Application Form at paragraph 9 states that where an applicant cannot provide required documentary evidence, they should 'provide an explanation as to why the documents cannot be provided'. The Form is available at https://www.african-court.org/wpafc/forms-for-parties-2/ (accessed 17 March 2023).

Cheusi v. Tanzania, Justice Chafika faulted the majority for dismissing the applicant's compensation claims in the matter for lack of sufficient evidence without first taking administrative steps to request the applicant to supply additional evidence. She stated:

> In my opinion, this approach is contrary to the spirit of the above-mentioned instruments and to the positive role that a judge must play for the proper administration of justice… the Court could have responded by asking the applicant to file the documents. If such a request had not been complied with, the Court would have based the dismissal of the applications on Rule [51] of the Rules.[101]

It is in the *Joseph John v. Tanzania* case that Justice Chafika perhaps best articulated her position on this issue. In this case, the Court dismissed, as it has done in many cases, the applicant's prayer for moral damages for the reason that he did not prove his relationship with the alleged indirect victims. She disagreed with the majority and observed as follows:

> It is my position that the Court must always compel the parties to file documents in support of the alleged violation of rights, instead of simply dismissing the request without first trying to use its power to have the parties file the documents.[102]

As she has done previously, she invoked Rule 51 and Rule 55 of the Court's Rules and stated that:

> The Court has the prerogative to request for any document relevant to the resolution of the dispute! Therefore, although the exercise of this prerogative is at the discretion of the judges, the Court must in no way choose to exercise it against the interest of justice! As its fundamental goal is to protect human rights and people's rights, which often brings to the fore poor, illiterate and ignorant applicants, the Court must always make decisions based on grounds that are beyond reproach.[103]

I suggest that the 'Chafika position', namely, that the Court ought to be proactive in seeking evidence and not limit its role to being reactive to evidence presented by parties, should become the norm at the Court for three reasons. First, because the African context as Justice Chafika observes indeed calls for this proactivity and my position is informed by my fieldwork experience at the African Court. I observed that a considerable number of applicants were unrepresented and therefore unfamiliar with the procedural basics at the Court, including evidence requirements.

[101] Separate Opinion of Justice Bensaoula Chafika in *Andrew Ambrose Cheusi v. Tanzania,* (n 64), page 5.
[102] *Joseph John v. Tanzania*, Application No. 005/2018, Dissenting Opinion by Bensaoula Chafika, 22 September 2022, para 1-2.
[103] Dissenting Opinion by Bensaoula Chafika (n 98), para 5.

Even when legal aid was granted to indigent applicants in the course of the exchange of pleadings, I observed instances when the appointed lawyers did not re-draft all pleadings filed by applicants. In any case, as Justice Chafika also observes, 'the fact that the applicant is represented by a lawyer cannot be sufficient ground for the Court to discard its power to compel the parties to file relevant documents'.[104] A possible counterargument to the role that she urges the African Court to play is that with an increased workload, this approach may strain the Court administratively and result in a backlog of cases. However, the Court has received a total of 366 cases and finalised 228 from its inception to date (September 2024) and the workload argument, which may be valid for a busier court such as the ECtHR, is not ripe in the case of the African Court. This is especially so now that Tanzania, the respondent State in a majority of these cases, has withdrawn the declaration allowing individuals and NGOs in the country to directly file applications against it at the Court. This move is likely to see the Court receive less applications than it has previously.[105]

The second reason why I support Justice Chafika's view is that there is already a Rule, as seen above, that allows the Court to ask parties to file additional documents. There appears to be no good justification for the Court not to invoke this Rule and/or not to apply it consistently in all cases. I would even go further and argue that the spirit of Rule 51 anticipates that the Court will ask to be supplied with additional evidence in all appropriate cases, namely, where there are evidence gaps. This would also explain why, according to this Rule, 'the Court shall formally take note of any failure to comply'. This, to my mind, suggests that the Court would subsequently be in a justifiable position to infer lack of merit in a claim where the applicant fails to comply with a request for more evidence or at the very least provide an explanation for why evidence is unavailable.

My third and final reason for supporting this position is that the Court has previously done exactly what Justice Chafika is calling for. What remains, based on my assessment, is for the Court to do this consistently. Four decisions illustrate this point. In *Anaclet Paulo v. Tanzania*, a part of the judgment provided that 'on 27 June 2018, the Registry requested the applicant to submit supporting documents for his claim for reparation, but no response [had] been received as at the

[104] Ibid, para 6.

[105] The Court's Activity Reports to the Executive Council of the AU (available on the Court's website) show that it received 54 cases in 2019, 40 cases in 2020, 17 cases in 2021, 7 cases in 2022 and 8 cases in 2023, which shows a general decline in cases being received at the Court. For a discussion on the reasons why a majority of applications have been filed against Tanzania, which include proximity of the African Court to its citizens, see Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 Int'l & Comp LQ 63, 69.

time of this judgment'.[106] Similarly in *Thobias Mango v. Tanzania*, the judgment notes that 'on 4 September 2020, the Court issued an Order for re-opening pleadings, allowing the admission of the applicants' additional evidence filed on 3 June 2020'.[107] The Court in *Nguza Viking & Another v. Tanzania* dismissed the claim for moral damages for indirect victims for lack of evidence after having recalled that 'even after reopening of pleadings twice that is on 10 February 2019 and on 9 March 2020 and requesting for the parties to file further evidence, the applicants failed to do so'.[108] Finally, in *Leon Mugesera v. Rwanda*, the Court explicitly acknowledges the inquisitorial nature of its proceeding and its fact-finding role. It noted that:

> The inquisitorial nature of the international human rights litigation and Rule 55 of the Rules allow it to obtain, on its own initiative, all the evidence it considers appropriate to enlighten itself the facts of the case.[109]

In view of all the above, I suggest that by consistently adopting the proactive approach of routinely requesting for more evidence before dismissing claims for lack of evidence, it would provide an opportunity for applicants who are unaware of the required evidence to provide it or explain the unavailability of such evidence for consideration by the Court. This would be in furtherance of an equitable, fair and reasonable approach to evidence that the Court commits to in its publications and selected cases. With this, more decisions would be decided substantively on availed evidence and less claims would be dismissed on the technicality of absence of evidence. For clarity, as observed in Chapter three, this view does not mean that applicants should not lose cases. As Leane rightly notes, there is bound to be a loser in adversarial proceedings but such loss 'must at least be an outcome that we, as parties and observers, can accept as believable, legitimate and justifiable according to some felt sense of 'fairness' and justice within some common web of understanding'.[110] Arguably, this sense of fairness and justice in the decisions of the African Court requires that dismissal of applicants' compensation claims should be preceded by sufficient

[106] *Anaclet Paulo v. Tanzania*, Application No. 020/2016, Judgment on Merits and Reparations, 21 September 2018, para 16.
[107] *Thobias Mang'ara Mango* (n 48), para 8.
[108] *Nguza Viking & Johnson Nguza v. Tanzania,* Application No. 006/2015 Judgment on Reparations, 8 May 2020, para 52. For another example of this practice of requesting for additional evidence, see also *Harold Mbalanda Munthali v. Malawi* (n 6) para 12.
[109] *Lèon Mugesera v. Rwanda* (n 62), para 152.
[110] Geoffrey Leane, 'Testing Some Theories About Law: Can We Find Substantive Justice Within Law's Rules?' (1994) 19(4) Melbourne University Law Review, 925.

information on the required evidence and opportunity to adduce it.[111] With such intervention, regardless of the party that wins the case, I suggest that the final outcome is substantively accurate.

7.7.2 Compensation in equity as the standard in selected claims

There are instances where the African Court's rejection of some claims for lack of specific supporting evidence and without the option of awarding compensation in equity arguably results in unjust outcomes for applicants. A case in point is how the Court determines claims for costs of legal representation in domestic proceedings. The Court first established the applicable law on the issue in *Reverend Christopher Mtikila v. Tanzania* where it held that:

> Expenses and costs form part of the concept of reparations. Therefore, where the international responsibility of a State is established in a declaratory judgment, the Court may order the State to compensate the victim for expenditure and costs incurred in his or her efforts to obtain justice at the national and international levels.

The Court, however, added that the applicant 'has to remit probative documents' in support of such claims.[112] Elsewhere, it has stated that 'the applicant must provide justification for the amounts claimed'.[113] In subsequent decisions, the Court has taken two differing positions by either reimbursing legal costs in equity or rejecting requests for the same due to lack of evidence substantiating the amounts claimed. As seen earlier, in *Ingabire Umuhoza v. Rwanda* the Court noted that although the claim for legal costs was 'not substantiated in a fees agreement…the applicant must have incurred these expenses for the purposes of her defence'.[114] In *Leon Mugesera v. Rwanda*, the Court observed, in regard to the request for reimbursement of costs incurred by the applicant's lawyer, that 'the applicant did not submit proof of payment of the amounts claimed'. It nonetheless awarded costs for his lawyers expenses and fees 'in view of the fact that he [had] hired a counsel, which [had] certainly led to expenses for him'.[115] This flexibility by the Court is however not applied in all cases, even when the facts are similar to the two highlighted cases as two decisions illustrate.

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[111] A good illustration of how this suggestion can work in practice is seen in the case of *Umalo Musa v. Tanzania* Application No. 031/2016, Judgment of 13 June 2023 at para 47 where the Court held as follows: 'On 7 October and 12 November 2022 and 25 January 2023 the Court requested the Applicant to file documents indicating that the Court of Appeal granted him leave to file his application for review out of time and that the said application was filed and served on the Respondent State. The Applicant failed to do so. In view of these circumstances, the Court finds that the Applicant's claim that the application for review was pending at the time the Application was filed before this Court has not been proven'. I suggest that this is a progressive approach by the Court but which is not consistently applied.

[112] *Reverend Christopher R. Mtikila v. Tanzania*, (n 19), para 39-40.

[113] *Armand Guehi v. Tanzania*, Application No. 001/2015, Judgment on Merits and Reparations, 7 December 2018, para 188.

[114] *Ingabire Victoire Umuhoza vs Rwanda* (n 20), para 44.

[115] *Lèon Mugesera v. Rwanda* (n 62), para 141.

In *Andrew Ambrose Cheusi v. Tanzania*, the Court observed that 'the claim for lawyers' fees during domestic proceedings…should be proven [with] evidence of payments to his counsel'. Finding that 'the applicant provided no such evidence in support of his claims' it dismissed the claim for legal fees in domestic proceedings.[116] Similarly, in *Wilfred Onyango Nganyi & 9 Others v. Tanzania* it held, regarding the claim for legal fees, that 'the applicants did not submit any supporting document to prove the costs allegedly incurred … They maintain that the receipts were misplaced due to long passage of time. The Court finds that the explanation provided is not sufficient proof'.[117] Given these clearly contradictory positions by the Court, I suggest that where it is possible for the Court to establish that there was legal representation in domestic proceedings, a fairer approach should be to award legal costs in equity in all cases where there is no specific evidence and not to dismiss the claim. The fact of representation is in most cases verifiable from domestic court documents which in practice form part of the key documents filed at the African Court. In adopting such an approach, the Court could draw inspiration from the IACtHR that has had a practice of awarding legal costs in equity where documentary evidence is not provided. In *Gutiérrez and Family v. Argentina*, it determined that

> Regarding the reimbursement of expenses, the Court must make a prudent assessment of their scope, which includes the expenses generated before the authorities of the domestic jurisdiction … taking into account the circumstances of the specific case ... This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that their quantum is reasonable.[118]

In *Mémoli v. Argentina*, although the applicant could only prove expenses of about USD 300, the IACtHR awarded USD 8000 in legal costs and expenses, even after noting that vouchers for these expenses were not provided. The Court stated that it could 'infer that the representatives incurred in additional expenses in the processing of the case before the inter-American human rights system derived from the litigation and from the presence of two representatives at the Court's public hearing'.[119] I submit that it would be reasonable for the African Court to make similar inferences regarding legal costs in domestic proceedings.

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[116] *Andrew Ambrose Cheusi v. Tanzania,* (n 64), para 145.
[117] *Wilfred Onyango Nganyi & 9 Others v. Tanzania,* (n 17), para 52.
[118] *Gutiérrez and Family v. Argentina*, Merits, Reparations and Costs, Judgment of November 25, 2013, I/A Court H. R., Series C No. 271 (2013), para 192.
[119] *Mémoli v. Argentina*, Preliminary objections, merits, reparations and costs, Judgment of August 22, 2013, para 226.

These practices from the IACtHR further buttress my argument that where it is clear that applicants requesting for legal costs were represented in domestic courts, fairness demands that the African Court should, in all cases, award legal costs in equity where specific proof is not adduced. The above analysis on reimbursement of legal costs is not just a detail in international human rights adjudication, it matters and the requests count in the overall endeavour to remedy violations. As Shelton has pointed out, 'if the victims and their families are unable to recover costs and fees, the goal of *restitutio in integrum* is defeated because the victims suffer unrecovered losses as a direct consequence of the violation'.[120] If the African Court adopted the suggested approach, it would not only be in furtherance of an equitable approach to evidence in compensation claims but also a step closer to more consistent jurisprudence on the issue of legal costs as like cases would be decided alike. If this contention is valid, as I argue it is, its rationale could be extended to other compensation claims such as loss of income, especially where an applicant has successfully proven existence of a business or other source of income.

7.7.3 Presumptions and inferences as alternatives to requiring specific proof

One of the evidentiary tools that the Court could apply through the equitable applicant-centred approach to evidence in compensation claims as discussed above is use of presumptions. As seen in the literature review in Chapter four, 'a presumption requires that a finding of a basic fact give rise to the existence of a presumed fact' and further that where 'the conclusion of fact is presumed or arises from a presumption, proof is not required of the conclusion of fact'.[121] Application of presumptions in determining reparations claims, as one study notes, helps to 'fill gaps in the evidence provided by claimants'.[122] It has been pointed out that 'harm is not always easy to document or to render visible' and this may mean adapting evidence standards such as the burden of proof which can be shifted or 'alleviated through the use of inferences or presumptions'.[123] As noted earlier, there is a well-established principle at the African Court that moral prejudice is always presumed and therefore applicants are not required to adduce evidence in this regard. With material loss, however, the Court has applied presumptions and inferences at it discretion and the point that I will make here is that it is possible for the Court to replicate instances when in has applied presumptions in other similar cases for more consistent decisions. I will rely on the jurisprudence of the IACtHR as a source of inspiration for the suggestions I make regarding use of presumptions and inferences.

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[120] Dinah Shelton, (n 93), 431.
[121] CF Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005), 211.
[122] Heike Niebergall, 'Overcoming Evidentiary Weaknesses in Reparation Claims Programmes' (n 71), 233.
[123] Ruth Rubio-Marin & Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton field Judgment', (2011) 33 Human Rights Quarterly 1062, 1070

The African Court made use of an inference, as opposed to strictly requiring proof of material loss as it regularly does, in the case of *Anudo Ochieng Anudo v. Tanzania*. The applicant claimed he operated a sawmill and lost income as a consequence of the violations that had been established by the Court. He submitted as evidence of this a certificate of registration and a tax certificate for the sawmill. The Court observed that these documents were only proof that the sawmill was a commercial venture belonging to the applicant, but did not prove whether this was profitable or not. It, however, stated that it 'can infer from the mere fact that they exist, that the applicant made investments in them and it was logical for him to have expected income from them'.[124] This inference has not been made by the Court in all instances where an applicant establishes existence of a business.[125] My argument therefore is that use of an inference as was done in the *Anudo* case is good law, but which I did not come across in any other of all reviewed decisions on claims for loss of income. My support for the Court's approach in this case is based not only on the fact that it is reasonable for the Court to do so but also because similar practices (on presumptions of facts) at the IACtHR are convincing and can inspire the African Court as some of its decisions demonstrate. The IACtHR has adopted use of presumptions to circumvent the challenges applicants face in proving claims of loss of income. In *Del Caracazo v. Venezuela*, the Court listed a number of presumptions that it resorts to 'for want of direct evidence' and which 'may be used because they are firmly rooted in what has been learned from experience, insofar as they are not weakened in this case by evidence to the contrary'.[126] Regarding loss of income, the IACtHR stated that it applies

> the presumption according to which every person, from the time he or she attains majority, carries out productive activities and perceives(sic), at least, an income equivalent to minimum legal wage in the country involved. The Court finds no reason to set aside this presumption even in cases where there is evidence that the victim performed only informal or unstable work or was unemployed at the time of the events.[127]

[124] *Anudo Ochieng Anudo*, (n 31), para 44.
[125] See for example in *Wilfred Onyango Nganyi & 9 Others v. Tanzania* (n 17) at para 35, where the Court notes that a business licence submitted as evidence only proved existence of the business and the claim for loss of income was dismissed.
[126] *Del Caracazo v. Venezuela* (Reparations) (2002) Series C No. 95, para 50.
[127] ibid.

The IACtHR has taken an approach similar to the above in other cases.[128] Although not expressly invoking a presumption, the African Court in *Mgosi Mwita Makungu v. Tanzania* awarded damages for loss of income on the basis of Tanzania's minimum monthly wage and this even after noting that the applicant 'asserts that he earned his income from the farming sector without any specifications'.[129] Drawing correlations from this finding to the practices at the IACtHR, I suggest that the equitable and, in my view, progressive approach in *Mgosi Mwita Makungu* can be replicated in all suitable cases through the instrument of presumptions of fact (inferences). Stated differently, I propose that the African Court could drastically reduce the compensation claims for loss of income that it dismisses based on the fact that applicants cannot adduce specific proof if it proceeded on the presumption that an adult citizen somehow earns some income for their survival. This presumption would be particularly suited for the African context where a considerable section of the population, and therefore potential applicants as well, engages in informal work and may find it difficult to specifically prove their income with documentary evidence. One of the judges I interviewed acknowledged this difficulty when he made the following observation:

> If you (an applicant) are running a small shop in the countryside, you are not going to have audited accounts. Maybe you don't even pay taxes. And maybe you don't even have receipts. So what are you going to give to the Court? And without those documents, the Court is not going to believe you. So it's a challenge. A major challenge.[130]

In view of challenges such as the one highlighted above, I propose that awarding material damages in equity for loss of income based on a presumption as suggested in the above discussion would promote fairer outcomes from the African Court, retain its flexibility while at it and address the challenge of varying decisions in cases with similar facts. As an alternative to reliance on presumptions of fact as discussed above, allowing varying forms of evidence can equally address the unfairness that is sometimes created by insistence on documentary evidence. This is briefly examined below.

7.7.4 Allowing varying forms of evidence

It is suggested that the African Court should broaden the range of forms of evidence that could support compensation claims where applicants cannot produce documentary evidence. This can include use of affidavits as a form of evidence, a practice that has application in other international

[128] *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala* Judgment of May 26, 2001 (Reparations and Costs), para 79; *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala* (n 89), para 116.
[129] *Mgosi Mwita Makungu v. Tanzania* (n 49), para 33
[130] Interview with Judge No. 1 of the African Court (Arusha, 22 March 2022).

human rights tribunals such as the Inter-American Court and the African Commission.[131] An affidavit has been defined as a 'written declaration made under oath by an interested party or witness in a case and which constitutes a *sui generis* mode of proof'.[132] In his discussion on use of affidavits as evidence by different international tribunals, Amerasinghe highlights the *Office Belge de Verification Case* where the tribunal in that case took the view that 'where other means of proof were not available, the affidavit of the claimant could have a special value for the purposes of proof… because of the reasons he had given to explain why the production of other evidence was not possible'.[133] He further highlights the *Cameron Case* decided by the General Claims Commission (Mexico/US) where the tribunal 'decided to rely on affidavits to some extent, because they related to events which had taken place so long ago that there were no witnesses as to such events available'.[134]

Rule 55(3) of the Court's Rules allows the Court to 'take evidence in any other manner, including to take testimony on oath using appropriate means' and this arguably permits the Court to rely on affidavits as evidence. The Court has received and considered affidavit evidence but its approach remains limiting because it still requires affidavits to be corroborated by other documentary evidence. This approach fails to capitalise on the possibility of affidavits filling evidentiary gaps where applicants cannot, for valid reasons, produce the typical evidence required to support a claim. In the case of *Thobias Mang'ara Mango & Shukurani Masegenya Mango v. Tanzania* for example, the Court held as follows:

> Although it is likely the applicants encountered difficulties in accessing some documents to support their claim, the affidavits they filed [ ]are not enough to prove their claims … the Applicants ought to have supported the affidavits with other documentary evidence, such as, business licenses, tax filings with the Revenue Authority and bank records proving the existence and their ownership of businesses they refer to.[135]

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[131] Article 46(1) and Article 50 (1) of the Rules of Procedure of the Inter-American Court of Human Rights (2009); Also see decisions of the African Commission in *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, Communication 249/ 02, 7 December 2004, para 43;, *Gabriel Shumba v Zimbabwe*, Communication 288/ 04, 2 May 2012, paras 158-159;, *Mohammed Abdullah Saleh Al- Asad v. Djibouti*, Communication 383/ 10, 14 October 2014, para 24, 36,104, 109, 111 and others; *Michael Majuru v Zimbabwe*, Communication 308/ 05, 24 November 2008, para 92.

[132] V. S. Mani, *International Adjudication: Procedural Aspects* (Nijhoff, 1980), 225; see a similar definition in Jens Evensen, 'Evidence before International Courts' (1955) 25 Nordisk Tidsskrift for International Ret 44, 53.

[133] CF Amerasinghe, *Evidence in International Litigation* (n 121), 197 citing (1926, Belgium v. Germany), 6 T.A.M. at p. 706.

[134] ibid, at 197, citing the Cameron Case (G.B. v. Mexico)(1929), 5 UNRIAA at p. 30.

[135] *Thobias Mang'ara Mango & Shukurani Masegenya Mango v. Tanzania* (n 48), para 33.

In the same case, the Court rejected claims for legal fees incurred in domestic proceedings by noting that although applicants had filed affidavits stating that they had hired legal representatives they had 'not adduced any other evidence to support these claims, such as retainer agreements with their counsel or receipts of payment of legal fees or bank transfers to the said counsel'.[136] It has adopted a similar approach to reject unsupported affidavits in other cases.[137] During my fieldwork at the African Court, I was requested to support the Court with research on use of affidavits in international adjudication. Based on the research I conducted, I recommended that the Court should reform its practices to allow use of unsupported affidavits as complete evidence in appropriate cases. This proposal was accepted by the Court and is now reflected in the Court's Practice Directions which provide that:

> The Court may consider evidence by way of an affidavit that is not supported or corroborated by other forms of evidence, provided that the Party relying on such affidavit justifies the absence or demonstrates inaccessibility of other forms of supporting or corroborating evidence.[138]

Building on the above, it is suggested that besides use of affidavits, the African Court should broaden the array of forms of evidence it accepts in support of claims as alternatives to documentary evidence where this is unavailable. In my interviews with members of the Registry, I sought to find out if there are ways for the Court to avoid dismissal of what may be valid compensation claims by the strict insistence on documentary evidence. One member stated that they 'would advocate for an approach where you have different types of documentation acceptable'.[139] A second member, in agreement with the colleague's recommendation that the Court should accept a wide range of documentation, noted as follows:

> In some instances, it is really difficult to request proof and especially written documents. For example, to prove filiation of an applicant to indirect victims, if you insist on a marriage or birth certificate, some applicants may not have such. We should in such cases ask for alternative documents, like a letter from the chief(local administrator). In claims for material damages where we are strict on proof because of monetary considerations, if an applicant, for example, lost their documentation, a letter from a relevant

[136] ibid, para 40.
[137] *Kennedy Owino Onyachi & Charles John Mwanini Njoka v. Tanzania* (n 41), para 30 where the Court found that 'though [the applicants] filed affidavits, they did not provide documentary evidence such as business licences, registration with Revenue Authorities, etc. proving the existence of businesses that they alleged to have had before their arrest and conviction'.
[138] See paragraph 22 in the Annexture on Evidence Matters in the Court's Practice Directions, 2024.
[139] Interview with Registry Member No. 6 at the African Court (Arusha, Tanzania, 22 August 2023).

> authority should suffice. Such alternatives should be captured in our products, such as our reparations guidelines and communicated to prospective applicants.[140]

An additional alternative in absence of documentary cases is permitting oral testimony in appropriate cases, the veracity of which can be tested by respondent States in cross-examination. Besides considering alternative proof, it is suggested that the Court considers alternatives to proof such as explanations of inability to produce evidence. Commendably, the Court already invites such explanations by providing that applicants can 'explain challenges or limitations encountered in providing evidence due to circumstances of the case, conditions of the applicant or the victims'.[141] These explanations are, however, not requested for or considered by the Court in most cases and there is therefore a gap between the Court's commitment and the practice. In summary, allowing other forms of evidence such as affidavits, institutional letters and oral testimony (among other forms) as discussed would enhance procedural fairness in proceedings at the African Court and increase the number of cases decided on their substance rather than the technicality of lack of specific forms of evidence.

7.8 Addressing inconsistencies

As seen from discussions in this Chapter, inconsistencies in the decisions of the Court from this twin approach to evidence in considering compensation claims are a challenge that cannot be ignored. Importantly, this challenge is not limited to reparations proceedings and is evident in admissibility and merits decisions as discussions in Chapter five and six revealed. An identified problem with lack of clarity in the Court's approach to remedies (and which arguably applies to inconsistencies in its case law generally) is that applicants 'cannot rely on consistent precedent to assert their rights' while respondent States 'cannot rely on clear case law in order to fulfil their treaty obligations'.[142] McIntyre makes a connection between inconsistencies and erosion of legitimacy and although she speaks to the practices of the ICC, the observation is arguably relevant to international adjudication in general and therefore applicable to the African Court as well. She suggests that the reason for the 'crisis of confidence' in the Court derives from failing to appreciate how 'inconsistency and incoherence in its decision-making' impacts on the court's legitimacy.[143]

[140] Interview with Registry Member No. 3 at the African Court (Arusha, Tanzania, 23 August 2023).
[141] Fact Sheet on Filing Reparation Claims (n 34), 7.
[142] Misha Ariana Plagis (n 39), 57.
[143] Gabrielle McIntyre, 'The Impact of a Lack of Consistency and Coherence: How Key Decisions of the ICC have Undermined the Court's Legitimacy' (2020) 67 Questions of International Law 25, 27.

Nkhata, a legal officer at the Court, has identified inconsistencies including those in decisions rendered on the same day as a challenge for the Court.[144] Although he finds it 'worrisome' that the Court can determine an issue in one case and be 'oblivious of the reasoning and approach' on a similar issue in a different case, he does not go further to either shed light from an insider's standpoint as to how this happens or could be avoided.[145] This study contends that the root cause of inconsistent decisions is the unacknowledged or unstated conceptual differences on the applicable model of procedural fairness and related evidential approaches. These ideological differences among the key actors at the Court (judges who keep changing and Registry members) have resulted, over time, in the Court's oscillation between an equitable applicant-centred approach and an attempt to equally balance parties' interests in addressing procedural fairness and evidence.

During fieldwork, I asked Registry officers and judges about the factors that contribute to inconsistent decisions and how the challenge can be addressed. I argue that the responses given reflect the organizational inhibitors to spotting or avoiding inconsistencies and although not necessarily the only explanation, at the heart of the problem is the above-stated divide as advanced in the study. The reasons given by interviewees for why the Court was issuing contradictory judgments varied. One explanation was that given the composition of the bench is always changing, the fact that a judge(s) may be in one case and not in a subsequent one makes it possible for the Court to contradict itself. Further, that 'a judge's thinking may evolve in between the two cases' and some judges will shift their positions because 'they appreciate the subsequent situation differently'.[146] A related reason for inconsistencies as identified by a legal officer was that some dissenting judges had managed over time to convince the majority to adopt their positions.[147]

Another reason given for inconsistencies was lack of capacity in terms of personnel at the Court. It was pointed out that draft judgments are developed by different legal officers, which are in turn reviewed by different judge rapporteurs and presented in plenary for deliberations at different times. Given that the Court, as one officer put it, 'doesn't have a system in place for quality assurance to ensure consistency', a decision taken in one session can be contradicted by another in a subsequent session if judges are not reminded of their previous position.[148] Another explanation given and which was related to the identified capacity problem was that all judges,

[144] Mwiza Jo Nkhata 'What counts as a 'reasonable period'? An analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications' (2022) 6 African Human Rights Yearbook 129, 149.
[145] ibid.
[146] Interview with Registry Member No. 6 at the African Court (Arusha, Tanzania, 22 August 2023).
[147] Interview with Registry Member No. 3 at the African Court (Arusha, Tanzania, 23 August 2023).
[148] Interview with Registry Member No. 4 at the African Court (Arusha, Tanzania, 30 August 2023).

except the President who is permanently based at the Court, have other occupations and therefore 'can be excused sometimes for failing to constantly attend to the Court business because they also have to attend to other issues'.[149] One judge also observed that the Court was 'doing too many cases' particularly in the years 2021 and 2022 and there was a concern that it seemed to be 'too focused on the numbers and rushing through drafts'.[150] Another judge thought that the major explanation for inconsistencies is the case by case approach by the Court and that as long as this approach remains 'there is bound to be inconsistency'.[151]

I asked the respondents in the conducted interviews about possible solutions that could address the problem of inconsistencies. Most of them were in agreement about one main suggestion in response to the capacity problem and it was that the Court should establish a mechanism where some staff member(s) is dedicated to reviewing or screening decisions of the Court with the sole purpose of ensuing consistency. I was informed that in a new structure being proposed for the Court, the institution was 'looking at having a legal officer whose role will simply be looking at consistency of jurisprudence'.[152] There was an additional suggestion that for the Court to rid itself of contradictory decisions, it must consistently distinguish cases with similar facts when different positions are adopted. To balance the Court's preference for the case by case approach and the need for consistency, the Court must in the words of one judge 'accept the pain of distinguishing cases'.[153] My additional proposal to these sound suggestions by those at the Court is for the majority decisions to engage with dissenting opinions and particularly where the latter raise concerns of contradictory decision-making. In other words, where the Court's institutional memory (the Registry) fails to note contradictions, the Court should capitalise on dissenting opinions that point them out and address the concerns they raise in this regard, something that is presently not happening.

7.9 Summary

This Chapter has examined the evidentiary practices of the African Court in its reparations decisions from 2014-2024, with particular focus on the Court's approach to evidence in compensation claims. I have shown that through a key publication and in its decisions, the Court proclaims to be applying a flexible approach to evidence in reparation claims guided by principles

[149] Interview with Registry Member No. 2 at the African Court (Arusha, Tanzania, 15 August 2023).
[150] Interview with Judge No. 1 of the African Court (Arusha, Tanzania, 7 September 2023).
[151] Interview with Judge No. 3 of the African Court (Arusha, Tanzania, 6 September 2023).
[152] Interview with Registry Member No. 4 at the African Court (Arusha, Tanzania, 30 August 2023).
[153] Interview with Judge No. 3 of the African Court (Arusha, Tanzania, 6 September 2023). The Court has made attempts to distinguish its decisions except that it does not do this consistently. See for example, para 44 of *Yusuph Said v. Tanzania* Application No. 011/2019, Ruling of 30 September 2021.

of equity, fairness and reasonableness. I have questioned whether the commitment to these principles is consistently reflected in all decisions on compensation claims. The analysis done shows that the reality at the Court is that a twin approach to evidence is discernible from a collective examination of all its reparations decisions on claims for compensation. The Court employs an equitable applicant-centred approach defined by flexibility on evidence questions in some cases but in the majority of its decisions it dismisses compensation claims for material loss where specific evidence proving such loss is not adduced. The result of this twin approach has been notable inconsistencies in the decisions of the Court and which decisions hinge on how proof has been assessed. Through a scan of international practices on evidence in reparations claims, the Chapter has shown that a flexible approach is the general rule. The noticeable pattern at the African Court where documentary evidence is strictly required in compensation claims goes against the general trend in international practice and increases the possibility of arriving at unfair decisions where claims with merit are dismissed owing to inflexibility on evidence. To cure this apparent rigidity, I have suggested that the Court should consistently apply an equitable applicant-centred evidentiary approach through four interventions.

First, I urge the Court to be more proactive by requesting for additional evidence as allowed by the Court's Rules and consistent with a few decisions where it has permitted applicants to file additional evidence before making a final determination on compensation claims. Second, I suggest that there is room for expanding the instances when the Court should award compensation in equity and without insisting on specific documentary evidence to support claims, such as costs for legal representation incurred in domestic proceedings. I further argue that the suggested reasoning regarding such claims could be extrapolated to other compensation claims like loss of income, as appropriate. Third, the African Court should consider use of presumptions of facts (inferences) as an alternative to the current practice of being particular about direct (documentary) evidence. In this regard, I propose that the illustrative jurisprudence from the IACtHR as highlighted in the Chapter is quite convincing in demonstrating that a different approach to proof is possible and this can be a source of inspiration for the African Court. Fourth, the Court should allow a variety of forms of evidence it accepts to support claims, including through use of affidavits. My analysis shows that the Court has applied the suggestions made in this Chapter, but it has done so inconsistently and only in a few cases. The four proposals are, therefore, essentially a call for the Court to mainstream what it has done rightly but sparingly.

CHAPTER 8: Conclusion

"We should adopt principles of evidence and disseminate them…Such guidelines or principles would also encourage people to seize the Court because a court where applications are constantly rejected or a court where applicants don't know what to do is not a useful court."[1]

8.1 Introduction

This study has made the case that the African Court and, by extension, other international human rights courts and bodies, are special in their nature because they are mandated to interpret human rights instruments that are equally special in their character as they belong to a distinct legal order in international law. Further to this, the primary subject and beneficiary of the rights enshrined in the African Charter and other relevant human rights instruments that the African Court interprets and applies is the individual and peoples. The study has therefore contended that given the specialised nature of both the Court and human rights norms, it follows that its procedures, including its approach to evidence, are or ought to be (justifiably) distinct from those that obtain in 'ordinary' courts of law at both the domestic and international levels. In view of the centrality of the individual in the rationale for the human right project, evidentiary practices at the African Court as the study has contended, should be responsive to the evidentiary difficulties and practical inequalities that individual applicants, the primary beneficiaries of its function, deal with. The study has emphasized that these challenges faced by individual applicants, most of which are related to unique socio-legal realities in Africa, call for interpretation and application of evidence rules such that these realities inform the Court's reasoning in its assessment of evidence.

There is overwhelming consensus in literature that the legal contest pitting a State and an individual in international adjudication more often than not has one party (the individual/non-state actor) as the underdog because of a resource and information imbalance between the parties. The analyses in the thesis have demonstrated that there is no doubt that individual applicants who approach the African Court, a substantial number of whom have no legal representation, occupy weaker or disadvantaged procedural positions in the litigation process at the Court. Given this evident absence of equality of arms, this study argues against a formalistic approach to evidence where unequal parties are treated as equals in the evaluation of evidence. For the African Court to remain true to its purpose of protecting human rights in their substance, the study has suggested that an equitable approach to evidence that prioritises applicants, the underdogs, allows for a semblance of a level playing field and

[1] A quote from an interview with Judge No. 4 of the African Court on 23 March 2022 in Arusha, Tanzania.

provides better prospects of substantively fairer outcomes from the Court's adjudication process. With an ambitious aim of influencing judicial practice at the African Court through the suggested equitable applicant-centred approach defined by deliberate and consistent flexibility in the Court's approaches to evidence, the study has in its recommendations put forward four principles (see section 8.3 below) that could act as the pillars that anchor the suggested evidentiary approach.

The subsequent sections of this concluding Chapter summarise the study's findings, recommendations to address identified challenges, practical implications of the study and proposed areas for future research.

8.2 Summary of research findings

8.2.1 Overall finding

Although varied reasons could explain the African Court's approaches to evidence, the study has demonstrated that a common thread is discernible and can provide a general explanation of its evidentiary practices. The reviewed case law and information from fieldwork point to the fact that the Court has either applied an equitable applicant-centred approach to evidence or an approach seeking to equally balance interests of both parties while considering evidence. The study has argued that the identified context-related challenges (see below) create an information and power imbalance that justifies a pro-applicant (and therefore pro-human rights) evidentiary approach. The two case studies examined have confirmed that the choice between an applicant-centred or equal approach to evidence can positively or negatively impact the goal of arriving at substantively just decisions in line with the purpose for which the Court was established.

The analyses in Chapter six showed an incremental dominance of the equal approach to evidence since 2019 that has resulted in an increased number of applications found inadmissible. Chapter seven similarly demonstrated that while there is a back and forth between the two approaches to evidence, the equal approach has informed a rigid requirement for documentary evidence in consideration of compensation claims that has resulted in dismissal of claims that possibly have merit. The study has linked this general shift in the Court's approach to evidence (where there is greater emphasis on it being a neutral arbiter that allows a competitive process between applicants and respondent States in presenting evidence) to reduced substantive accuracy of decisions. In this regard, the study concludes that the Court's possible gains from increased legitimacy among States in its attempt at neutrality while considering evidence are outweighed by further complication of access to the Court and substantively unjust decisions resulting from an acontextual application of the equal approach to evidence.

Importantly, it was not lost on the study that the emerging shift to a stricter approach to evidence has coincided with a backlash against the Court in the form of withdrawal of Article 34(6) declarations by Tanzania, Benin and Côte d'Ivoire. The study deduces that the two developments were not a mere coincidence but rather a deliberate reaction by the Court to signal (to States) a change of approach in an attempt to placate the hostility against it and halt the erosion of its legitimacy from these and potentially other withdrawals of the declaration. The study agrees with the literature, as seen in Chapter three, that supports prioritising considerations of procedural justice aimed at substantively fair outcomes over any legitimacy concerns. By keeping its eyes on the importance of substantive protection of human rights in its adjudication process and rejecting the invitation by State interests to adopt a formalistic approach to evidence not favourable to human rights protection, the African Court would be upholding the value system it represents. Given the socio-legal realities that inform the Court's operating context, a return to and/or consistent application of an equitable applicant-centred approach to evidence at the Court guided by some principles such as those recommended in the study would arguably promote fairer and more just decisions. Such outcome would, as a consequence, enhance the Court's sociological legitimacy.[2]

8.2.2 Core evidentiary practices at the African Court

As regards application of the burden of proof, the study has established that the Court is as a general rule guided by the principle of *actori incumbit probatio* which according to the Court allocates the initial burden or onus of proof to the applicant. However, there are exceptions to this general rule and the Court will reverse or shift the burden of proof to the respondent State in certain circumstances such as when the State controls access to the relevant information or the means of ascertaining the applicant's claim. Before this shift, however, an applicant is required to adduce *prima facie* evidence of the relevant claim. The analyses showed that the practice of shifting the burden of proof is a common feature in other international human rights tribunals and according to the reviewed literature, the flexibility exercised by these adjudicative bodies is informed by considerations of fairness and the endeavour to realise substantive justice. The study's scrutiny of the Court's practices also showed that in assessing evidence in some cases, it will make use of presumptions of fact (inferences) to lessen the burden of proof on the applicant in some circumstances such as when there are difficulties in obtaining required evidence. It is submitted that the highlighted practices of the Court on shifting the burden of proof are progressive and human rights-driven. Although not consistently applied in all

[2] I borrow the expression 'sociological legitimacy' from a presentation by Justice Ben Kioko in: Inter American Court on Human Rights, *Dialogue between Regional Human Rights Courts* (2020), 148. Available at https://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-en.pdf (first accessed on 13 March 2024).

cases with similar facts, they arguably demonstrate the practicability, rationale and benefits of an equitable applicant-centred evidentiary approach.

On the application of standards of proof, case law analyses offered reveal a very fluid or fluctuating approach to the way the Court deals with the issue, and the study has demonstrated that the Court is influenced by both the common law and civil law traditions in its interpretation of the concept. Viewed through a common law lens, the Court's practices show that it sometimes explicitly but in most cases implicitly applies three standards of proof: the *prima facie* standard, the preponderance of evidence -also known as the balance of probabilities- standard, and the 'clear and convincing' standard. Further, the Court also applies what this research dubbed a 'higher but unarticulated' standard in considering compensation claims and which arguably borders on the beyond reasonable doubt standard for requiring conclusive proof. Examination both of its decisions and of views expressed to me by key actors at the Court suggest that, in line with other international practices, determining the threshold of proof required at the African Court is done on a case-by-case basis and depends on the facts in issue, the stage of the proceedings and even the kind of remedy sought. In this regard, the Court is influenced by the civil law tradition where the relevant factors in the application of the standard of proof are not concerned with probabilities or the nature (civil or criminal) of the proceedings as is the case in the common law system but the inner, personal conviction of the judge ('*l'intime conviction du juge*'). Although the Court's publications have clarified that the preponderance of evidence is the standard of proof it applies, the Court does not explicitly mention or engage this standard in its decisions. This study therefore deduces that the Court has adopted a hybrid approach that uses common law language in reference to the application of the standard of proof but with its actual practices nonetheless generally reflecting a civil law approach to the issue. With the exception of the *prima facie* standard, the Court is not explicit in its decisions on the standard of proof being applied and its case law collectively implies that there is no one particular standard in application. This is the case notwithstanding the legal fiction created in the Court's publications that one standard applies. An important implication of this fluidity and contradiction as identified in the study is uncertainty for parties on the level of proof that will suffice for different kinds of claims. Additionally, a distinctly high or strict standard of proof in considering claims for compensation in reparations proceedings has meant a high failure rate for applicants even in cases where some claims may have merit.

Through a detailed analysis of the Court's decisions from 2013 to 2024 in Chapter six, the study has identified two distinct approaches to evidence in assessing compliance with the admissibility condition of filing applications within reasonable time after exhaustion of local remedies. In a strikingly similar

approach to that of the African Commission, the African Court started with a flexible approach to its interpretation of reasonableness of time under Article 56(6) of the African Charter before adopting a stricter and more rigid approach. The study has demonstrated that in the five-year period between 2013 and 2018, the Court liberally accepted justifications given by applicants to explain delayed seizure of the Court, including the facts of being lay, incarcerated, illiterate, indigent, unaware of the Court's existence and lack of legal representation. The Court in most cases relied on presumptions or the fact that the State had not rebutted the applicants' claims to find these facts established. An examination of the decisions from the next five years, i.e. 2019 to 2024, reveals a shift in the Court's evidentiary approach to this issue of the reasonableness of time taken to submit cases. Decisions in this period indicate a noticeably strict approach to evidence that requires applicants to specifically prove the facts which the Court had previously considered flexibly. Discussions in research interviews with judges and Registry staff confirmed that this shift was deliberate. Although the Court formally cited in its judgments legal certainty as the reason for the shift, interviewees suggested other explanations having to do with the increasing number of cases received, complaints by States about the Court's flexibility and the push by some judges for an equally balanced approach to evidence consideration.

The examination of decisions on compensation claims from 2014-2024 has shown that the African Court has adopted a twin approach to evidence consideration in compensation claims. On the one hand, it exercises flexibility by taking into consideration applicants' difficulties in availing required evidence and relies on presumptions of facts and circumstantial evidence to establish relevant facts that allow granting of compensation claims. On the other hand, the Court strictly and rigidly requires documentary proof from applicants and dismisses claims where such documents are not adduced. The study has further clarified that the latter, inflexible, approach is dominant in considering compensation claims. An examination of practices on reparations in other international courts and tribunals as well as mass claims mechanisms and programs has shown that relaxed evidentiary standards (both in Rules and decisions) are the norm. The inflexibility of the African Court in its evidentiary assessment of compensation claims therefore goes against the grain of international practices. Interview data not only confirmed the prevalence of this inflexible approach but also disclosed its possible reasons. Judges and Registry staff variably referred to needing to balance the interests of both parties by treating them equally, the need for caution before sanctioning or 'punishing' the State, protecting public interest given that the awarded compensation amount is borne by taxpayers and avoiding unjust enrichment. A notable implication of the said twin approach to evidence as the analyses in Chapter seven demonstrated is the challenge of inconsistent decisions. The study concludes that there are contextual reasons that justify the call for the African Court to consistently embrace flexibility on evidence in determining compensation claims where applicants

face genuine practical difficulties in producing documentary evidence. This would align the African Court's case law with international practices on reparations and at the same time make its procedure fairer and its decisions more substantively just.

8.2.3 Main challenges related to the African Court's treatment of evidence

The study has identified the main difficulties and gaps related to establishing facts and how they define the Court's evidential approaches. These challenges can be summarised in three heads, namely (1) context-related challenges, (2) challenges related to lack of clarity and (3) the problem of lack of consistency.

Beginning with the challenges linked to the Court's context or operating environment, as seen in Chapter two, there is general lack of awareness about the African Court among the general population in most State Parties. The problem is compounded by the fact that it extends to domestic lawyers who, as literature showed, also have a low level of awareness or interest in the regional human rights systems generally and therefore lack knowledge and capacity for effective legal representation at the Court. With this reality at the domestic level, it has not helped that majority of applications received at the Court are from applicants based in Tanzania, who are often illiterate, lay, serving long prison sentences and without legal representation. The practical implication of this is that without proper understanding of the legal intricacies of the Court's procedures, these applicants will often file poorly drafted applications, without attaching the required or relevant evidence, some of which is unavailable to them owing to lengthy periods of incarceration. Fieldwork interviews have made clear that the provision of *pro bono* legal representation has not universally cured this problem, with some lawyers having failed to represent applicants effectively. In sum, this situation has made it difficult for applicants to prove their claims and complicated the Court's ability to determine cases on their substance fairly.

The second set of challenges relates to a lack of clarity on the required evidence, particularly in cases where the Court finds the evidence presented to be insufficient and fails to capitalise on such cases to make determinations that guide litigants in subsequent applications. As discussed in Chapter six, the Court's shift in its approach to evidence while assessing whether an applicant filed a case within reasonable time also came with the insistence that applicants needed to specifically prove claims that they were indigent or lacked awareness about the Court's existence and how to approach it. Additionally, the Court started requiring that applicants provide proof of how these 'personal situations' impacted the delay in question. As argued in the study, applicants have remained unclear on the kind of evidence the Court anticipates should support claims of indigence or what an applicant needs to demonstrate to prove 'lack of awareness'. As pointed out in the study, establishing negative

facts such as 'lack of awareness' is generally difficult and places a heavy burden of proof on the applicant. With a notable increase in the number of applications that the Court has found inadmissible on the basis of lack of evidence, the study has argued that the Court is obligated, as a human rights-driven measure, to clarify to (prospective) applicants on the kind of evidence that it is generally disposed to consider sufficient. Further to this, failure to clarify or communicate to applicants (at the time of filing or during exchange of pleadings) the evidentiary requirements has meant, for the many applicants who are not well-versed in the Court's mandate and procedures, dismissal of application and reparation claims that could have had merit. Still on the need for clarity, Chapter five illustrated how the Court's application of standards of proof fluctuates owing to influences from both common law and civil law traditions. The Chapter suggested there is need for clarity on the applicable standard of proof but cautioned that requiring applicants to meet a higher standard than the preponderance of evidence in human rights adjudication is unusual and requires cogent justifications.

The third major challenge identified by the study concerns the lack of consistency in the Court's decision-making, which it attributes to a shift over time in the views held by key actors at the Court about the model of procedural fairness that should apply at the Court and to evidence matters in this regard. It has been argued that two schools of thought have informed the Court's approach to evidence: applying either an equitable applicant-centred approach or balancing both parties' interests equally. However, operational challenges also contribute to explaining the Court's inability to identify or avoid inconsistencies, including those touching on its treatment of evidence. As discussed in Chapter seven, fieldwork data points to the changing composition of the bench, dissenting judges managing to convince their colleagues to decide differently, lack of staff dedicated to screening decisions to ensure consistency, part-time nature of the judges' tenure, the rush to conclude cases within a specified time and the case-by-case approach to decision-making as factors that explain the Court's inconsistency (whether on evidence issues or other matters generally).

8.3 Summary of recommendations

In the substantive Chapters of the thesis, the study has canvassed ideas on how the challenges discussed throughout the study can be addressed. The proposals are informed by a synthesis of case law analysis and recommendations made in interviews conducted during fieldwork. Collectively, these proposals respond to the research sub-question - how can the African Court's evidentiary practices be improved to enhance protection of human rights? Given that the recommendations have been elaborated and justified in greater detail in the respective Chapters of the study, this section provides a summary of how reform of the African Court's evidentiary regime could look like as discussed in substantive Chapters. Importantly, what is suggested should be understood as the core pillars that

could concretely define an equitable applicant-centred evidentiary approach as advanced in the study. The study makes five recommendations the Court could consider in an effort to realise this goal as outlined below.

8.3.1 Communication of applicable evidence standards to litigants

The African Court has developed documents and publications that inform parties on its procedures - these include the standard forms for various applications, a factsheet on filing reparation claims and a comparative study on the law and practice on reparations. However, until the adoption of the new Practice Directions in 2024, there had not been a document that holistically consolidated information on applicable evidentiary standards at the Court. There was agreement across interviews that the Court should provide more information to guide litigants on evidence, an intervention that would particularly be helpful to applicants – as well, of course, as their representatives - who are unfamiliar with the Court's procedures. Respondent States also stand to benefit from greater clarity on applicable evidence standards and overall this would, as discussed literature suggests, facilitate the fulfillment of treaty obligations out of the adjudication process at the Court.

8.3.2 A more proactive fact-finding role by the Court

This study has noted that while Rule 51 and 55 of the Court's Rules allow it to seek (on its own motion) additional evidence in the course of proceedings, the Court has not fully capitalised on its powers under these rules. Instead of the Court limiting its role to that of a neutral arbiter acting on submitted evidence, it is suggested that greater proactivity by the Court in seeking evidence would fill evidence gaps occasioned by the reality of applicants who are not fully conversant with its processes such as those who are unrepresented. In addition, consistently invoking these rules where necessary would enhance consistency of decisions as the Court has adopted this proactivity but done so inconsistently. Discussions in the thesis and dissenting opinions in some cases exposed the fact that there are some claims of violation of rights or for reparation that may not have been dismissed had the applicant been made aware of required proof at the appropriate stage in the process of filing and exchanging pleadings. It is recommended that the Court's Registry should clearly, consistently and timeously communicate evidence requirements when applications are filed. Additionally, the Court should exercise discretion as allowed in Rules 51 and 55 to call for additional evidence during proceedings in appropriate circumstances.

The overall aim of this proposal is to enhance the fairness of the Court's decisions by ensuring that in most if not all cases where the Court dismisses claims for 'insufficient evidence', this is not because applicants were not aware of required evidence or were not availed an opportunity to furnish further evidence. Whereas there may be a legitimate concern that consistent proactivity in seeking evidence

not presented by parties may delay proceedings and result in a backlog of cases, this concern does not apply to the African Court as it is presently receiving very few applications annually, particularly in the wake of Tanzania's withdrawal of its declaration allowing direct access to the Court for individuals and NGOs. The benefit of the urged proactive role of the Court regarding evidence, namely, arriving at just and fair decisions, outweighs the concerns of perceived loss of neutrality. The concern about partiality has been the main counter-argument expressed by some of the interviewees who were not wholly convinced about the appropriateness of the suggested proactivity. This study's contention, however, is that the requests for additional evidence where there are evidentiary gaps (which can be made to either party to the proceedings) merely enable the Court to make informed decisions based on all available evidence and thus do not translate into bias on the part of the Court. Related to this, prior communication of evidence requirements as suggested in the first recommendation above such as through the Court's guides for litigants would mean both applicants and respondents are guided and informed beforehand on applicable standards, eliminating the concern of partiality.

8.3.3 Flexibility regarding acceptable forms of evidence

Owing to the context-related challenges discussed in the study and summarised in section 8.2.3 above, an argument has been made in the study for flexibility in evidence requirements where these challenges explain applicants' difficulties in accessing required direct evidence. In such cases, the study has suggested that fairness requires the Court to exercise discretion and allow alternative forms of evidence such as affidavits, letters from local administrators and relevant institutions, oral testimony and other circumstantial or indirect evidence. Similarly, Chapter seven demonstrated how the Court can ensure substantively just outcomes in some types of compensation claims such as those for legal costs incurred in domestic proceedings by awarding costs in equity where evidence is unavailable. The logic behind this proposed flexibility is the possibility for the Court to establish the fact of legal representation in domestic courts with relative ease such as through copies of judgments that are typically relied on by most applicants.

8.3.4 Reliance on presumptions of fact and taking judicial notice of certain facts

The study has deduced that the African Court inappropriately dismisses some claims by insistence on specific proof rather than relying on adjudicatory tools such as presumptions of fact (inferences) and taking judicial notice of some facts while assessing evidence. It has demonstrated the onerous nature (or unfairness) of demanding specific proof in some cases and suggests that the Court ought to exercise its discretionary powers in such cases through these adjudicatory tools for fairer assessment of claims and just outcomes from the Court's decisions. As discussed in Chapter six, given the challenges associated with establishing proof of indigence as seen in admissibility decisions since 2019,

the study recommends that the Courts reverts to drawing inferences of the fact of indigence from other circumstantial evidence as it did in its more flexible era on this issue (2013-2018). In addition, Chapter seven's discussions have demonstrated that the Court could significantly reduce the number of compensation claims it dismisses with reliance on rebuttable presumptions of fact, particular where there is indicative evidence supporting claims of loss of income as a result of established violations. The study recommends that the African Court could draw inspiration in this regard from the Inter-American Court that has an established practice of relying on inferences (in an endeavour to ensure substantive fairness) to circumvent applicants' challenges in proving loss of income due to lack of direct evidence.

It is further recommended that the African Court should make greater use of taking judicial notice of certain facts to eliminate the need to adduce specific evidence to prove these facts. As discussions in Chapter six have revealed, in the more recent decisions of the Court, there is a requirement to specifically prove the claim of lack of awareness about the Court's existence (as justification for delayed filing of an application) which unduly places a heavy burden of proof on applicants. The study recommends that the African Court should take judicial notice of the fact that there is still lack of awareness about the existence and activities of the African Court for the vast majority of individuals and lawyers across the continent. This approach would eliminate the requirement for applicants to prove the negative fact of lack of awareness, a demand that has proved difficult to meet for most applicants raising this issue since the Court changed its approach in 2019. Related to this, the study has suggested that a more equitable distribution of the burden of having to prove lack of awareness is to reverse or shift this burden to the State (to prove measures taken to create awareness) when applicants adduce *prima facie* evidence of lack of awareness. Arguably, this is justified since the State has an obligation under the African Charter to create awareness about enforcement mechanisms such as the African Court. The study suggests that this distribution of the burden of proof in considering admissibility of applications would, overall, enhance the fairness of proceedings at the Court.

8.3.5 Addressing inconsistencies through the consistent application of an applicant-centred evidential approach

As seen in Chapter seven and the summary in section 8.2.3 above, fieldwork data has clearly indicated that there are organizational factors that make it difficult for the African Court to detect or avoid inconsistencies in its decisions, including on evidence matters. Interviewees generally agreed that the challenge of inconsistency can be solved with more resources, namely, adequate staff dedicated to ensuring consistent decision-making. While this intervention would certainly help, this study suggests that the root cause of the problem of inconsistency in evidentiary decisions is the Court's oscillation

between an equitable applicant-centred approach in some cases and an attempt to equally balance parties' interests in dealing with evidence matters in other cases. It is suggested that a clear choice of the former as advocated in discussions in the substantive Chapters and consistent application of the same (in line with already existing jurisprudence that is flexible on evidence issues and applicant-centred) would address the fundamental cause of inconsistent decisions.

8.4 Practical implications of the study

As highlighted in Chapter one, the evidence provisions in the revised Practice Directions adopted by the Court in March 2024 are an outcome of this study. This section summarises the evidence provisions in the Directions that have arguably expanded the boundaries of flexibility on evidence at the Court. This is anticipated to be beneficial to applicants facing varied difficulties related to adducing evidence as discussed in the study. The summary will also show how most of the recommendations emerging from the study are reflected in the Practice directions.

8.4.1 Provisions on evidence in the revised Practice Directions

Objective: the annexture provides that its objectives are threefold – to provide information and clarity to the parties about evidence rules and practices applicable at the Court, to guide parties in situations where required evidence is unavailable for valid reasons and to collate existing evidentiary guidelines and practices applied by the Court.

Sources of evidence: there is a restatement of the provisions of the Protocol and Rules that decisions of the Court are based on evidence and sources of evidence include: (1) evidence adduced by the parties, and their witnesses, experts or any other person whose submissions, assertions or statements are likely to assist the Court, (2) evidence obtained by the Court that clarifies facts of a case including from enquiries or visits to the scene of incident, requests for opinions and reports from individuals and institutions and testimony on oath and (3) fact-finding by the African Commission on behalf of the Court in cases where the Commission is not a party. Importantly, there is clarification that the Court will be guided by the principles of equity, fairness, and reasonableness in the process of allowing and considering evidence.

Burden of proof: the annexture clarifies that in general, the burden to prove the merits of a case and justify claims thereof lies with the applicant. However, the burden of proof may shift to the respondent State in certain circumstances such as where the respondent State has more or exclusive access to relevant information about a fact in issue. This provision reflects what, as seen in Chapter four, literature has referred to as the normal default rule regarding the burden of proof.

Standard of proof: the applicable standard of proof in all proceedings at the Court is the balance of probabilities. Further, the Court will consider the circumstances of each case to determine whether a fact has been established or proven. With the identification of one specific standard of proof in all proceedings, which had not been explicitly done previously, applicants arguably have a solid basis to question practices pointing to application of a higher standard of proof especially in reparations decisions as discussions in Chapter seven showed.

Presumptions, inferences and judicial notice: the annexure provides that the Court will rely on presumptions and inferences in appropriate circumstances. Where a party fails to challenge evidence, fails to adduce evidence or provide information requested by the Court, fails to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw appropriate inferences. Related to judicial notice, the annexure states that the Court shall take judicial notice of facts which are of common knowledge.

Inability to adduce evidence: an important provision in the annexture in the context of the discussions in the study is that if a party is unable to adduce documentary evidence required to establish a claim, the Court may allow such party to explain why such document cannot be provided and allow use of oral evidence instead. Further, that the Court may take into consideration the difficulties experienced by a party in obtaining evidence in support of their claims. Additionally, the Court may waive the requirement to adduce evidence for any of the following reasons: (1) if there is an unreasonable burden to produce the required evidence, (2) if there is loss or destruction of documentary evidence that has been shown with reasonable likelihood to have occurred and (3) considerations of procedural efficiency, proportionality, fairness, or equality of the parties that the Court determines to be compelling.

Examples of evidence for various claims: there is a provision in the annexure providing an expansive but non-exhaustive list of examples of evidence that litigants can rely on at the Court. Some of the examples provided include - certified copies of judgments, rulings, orders, correspondence and any other written evidence related to the application, government records and reports, domestic laws and other relevant statutory material, photographs, videos, transcripts, witness statements and testimony, charge sheets, medical reports, newspaper articles, NGO reports, expert reports and opinions and certified copies of any record of a decision of a public authority that is being challenged. Additionally, a long list of examples of evidence that may be adduced to support reparations claims is provided and this includes forms of evidence to prove the identity of the victim, to prove familial relationship to the victim, to prove existence of a business, to prove income from business, to prove

loss of land or property where there is no official proof of title and to prove loss of income and loss of future earnings.

Affidavit evidence: another key provision in the annexure was on use of affidavit evidence at the Court. This provision was informed by findings from an initial research I had conducted at the request of the Court on use of affidavits in international adjudication. This clause in the annexture outlines the formal requirements that should be met by a party seeking to rely on an affidavit as evidence. It further provides that the Court may consider evidence by way of an affidavit that is not supported or corroborated by other forms of evidence, provided that the party relying on such affidavit justifies the absence or demonstrates inaccessibility of other forms of supporting or corroborating evidence. The factors that the Court will consider in attaching appropriate probative value or weight to affidavit evidence are also listed. As seen in Chapter seven of the study, the Court's reliance on affidavit evidence has been limited for requiring that affidavits be accompanied by corroborating evidence and this clause addressed this limitation by allowing use of unsupported affidavits, that is, affidavits that are stand alone sources of evidence without corroboration where corroborating evidence is unavailable for valid reasons. The abovementioned research on use of affidavit evidence in international courts that I had conducted while at the Court showed existence of international practices allowing use of such affidavits and these findings informed inclusion of this provision in the annexture.

Inherent powers of the Court on evidence: the last clause in the annexture speaks to the Court's inherent powers on evidence. It provides that in appropriate circumstances and subject to its discretion, the Court may at the request of a party or on its own motion, order the re-opening of pleadings to receiving additional evidence. Further, the Court retains the inherent powers to adopt such procedures or decisions regarding the receipt and assessment of evidence as may be necessary. Although a similar clause is in the Court's Rules, this is a useful reminder to litigants and the Court that a proactive fact-finding role for the Court is permitted and such powers need to be put to use as the study has argued.

8.5 Future research

This final section will briefly reflect on possible ways of building on this thesis through further research. Suggestions herein simultaneously speak to some of the limitations and implications of the study. As noted in Chapter one, most cases filed at the Court have been against the host country Tanzania and this is mainly explained by Tanzania-based applicants' proximity to the Court. As a result, the bulk of analyses in the study were by default based on cases where Tanzania is the

respondent State. Future research could explore evidentiary practices at the African Court using an alternative data set that does not heavily rely on case law involving one State to interrogate how different domestic settings may influence the Court's approaches and take stock of the Court's consolidation or departure from the 'Tanzanian jurisprudence'.

Related to the scope of fieldwork data, interviewees for the study were limited to judges and members of the Court's Registry. Future studies on evidence at the Court could adopt a more expansive empirical focus and particularly broaden the range of participants in interviews to, for example, get perspectives from lawyers and NGOs that regularly litigate at the Court as well as document the experiences of government representatives, self-represented and represented applicants and victims.

The two case studies in the thesis were limited to examining evidentiary practices in the Court's assessment of one admissibility condition and one form of reparation. Going forward and with an increase in the number of decided cases at the Court, further research may be necessary on evidence issues emerging from decisions on other admissibility conditions and on other forms of reparation. Additionally, as noted in Chapter one, analyses in the study considerably drew upon the practices in other regional human rights adjudicating bodies. In an effort to contrast practices in peer institutions, the study did not analyse decisions of sub-regional courts that exercise a human rights mandate like the ECOWAS Court of Justice and the East African Court of Justice. In retrospect, however, omission of decisions by ECOWAS Court of Justice is notable given the Court's extensive case law on the African Charter. I suggest that future research on international human rights adjudication could build on the findings of this study by paying particular attention to the evidentiary practices of this Court as a relevant comparator.

This study mostly focused on how the African Court treats evidence in cases involving an individual applicant. While this can be explained by the fact that there have been very few cases involving collective or group rights such as the *Ogiek* case, with an increase in case law, future research may build on this study by examining and contrasting the Court's evidentiary approaches in cases involving groups of individuals, communities, peoples and contexts of mass violations. Finally, further research on the impact of inclusion of a set of evidence standards in the revised Practice Directions may be needed. Future studies are suggested to examine how this development at the Court will have impacted the quality of applications and the Court's decisions from a procedural fairness standpoint as well as through the lens of substantive accuracy of the Court's decisions.

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APPENDICES

Appendix 1: Table of interviews

No.	Date	Designation	Recorded? Y/N	Duration
1.	22/03/2022 J1	Judge	Y	48 Minutes
2.	23/03/2022 J3	Judge	N	
3.	23/03/2022 J4	Judge	Y	43 Minutes
4.	24/03/2022 J2	Judge	N	
5.	12/04/2022 R4	Registry Member	Y	58 minutes
6.	23/05/2022 J6	Judge	N	
7.	30/05/2022 R6	Registry Member	Y	1 hour 1 minute
8.	31/05/2022 J5	Judge	Y	1 hour 22 minutes
9.	09/08/2023 R7	Registry Member	N	
10.	14/08/2023 R1	Registry Member	Y	1 hour 29 minutes
11.	15/08/2023 R2	Registry Member	Y	54 minutes
12.	22/08/2023 R6	Registry Member	Y	1 hour 26 minutes
13.	23/08/2023 R3	Registry Member	Y	57 minutes
14.	24/08/2023 R5	Registry Member	Y	1 hour 17 minutes
15.	30/08/2023 R4	Registry Member	Y	36 minutes
16.	06/09/2023 J3	Judge	Y	41 minutes
17.	07/09/2023 J1	Judge	Y	59 minutes
18.	07/09/2023 J7	Judge	Y	35 minutes

Appendix 2: Interview questionnaire – first Court visit (1 March to 30 June 2022)

1. From my reading of the Court's case law, I have the perception that there may be several standards of proof being applied by the Court. Is this correct, and if so, what may inform the raising or lowering of the applied standard?
2. Do you believe that the civil law or common law backgrounds of the judges, legal officers and origins of the applications generally impact the Court's jurisprudence/practices, including how evidence is treated?
3. How useful are oral hearings in helping the judges to resolve factual/evidentiary differences between the parties and will the Court have more or less hearings going forward?
4. I have noted that in most cases where the Court allows expert testimony, the evidence of the experts is often reproduced in the judgments but the Court often does not integrate the substance of such testimony in its findings. What could explain this and is it deliberate on the part of the Court to do this?
5. Rule 36(4) allows the Court to request the African Commission to conduct fact-finding on behalf of the Court. What informed this inclusion in the Court's Rules and how is this likely to impact assessment of evidence by the Court?
6. Can you think of instances where the Court has adapted/should have adapted its evidentiary practices in the interest of justice/recognizing weaker or difficult positions of applicants regarding access to evidence?
7. Are there some forms of evidence that are given greater weight than others? In other words, is there a hierarchy of the different types of evidence in terms of probative value?
8. What are the main challenges/possible areas of improvement in how the Court deals with evidence issues?
9. Are there some innovations by the Court in the area of evidence assessment that stand out/other regional Courts can learn from?
10. Is there a need/would it be helpful (for the Court and litigants) if the Court adopted principles/guidelines on how the Court treats evidence issues such as standard(s) of proof, burden of proof and when it shifts, expected forms of evidence, situations of missing, lost or inaccessible evidence etc.?

Appendix 3: Interview questionnaire - second Court visit (1 August to 15 September 2023)

1. Have there been any discussions or debates within the Court about its approaches to evidence?
2. My assessment of the Court's more recent jurisprudence is that it has become stricter on evidence questions in determining admissibility of applications (specifically in assessing reasonableness of time taken to submit applications). If you concur, what is your take on this development?
3. In most of its decisions on reparations, the Court appears to be specific/strict in requiring documentary proof to support reparations claims. Are there alternatives to this approach that can avoid dismissal of what may be valid reparations claims?
4. Justice Chafika has regularly expressed a minority view that the Court should request applicants to submit additional evidence before it dismisses an applicant's contention for insufficient evidence. What is your take on this?
5. How have the common law and civil law systems influenced evidentiary practices at the Court, if at all? (e.g. on role of the Court in fact-finding, how hearings are conducted, applicable standard of proof or lack thereof etc.)
6. What are the most significant challenges regarding the Court's approaches to evidence and how can they be addressed?
7. How can inconsistencies in decisions of the Court be addressed?
8. How does the Court's structure and organization (e.g. procedures, personnel & other logistical/capacity factors) impact its approaches to evidence and fact-finding?
9. How do political circumstances in respondent States and States' responses to the Court's work impact or influence decision-making at the Court?
10. To what extent does the Court rely on or is it influenced by submissions of the parties? (comparing represented & unrepresented applicants as well as those represented pro-bono compared to those with their own legal representation)
11. Are there some instances where the Court misses opportunities to be "pro-human rights" in its interpretation and application of the Charter and evidence principles? E.g. Are there instances when it does not fully appreciate evidence-related difficulties faced by applicants?
12. How have the jurisprudential approaches at the African Commission affected the Court's practices? Has the African Court borrowed any practices from other regional courts that are unsuitable for the context in which it operates?

Appendix 4: Participant information sheet

Information Sheet

This information sheet is especially addressed to judges, registry officers, lawyers, NGO representatives and others who may consider giving an interview to the DISSECT research team. *It briefly introduces the aim and design of the research project DISSECT: Evidence in International Human Rights Adjudication, in order to help you decide whether you are willing to be interviewed. You are most welcome to ask for clarification or elaboration before you decide whether you wish to proceed. If an interview goes ahead, you will first be asked to sign a consent form. This will ensure that you fully agree to the terms of the interview.*

Project's aim: To uncover the evidentiary regime that international human rights judicial and quasi-judicial institutions have developed. Edward Kahuthia Murimi's research specifically deals with the evidence regime developed by the African Court on Human and Peoples' Rights.

DISSECT's main research questions:

1. Which regime (set of formal and informal rules and practices) governs the treatment of evidence in the three world's regional human rights courts as well as in some UN Human Rights treaty-bodies?
2. What power relations and political uses underpin these evidentiary regimes?
3. What practical recommendations can be made in order to improve these regimes?
4. How does law treat factual uncertainty, and what does this tell us about the relationship between truth, evidence and human rights?

Research methods: 'classical' legal doctrinal analysis allied with methods more akin to the way social anthropologists conduct research. The latter includes:

- **Research interviews** with those who have direct experience of the regimes studied. Only non-confidential information is collected. Participation is voluntary. Interviewees can withdraw consent to participate at any time without giving reason.
- **Field observation** conducted in order to enhance the understanding of the way the adjudicatory bodies work through observing how things are done and what is being said (and not said) in places connected to the study. Fieldworkers aim to act in an unobtrusive way that does not disrupt the normal course of the observed events. The observed do not necessarily know they are being observed. Fieldworkers take notes about what they have observed as soon as possible after observation has come to an end. Fieldnotes are used in a sensitive way that respects anonymity (except if this is not necessary – e.g. reporting interventions made in a judicial public hearing).

Outcomes: PhD thesis, academic articles, blog posts and conference presentations.

Full title and affiliation: 'DISSECT: Evidence in International Human Rights Adjudication'. This is a five-year research programme that started on 1 October 2020 and is funded by the European Research Council (ERC Advanced Grant 834044). It is based at the Human Rights Centre of Ghent University. The research team is led by Prof Marie-Bénédicte Dembour, Professor of Law and Anthropology. DISSECT's advisory board is composed of former presidents of the institutions studied, other former or current members as well as distinguished academics.
For further information, see https://dissect.ugent.be/ or contact the Principal Investigator of the DISSECT project, Professor Dembour, at mariebene.dembour@ugent.be.

Appendix 5: Consent form

Consent form for interviewees

The DISSECT research team, especially Edward Kahuthia Murimi, thank you for your willingness to be interviewed.

Please note the following:

• Your participation in this research interview is voluntary. You are free not to answer any question. You can stop the interview at any time. You can ask the record of the interview to be destroyed at any point in the future. You do not need to give any reason for withdrawing from this study.

• The interview may be recorded. In this case, it may be transcribed either by the interviewing researcher or a person who has signed a confidentiality agreement. If you agree to this, please add your initials here: **……**

• If the interview is not recorded, the researcher will appreciate taking notes as you speak. If you agree to this, add your initials here: **……**

• The information you provide during the interview will not be attributed to you in any publication or public forum – except if your permission is requested and you specifically consent to this attribution.

• Any hard copy of the record of your interview will be kept as much as possible in a locked space (though obviously not during transport).

• Electronic files of your interview's recording/transcription will be password-protected and saved on a secure server or cloud storage (the one of Ghent University during the employment of the researcher there).

• These files will be accessible to the researcher who is interviewing you for the lifetime of the DISSECT project and, as is common practice in academic research, for five years afterwards.

• During the lifetime of the project, these files will also be accessible to the other members of the DISSECT research team, including the researchers in charge of conducting certain parts of the DISSECT project, their PhD advisors and the members of DISSECT's advisory committee. If you agree, add your initials here: **……..**

• In a departure from common practice, you are asked if you agree for these files to remain accessible to the interviewing researcher for as long as they remain professionally active, for use in the context of other research related to human rights law. If you agree to this, add your initials here: **…….**

• If you withdraw consent at any time in the future, the data provided up to that point will be destroyed. It will also cease to be used for research. However, it may not be possible to alter publications already in preparation (or out).

Declaration: I confirm that I have read the above as well as DISSECT's information sheet. I agree to participate in the DISSECT research project in accordance with the terms indicated in these two documents.

_____	_____	_____
Name	Participant's signature	Date

Contacts

If you have any further questions or concerns about this study, please contact DISSECT's Principal Investigator and Edward Kahuthia Murimi's supervisor, Prof Marie-Bénédicte Dembour.
Postal address: Human Rights Center, Ghent University, Universiteitstraat 4, B-9000 Ghent, Belgium
Tel: +32 9 264 68 98
E-mail: mariebene.dembour@ugent.be

The researcher interviewing you is Edward Kahuthia Murimi, Doctoral researcher at Ghent University, Department of European, Public and International Law
Visitors' address: Campus Aula, Paddenhoek 5, 2nd floor, B-9000 Ghent, Belgium
Postal address: Human Rights Center, Ghent University, Universiteitstraat 4, B-9000 Ghent, Belgium
T: +32 9 264 6925 (office)
+32 472 536814 /+254 723 653 745(mobile)

If you have any questions or concerns regarding the data DISSECT may hold on you, or if you would like to have your data rectified or erased, obtain a copy of it, or withdraw your consent, you can contact at any time either Prof Dembour or the Personal Data Officer at Ghent University – currently Ms. Hanne Elsen.
Postal address: Sint-Pietersnieuwstraat 25, Rect.2, 9000 Gent, Belgium
Tel: 0032 9 264 32 39
E-mail: hanne.elsen@ugent.be

Appendix 6: Annexure on Evidentiary Matters, Practice Directions, 5 March 2024

I. Objectives of the Annexure

1. The objectives of this annexure on evidence before the Court are:
   a. To provide information and clarity to the Parties about evidence rules and practices applicable in proceedings before the Court.
   b. To provide guidance to the Parties in situations where required evidence is unavailable for valid reasons.
   c. To collate existing evidentiary guidelines and practices applied by the Court.

II. General Provisions on Evidence

2. Pursuant to Article 26(2) of the Protocol, decisions of the Court will be made based on evidence, sources of which may include:
   a. Evidence adduced by the Parties, and their witnesses, experts or any other person whose submissions, assertions or statements are likely to assist the Court.
   b. Any evidence obtained by the Court that clarifies facts of a case including from enquiries or visits to the scene of incident, requests for opinions and reports from individuals and institutions and testimony on oath, pursuant to Rule 55 of the Rules.
   c. Fact-finding by the African Commission on Human and Peoples' Rights on behalf of the Court in cases where the Commission is not a party, in accordance with Rule 36(4) of the Rules.

3. The Court will be guided by the principles of equity, fairness, and reasonableness in the process of allowing and considering evidence.

III. Burden of Proof

4. In general, the burden to prove the merits of a case and justify claims thereof lies with the Applicant.

5. The burden of proof may shift to the Respondent State in certain circumstances, *inter alia*, where the Respondent State has more or exclusive access to relevant information about a fact in issue.

IV. Standard of Proof

6. The applicable standard of proof in all proceedings at the Court is the balance of probabilities.

7. The Court shall consider the circumstances of each case to determine whether a fact has been established or proven.

V. Presumptions, Inferences and Judicial Notice

8. In appropriate circumstances, the Court may make use of presumptions and inferences.

9. Where a Party fails to challenge evidence, fails to adduce evidence or provide information requested by the Court, fails to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate.

10. The Court shall take judicial notice of facts which are of common knowledge.

VI. Inability to Adduce Evidence

11. If a Party is unable to provide documentary evidence required to prove a fact in issue, such Party may provide an explanation why such document cannot be provided, and oral evidence may be used instead.

12. The Court may, in exercise of its discretion and in appropriate circumstances, take into consideration the difficulties experienced by a Party in obtaining evidence in support of their claims.

13. The Court may, at the request of a Party or on its own motion, waive the requirement to adduce evidence for any of the following reasons:
    a. If there is an unreasonable burden to produce the required evidence.
    b. If there is loss or destruction of documentary evidence that has been shown with reasonable likelihood to have occurred.
    c. Considerations of procedural efficiency, proportionality, fairness, or equality of the Parties that the Court determines to be compelling.

VII. Examples of Evidence for Various Claims

14. Examples of evidence that a Party may rely on include, but are not limited to: certified copies of judgments, rulings, orders, correspondence and any other written evidence related to the application, government records and reports, domestic laws and other relevant statutory material, photographs, videos, transcripts, witness statements and testimony, charge sheets, medical reports, newspaper articles, NGO reports, expert reports and opinions and certified copies of any record of a decision of a public authority that is being challenged.

15. For any claim of alleged material loss, an Applicant is required to adduce specific evidence in support of the precise loss that he or she has suffered due to the alleged violation.

16. Examples of evidence that may be relied on to prove the identity of the victim include but are not limited to, certified copies of: passports, national identity cards, driver's licences, birth certificates, baptismal certificates, electoral cards, voter's cards, refugee cards, consular identity cards and certificates of loss of identification.

17. Documents that the Court may consider as proof of familial relationship to the victim include, but are not limited to, certified copies of: marriage certificates, death certificates, attestation of paternity or maternity, decisions of a national court recognising a family relationship, documents pertaining to medical treatment, family registration booklets and genetic evidence.

18. In reparation claims related to business, examples of evidence that may be relied on to prove existence of a business include but are not limited to: certified copies of: business licences, certificates of business registration, payment receipts or business contracts while examples of forms of evidence that may be relied on to prove income from the business include certified copies of bank statements and of tax records or tax compliance certificates.

19. For purposes of proving loss of land or property where there is no official proof of title, the Court may accept relevant evidence, including but not limited to: proof of prior possession or ownership of the land or property, sale agreements, certified copies of residency certificates or habitation certificates and expert testimony in so far as these are provided for under the domestic legal regime.

20. To prove loss of income and loss of future earnings, evidence of the actual income of the victim should be provided. Where such evidence is unavailable, relevant information can be provided, including, but not limited to, the alleged victim's educational records and professional qualifications to prove the salary they likely would have earned, the average wage for the victim's profession, expert estimations of the annual amount of income in the profession per year, and minimum wage or per capita income in the Respondent State.

VIII. Affidavit Evidence

21. The following formal requirements should be met by a Party seeking to rely on an affidavit as evidence:
    a. The depositions in the affidavit must be witnessed by a person authorised to witness such a declaration in accordance with the law and procedure of the applicable State.
    b. That the deponent states that the contents of the affidavit are, to the best of his or her knowledge and belief, true and correct.
    c. The content is relevant and relates to the case being considered.
    d. Indicate the date and place of the declaration.
    e. Be signed or marked by the deponent.

22. The Court may consider evidence by way of an affidavit that is not supported or corroborated by other forms of evidence, provided that the Party relying on such affidavit justifies the absence or demonstrates inaccessibility of other forms of supporting or corroborating evidence.

23. The other Party or Parties are entitled to file counter affidavits.

24. The probative value or weight to be attached to affidavit evidence by the Court will depend on the circumstances of each case. Factors to be considered by the Court include but are not limited to:
    a. Whether or not the deponent is an interested or disinterested Party to the outcomes of the case.
    b. Whether the content of the affidavit has been disputed by the opposing Party.
    c. The reliability or probity or relevance of the contents of the affidavit including whether what is attested to is within personal knowledge of the deponent.
    d. The closeness in time between the period when the relevant facts occurred and drawing of the affidavit.

e. Whether the content of the affidavit is a restatement of the Party's submissions.

IX. Inherent Powers of the Court on Evidence

25. In appropriate circumstances and subject to its discretion, the Court may at the request of a Party or on its own motion, order the re-opening of pleadings for purposes of receiving additional evidence.

26. The Court retains the inherent powers to adopt such procedures or decisions regarding the receipt and assessment of evidence as may be necessary.

Appendix 7: Acknowledgment letter from the African Court

AFRICAN UNION
الاتحاد الأفريقي
UNIÓN AFRICANA

UNION AFRICAINE
UNIÃO AFRICANA
UMOJA WA AFRIKA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
P.O. Box 6274 Arusha, Tanzania – Telephone: +255 27 510 510
Website:www.african-court.org / Email: registrar@african-court.org

Ref: AFCHPR/REG./EXT/002.25

Date: 7 January 2025

Edward Kahuthia Murimi
DISSECT Research Project, Human Rights Centre, Ghent University.
Email: edwardkahuthia.murimi@UGent.be

Dear Mr Murimi,

Subject: Acknowledgment of your Contribution to the African Court

I write to express the appreciation of the African Court on Human and Peoples' Rights for your contribution to the Court's work. I note that as part of your PhD research at Ghent University which focused on the evidentiary practices at the African Court, you significantly supported the Court's mandate during your placement at the Court from 1 March to 30 June 2022.

On behalf of the Court, I particularly express gratitude for your role in conceptualizing and authoring a draft of the evidentiary standards applicable at the Court. The draft you developed is now annexed to the revised Practice Directions adopted by the Court on 5 March 2024. This collation and clarification of applicable evidentiary standards at the Court is expected to significantly improve the quality of pleadings we receive. The Court further anticipates that the expanded flexibility on evidence matters as captured in the Practice Directions will be beneficial to parties, enhancing access to justice, particularly in cases where required evidence is unavailable for valid reasons.

We look forward to receiving and engaging with the final findings of your research and wish you well in your future endeavours.

Dr. Robert Eno
Registrar