

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

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ABSTRACT: Applications filed before the African Court on Human and Peoples’ Rights (Court) must fulfil all the admissibility requirements listed in article 56 of the African Charter on Human and Peoples’ Rights (Charter). The requirements in article 56 are all replicated in Rule 50(2) of the Rules of Court (Rules). One of these requirements is that applications must be filed within a reasonable period from the time local remedies have been exhausted or from the date set by the Court. The Court’s jurisprudence confirms that it takes a case-by-case approach in assessing the admissibility of cases while paying attention to the individual facts of each case. Notably, the Court, similar to the African Commission on Human and Peoples’ Rights (Commission), has refused to set a fixed time limit that can universally be accepted as reasonable for purposes of article 56(6). This article conducts an analytical survey of the Court’s article 56(6) jurisprudence. The analysis reveals that while the Court has, at least conceptually, been clear about its general approach for applying article 56(6), its decisions demonstrate an ambivalence about the factors that are considered for determining the reasonableness of time as well as the baseline for computing time.

TITRE ET RÉSUMÉ EN FRANCAIS:

Qu’est-ce qu’un «délai raisonnable»? une étude analytique de la jurisprudence de la Cour africaine des droits de l’homme et des peuples sur le délai raisonnable pour introduire une requête

RÉSUMÉ: Les requêtes introduites devant la Cour africaine des droits de l’homme et des peuples (Cour) doivent remplir toutes les conditions de recevabilité énumérées à l’article 56 de la Charte africaine des droits de l’homme et des peuples (Charte). Les exigences de l’article 56 sont toutes reprises à la règle 50(2) du Règlement intérieur de la Cour (Règlement). L’une de ces exigences est que les requêtes doivent être introduites dans un délai raisonnable à partir du moment où les recours internes ont été épuisés ou à partir de la date fixée par la Cour. La jurisprudence de la Cour confirme qu’elle adopte une approche au cas par cas pour évaluer la recevabilité des requêtes tout en prêtant attention aux circonstances individuelles de chaque affaire. Notamment, la Cour, comme la Commission africaine des droits de l’homme et des peuples (Commission), s’est refusée à fixer un délai spécifique qui puisse être universellement accepté comme raisonnable aux fins de l’article 56(6). Cet article effectue une étude analytique de la jurisprudence de la Cour sur l’article 56(6). L’analyse révèle que si la Cour a, au moins sur le plan conceptuel, été certaine de son approche générale de l’application de l’article 56(6), ses décisions démontrent une ambivalence quant aux facteurs qui sont pris en compte pour déterminer le caractère raisonnable du délai ainsi que la base de calcul du délai.

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CONTENT:

1	Introduction.....	130
2	The three regional human rights systems and reasonable time for filing applications.....	131
2.1	The Inter-American human rights system.....	132
2.2	The European human rights system.....	133
2.3	The African human rights system.....	135
3	What justifies the requirement to file applications within a ‘reasonable’ period?.....	136
4	Exploring ‘reasonable time’ for filing applications before the Court.....	137
4.1	Cases found admissible for being filed within a reasonable time.....	138
4.2	Cases found inadmissible for having been filed outside of a reasonable period.....	146
4.3	Exceptions and other factors affecting computation of reasonable time.....	149
5	What has ‘reasonableness’ translated to in the Court’s jurisprudence?.....	151
6	Conclusion.....	152

1 INTRODUCTION

Article 56 of the African Charter on Human and Peoples’ Rights (Charter) outlines the admissibility requirements that must be fulfilled before an application is considered by either the African Commission on Human and Peoples Rights (Commission) or the African Court on Human and Peoples’ Rights (Court). In total, seven requirements are spelt out. The Rules of Procedure of the Commission, as well as the Rules of Court, both expressly incorporate the seven admissibility requirements contained in article 56 of the Charter.¹ More explicitly, article 6 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Protocol) directs the Court to take into account the provisions of article 56 of the Charter in ruling on admissibility of cases. Just as is the case with many supranational judicial, or even quasi-judicial bodies, admissibility, together with jurisdiction, are important prerequisites for the consideration of any case.² The application of admissibility requirements, in practice, entails that even if a supranational judicial body establishes that it has jurisdiction, it will nevertheless decline to exercise its jurisdiction if an applicant has failed to fulfil the admissibility requirements. Admissibility requirements, therefore, although often considered as being only procedural, carry significant consequences for litigation before supra-national bodies.³ By way of illustration, the Court has reiterated the fact that the

1 See, Rule 118 of the Rules of Procedure of the Commission, https://www.achpr.org/public/Document/file/English/Rules%20of%20Procedure%202020_ENG.pdf (accessed 5 July 2022) and Rule 50 of the Rules of Court https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf (accessed 5 July 2022).

2 MJ 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 *The Law and Practice of International Tribunals* 470-479.

3 As above.

admissibility requirements in article 56 of the Charter are cumulative such that any application that fails to fulfil one of the seven requirements is automatically inadmissible.⁴

Although article 56 of the Charter outlines seven admissibility requirements, the focus of this article is on article 56(6) which addresses the question of reasonable time for filing applications. The central objective of this article is to analyse the jurisprudence of the Court dealing with article 56(6) in order to discern what the Court has established as being reasonable time for filing applications. In terms of organisation, the next section of the article conducts a brief comparative analysis, as among the three major regional human rights systems, to highlight how the requirement for filing applications within a reasonable time is applied. The section following therefrom interrogates, firstly, the general rationale for the rule on filing applications within a reasonable time and, secondly, the application of the rule within the African human rights system. The penultimate section of the article surveys the jurisprudence of the Court to flesh out the application of the requirement in article 56(6) of the Charter. Among other things, the article interrogates the Court's interpretation of the conditions contained in article 56(6); the factors that the Court has considered in determining whether the time taken by an applicant to file an application is reasonable or not; and also the overall propriety of the Court's major findings on reasonableness of time for filing applications. A conclusion wraps up the discussion.

It is worth pointing out that given that both the Commission and the Court operate within the same regional human rights system and, on admissibility, apply the same criteria, although the discussion herein is focused on the Court's jurisprudence, wherever necessary reference shall also be made to the Commission's jurisprudence. Aside from the similarity of the admissibility criteria that the two institutions apply, recourse to the Commission's jurisprudence is also justifiable because the Commission has had a longer history of applying article 56 of the Charter as compared to the Court.

2 THE THREE REGIONAL HUMAN RIGHTS SYSTEMS AND REASONABLE TIME FOR FILING APPLICATIONS

Globally, three regional human rights systems are recognised and these are, the Inter-American system, the European system and the African system. In each of these systems, standard setting instruments have been adopted and institutions have been established to support the protection and promotion of human rights. All the three systems apply a variation of the rule on reasonable time for filing applications. The application of this rule in these three regional human rights systems

4 *Jean-Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270 para 61 and *Dexter Eddie Johnson v Ghana* (jurisdiction and admissibility) (2019) 3 AfCLR 99 para 57.

will now be briefly explored beginning with the Inter American system, followed by the European system and concluding with the African system. This expose should, hopefully, confirm the general applicability of a rule on reasonable time for filing applications, and the general parameters thereof, while also serving to highlight the nuances in the application of the rule across the three systems.

2.1 The Inter-American human rights system

The Inter-American human rights system permits individuals and groups to submit applications alleging violation, by member states of the Organization of American States, of rights protected by the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other regional human rights treaties.⁵ Procedurally, such applications are first filed before the Inter-American Commission on Human Rights (Inter-American Commission) and, in some circumstances, may be referred to the Inter-American Court of Human Rights (Inter-American Court). All applications must satisfy the admissibility requirements set out in article 46 of the American Convention on Human Rights (American Convention).⁶

Among the admissibility requirements set out in article 46 of the American Convention is one that requires an application to be lodged within six months from when domestic remedies are exhausted.⁷ This requirement is reiterated in article 32 of the Rules of Procedure of the Inter-American Commission.⁸ For purposes of computing the six months, time begins to run when the petitioner is first notified of the final domestic judgment.⁹ However, if exceptions to exhaustion of domestic remedies apply or if the violation is continuing the rule is not applicable.¹⁰ The six-months is also inapplicable if it is impossible for an applicant to exhaust domestic remedies because of a lack of due process, denial of access to remedies, or unwarranted delay in issuing a

5 International Justice Centre 'Exhaustion of domestic remedies in the Inter American Human Rights System' <https://ijrcenter.org/wp-content/uploads/2018/04/9.-Exhaustion-of-Domestic-Remedies-Inter-American-System.pdf> (accessed 17 August 2022).

6 For a text of the Convention, see, <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf> (accessed 17 August 2022).

7 IACHR, Admissibility Report 26/08, Petition 270-02, *Cesar Alberto Mendoza and Others v Argentina*, 14 March 2008, para 76, <http://cidh.org/annualrep/2008eng/Argentina270.02eng.htm> (accessed 18 August 2022).

8 See, <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr2013.pdf> (accessed 17 August 2022).

9 IACHR, Admissibility Report 35/09, Petition 466-99, *Ramon Nicolas Guarino v Argentina*, 19 March 2009, para 33, <http://www.cidh.oas.org/annualrep/2009eng/Argentina466.99eng.htm> (accessed 17 August 2022).

10 IACHR, Admissibility Report 51/03, Petition 11.819, *Christian Daniel Domínguez Domenichetti v Argentina*, 24 October 2003, para 48, <http://cidh.org/annualrep/2003eng/Argentina.11819.htm> (accessed 18 August 2022).

final decision at the domestic level.¹¹ Where the six-month period is inapplicable, article 32(2) of the Rules of Procedure of the Inter-American Commission stipulates that the deadline for filing an application shall be ‘within a reasonable period of time, as determined by the Commission’ considering the circumstances of each specific case. To determine the reasonableness of the deadline, the Inter-American Commission considers the date on which the alleged violation of the rights occurred and the circumstances of each particular case.¹² For example, in *García Linera v Bolivia*, the Inter-American Commission concluded that the lapse of 13 years, between the occurrence of the facts giving rise to the case and the filing of the application, was reasonable since the victims had taken procedural steps in good faith to resolve the situation and it was the state that had failed to timeously issue a final decision on the judicial proceedings.¹³

2.2 The European human rights system

Article 34 of the European Convention on Human Rights (European Convention) mandates the European Court of Human Rights (European Court) to receive individual applications alleging violations of the European Convention or any of its protocols. Before 1 February 2022, applications before the European Court needed to be filed within six months for them to be deemed to have been filed within a reasonable time. This has since been revised and set at four months.¹⁴ As formulated in article 35 of the European Convention, cases before the European Court, to be admissible, must be filed after domestic remedies have been exhausted and within four months from the date on which the final decision was taken.

11 As above. See also, art 32(2) Rules of Procedure of the Inter-American Commission on Human Rights.

12 IACHR, Admissibility, Report No 86/06, Petition 499-04, *Marino Lopez and Others v Colombia*, 21 October 2006, para 53, <http://cidh.org/annualrep/2006eng/COLOMBIA.499.04eng.htm> (accessed 16 August 2022).

13 IACHR, Admissibility Report No 54/05, Petition 150/01, *Raúl García Linera, and Others v Bolivia*, 12 October 2005, para 45, <http://cidh.org/annualrep/2005eng/Bolivia.150.01eng.htm> (accessed 16 August 2022).

14 See, art 35(1) ECHR. Protocol 15 to the Convention reduces from six to four months the time-limit for lodging an application before the Court. This four-month time-limit came into force on 1 February 2022. However, it only applies to applications in which the final domestic decision in question was taken on or after 1 February 2022, <https://www.echr.coe.int/Pages/home.aspx?p=applicants&c> (accessed 16 August 2022). This revision followed from recommendations in the Brighton Declaration which, among other things, urged the Court to develop practical tools for facilitating focus on cases warranting its consideration, https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (accessed 25 October 2022). The need to control the Court’s case-load was also cited as justification for introduction of the four month time frame, <https://www.echrblog.com/2021/06/blog-symposium-on-protocol-15-echr-what.html> (accessed 26 October 2022).

According to the European Court, the four-month rule is a public policy rule and that, consequently, the Court has the jurisdiction to apply it 'of its own motion'.¹⁵ This means that the European Court can invoke the four-month rule even if the respondent has not raised an objection relating to the time of filing a case. It is also argued that the rule affords a prospective applicant time to consider whether or not to lodge an application with the European Court and, if so, to decide on the specific complaints and arguments to be raised.¹⁶ Given the mandatory nature of this rule, it is not open for respondents to unilaterally waive compliance with the rule.¹⁷ The four-month rule, however, does not require an applicant to lodge their complaint with the Court before their position in connection with the matter has been finally settled at the domestic level.¹⁸ The four-month period runs as from the day of the final decision in the process of exhaustion of domestic remedies.¹⁹ For the period to start running, the applicant must have made use of normal domestic remedies which are likely to be effective and sufficient.²⁰ Only remedies which are normal and effective will be taken into account in computing the four-month period. Resultantly, an applicant cannot purport to extend the time limit by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue.²¹ Also excluded from consideration, as a result, are remedies the use of which depends on the discretionary powers of public officials.²² On the whole 'determining whether a domestic procedure constitutes an effective remedy, which an applicant must exhaust and which should therefore be taken into account for the purposes of the four-month time-limit, depends on a number of factors, notably the applicant's complaint, the scope of the obligations of the state under that particular Convention provision, the available remedies in the respondent state and the specific circumstances of the case'.²³

15 *Case of Sabri Güneş v Turkey* Application 27396/06 <https://hudoc.echr.coe.int/eng> (accessed 16 August 2022) para 29.

16 *O'Loughlin and Others v the United Kingdom* Application 23274/04 https://www.stradalex.com/en/sl_src_int/document/echr_23274-04 (accessed 24 August 2022).

17 *Case of Sabri Güneş v Turkey* (n 15) para 29.

18 *Varnava and Others v Turkey*, <https://hudoc.echr.coe.int/eng#%22fulltext%22:%22Varnava%20and%20Others%20v.%20Turkey%22,%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22001-94162%22>} (accessed 24 August 2022) para 157.

19 *Case of Mago and Others v Bosnia and Herzegovina* <https://hudoc.echr.coe.int/eng#%22fulltext%22:%22fernie%20v%20united%20kingdom%22,%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22001-110719%22>} (accessed 16 August 2022) paras 80-81.

20 *Moreira Barbosa v Portugal* <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-66550%22>} (accessed 16 August 2022).

21 *Case of Lopes de Sousa Fernandes v Portugal* <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-179556%22>} (accessed 25 October 2022) para 132.

22 European Court of Human Rights 'Practical guide on admissibility criteria' https://www.echr.coe.int/documents/admissibility_guide_eng.pdf (accessed 17 August 2022) para 93.

23 As above, para 132.

2.3 The African human rights system

The African human rights system has two principal human rights supervisory mechanisms being the Commission and the Court. In so far as admissibility is concerned, both institutions apply the requirements contained in article 56 of the Charter. Akin to the situation that obtains both in the Inter-American system and the European system, the admissibility requirements before the Commission and the Court contain a requirement directing that applications must be filed within a reasonable period. Unlike the situation obtaining in the Inter-American and the European systems, the governing law in the African human rights system does not stipulate the amount of time that qualifies as 'reasonable' for purposes of admissibility.²⁴ Article 56(6) of the Charter simply provides that 'communications relating to human and peoples' rights ... 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 with the matter.'

Due to the lack of specific prescription in article 56(6) of the Charter, both the Commission and the Court have adopted a flexible approach in determining what counts as 'reasonable time'. In the practice of both the Commission and the Court, therefore, 'reasonable time' is determined on a case-by-case basis.²⁵ According to the Commission, the flexible case-by-case approach is justifiable due to 'the challenges of the communications system in Africa' and of securing representation for international cases.²⁶ It is Viljoen, however, who offers a more comprehensive justification as to why the framers of the Charter deliberately departed from the approach in the European System and Inter-American system. According to Viljoen, the following reasons justify the position taken by article 56(6):²⁷

... the general low level of awareness of the Charter, even among lawyers on the continent, linked to the relative invisibility of the Commission with its seat in Banjul; the material conditions in which complainants may find themselves; and the slow pace of judicial proceedings in the domestic courts of most African countries ... In addition, the rationale for the stringent admissibility criteria in the other two regional systems – the seemingly incessant stream of applications ... – is hardly an issue in Africa ...

24 Communication 288/04 *Gabriel Shumba v Zimbabwe* https://www.achpr.org/public/Document/file/English/288_04_gabriel_shumba_v_zimbabwe.pdf (accessed 15 August 2022) para 44.

25 *Gabriel Shumba v Zimbabwe* (as above) and *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599 para 91 and *Peter Joseph Chacha v Tanzania* (2014) 1 AfCLR 398 para 155.

26 Communication 334/06 *Egyptian Initiative for Personal Rights and Interights v Egypt*, <https://www.achpr.org/sessions/descions?id=201> (accessed 15 August 2022) para 99.

27 F Viljoen *International human rights law in Africa* (2012) 320.

The provisions of article 56(6) notwithstanding, the Commission has held that where there is a good and compelling reason for why an applicant did not submit a communication within a reasonable time, it may nevertheless consider the communication to ensure fairness and justice.²⁸ The next section of the article explores the justification for a rule on filing applications within a ‘reasonable time’ as discerned from the jurisprudence of the three major regional human rights systems.

3 WHAT JUSTIFIES THE REQUIREMENT TO FILE APPLICATIONS WITHIN A ‘REASONABLE’ PERIOD?

Notwithstanding the different formulations of the rule relating to the time for filing applications, a common justification is discernible. According to the Inter-American Court, the purpose of the rule is to prevent decisions from being subject to challenge long after they have been delivered, in the interests of legal stability and certainty.²⁹ The European Court has stated that the primary purpose of the rule is to maintain legal certainty by ensuring that cases are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time.³⁰ In the same vein, the Commission has stated that the purpose of the rule is to require complainants to ‘be vigilant and to discourage tardiness’.³¹ Overall, therefore, the rule serves the interests of all litigants in ensuring that proceedings are initiated promptly while at the same time not unduly exposing respondents to the perpetual possibility of legal action.

Across the three regional systems, the application of the requirement to file within a reasonable period is related to the rule on exhaustion of domestic remedies, especially in so far as establishing when time must start running for purposes of determining ‘reasonableness’.³² Resultantly, this requirement is applied when remedies are in fact exhausted – not when an exception to the exhaustion rule is invoked.³³ Where an exception to exhaustion is invoked it is inappropriate to employ a rigid delimitation of the

28 Communication 386/10 *Dr Farouk Mohamed Ibrahim (represented by REDRESS) v Sudan*, <https://www.achpr.org/sessions/descions?id=208> (accessed 15 August 2022) para 75 and Communication 308/05 *Michael Majuru v Zimbabwe* <https://www.achpr.org/sessions/descions?id=188> (accessed 15 August 2022) para 109.

29 *Plan de Sánchez Massacre v Guatemala*, Application 11, 763 IACHR para 29.

30 European Court of Human Rights (n 22) para 87.

31 Communication 310/05 *Darfur Relief and Documentation Centre v Sudan* <https://www.achpr.org/sessions/descions?id=194> (accessed 24 August 2022) para 78.

32 See, for example, *Ramadhani Issa Malengo v Tanzania* (jurisdiction and admissibility) (2019) 3 AfCLR 356 para 38.

33 FIDH ‘Admissibility of complaints before the African Court: A practical guide’ <https://www.refworld.org/pdfid/577cd89d4.pdf> (accessed 24 August 2022) 26-2726.

timeliness for filing an application.³⁴ This is because, among other reasons, there will often not be a sharp date to which the violation may be traced, as violations often consist of fact patterns extended in time and also because the effects of the violation will often impact negatively on victims' lives so as to make immediate recourse to legal redress impossible.³⁵ The Court's decision in *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso (Zongo)* confirms that the rule in article 56(6) will not apply when an exception to article 56(5) of the Charter has been established.³⁶ In *Zongo*, although a substantial period had passed between dismissal of the case at the national level and the filing before the Court, this was held to be irrelevant, presumably, on the basis that national level proceedings had been unduly prolonged such that appropriate remedies for exhaustion were never provided to applicants.

Seemingly, the rule for filing an application within a reasonable time applies relative to negative judgments.³⁷ This entails that if the judgment is positive, but is not complied with, a more gracious period may be called for in determining 'reasonableness'.³⁸ Similarly, if the domestic judgment calls on a government institution to take action, potential litigants may be justified in waiting to see if action is taken before filing their case with a supranational tribunal. This would then justify a longer period between the domestic decision and the submission to a supranational body. The requirement to file an application within a reasonable time, therefore, marks out the temporal limit of the supervision offered by a supranational body and operates to prevent past decisions from being litigated in perpetuity.³⁹

4 EXPLORING 'REASONABLE TIME' FOR FILING APPLICATIONS BEFORE THE COURT

A range of factors have influenced the Court's determination of what amounts to reasonable time within which an application must be filed. The Court's application of the requirements in article 56(6) results in a binary outcome, either the matter is admissible or inadmissible. In this section of the article, some of the factors that the Court has considered are highlighted as well as the periods that have been accepted as being reasonable. In an attempt to provide a structured discussion, the article, first, discusses cases where the question of reasonable time arose but which were found to be admissible before discussing cases

34 FIDH (n 33) 26-27.

35 FIDH (n 33) 27.

36 (preliminary objections) (2013) 1 AfCLR 197 paras 121-124.

37 FIDH (n 33) 27.

38 As above.

39 *Idalov v Russia* <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-110986&filename=001-110986.pdf> (accessed 24 August 2022) para 128 and *Sabri Gunes v Turkey* (n 15) para 40.

that were found inadmissible due to a failure to file within a reasonable time.

4.1 Cases found admissible for being filed within a reasonable time

In the joined application between *Tanganyika Law Society and Another v Tanzania (TLS)*,⁴⁰ the domestic decision which was the subject of the applicants' action was a judgment of the respondent state's Court of Appeal delivered on 17 June 2010. The first of the two applicants filed their application on 2 June 2011 while the other filed on 10 June 2011. The Court determined that there had been a lapse of about 360 days between the Court of Appeal's decision and the filing of the application. It then concluded that the applicants were not guilty of '...inordinate delay in filing the Applications; because after the judgment of the Court of Appeal [they] were entitled to wait for the reaction of Parliament to the judgment.'⁴¹ In this decision, the Court rooted its reasoning in the fact that the Court of Appeal had determined that the case before it required a political solution and that, subsequently, the respondent state's Parliament had initiated a national consultative process for the purpose of obtaining views on the constitutional provisions that had been the subject of the applicants' challenge.⁴² Given the nature of the Court of Appeal's pronouncement, which envisaged that political interventions would be undertaken by Parliament to resolve the applicants' grievances, the Court was correct in holding that the applicants were justified in biding their time before filing the applications. In any event, the period of 360 days suggests that the applicants should indeed have benefited from the flexibility in article 56(6) of the Charter. Three hundred and sixty days does not seem to be objectively unduly prolonged given the challenges that, as earlier argued, prompted the framers of the Charter to eschew the incorporation of a fixed time limit in article 56(6) of the Charter. Additionally, and although not mentioned in *TLS*, it should not be forgotten that in 2010, when the *TLS* application was filed, the Court and its procedures were still very much unknown across Africa. From this perspective, therefore, some 'delay' on the part of applicants ought to have automatically been excused.

The decision in *Zongo* also required the Court, among other things, to determine if the application had been filed within a reasonable time. In this matter, the application was filed on 11 December 2011 but the genesis of the action was the murder of Norbert Zongo and his colleagues on 13 December 1998. To determine whether the application had been filed within a reasonable time, the Court held that it had to first establish the date from which time should be calculated. It began by noting that 'article 56(6) provides that reasonable time ... begins

40 *Tanganyika Law Society and Another v Tanzania (TLS)*(merits) (2013) 1 AfCLR 34.

41 As above para 83.

42 As above para 74.

from the time local remedies are exhausted or from the date the [Court] is seized with the matter.⁴³ It then noted that in cases where domestic remedies have not been exhausted, on the ground that they are unduly prolonged, the date from which reasonable time must be computed is the date of the expiry of the right to appeal under national law. Accordingly, since the applicants' right to appeal under Burkinabe law would have expired five days after the delivery of the Court of Appeal's decision – which was on 16 August 2006 – the Court held that 'the date of commencement of the seizure of the African Court would be 22 August 2006.'⁴⁴ Interestingly, having determined the date of commencement of seizure, the Court noted that since it did not immediately start its judicial activities, after its establishment in July 2006, it would have been improper to hold that time for filing an application started to run before it had become operational. Specifically, the Court pointed to the fact that its Rules of Court were only adopted on 20 June 2008 whereupon potential litigants were finally able to trigger its jurisdiction. Resultantly, the Court concluded that the appropriate date for computing reasonable time would be 20 June 2008.

Having established the date of commencement, for purposes of computing reasonable time, the Court still had to resolve whether the time lapse, in *Zongo*, was reasonable. The period at issue was three years and five months. The Court confirmed 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'.⁴⁵ It then, again, highlighted the fact that, at the time, it was still a relatively new judicial body and that any consequences as a result thereof should work in the favour of applicants in the assessment of the reasonableness of time for filing an application. It also pointed out that given the nature of the case, the applicants 'may have needed more time to reflect on the suitability of submitting an Application and specifying the complaints and arguments to be raised with the Court'.⁴⁶ The Court also took the position that given that the facts of the application were largely uncontested, as between the parties, the period of three years and five months would not affect its ability to effectively dispose of the case. It thus concluded that three years and five months was reasonable within the meaning of article 56(6) of the Charter.⁴⁷

The Court's approach in *Zongo*, firstly, invites an immediate contrast with that adopted in *TLS*. The ruling on the preliminary objections in *Zongo* was delivered on 25 June 2013 while the judgment in *TLS* was delivered on 14 June 2013. In *Zongo*, the Court correctly pointed out that its recent establishment was a relevant factor in determining the reasonableness of time for seizure. No similar concession was made in *TLS* even though both cases, coming very early

43 *Zongo* (n 36) para 117.

44 *Zongo* (n 36) para 118.

45 *Zongo* (n 36) para 121.

46 *Zongo* (n 36) para 123.

47 *Zongo* (n 36) para 124.

in the life of the Court, were affected by this fact. However, given that the Court found both cases admissible, perhaps this point is relevant only to the extent that it demonstrates some inconsistency in approach on the part of the Court. Secondly, it is a bit strange that in *Zongo* the Court, partly, found that the period of three years and five months was reasonable because the facts of the case were not in serious contest between the parties. Given that the admissibility stage of proceedings is akin to a preliminary inquiry, it is open to question how much influence the merits of the case must have on resolving admissibility. It is arguable that *Zongo*, on its own unique facts, was admissible even without the Court having to allude to the absence of contest on the facts. The allusion to the nature of the facts suggests that the Court may have jumped the gun to peep at the merits of the case while still engaged with the preliminary issue of admissibility. While article 56 of the Charter does not provide explicit guidance on how far the Court can look to the merits of an application in resolving admissibility, the reference to the absence of contest on the facts, as partly justifying the admissibility of the case, was unnecessary and pointless.

The respondent state objected to the admissibility of the application in *Alex Thomas v Tanzania (Thomas)*⁴⁸ on the ground that the Applicant had not filed the same within a reasonable time, as envisaged by article 56(6) of the Charter. The application was filed on 2 August 2013 but it is the sequence of steps taken by the applicant before domestic courts that seem to have had a significant bearing on the Court's finding on admissibility. The applicant's case before the Court of Appeal was dismissed on 21 September 2005. At the time his appeal was being dismissed, the applicant had yet to be furnished with a copy of the record of the High Court notwithstanding his several requests for the same.⁴⁹ Between 2005 and 2011 the applicant took steps to file his appeal out of time; had his appeal dismissed again; requested the Chief Justice to provide him with *pro bono* counsel; and applied for a review of the Court of Appeal's decision dismissing his appeal, among other things.⁵⁰ In its decision, the Court held that reasonable time, from the time local remedies were exhausted, was supposed to run from 29 May 2009, being the date when the Court of Appeal dismissed his appeal. However, noting that Tanzania had deposited its declaration under article 34(6) of the Protocol – permitting individuals and non-governmental organisation to bring cases directly against it before the Court – on 19 March 2010, the Court held that this ought to be the date for reckoning of time for purposes of article 56(6) of the Charter. The time lapse at issue, therefore, was computed as three years and five months. The Court concluded that three years and five months was reasonable because:⁵¹

Considering the Applicant's situation, that he is a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records, and his attempt to use extraordinary measures, that is, the Application for review of the Court of

48 *Thomas (merits)* (2015) 1AfCLR 465.

49 *Thomas* (n 48) para 29.

50 *Thomas* (n 48) paras 30-36.

51 *Thomas* (n 48) para 74.

Appeal's decision, we find that these constitute sufficient grounds to explain why he filed the Application before this Court on 2 August 2013 ...

The approach adopted by the Court in *Thomas* is true to the principle enunciated in *Zongo*, which is that reasonableness of the time limit for seizure will depend on the circumstances of each case and will be determined on a case-by-case basis. The conclusions on admissibility in *Thomas*, however, are probably down to the application's unique facts. In scrutinising the Court's narration of the history of the domestic proceedings, one is immediately struck by the level of industry shown by the applicant in, repeatedly, attempting to engage with the Tanzanian criminal justice system, which was, however, rather unresponsive.⁵² It is particularly notable that the applicant's engagement was, for the large part, without the assistance of counsel. In the circumstances, it is submitted, it would have been inequitable for the respondent state to rely on its own inefficiencies, which caused delay to the applicant, to dismiss the application for being filed out of a reasonable period of time. However, in so far as the determination of when time must begin to run is concerned, the Court correctly held that this must be from the date when Tanzania filed its declaration under article 34(6) of the Protocol since it would have been impossible to commence cases against it before that date.

It should be noted though that in *Thomas*, the Court introduced the relevance of 'extraordinary measures' in determining the reasonableness of time for filing. As earlier pointed out, part of the Court's justification for holding that the application was filed within a reasonable time was that the applicant had attempted to 'use extraordinary measures, that is, the Application for review of the Court of Appeal's decision ...'.⁵³ Strangely, particularly given that this was the first time that the Court alluded to the relevance of extraordinary remedies during consideration of admissibility, the Court's decision does not offer any clarification as to why the application for review is/was an extraordinary remedy. As a matter of fact, while reference to the relevance of extraordinary remedies in determining reasonableness of time for filing applications has continued to appear in the Court's decisions, regrettably, there has not been much by way of clarification. There thus remains a lack of clarity as to what makes an application for review of a decision of a country's apex court, following a procedure established by law, an extraordinary remedy. As demonstrated later in this article, a further source of lack of clarity relates to whether recourse to the so-called extraordinary remedies extends time which should be considered for purposes of determining reasonableness or whether this is simply one among the factors that the Court ought to consider in using its case-by-case approach.

By the time the Court delivered its judgment in *Mohamed Abubakari v Tanzania (Abubakari)*,⁵⁴ a pattern had begun to emerge in terms of how article 56(6) of the Charter was being applied. In a way,

52 *Thomas* (n 48) paras 23-36.

53 *Thomas* (n 48) para 74.

54 n 25.

Abubakari combined the reasoning from *TLC, Zongo* and *Thomas* to find that the period of three years and three months was reasonable. According to the Court:⁵⁵

In the instant case, the fact that the Applicant is in prison; the fact that he is indigent; that he is not able to pay a lawyer; the fact that he did not have the free assistance of a lawyer since 14 July 1997; that he is illiterate; the fact that he could not be aware of the existence of this Court because of its relatively recent establishment; all these circumstances justify some flexibility in assessing the reasonableness of the timeline for seizure of the Court.

The above line of reasoning is replicated in several decisions of the Court subsequent to *Abubakari*. For example, in *Kennedy Owingo Onyachi and Charles John Njoka v Tanzania (Onyachi and Njoka)*,⁵⁶ the Court established that the decision of the Court of Appeal, in the applicants' domestic case, was delivered on 24 November 2009 but the applicants only received copies of the judgment on 2 November 2011. It thus determined that for the first applicant reasonable time was to run from 2 November 2011, being the day when both applicants first accessed copies of the judgment of the Court of Appeal. Since the application before the Court was filed on 7 January 2015, the Court found that the first applicant had filed his application three years and two months after exhaustion of domestic remedies. As for the second applicant, the Court noted that he had filed an application for review of the Court of Appeal's decision which was dismissed on 9 June 2014. In his case, therefore, the Court held that the time lapse before filing the application was seven months. In assessing the two periods of time, the Court held that, for the second applicant, the period of seven months was not unreasonable given that 'he is lay, incarcerated and indigent person with no legal assistance.'⁵⁷ As for the first applicant, the Court held that while 'three years and two months is relatively long to bring an Application ... he is also lay, incarcerated and indigent person without the benefit of legal education and legal assistance ... the time in which the Application was filed is reasonable.'⁵⁸

The decision in *Onyachi and Njoka* confirms that the determination of reasonable time under article 56(6) remains in the discretion of the Court. Notably in this case, the Court held that time did not begin running, for the applicants, from the date of the judgment of the Court of Appeal but from the date when they first accessed copies of their judgment. It is also notable that, for the second applicant, the Court found that time would begin running as from the date of the Court of Appeal's decision on his application for review. Curiously, the Court does not allude to the fact that it had earlier, in *Thomas*, classified the application for review of the Court of Appeal's decision as an extraordinary measure. The reasoning in *Onyachi and Njoka* and *Thomas* does not offer clarity as to how the Court understood the effect

55 *Thomas* (n 48) para 92.

56 *Onyachi and Njoka* (merits)(2017) 2 AfCLR 65.

57 *Onyachi and Njoka* (n 56) para 67.

58 *Onyachi and Njoka* (n 56) para 68. Similar reasoning was also employed in *Majid Goa alias Vedastus v Tanzania* (2019) 3 AfCLR 498 para 41-42 (application filed after one year and 20 days) and *Ally Rajabu and Others v Tanzania* (2019) 3 AfCLR 539 (application filed after two years and four days).

of having recourse to an application for review of an apex court's decision and what, specifically, makes this remedy extraordinary.

Another decision that follows the reasoning in *Abubakari* is *Christopher Jonas v Tanzania (Jonas)*.⁵⁹ In this case the Court established that five years and one month had lapsed between the exhaustion of domestic remedies and the filing of the application. The Court reasoned, however, that this period was reasonable given that the applicant was in a similar position to *Abubakari* i.e. he was incarcerated, indigent, did not have the benefit of free legal assistance during domestic proceedings, he was illiterate and was unaware of the existence of the Court.⁶⁰ Yet another decision that employs similar reasoning is *Kijiji Isiaga v Tanzania*.⁶¹ The period at issue in this case was two years and 11 months. The Court held that this period was reasonable since the respondent state did not dispute that the Applicant is a lay, indigent and incarcerated person without the benefit of legal education or assistance [which] makes it plausible that [he] may not have been aware of the Court's existence and how to access it.⁶²

The *Abubakari* line of reasoning was also employed to find admissible the case of *Nguza Viking and Johnson Nguza v Tanzania (Nguza and Another)*,⁶³ which was filed one year and three months after the exhaustion of domestic remedies. Equally, in *Thobias Mango and Another v Tanzania (Mango)*,⁶⁴ the Court found a filing made four years and eight months after local remedies were exhausted as being reasonable. In *Minani Evarist v Tanzania (Evarist)* a period of three years seven months was also found to be reasonable based on reasoning similar to that in *Abubakari*.⁶⁵ Notably, all these decisions make reference to the applicants' efforts at using 'extraordinary remedies' as offering justification for finding the various time periods as reasonable.⁶⁶ By way of illustration, in *Nguza and Another*, the Court reasoned that the applicants' efforts to 'use extraordinary remedies through the Application for Review of the Court of Appeal's Decision' constitute sufficient justification for filing the application one year three months 'after the Court of Appeal's decision on the request for review.'⁶⁷ In *Mango*, the Court cemented its finding that the application was filed within a reasonable time by reasoning that the applicants 'should also not be penalised for attempting to use an

59 *Jonas* (merits) (2017) 2 AfCLR 101. Other decisions following the same reasoning include: *Amiri Ramdhani v Tanzania* (2018) 2 AfCLR 344 para 50 (application filed after five years and one month); *Diocles William v Tanzania* (2018) 2 AfCLR 426 para 52 (application filed after one year and 13 days); *Kennedy Ivan v Tanzania* (2019) 3 AfCLR 48 para 53 (application filed after four years and 36 days).

60 *Jonas* (n 59) para 54.

61 *Kijiji Isiaga* (merits) (2018) 2 AfCLR 218.

62 *Kijiji Isiaga* (n 61) para 54.

63 *Nguza and Another* (2018) 2 AfCLR 287

64 *Nguza and Another* (n 63) 314

65 (merits) (2018) 2 AfCLR 402.

66 See, also, *Bunyerere v Tanzania* (merits and reparations) (2019) 3 AfCLR 702 para 47.

67 *Nguza and Another* (n 63) para 61.

extraordinary remedy, that is, the Application for Review of the Court of Appeal's Judgment ...⁶⁸ The applicant's 'attempt to use extraordinary measures, that is the application for review of the Court of Appeal's decision' was also part of the grounds justifying the filing of the application after three years and seven months in *Evarist*.⁶⁹

The Court's reference to recourse to an extraordinary remedy/measure, particularly for justifying the reasonableness of time for filing an application deserves further interrogation. As earlier pointed out, the Court's first references to extraordinary remedies, especially their effect on the assessment of reasonableness of time for filing applications came without any clear clarification or justification.⁷⁰ Arguably, the Court's first attempt at explaining the role of extraordinary remedies, in determining reasonableness of time for filing applications, came in *Armand Guehi v Tanzania (Guehi)*.⁷¹ The 'explanation', however, is rather oblique but it suggests that recourse to an extraordinary remedy is a factor that must be taken into account in computing reasonableness of time. According to *Guehi*, the period of 11 months and nine days was reasonable because:⁷²

...following the judgment of the Court of Appeal, the Applicant tried to have that judgment reviewed. In the Court's view, he was therefore at liberty to wait for some time before submitting the present application. As the Court [has held] even if the review process is an extraordinary remedy, the time spent by the Applicant in attempting to exhaust the said remedy should be taken into account while assessing reasonableness within the meaning of article 56(6) of the Charter.

Similarly, in *Werema Wangoko Werema and Another v Tanzania (Werema and Another)*⁷³ the Court noted that the applicants had offered no particular reasons for taking five years and five months to seize it. Nevertheless, it concluded that 'it is evident from the file that the five (5) years and five (5) months delay in filing the Application was due to the fact the Applicants were awaiting the outcome of this review procedure ...'.⁷⁴ The Court reached a similar conclusion in *Alfred Agbes Woyome v Ghana* by holding that the applicant was entitled to wait for the outcome of processes post the final decision of the highest appellate court in Ghana.⁷⁵ According to the Court, this waiting justified the filing of the *Woyome* application two years and five months after the decision of the Supreme Court of Ghana.

As earlier alluded to, this far, the Court's case law has not clarified or justified why and how an application for review of the Court of Appeal's decision, for cases involving Tanzania, or any apex court's decision, for other countries, qualifies as an extraordinary remedy. For example, the decision in *Guehi* simply referred to *Nguza* to presumptively conclude that the question of an application for review

68 *Mango* (n 64) para 55.

69 *Evarist* (n 65) para 45.

70 See, *Thomas* (n 48) and *Abubakari* (n 25 above) and the discussion herein earlier.

71 (merits and reparations) (2018) 2 AfCLR 477.

72 As above para 56.

73 (merits) (2018) 2 AfCLR 520 para 49.

74 As above.

75 (merits and reparations) (2019) 3 AfCLR 235 paras 85-86.

being an extraordinary remedy had already been decided. In *Werema and Another*, like many other decisions by the Court, no attempt was made to unpack the extraordinary nature of an application for review of an apex court's decision. What seems to be clear though is that an applicant who files for review of an apex court's decision may be justified in waiting for the outcome thereof before filing with the Court. This suggests that an application for review 'freezes' time for purposes of computing reasonable time under article 56(6) of the Charter. If the preceding is correct, the question then becomes, ought the Court compute reasonable time from the date of the final appellate decision or from the date of the decision on review by the final appellate court? *Guehi* suggests that the time spent in exhausting an extraordinary remedy 'should be taken into account' in assessing the reasonableness of time for filing. This further suggests that the correct time for reckoning remains the date of the decision by the final appellate court – on this score *Guehi* aligns with the decision in *Jean Claude Gombert v Côte d'Ivoire (Gombert)*⁷⁶ where the Court took note and considered the applicant's recourse to a regional court but still used the date of the decision of the Supreme Court of Côte d'Ivoire to determine reasonableness. Unlike *Guehi*, however, the Court's analysis in *Werema and Another* does not suggest that the recourse to an 'extraordinary remedy' is simply a factor to be considered in assessing reasonableness but that the baseline for computing time remains the date of the decision by the final appellate court.⁷⁷ This far, therefore, the Court's jurisprudence diverges in terms of when exactly the computation of time should begin for purposes of establishing reasonable time and this divergence, to a large part, stems from the Court's approach in classifying certain remedies as extraordinary.

In so far as the 'extraordinary' nature of the application for review of an apex court's decision is concerned, the Court's remarks in *Rajabu v Tanzania (Rajabu)*, arguably, cultivate further uncertainty.⁷⁸ In this case, the Court concluded that the time spent in pursuing an application for review of the Court of Appeal's decision must be taken into account in assessing reasonableness under article 56(6) of the Charter. In the same decision, however, the Court concluded that an application for review 'is a legal entitlement, the applicants cannot be penalised for exercising that remedy'.⁷⁹ If recourse to an application for review is a legal entitlement for any litigant, what then makes it an extraordinary remedy? In the absence of clarification from the Court it is hard to determine where exactly the 'extraordinariness' of this remedy lies. It is fair to conclude, therefore, that the Court's recourse to

76 *Gombert* (n 4) paras 36-37.

77 *Werema* (n 73) paras 47-49. In this case the period considered by the Court was the five years and five months from the date of the respondent state's deposit of the art 34(6) declaration. Although the Court refers to the six months between the dismissal of the application for review and the filing of the application, the effect of the six months is not at all discussed.

78 n 58.

79 As above para 51. The fact that an applicant should not be penalized for having recourse to the application for review also comes out in *Mussa and Mangaya v Tanzania* (2019) 3 AfCLR 629 paras 49-51.

the notion of extraordinary remedies or measures, for purposes of determining the reasonableness of time for filing applications, lacks clarity and is in need of further clarification.

4.2. Cases found inadmissible for having been filed outside of a reasonable period

In *Godfred Anthony and Ifunda Kisite v Tanzania (Anthony and Kisite)*,⁸⁰ the Court established that the application had been filed five years and four months after Tanzania deposited its declaration under article 34(6) of the Protocol (the decision of the Court of Appeal was on 21 May 2004 and predated the deposit of the declaration). After recalling its previous findings in *Zongo, Ramadhani, Jonas, and Werema and Another*, the Court concluded that:

... although the Applicants are also incarcerated and thus restricted in their movement, they have not asserted or provided any proof that they are illiterate, lay, or had no knowledge of the existence of the Court. The Applicants have simply described themselves as “indigent”.⁸¹

The Court thus proceeded to dismiss the application for not complying with article 56(6) of the Charter. It noted that the applicants had the help of counsel during their domestic proceedings yet they never filed an application for review of the Court of Appeal’s decision. The Court also reasoned that although it always considered the personal circumstances of a litigant, in determining reasonable time, the applicants had ‘not provided [it] with any material evidence on the basis of which [it could] conclude that the period of five (5) years and four (4) months was a reasonable period of time taken to file their application before this Court.’⁸²

The approach in *Anthony and Kisite* was applied in *Livinus Daudi Manyuka v Tanzania (Manyuka)*.⁸³ In *Manyuka*, the time lapse before the filing of the application was five years and six months. The Court enumerated a non-exhaustive list of circumstances that influences its determination of the reasonableness of time including: 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.⁸⁴ It then concluded that:⁸⁵

... the Applicant has indicated that he is ‘an indigent person operating without legal assistance or legal representation ...’. ... he has also stated that he is a peasant. ... however, aside from the blanket assertion of indigence the Applicant has not attempted to adduce evidence explaining why it took him five (5) years and six (6) months to file his Application.

80 (Jurisdiction and admissibility) (2019) 3 AfCLR 470

81 As above para 48.

82 As above para 49.

83 (jurisdiction and admissibility) (2019) 3 AfCLR 689.

84 As above para 50.

85 As above para 54.

The Court then distinguished *Ramadhani* and *Jonas* on the ground that the applicant in *Manyuka* had legal representation during the domestic proceedings. It then concluded that ‘in the absence of any clear and compelling justification for the lapse of five years and six months ...[the] Application was not filed within a reasonable time within the meaning of article 56(6) of the Charter.’⁸⁶

The reasoning in *Anthony and Kisite* and *Manyuka* is also evident in *Chananja Luchagula v Tanzania (Luchagula)*;⁸⁷ *Hamad Lyambaka v Tanzania (Lyambaka)*;⁸⁸ *Layford Makene v Tanzania (Makene)*⁸⁹ and *Rajabu Yusuph v Tanzania (Yusuph)*.⁹⁰ In *Luchagula*, the time lapse was six years and three months which the Court found unacceptable because ‘while it emerges from the record that the Applicant was incarcerated at the time of filing the Application, he has not provided evidence to support his claim of indigence and that he was subject to restrictions.’⁹¹ In *Lyambaka* the time lapse was five years and eleven months. In considering the facts of the case, the Court concluded that:⁹²

the Applicant does not aver that the delay was owing to him being lay, illiterate, indigent or having pursued an extraordinary remedy. He only submits that he used the available opportunity in a timely manner to file the Application...the Court observes that while it emerges from the record that the Applicant was incarcerated, there is no proof that his incarceration constituted an impediment to the timely filing of the Application.

The Court’s reasoning in *Makene* offers a bit of clarity in terms of the approach employed to determine reasonableness of time for filing applications. At issue in *Makene* was whether the period of six years and two months was reasonable. In assessing this period, and dismissing the application, the Court stated that

... it is not enough for an applicant to simply plead that he/she was incarcerated, is lay or indigent, for example, to justify his/her failure to file an Application within a reasonable period of time ... even for lay, incarcerated or indigent litigants there is a duty to demonstrate how their personal situation prevented them from filing their Applications timeously. Although the Applicant was, at the material time, incarcerated he has provided the Court with neither evidence nor cogent arguments to demonstrate that his personal situation prevented him from filing the Application timeously.⁹³

Strikingly, the cases that the Court has found inadmissible, for being filed outside of a reasonable period after exhaustion of domestic remedies, if analysed critically, are not factually very different from those that have been found admissible. The bulk of these cases, especially those from Tanzania, involved serving prisoners who challenged various aspects of their trials. Many of the applicants pleaded indigence, incarceration, illiteracy, being lay and lack of access

86 As above para 55.

87 Application 39/2016 (Judgment of 25 September 2020).

88 Application 10/2016 (Judgment of 25 September 2020).

89 Application 28/2017 (Judgment of 2 December 2021).

90 Application 36/2017 (Judgment of 24 March 2022).

91 *Luchagula* (n 87) para 59.

92 *Lyambaka* (n 88) paras 49-50.

93 *Makene* (n 89) paras 48 & 50.

to free legal services, among other things, as being factors that had hindered them from approaching the Court promptly.

Given that the Court has been arriving at different conclusions from seemingly factually identical cases, it is important to try and understand the possible source of the difference. A useful starting point is to put in one group the line of decisions including *Thomas, Abubakari, Onyachi* and *Njoka* – which were found to be admissible – and to put in another group the line of decisions represented by *Anthony* and *Kisite, Manyuka* and *Luchagula* – which were found inadmissible. Once this is done the possible source of the difference, in the Court’s reasoning, begins to emerge. Conceptually, the Court has maintained a uniform standard in treating admissibility decisions on a case-by-case basis having regard to the facts of each case. However, a close look at the line of authorities to which *Thomas, Abubakari, Onyachi* and *Njoka* belong reveals that the Court did not specifically interrogate the applicants’ claims related to indigence, lack of free legal services, illiteracy, being a lay person or being incarcerated. It is almost as if the Court accepted, at face value, that an applicant who was a lay person, incarcerated, illiterate and so on, was automatically inhibited from accessing it within a reasonable time.

In the *Anthony and Kisite, Manyuka and Luchagula* line of decisions the Court began to question whether being a lay person, incarcerated or indigent, among others, of themselves are sufficient factors to justify delay in filing an application. As demonstrated earlier, in following this approach, the Court has asked applicants to demonstrate how being incarcerated, lay or indigent materially affected their ability to file the application within a reasonable period. In principle, this approach is commendable, and it aligns with the general principle that the burden of proof always lies with the one who alleges. A potential pitfall this far, however, is that it remains unclear what type of evidence the Court will accept as proof of indigence or of how one’s incarceration affected his/her ability to file his application timeously. None of the Court’s decisions, this far, offer any clarity on this matter.

Notwithstanding the Court’s approach of demanding specific proof of the factors that affected the time taken by a litigant in filing his/her application, uncertainty has not been completely eliminated. For example, the decision in *Mlama and Others v Tanzania (Mlama)*⁹⁴ was delivered on the same day – 25 September 2020 – as were the decisions in *Luchagula* and *Lyambaka*. Notably, the decision in *Mlama*, partly, revolved around the question of whether the application had been filed timeously or not, which was also the same point on which *Luchagula* and *Lyambaka* were disposed of. The Court, however, found *Mlama* admissible while *Luchagula* and *Lyambaka* were inadmissible. According to the Court in *Mlama*:⁹⁵

... the Applicants are incarcerated, restricted in their movements and with limited access to information and they have also submitted that they were unaware of the court until late in the year 2015. Ultimately, the above-mentioned circumstances

94 Application 19/2016 (Judgment of 25 September 2020).

95 As above para 51.

delayed the Applicants in filing their claim to this court. Thus, the court finds that the two (2) years and eight (8) months and (10) days taken to file the Application before this court is reasonable.

What is striking about the decision in *Mlama* is that the Court did not ask the same questions it asked of the applicants in *Luchagula* and *Lyambaka*.⁹⁶ For example, no inquiry was made as to how exactly the applicants' incarceration and access to limited information affected the time it took them to file their application. In *Mlama*, therefore, the Court reverted to its earlier approach which is manifested by decisions such as *Thomas*, *Abubakari*, *Onyachi* and *Njoka*. As earlier pointed out, in this latter approach the Court does not take the initiative to further interrogate the impact of the alleged indigence, incarceration or lack of access to legal services on an applicant's ability to file within a reasonable time. What is worrisome though is that *Mlama*, though delivered on the same day with *Luchagula* and *Lyambaka*, seems oblivious of the reasoning and approach in the latter two cases. Overall, therefore, it seems to be the case that the Court may not have decided with finality whether all applicants alleging indigence, lack of counsel, illiteracy etc will be required to specifically prove the same for their applications to be admissible. As matters stand it is unclear how the Court decides whether or not to ask for specific proof of the personal circumstances alleged by an applicant.⁹⁷

4.3 Exceptions and other factors affecting computation of reasonable time

Article 56(6) of the Charter does not stipulate any exceptions to the rule that it postulates. This can be contrasted with article 56(5), on exhaustion of local remedies, which incorporates an exception i.e. an applicant need not exhaust local remedies if the procedure is unduly prolonged. It bears pointing out, however, that there is a relationship between articles 56(6) and 56(5) of the Charter. This relationship comes out clearly to the extent that the computation of reasonable time for filing applications runs from the date of exhaustion of domestic remedies.⁹⁸

Notwithstanding the formulation of article 56(6) of the Charter, the jurisprudence of the Court, and even of the Commission, has

96 The judgment in Application 13/2016 *Stephen Rutakirwa v Tanzania* (judgment of 24 March 2022) para 48, however, aligns with the approach in *Mlama* even though it also came after *Luchagula* and *Lyambaka*. This suggests that the threshold approach is yet to be entrenched in the Court's practice.

97 The rulings in Application 5/2017 *Fidele Mulindahabi v Rwanda* (ruling of 26 June 2020) para 47 and Application 10/2017 *Fidele Mulindahabi v Rwanda* (ruling of 26 June 2020) para 52 suggest that if an applicant is not in prison, he is not indigent and has a decent level of education he is more likely to be aware of the existence of the Court and hence a shorter period may be found to be reasonable for them to file their application. This reasoning suffers from the same flaw earlier pointed out in that there is no clarity in the evidence or means that the Court uses, for example, to prove better knowledge of the Court for those not in prison or to establish the level of education of an applicant.

98 *Ramadhani Issa Malengo* (n 32).

recognised exceptions to the rule on filing within a reasonable period. Arguably, however, in some instances the jurisprudence does not recognise full exceptions to the rule but simply conditions that may affect the computation of time under article 56(6). The clearest exception seems to be where the case involves continuing violations.⁹⁹ Continuing violations are contrasted from violations occasioned by an instantaneous act. Notably, however, the fact that an event has significant consequences over time does not mean that the event has produced continuing violations.¹⁰⁰ For cases involving continuing violations, it is only when the situation ends that time, for purposes of determining reasonableness, can be computed. In *Kambole v Tanzania*, the Court held that where there are no domestic remedies to exhaust, the question of reasonableness of time within which to file an application does not arise.¹⁰¹ It also held that the essence of continuing violations is that they renew themselves every day as long as the state fails to take steps to remedy them.¹⁰² The Court thus found that the period of eight years and four months that it took the applicant to file his application was reasonable given the lack of domestic remedies as well as the continuing character of the violations. Similar reasoning was employed in *Harold Mbalanda Munthali v Malawi* to find an application filed eight years and 10 months after exhaustion of domestic remedies admissible.¹⁰³

In other cases, the Court has merely recognised circumstances that affect its computation of the reasonableness of time for filing an application rather than crafting explicit exceptions. For example, in *APDF and IHRDA v Mali*, the Court held that the period of four years and six months was reasonable taking into account ‘first, that the Applicants needed time to properly study the compatibility of the law with the many relevant international human rights instruments to which the Respondent state is a Party; and secondly, given the climate of fear, intimidation and threats’.¹⁰⁴ The Court also found a period of about one year to be reasonable because ‘the applicants were entitled to wait for the reaction of Parliament to the judgment.’¹⁰⁵ Where an applicant was deported within a week of a high court judgment declaring him to be a prohibited immigrant, the Court held that a period of one year and 26 days was reasonable within the meaning of article 56(6) since he ‘lacked the proximity necessary to follow up on his requests to the domestic authorities’.¹⁰⁶ Equally, in *Anudo v Tanzania*, the Court found that the application was filed within a reasonable time

99 E Ankumah *The African Commission on Human and Peoples’ Rights: Practices and procedures* (1996) 65-66.

100 *Sabri Günes, v Turkey* (n 15) para 54.

101 Application 18/2018 (judgment of 15 July 2020) para 50.

102 As above para 52.

103 Application 22/2017 (Judgment of 23 June 2022).

104 (merits) (2018) 2 AfCLR 380 para 54.

105 *TLS* (n 40) para 83.

106 *Lucien Rashidi v Tanzania* (2019) 3 AfCLR 13 para 55.

‘considering in particular the fact that the Applicant was outside the country’.¹⁰⁷ The Court has also held that the fact that an applicant had access to a regional court is a factor that may be taken into consideration in assessing reasonableness of the period mentioned under article 56(6) of the Charter.¹⁰⁸ Additionally, as demonstrated earlier, for cases arising before the particular respondent made the declaration under article 34(6) of the Protocol, time, for purposes of computing reasonableness, only began to run from the date the declaration was deposited. Overall, given the case-by-case approach favoured by the Court, it is arguable that the factors that will be considered in determining reasonable time will remain an open category.

5 WHAT HAS ‘REASONABLENESS’ TRANSLATED TO IN THE COURT’S JURISPRUDENCE?

As earlier alluded to, barring the Court’s shift in approach, factually, there seems to be little difference between the cases found to be admissible and those declared inadmissible on account of the reasonableness of the time it took the applicants to start the process. In sticking true to the terms of article 56(6) of the Charter, the Court has not set a fixed time by which it determines whether the time taken by an applicant is reasonable or not. A careful consideration of the Court’s jurisprudence, however, reveals two things. First, a trend has emerged which reveals how the Court will, likely, assess the reasonableness of the time taken by an applicant to file an application. As earlier demonstrated, the Court, these days, is unlikely to accept a blanket claim of indigence, for example, as justifying delay in filing an application. Secondly, although the Court has not come out openly, one can hazard a period beyond which an application will be admissible only on proof of exceptional circumstances. According to this article’s assessment, and based on the extant case law, the line of reasonableness of time for filing seems to be hovering somewhere around five years post the exhaustion of domestic remedies. Unfortunately, there is a split in terms of the baseline for the computation of time particularly in cases involving recourse to the so-called ‘extraordinary remedies/procedures’.

The above hypothesis may, perhaps, explain the difference in approach between *Mlama*, on the one hand, and *Luchagula* and *Lyambaka*, on the other hand. As may be recalled, the period at issue in *Mlama* was two years and eight months while in *Luchagula* it was six years and three months while in *Lyambaka* it was five years and 11 months. It is arguable, therefore, that *Mlama* may have been found admissible simply because a shorter period was at stake as compared to both *Lyambaka* and *Luchagula* where periods in excess of five years

107 *Anudo Ochieng Anudo v Tanzania* (2018) 2 AfCLR 237 para 58.

108 *Gombert* (n 4) para 37.

were at stake. This suggests that it is applications filed five years after exhaustion of domestic remedies that require special justification to be admissible.

A final point in relation to the determination of reasonable time concerns the argument that has been made that the Court should adopt the six-month rule that was previously applied by the European Court, and which is still applied by the Inter-American Court.¹⁰⁹ Articles 60 and 61 of the Charter permit the Court to draw inspiration, and take consideration, of general international law in interpreting and applying the Charter.¹¹⁰ However, given the very clear formulation of article 56(6) of the Charter, it would be absurd for the Court, and even the Commission, to impose a fixed time limit when the Charter patently eschews the same. The Court has thus done well to reject the entreaties to adopt the six-month rule.¹¹¹ In this article's assessment, however, the Commission, while not departing from the terms of article 56(6), may have been tacitly swayed by the jurisprudence of the European Court or the Inter-American Court with the result that it may have improperly constrained its flexibility in assessing reasonable time for filing applications.¹¹² Comparatively, therefore, the Court may, generally, seem to be more generous in its assessment of reasonable time as compared to the Commission. A full analysis of this latter issue, however, is beyond the realms of the current article.

6 CONCLUSION

The admissibility requirements as provided for in article 56 of the Charter are cumulative and must all be complied with before an application is declared admissible. Given the framing of article 56, it is arguable that the requirements listed therein constitute a complete category which must always be applied in all cases. It is not open for the Court, or even the Commission, to use a requirement not listed in article 56 for purposes of resolving the admissibility of an application. In so far as the requirement for filing applications within a reasonable time is concerned, the jurisprudence of both the Court and the Commission suggests that Africa's supranational adjudicatory mechanisms have striven to maintain a balance between facilitating access to justice while not unduly exposing states in perpetuity to the possibility of litigation. This approach has allowed both the Court and the Commission, in their own distinct ways, to maintain a flexibility in assessing admissibility of cases while paying attention to the specific facts of each case. The Court's jurisprudence addressing reasonable time is expansive and not all its decisions could have been analysed in

109 The Republic of Tanzania seems to have consistently made this argument. See, for example, *Jonas* (n 59 above) para 47 and *Isiaga* (n 61) para 50.

110 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 743.

111 *Rashidi* (n 100) para 54 and *Mulindahabi v Rwanda* (n 97) para 40.

112 A good illustration of the Commission's approach can be had from *Majuru v Zimbabwe* (n 28) and *Darfur Relief and Documentation Centre v Sudan* (n 31).

this article, nevertheless the analysis herein has shown that while the general approach is clear and consistent, the specific cases demonstrate inconsistencies that require clarification.