

**A REGIONAL RIGHT AGAINST AIR POLLUTION:
THE APPLICABILITY OF THE REQUIREMENT TO EXHAUST LOCAL
REMEDIES IN THE CONTEXT OF THE RIGHT TO A CLEAN AND
HEALTHY ENVIRONMENT UNDER THE AFRICAN CHARTER**

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DECLARATION

I declare that this proposal is my original work and has not been submitted for the award of a degree or any other award in any other university.

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ABSTRACT:

Human rights appear to have different implications amongst different peoples predicated upon their particular political, religious, social, and cultural settings. The European Court of Human Rights in *Lautsi and Others v Italy* propounded that to establish a uniform application of human rights would be against the foundational purpose of those human rights it seeks to protect as it would purport to impose a uniform culture and thus freeze cultural practices in status quo. It is against the backdrop of this realisation that the margin of appreciation was introduced by the European Commission and later adopted by the African Commission, in order to accommodate such diversities by providing for a ‘contextualised implementation’ of human rights. The margin of appreciation refers to the leeway that International organisation grant national authorities, in fulfilling their obligations under Human Rights Conventions. This approach has since been acknowledged to be manifested, cardinally, in the duty to exhaust local remedies under article 56(5) of the African Charter on Human and Peoples’ Rights. The purpose for which is to allow the respondent state an opportunity to redress, by its own means, within the framework of its own domestic legal system the wrong alleged to have been done to the individual.

This study seeks to interrogate the applicability of the duty to exhaust local remedies to the right to a clean and healthy environment. As such, the study will evaluate the limitations on the applicability of the requirement to exhaust local remedies in the context of the right to a clean and healthy environment under the African Charter.

The study proceeds from the approach that the right to a clean and healthy environment is trans-national in character and therefore outside the scope of the margin of appreciation of state parties. Such analysis will, however, be specific to air pollution due to the acknowledgement that it is a universal facet, although not exclusively so, of this right.

LIST OF ABBREVIATIONS

ACmHPR	African Commission on Human and Peoples' Rights
AfCHPR	African Court on Human and Peoples' Rights
ACHPR	African Charter on Human and Peoples' Rights
ECmHR	European Commission on Human Rights
ECtHR	European Court on Human Rights

LIST of CASES:

ICJ:

Corfu Channel Case (United Kingdom v. Albania), Judgment, (1949), ICJ Reports

Interhandel- Switzerland v. U.S, Preliminary Objections, (1959) ICJ Reports 6

African Commission;

Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi, ACmHR, Comm. 231/99 14 Activity Report (2000).

Garreth Anver Prince v South Africa, ACmHR, Comm. No 255/2002, 18 Activity Report (2004).

Jawara v The Gambia (Gambian coup case), ACmHR, Comm. 147/95, 149/96, 13 Activity Report (1999).

Pagnouille (on behalf of Mazuo) v Cameroon (Mazuo case), ACmHR, Comm. 39/30, 10 Activity Report (1996).

Recontre Africaine pour la Defense des Droits l'Homme v Zambia (Zambian expulsion case), ACmHR, Comm. 71/92, 10 Activity Report (1996).

World Organization Against Torture and Others v Zaire (Zaire mass violations case), ACmHR, Comm. 25/89, 47/90, 56/91 & 100/93, 9 Activity Report (1995).

Amnesty International, Comite Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan, ACmHR, Comm. 48/90-50/91-52/91-89/93, 12 Activity Report (1999).

Article 19 v Eritrea, ACmHR, Comm. 275/03, 22 Activity report (2007).

Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v DRC, ACmHR, Comm. 25/89-47/90-56/91-100/93, 9 Activity Report (1996).

Kenya Human Rights Commission v Kenya, ACmHR, Comm. 135/949, 39 Activity Report (2015).

Achutan (on Behalf of Banda) and Another (on behalf of Chirwa and another) (Chirwa case) v. Malawi, ACmHR, Comm. 64/92, 68/92 & 78/92, 8 Activity Report (1994).

Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, ACmHR, Comm. 140/94, 141/94, 145/95, 12 Activity Report (1999).

Diakite v Gabon, ACmHR, Comm. 73/92, 8 Activity Report (1994).

European Court of Human Rights;

Lautsi and Others v Italy ECtHR Judgment of 18th March 2011.

De Jong, Baljet & van den Brink v Netherlands ECtHR Judgment of 22nd May 1984.

Hatton and Others v The United Kingdom; ECtHR Judgment of 8th July 2003.

Inter-American Court of Human Rights

Velásquez-Rodríguez v. Honduras, IACtHR Judgment of 26 June 1987, (Preliminary Objections), 21.

INTERNATIONAL INSTRUMENTS and CONVENTIONS:

African Charter on Human and Peoples' Rights ("Banjul Charter"), 27th June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58.

Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC), 11th December 1997, 2303 UNTS 148 / [2008] ATS 2 / 37 ILM 22 (1998).

Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998 replaced by;

Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

Convention on Long-Range Transboundary Air Pollution, March 16th, 1983, TIAS 10541; 1302 UNTS 217; 18 ILM 1442.

Universal Declaration of Human Rights, 10th December 1948, 217 A (III).

International Covenant on Economic, Social and Cultural Rights, 16th December 1966, United Nations, Treaty Series, vol. 993.

Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least 30 Per Cent, 8th July 1985, 27 ILM 707.

Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes(1988 NOx Protocol), 31st October 1988, 28 ILM 214.

Protocol concerning the Control of Emissions of Volatile Organic Compounds, 18th November 1991, 31 ILM 568.

Protocol on Further Reductions of Sulphur Emissions(Oslo Protocol), 14 June 1994.

1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-Level Ozone, 30th November 1999.

CHAPTER 1:

INTRODUCTION

BACKGROUND

Within international human rights law, there are procedural barriers that limit individual access to human rights tribunals.¹ Foremost amongst which is the requirement to exhaust local remedies; a principle of customary international law granting state parties an opportunity to redress an alleged wrong within the framework of their own domestic legal system prior to their international responsibility being called into question at the international level.²

In human rights institutions such as the African Commission on Human and Peoples' Rights, the local remedies rule has been applied in a flexible manner.³ The rule has been qualified to the extent that; the only remedies required to be exhausted are those that relate to the breaches alleged, and such remedies must at the same time be available and sufficient. The existence of these remedies must further be sufficiently certain, not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; thus rendering them constructively exhausted.

This flexible approach has consequently transformed a procedural barrier into a mechanism to facilitate normative reform within the domestic legislative institutions of States Parties to the

¹In the case of the African Court of Human and Peoples' Rights, the constitutive protocol of the African Court of Human and Peoples' Rights requires states to sign a declaration allowing access of individuals to the court. This barrier which has an essential impact in the workings of the court has not been considered analysed in this study due to the fact that it is mostly due to political reasons of a temporary nature.

²*World Organization Against Torture and Others v Zaire (Zaire mass violations case)*, ACmHPR, Comm. 25/89, 47/90,56/91 & 100/93, 9 Activity Report (1995), 36; *Recontre Africaine pour la Defense des Droits l'Homme v Zambia (Zambian expulsion case)*, ACmHPR, Comm. 71/92, 10 Activity Report (1996), 11,.

³*De Jong, Baljet & van den Brink v Netherlands* ECtHR Judgment of 22nd May 1984, para 39; this decision was pronounced verbatim in *Jawara v The Gambia* (Gambian coup case), ACmHPR, Comm. 147/95, 149/96, 13 Activity Report (1999), 35.

African Charter on Human and Peoples' Rights.⁴ The Kyoto Protocol, however, makes patent the notion that the question of air pollution is a trans-national one, as it knows no respect for the boundaries of national sovereignty.⁵ There is, therefore, a need to explore the limitations to the scope of this duty in order to adequately assess the applicability of this rule to rights of this nature, and specifically, the right to a clean and healthy environment under the African Charter.

STATEMENT OF THE PROBLEM:

The wording of the African Charter carries the promise of protecting and promoting human rights. Article 56(5) provides for the exhaustion of local remedies prior to seeking redress from the courts. This seems to constitute a claw-back clause to trans-national rights such as that against air pollution and thereby to a clean and healthy environment; the effects of which, although unclear, may effectively prevent redress for other affected and interested parties.⁶

JUSTIFICATION OF THE STUDY

Air pollution falls within the scope of violation of the right to a clean and healthy environment. The nature of such violation exceeds the boundaries of national jurisdictions and it, therefore, necessary to study in depth the adequacy of local remedies in redressing a trans-national violation.

RESEARCH OBJECTIVES:

Overall objective: To evaluate the whether the trans-national nature air pollution necessitates constructive exhaustion of local remedies. To which end this study seeks;

⁴*African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58.

⁵*Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC)*, 11th December 1997, 2303 UNTS 148 / [2008] ATS 2 / 37 ILM 22 (1998).

⁶Since these aspirations are, to a large extent, compromised by article 56(5) which provides for admissibility of suits predicated on the exhaustion of local remedies; thus giving primacy to domestic systems.

1. To examine the effectiveness of the legal mechanisms providing redress for violation of the right against air pollution.
2. To analyse the scope of constructive exhaustion of local remedies and its application to the right to a clean and healthy environment.

RESEARCH QUESTIONS:

Local remedies are deemed to be constructively exhausted should they prove unavailable and ineffective⁷ in addressing the violations in question. Absent which such remedies are deemed constructively exhausted.⁸ In light of this, the study seeks to answer the following questions;

1. What are the underlying considerations for the constructive exhaustion of local remedies?
2. Whether the trans-national character of the right to a clean and healthy environment constructively exhausts local remedies.

LITERATURE REVIEW

This research work employs a thematic approach in conducting the literature review. The study seeks to apply the doctrine of constructive exhaustion of local remedies to air pollution in concurring with descriptions of its nature, and the nature of this exception to article 56(5). The themes covered are; the primacy of national jurisdictions and the nature of air pollution.

a) The nature of air pollution;

The legal genesis of the remedies for injury arising due to air pollution lies within tort law. Private nuisance, trespass and strict liability were the traditional means of pollution redress and control.⁹ The use of such causes allow for the issuance of court orders both requiring installation of pollution restriction measures and mandating the cease of operations of seriously polluting entities. The benefits of this approach are, however, only *prima facie* due to the fact that air

⁷*Jawara v The Gambia* (Gambian coup case), ACmHPR, 35.; *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi*, ACmHR, Comm. 231/9914 Activity Report (2000), 21-23.

⁸*Pagnoulle (on behalf of Mazuo) v Cameroon (Mazuo case)*, ACmHR, Comm.39/30, 10 Activity Report (1996), 13.

⁹Reitze, Arnold W. *Air Pollution Control Law: Compliance and Enforcement*. Washington, DC: Environmental Law Institute, 2001, 9.

pollution cases are seldom successful.¹⁰ This deplorable success is solely attributable to the difficulty in establishing causation for two distinct but interrelated reasons;

Firstly; there is a difficulty in identifying a definitive source of the pollution due to the presence of multiple emitters. Furthermore, the fact that such emissions can be transported for long distances, during which many chemical transformations may occur, obscures the possibility of distinction of any individual source of pollution.¹¹

Secondly, the dilemma in which, due to the transaction costs of the tort system, only the most severely injured can expect redress. However, due to the delayed manifestations of injury from the time of emission, in some cases decades, the alleged perpetrators may no longer be in business. Any remedies are therefore rendered redundant despite the presence of any overt or excessive damage as a result of the pollution.¹²

The nature of damage caused by air pollution has been perceived being multi-faceted; it is not exclusive to the environment but as also affects the enjoyment of human rights such as that to life, clean water, food, and the right to information amongst other rights enshrined in the UDHR. It is in light of this realisation that the mandate of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic Waste was adopted.¹³ Such approach is reflected in general comment number 3 to the African Charter which sets out the broad definition of the right to life as “*the protection, not only of life in a narrow sense, but of dignified life*” which; “*...requires a broad interpretation of States’ responsibilities to protect life*” including preventive steps to preserve and protect the natural environment.

¹⁰Reitze, Arnold W. *Air Pollution Control Law: Compliance and Enforcement*, 9.

¹¹Reitze Arnold W., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1552 (1991).

¹²Reitze, Arnold W. *Air Pollution Control Law: Compliance and Enforcement*, 9.

¹³*Special Rapporteur On The Adverse Effects Of The Movement And Dumping Of Toxic And Dangerous Products And Wastes On The Enjoyment Of Human Rights'* <<http://www2.ohchr.org/english/issues/environment/waste/>> accessed 10 April 2016.

b) Primacy of National Jurisdictions

Much of the literature on the African human rights system emphasises the prevalence of the principle of non-interference as still holding considerable sway in inter-State relations.¹⁴ This position is reflected and further justified in the jurisprudence of the African Commission through the application of the principle of the margin of appreciation as borrowed from the European Court of Human Rights.¹⁵ Such borrowing is evidently justifiable as there is a natural corollary between the primacy of national jurisdictions and the margin of appreciation of state parties.¹⁶

In the *Prince case*, the Commission, by noting that the principle of margin of appreciation informs the Charter, recognised the primacy of the respondent state in being better positioned than a regional Commissioner to adopt national rules, policies and guidelines in promoting and protecting human and peoples' rights.¹⁷

This rule has been described by scholars such as Mutua, Gittleman, Naldi, and Welch as a limitation on rights guaranteed by the African Charter. This is due to "*limitations placed on the African Commission's remedial authority because of its subordinate role to the African Union's Assembly of Heads of State, and the near absence of direct State compliance with recommendations of the African Commission.*"¹⁸ Ndahinda further describes it in the context of barriers to implementation of essential guarantees within the charter.¹⁹

¹⁴Udombana Nsongurua, "Toward the African Court on Human and Peoples' Rights", 3 Yale Human Rights Development Law Journal 45 (2003), 58-60.

¹⁵The principle as enshrined in *Lautsi and Others v Italy*, 68.

¹⁶Hopkins Kevin, 'The Effect Of An African Court On The Domestic Legal Orders Of African States' 2 (2002) African Human Rights Law Journal, 244, <<http://www.ahrlj.up.ac.za/hopkins-k>> accessed 15 February 2016.

¹⁷*Garreth Anver Prince v South Africa*, ACmHR, Comm. No 255/2002, 18 Activity Report (2004), 50-53.

¹⁸Agocha Bernadine, 'The Application Of The Local Remedies Rule Under The African Charter On Human And Peoples' Rights: With A Case Study On Communications From The Niger Delta' Published LLM, Thesis, McGill University, Montreal, November 2009, 15. See also; Makau Mutua, "The African Human Rights Court: A Two-Legged Stool?" (1999) 21 Hum. Rts. Q. at 342, 343 (asserting that "although the African Charter makes a significant contribution to the human rights corpus, it creates an ineffectual enforcement system..." due to "weaknesses" in the African system which include "the claw back clauses in the African Charter, the potential abuse of the language of duties, and the absence of an effective protection mandate for the African Commission") as cited in Agocha Bernadine, 'The Application Of The Local Remedies Rule Under The African Charter On Human And Peoples' Rights: With A Case Study On Communications From The Niger Delta', 15; See; Gittleman R, "The

The African Commission has described this rule as the justification for the duty to exhaust local remedies²⁰ since; Government should have notice of a human rights violation in order to have the opportunity to remedy it before being brought before an international body.²¹

It has, however, further held that; the only remedies required to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient.²² The existence of such remedies must, therefore, be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.

This flexible interpretation has been commented on by Odinkalu as being an “*inbuilt mechanism for self-correction and adjustment*.” inherent in the African Charter and Commission.²³

The purpose of the application of the local remedies rule seems to be inadequate in the context of the fulfilment of the human right against air pollution, as a facet of that to a clean and healthy environment. This is illustrated by the trans-national²⁴ character of not only the right, as

African Charter on Human and Peoples' Rights: A Legal Analysis” Virginia Journal of International Law 22 (1982), 694 (arguing that limiting phrases preceding rights guarantees in the African Charter render the African human rights system incapable of “supplying even a scintilla of external restraint upon a government’s power to create laws contrary to the spirit of the rights granted.”); See Naldi Gino, “*Future Trends in Human Rights in Africa: The Increased Role of the OAU*” in Malcolm D. Evans & Rachel Murray, eds. “*The African Charter on Human and Peoples' Rights: The System in Practice*” 1986- 2000, Cambridge: Cambridge University Press, 2002 at 9-10 (arguing that “[t]he Commission, mandated under the African Charter with promoting and ensuring the protection of human and people’s rights, has relatively weak powers of investigation and enforcement. Lack of an effective remedy has been identified as a particular deficiency. . .”);

¹⁹ Ndahinda Felix, “*Human Rights in African Political Institutions: Between Rhetoric, Practice and the Struggle for International Visibility*” Leiden Journal of International Law, 20 (2007), 699 at 706-71.

²⁰ *Recontre Africaine pour la Defense des Droits l’Homme v Zambia (Zambian expulsion case)*, ACmHR, 11.

²¹ *World Organization Against Torture and Others v Zaire*, ACmHR, 36.

²² *De Jong, Baljet & van den Brink v Netherlands*, 39. As pronounced verbatim in *Jawara v The Gambia*.

²³ Odinkalu Chidi, “*The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System*” 2 (2001) Africa Human Rights Law Journal, 234 and 235.

²⁴ Sweden's Case Study for the United Nations Conference on the Human Environment, Supporting Studies to Air Pollution across National Boundaries: The Impact on the Environment of Sulphur in the Air and Precipitation (1972);

evidenced by the Kyoto Protocol²⁵ but also the violation in question since air pollution has been held both in international treaties²⁶ as well as scholarly articles as having trans-boundary ramifications²⁷ including countries “*not within the immediate proximity of the source of pollution*”.²⁸

This is further due to the fact that article 56(5); “*represents a further guarantee for individuals [and] can thus be seen in improving the judicial protection of human rights at the national level, in coordinating the international with the national level, and the interests of the States with the interests of individuals.*”²⁹ This especially so given the fact that there exists no form of redress for such violation even in public international law. Current treaty regimes are more concerned with the prevention and the monitoring of emissions rather than the responsibility for the effects transnational air pollution. One reason for this, as well as for the lack of an international treaty of the same is that states are afraid of being sued.³⁰

²⁵Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC). Although the Kyoto protocol was not conceived as a human rights instrument, its focus on a clean and healthy environment makes it applicable to this study.

²⁶Preamble, *Convention on Long-Range Transboundary Air Pollution*, March 16th, 1983, TIAS 10541; 1302 UNTS 217; 18 ILM 1442. (“*Recognizing the existence of possible adverse effects, in the short and long term, of air pollution including Transboundary air pollution*”).

²⁷Etsy C. Daniel, “*Revitalizing Environmental Federalism*” 95 Michigan Law Review 570, 593, 626-27, (1996) (“*The presence of transboundary harm demands some form of overarching governmental action across the scope of harm*”); see also; Reeves Richard, “*Federalism and Interstate Environmental Externalities*” 144 U. PA. L. REV. 2341, 2342-43, (1996) (“*describing interstate externalities as a primary reason for environmental regulation at the federal level*”) as cited in; Merrill Thomas, ‘*Golden Rules For Transboundary Pollution*’ (1997) 46 Duke Law Journal, 932.

²⁸Handl Günther. “*Territorial Sovereignty and the Problem of Transnational Pollution.*” American Journal of International Law 69.1 (1975), 50-76

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Accessed 28 March 2016.

²⁹Silvia D’Ascoli & Kathrin Maria Scherr, “*The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*” (2007) 2 EU Working Papers 1, 18 at 18.

³⁰Richardson, Benjamin, review of ‘*State Responsibility for Transboundary Air Pollution in International Law* by Phoebe Okowa’ (2002) 65 The Modern Law Review.

Where wrongs are envisioned, by international law, arising out of air pollution, as is the case in this instance³¹; which wrongs traverse the boundaries of such national jurisdiction, the customary international law dictates that there should be remedies for such wrong.³² The ineffectiveness of Public International Law in remedying the wrong in question thus leaves human rights as the only means of redress through the right to a clean and healthy environment envisioned under article 16 of the African Charter.

CONCEPTUAL FRAMEWORK

The historical development of human rights has led to a classification of rights into three generations; first generation, second generation and third generation rights.³³ The compartmentalization of human rights in this manner goes against the fluid and unified nature of these rights. It also compromises the basic principles of universality, indivisibility and interdependence of human rights. This, therefore, creates the danger of a slippery slope conclusion that such categorization, rather than representing different aspects of the totality of rights, signifies definitions of different types of distinct rights.³⁴

The principle of universality connotes the uniform application of human rights and is founded on the notion of equality of all persons. Indivisibility and interdependence refer to the notion that

³¹Article 1, Convention on Long Range pollution.

³²*Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), Judgment of 15 December 1949.

³³Jaswal, Nishta and Jaswal Paramjit S., “*Human Rights and the Law*”, APH Publishing Corporation, New Delhi, 1996. The first generation arose in the advent of feudal despotism and reflect civil and political rights; those of the individual against arbitrary interference from the state and include, amongst others, the rights to life, liberty, equality, dignity, freedom from torture and degrading treatment. Second generation rights arose as a response to widespread economic and social injustice and therefore consist of economic, social and cultural rights such as those to housing, education, health and social security. Third generation rights, also known as solidarity rights, arose as a logical consequence of globalization and the recognition of overlapping needs and concerns such as the right to development and a clean and healthy environment.

³⁴Mubangizi J, 'Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context' (2004) 4 African Human Rights Law Journal <<http://www.ahrlj.up.ac.za/mubangizi-j-c>> accessed 29 March 2016.

rights are not mutually exclusive and the enjoyment of one is inextricably predicated on the possession of all others. The violation of one right, therefore, affects the ability to enjoy all others as such rights should be equally enforceable.³⁵ This approach has since been crystallized in paragraph 8 of the preamble to the Charter as follows; "*It is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as their universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights*". "Sectional pretences"³⁶ are therefore barred from serving as a justification for violations of any such right due to the universal perception and holistic application naturally accruing thereto.³⁷

Aristotle inquired whether democratic conduct is that which is needed to preserve a democracy or that which people in democracies like. The notion, or concept, of human rights, is not as far removed from that of democracy it appears. It is with the realisation and struggles for democracy that the crystallisation of the philosophy of human rights into a mutually accepted and binding code of law first occurred; in the form of rights to which all men were entitled thereby giving rise to duties to which all men would adhere. It is for this reason they were termed 'the rights of man' until the 1940s when they adopted the name human rights to connote a universal application.

The basis of these rights was aptly set out by the UN as being moral claims arising from the inalienable and inherent dignity of all human individuals by virtue of their humanity alone. Given that the only qualification necessary for the enjoyment of human rights is being human, it then follows that such rights accrue and should be enjoyed by all persons equally regardless of their regional or geographic location. As set forth by Mubangizi; "*Political, economic and cultural differences, cannot and should not be used as an excuse for the denial or violation of*

³⁵Mubanguzi J, 'Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context'.

³⁶Mubanguzi J, 'Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context'.

³⁷Van der Vyver JD, "The doctrine of human rights: Its historical and philosophical foundation" in D Brand *et al*(eds) "*From human wrongs to human rights*" 48 (1995)Part IV.

human rights.”³⁸ Which differences, it is pertinent to note, are the justification for the primacy of national jurisdictions and thereby the margin of appreciation.

This is evidenced by the preamble to the Universal Declaration on Human Rights (UDHR)³⁹ in which it is juxtaposed that absent the protection of human rights by the rule of law, man will be subjected to tyranny and oppression. The enforcement of human rights is, therefore, essential to its significance and purpose for existence; absent which possibility to enforce, in the face of the overt violation of such rights, it is rendered a mere wallflower.

Article 56(5) of the charter, however, enjoins individuals seeking to redress to exhaust local remedies as a condition precedent to appearing before the court. Its residual effect is to respect the primary jurisdiction of states in the implementation of human rights law. One justification for this jurisdictional hierarchy is the idea that human rights are tailored to serve a diverse community of nations. Thus implying that rather than have all people behave in a uniform manner, which would amount to a violation of their rights, human rights law “*should be able to comprehend (and take into account) cultural relativity on one hand whilst being committed to reaching a uniform minimum standard of human rights protection on the other.*”⁴⁰ Such is the understanding of the concept of the margin of appreciation as an interpretive tool used to reconcile uniform application of human rights to a culturally diverse group of nations with a diverse understanding thereof arising as a logical consequence of the jurisdiction primacy of national courts.⁴¹ The basis for which is defined by one scholar as follows;

“the discretion that a state is allowed rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, local practices, and fine balances that need to be struck between competing and sometimes conflicting forces that shape a society. It follows that when the European Court sits in judgment on a state’s actions, it has to take into

³⁸Mubangizi J, 'Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context'

³⁹UN General Assembly, *Universal Declaration of Human Rights*, 10th December 1948, 217 A (III).

⁴⁰Hopkins, 'The Effect Of An African Court On The Domestic Legal Orders Of African States' at 244.

⁴¹Hopkins, 'The Effect Of An African Court On The Domestic Legal Orders Of African States' at 242.

account the legal and factual situations in the state, with the result that the standards of protection may vary in time and place."⁴²

Despite the cognizance by the Courts of the fact that goal of the charter is not to destroy the principle of sovereignty, the African Commission has proceeded to qualify this right to the extent that the only remedies required to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient.⁴³ The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will be constructively exhausted for lack of the requisite accessibility and effectiveness.⁴⁴

Therefore, underlying the principle of democracy and thereby human rights is the restraint of freedom. In this context and following Thomas Hobbes' *Leviathan*, freedom may be defined as; "*the absence of opposition*", that is, impediments of motion. When one is free, he is therefore not hindered to do what he has a will to do; thus placing human rights above oppressing structures. Accordingly, the developmental and industrial interests of state parties are trumped by the right to enjoy a clean and healthy environment. This is reflected in article 21 of the Charter which limits the freedom of a state to dispose of its natural resources to the extent that it violates the rights of others.

Despite the fact that the African commission is not, in principle, a court of first instance, the wording of the charter allows for the limitation of state sovereignty where it would provide redress for a human rights violation.

The efficacy of the application of the duty to exhaust local remedies to the right to a clean environment which has been held to be a transnational right⁴⁵ thus requires analysis in respect of; the scope of the margin of appreciation, the justification for such application and the legality thereof i.e.; whether it has been constructively exhausted.

⁴²Stemmet A, "*A future African Court for Human and Peoples' Rights and domestic human rights norms*" 23 (1998) South African Yearbook of International Law, 242.

⁴³Onoria Henry, "*The African Commission On Human And Peoples' Rights And The Exhaustion Of Local Remedies Under The African Charter*" 3 (2003) African Human Rights Law Journal, p 10.

<<http://www.corteidh.or.cr/tablas/R21568.pdf>> accessed 20 February 2016.

⁴⁴*Jawara v The Gambia* (Gambian coup case), ACmHR, 35.

⁴⁵*Hatton and Others v The United Kingdom*; ECtHR Judgment of 8th July 2003;

HYPOTHESIS

The trans-national character of air pollution as an essential component of the right to a clean and healthy environment constructively does away with the obligation to exhaust local remedies under article 56(5) of the African Charter.

RESEARCH DESIGN AND METHODOLOGY

The research shall mainly consist of qualitative research namely; library-based data along with the survey of documented facts on this subject in the form of books, journal articles and internet resources. The study will conduct an analysis of the relevant regional and international instruments.

The study adopts both critical and active research methods. As the subject under consideration is of particular pertinence to contemporary Africa, this study does not fall solely within the scope of human rights law.

LIMITATIONS:

1. While the right to a clean and healthy environment is broad, the analysis of this right in the study will be limited to air pollution in the form of carbon emissions.
2. Despite the global application of this right as enshrined in *article 12 of the ICESCR*⁴⁶ amongst other international instruments, the scope of this study is limited to Africa; specifically state parties to the African Charter.
3. The discourse of the margin of appreciation will be limited to its applicability to article 56(5) of the African Charter.
4. The study runs from March to December 2016.

CHAPTER BREAKDOWN

CHAPTER ONE: INTRODUCTION

This chapter introduces the study and the context in which it is set; highlighting its basis and setting out the structure of the study. It includes the background of the study, statement of the

⁴⁶UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.ad

problem, analysis of the pre-existing literature on the subject as well as the objectives of the study

CHAPTER TWO: THE NATURE OF THE DUTY TO EXHAUST LOCAL REMEDIES

This chapter will analyse the justification for and development of the duty to exhaust local remedies according to the decisions of the African Commission on Human and Peoples' Rights and the jurisprudence of the African Court of Human and Peoples' Rights vis-à-vis other international courts thereby discussing the varying degrees of its application. It will further highlight difficulties linked to the application of the doctrine of exhaustion of local remedies with particular regard to respect of the rule of law. It will further contain a comparative analysis and make particular reference to the doctrine of 'margin of appreciation' as developed by the European Court of Human Rights.

CHAPTER THREE: TRANS-NATIONAL NATURE OF THE RIGHT AGAINST AIR POLLUTION

This Chapter will entail an analysis of the nature of the right to a clean and healthy environment and the challenges that characterise its enforcement.

CHAPTER FOUR: FEASIBILITY OF THE APPLICATION OF ARTICLE 56(5) IN ENFORCING THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

This chapter will focus on air pollution as a major trans-boundary threat to the enforcement of the right of a clean and environment. The chapter makes bare the appropriateness of article 56(5) in the enforcement of the right to a clean and healthy environment.

CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

This chapter will contain a summary of the findings, conclusions and recommendations drawn from the entire study.

CHAPTER TWO:

THE NATURE OF THE DUTY TO EXHAUST LOCAL REMEDIES:

Introduction:

This chapter elaborates on the nature of the obligations enshrined under article 56(5) of the African Charter. It enumerates their origins, scope, limitations and on whom they place the burden to discharge such obligations.

The Nature and Development of the Duty to Exhaust Local Remedies in International Law

The local remedies rule has its roots in international procedural law. It primarily functions as an arbiter by promoting a discreet settlement of disputes prior to hoisting the flag of a state's indiscretion before the international community. Thus, few derogations blemish the track-record of earlier international experiments denying individuals procedural status.

By the late 19th century, commentators remarked on the vague nature of the rule due to the lack of an extensive discussion on or theoretical basis as well as the parameters of the rule.⁴⁷ This lack of attention led one commentator to remark that the rule has no logical necessity in international law and is merely justified by practical and political considerations.⁴⁸

The development of this rule can be largely attributed to international judicial and quasi-judicial bodies. The International Court of Justice (ICJ) has held that; "*the rule that local remedies must be exhausted before international proceedings may be instituted is a well- established rule of customary international law.*"⁴⁹

More practical and persuasive considerations have been suggested to support the application of this rule. These, albeit in the context of diplomatic protection, equally apply to other branches of international law including human rights law. They include; The greater suitability and convenience of national courts as forums for the claims of natural and legal persons, the need to

⁴⁷C. F. Amerasinghe, "*Local Remedies In International Law*", 2 ed., 2004, 200.

⁴⁸Brownlie, Ian, "*Principles of Public International Law*", Clarendon Press, Oxford, 5 ed., 1998, 497.

⁴⁹*Interhandel- Switzerland v. U.S*, Preliminary Objections, (1959) ICJ Reports 6, 27.

avoid a multiplicity of small claims, and a procedural utility which may lead to an expeditious and efficient classification of the facts and liquidation of the damages.⁵⁰

The requirement to exhaust local remedies presumes the existence of the remedies themselves. This amounts to an implicit duty on the state to provide them. As Udombana writes; “*Thus, the process of exhaustion is not the essence or raison d’etre of the rule; it is the actual redress for the wrong suffered that constitutes its fundamental element and ultimate purpose*”⁵¹

In human rights law, the flourishing of this rule was as a direct result of the grant of standing in international courts to individuals and non-state actors. One example encapsulating is the first Protocol to the International Covenant on Civil and Political Rights.⁵² In this instance, the grant of individual protection was predicated on the prior exhaustion of local remedies.⁵³ In various human rights instruments, this revolutionary development is qualified by this practical, albeit somewhat political, concession.⁵⁴

The justification for this is, in principle, the notion that effective human rights enforcement necessitates a contextualised implementation of such rights; at the national level. It would thus seem that to be effective human rights enforcement, much like charity, must begin at home.

⁵⁰Brownlie, Ian, “*Principles Of Public International Law*”, 497.

⁵¹Udombana N, ‘*So Far, So Fair: The Local Remedies Rule In The Jurisprudence Of The African Commission On Human And Peoples’ Rights*’, The American Journal of International Law, 97 (2003).

⁵²*International Covenant on Economic, Social and Cultural Rights*, 16th December 1966, United Nations, Treaty Series, vol. 993.[hereinafter ICCPR]; *Optional Protocol to the International Covenant on Civil and Political Rights*, Articles. 2, 5(2) (b), 999 UNTS 302 [hereinafter Protocol 1];

⁵³Reports of the Commission on Human Rights on its second, third, fifth, sixth, seventh, eighth, and ninth sessions, UN Docs. E/600 (1947), E/800 (1948), E/1371 (1949), E/1681 (1950), E/1992 (1951), E/2256 (1952), and E/2447 (1953), respectively;

⁵⁴Trindade Cancado; “*The Application Of The Rule Of Exhaustion Of Local Remedies In International Law*” Cambridge University Press, 1983, 3.

The rule also has its roots in the principle of state sovereignty, in so far as it seeks to protect the state from embarrassment by airing its proverbial dirty laundry for all the international community to see.⁵⁵

This rationale is also reflected in provisions of the African Charter. For instance, Article enjoins state parties to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the Charter. In addition, article 7 provides for the right to be heard while article 26 imposes on state parties the duty to ensure that the institutions tasked with enforcing these rights are able to effectively carry out their function.⁵⁶

Furthermore, the *Guidelines Regarding on the Form and Contents of Reports from States on Civil and Political Rights* prescribe a duty on state parties to report on the bodies that have jurisdiction in matters of human and peoples' rights, and on the remedies that are available to parties whose rights have been violated.⁵⁷

This clearly reflects the notion that although the African Charter enshrines fundamental rights and freedoms which may be enforced at the international level it is, by design, guided by the blueprint of contextualised implementation as its primary aim.

⁵⁵*Amnesty International, Comite Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, ACmHR, Comm. 48/90-50/91-52/91-89/93, 12 Activity Report(1999), 32.

⁵⁶Article 26 provides that; "*States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.*"

⁵⁷General Guidelines Regarding the Form and Contents of Reports from States on Civil and Political Rights, Bijilo Annex Layout, para. 4(iii), (iv), These were issued pursuant to Article 62 of the African Charter, which provides that "*each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.*"

The Duty to Exhaust Local Remedies under the African Charter

Article 56(5) of the African Charter states that Communications shall be considered if they; “*Are sent after exhausting local remedies if any unless it is obvious that this procedure is unduly prolonged*”. Under the African Charter, this rule, therefore, operates as one of procedure; a necessary precondition to the admissibility of any communication.

The justification for this rule was outlined by the African Commission as allowing states the opportunity to use their internal framework to remedy a wrong prior to the invocation of any international mechanisms.⁵⁸ Another justification for article 56(5) is that a government should have notice of human rights violations in order to have the opportunity to remedy them prior to being called to account by an international tribunal.⁵⁹ This condition, therefore, renders the Commission subsidiary to national jurisdictions.

A cardinal purpose of the exhaustion of local remedies rule is, therefore, to definitively establish, through the willingness to leave the wrong un-righted, that the alleged violation is a deliberate act of the State.⁶⁰

Where it is proven that the state had ample notice and time within which to remedy the situation, whether within the domestic remedies of the state or not, the state may still be said to have been adequately informed and is expected to have taken appropriate steps to remedy the violation alleged. Failure to take such action has been held to mean that domestic remedies are unavailable, ineffective or insufficient in redressing such violations.⁶¹ It is also pertinent to note that, the government is generally “*presumed to know the situation prevailing within its own*

⁵⁸Article 19 v Eritrea, ACmHR, Comm. 275/03, 22 Activity report (2007), 45

⁵⁹World Organization Against Torture and Others v Zaire, ACmHR, 36; Amnesty International, Comite Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan, ACmHR, 32.

⁶⁰Fawcett, ‘The Exhaustion of Local Remedies: Substance or Procedure?’, British Year Book of International Law 31 (1954), 452.

⁶¹Article 19 v Eritrea, ACmHR, 77.

territory as well as the content of its international obligations”; and thereby sufficiently aware of any violations thereof.⁶²

Exceptions

The Commission has stated that the requirement to exhaust local remedies has never been absolute further stating that the rule would not apply in instances where “*it is impractical or undesirable for the complainant to seize the domestic courts*”.⁶³ The observance of the primacy of national jurisdictions is, therefore, subject to the meeting of certain criteria.

The presumptions of article 56(5) are outlined by the Commission as being;

- “(1) *the existence of domestic procedures for dealing with the claim;*
- (2) The justiciability or otherwise, domestically, of the subject-matter of the complaint;*
- (3) The existence under the municipal legal order of provisions for redress of the type of wrong being complained of; and*
- (4) Available effective local remedies, that is, remedies sufficient or capable of redressing the wrong complained of.”*⁶⁴

The Commission further, in deciding that the terms “*unless it is obvious that this procedure is unduly prolonged*” required a flexible interpretation of this rule, listed the following circumstances which render article 56(5) inapplicable;

- “(i) *non-existence of local remedies,*
- (ii) Where local remedies are unduly and unreasonably prolonged;*

⁶²Amnesty International, *Comite Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, ACmHR.

⁶³*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v DRC*, ACmHR, Comm. 25/89-47/90-56/91-100/93, 9 Activity Report (1996), 37.

⁶⁴*Article 19 v Eritrea*, ACmHR, 47.

(iii) Recourse to local remedies is made impossible;

(iv) from the face of the complaint there is no justice or there are no local remedies to exhaust, for example, where the judiciary is under the control of the executive organ responsible for the illegal act; and the wrong is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts.”

An analysis of this discourse reveals that a failure to meet a pre-supposition of the rule renders the rule inapplicable. The exceptions to article 56(5) as well as the presuppositions are therefore both interrelated and interdependent.

The heart of the exception appears to be that where local remedies are unavailable, ineffective and insufficient article 56(5) is rendered constructively exhausted. This is due to the fact that the absence of a domestic framework for redress, impossibility in accessing the means of redress and the unjusticiable nature of the subject matter render local remedies unavailable. Remedies are further ineffective if they only exist at face value or are unduly prolonged. This is further corroborated by the legal idiom ‘justice delayed is justice denied’. Invariably, remedies that are unavailable and ineffective are insufficient and incapable of remedying the wrong complained of.

The Commission, in defining the scope of this blanket exception has developed parameters for determining whether remedies are available, effective and sufficient.

An available remedy is one the petitioner can pursue without impediment, it is deemed effective if it offers a prospect of success, and is sufficient if it is able to redress the wrong complained.⁶⁵

The test for whether local remedies are available and effective has been held to be objective rather than subjective. The perception of the complainant as to the existence and effectiveness of the local remedies, therefore, does not dissuade the Commission of the sufficiency of local remedies.⁶⁶

⁶⁵*Jawara v. Gambia*, ACmHR, 32.

⁶⁶*Kenya Human Rights Commission v Kenya*, ACmHR, Comm. 135/949, 39 Activity Report (2015), 16.; Viljoen F, ‘Admissibility under the African Charter of Human Rights’ in M Evans & R Murray (eds) “*The African Charter on*

This is, however, tempered by the disqualifying nature of non-judicial or discretionary remedies. On several occasions, this has resulted in the declaration that local remedies are insufficient in remedying the wrong alleged and therefore, unavailable and ineffective.⁶⁷ In *Amnesty International and Others v Sudan* the Commission gave a three-part test defining the scope of local remedies to be exhausted under article 56; those of a judicial nature, which are effective and not subordinated to the discretionary power of public authorities.⁶⁸ Discretionary remedies not of a judicial nature therefore constructively exhaust local remedies. One justification for this is that it fails to serve the pre-conditions for the provision of a remedy which have been identified by the Commission as being impartiality and the ability to decide according to legal principles.⁶⁹

On the flip side, in *Diakite v. Gabon*, the communication was declared inadmissible for the failure to petition the highest local courts, despite them being located in a foreign territory.⁷⁰ This decision has, however, been highly criticised by scholars. Odinkalu terms it as an ostensible inconsistency with the Commission's practice that is impossible to explain.⁷¹ Other commentators are of the opinion that "*such a case would fall under the exception to the domestic remedies requirement*," due to the impractical and unfeasible nature of the requirement to petition a court located in another country.⁷² In addition, the cost and delay involved in obtaining

Human and Peoples' Rights: The system in practice, 1986-2000", Cambridge University Press, Cambridge, (2002) at 85-86.

⁶⁷*Avocats Sans Frontieres v Burundi*, ACmHR, 23; Communication 64/92, 68/92 & 78/92 *Achutan (on Behalf of Banda) and Another (on behalf of Chirwa and another) (Chirwa case) v. Malawi*, ACmHR, Comm. 64/92, 68/92 & 78/92, 8 Activity Report (1994), 1.

⁶⁸*Amnesty International and Others v Sudan* (Sudan detention without trial case), ACmHR, 31

⁶⁹, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, ACmHR, Comm. 140/94, 141/94, 145/95, 12 Activity Report (1999) in which the Commission stated that; "*It would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles.*"

⁷⁰*Diakite v Gabon*, ACmHR, Comm. 73/92, 8 Activity Report (1994), 5.

⁷¹ Odinkalu Chidi, "*African Commission on Human and Peoples' Rights: Recent Cases*", 1 Human Rights Law Review 97, 100 (2001).

⁷² Ankumah E, "*The African Commission On Human And Peoples' Rights*", Martinus Nijhoff Publishers, (1996), 69.

such remedy would fall under the exceptions of unavailable and insufficient thus constructively exhausting local remedies in foreign courts.

Burden of proof

Whenever a state alleges the failure by the complainant to exhaust domestic remedies, it has the burden of showing that the remedies that have not been exhausted are available, effective and sufficient to cure the violation alleged, i.e. that the function of those remedies within the domestic legal system is suitable to address an infringement of a legal right and are effective. When a state does this, the burden of responsibility then shifts to the complainant who must demonstrate that the remedies in question were exhausted or that the exception provided for in article 56(5) of the African Charter is applicable.⁷³

The state thus bears the primary burden to prove that the remedies are available, effective and sufficient to remedy the wrong; that domestic remedies can effectively address the legal right infringed.⁷⁴ Once successful in this endeavour, the burden shifts to the complainant to demonstrate that either the remedies in question were exhausted or that an exception is applicable.

Conclusion:

A cardinal facet of the duty to exhaust local remedies is redress for the injury suffered. The burden, therefore, falls on the state to prove the existence of judicial, rather than discretionary, means to provide such redress. Both the failure to provide such redress or to provide it with unreasonable delay and the lack of judicial means of redress render such remedies constructively exhausted. It is against this backdrop that the suitability of article 56(5) of the African Charter to air pollution is analysed.

⁷³*Article 19 v Eritrea*, ACmHR, 51.

⁷⁴*Velásquez-Rodríguez v. Honduras*, IACtHR Judgment of 26 June 1987, (*Preliminary Objections*), 21.

CHAPTER 3:

TRANS-NATIONAL NATURE OF THE RIGHT AGAINST AIR POLLUTION

Introduction

This chapter examines the nature of air pollution and seeks to illustrate the trans-boundary nature of the violation of the right against air pollution as a facet of the right to a clean and healthy environment.

Analysis of the nature of air pollution

Interest in global emissions transportation developed due to a rising concern that current strategies of air pollution control may be inefficient. They are therefore the primary result of an analysis of air pollution in context; in view of the rising global and regional emissions.

Carbon monoxide is produced through incomplete combustion processes such as the burning of biofuel by cars. The bulk of the CO emissions is concentrated in the Northern Hemisphere while in the Southern Hemisphere, South Africa is an emission '*hot spot*' is found in South Africa due to a high number of large power plants albeit with relatively low CO emissions.⁷⁵

In the Northern Hemisphere, there are four regions with particularly high emissions: the North American east coast, Western and Central Europe, East Asia, and Southern Asia. The first three are in the middle latitudes which border the Tropic of Cancer and the Tropic of Capricorn to the east and west. In this area, westerly winds prevail at higher altitudes for most of the year.

The fourth is located in the Asian tropics, where seasonal monsoon winds facilitate inter-continental emissions transportation. Although this is outside the regional scope of this study, its relevance is thus; convection facilitates the transfer of emissions from South Asia into the upper

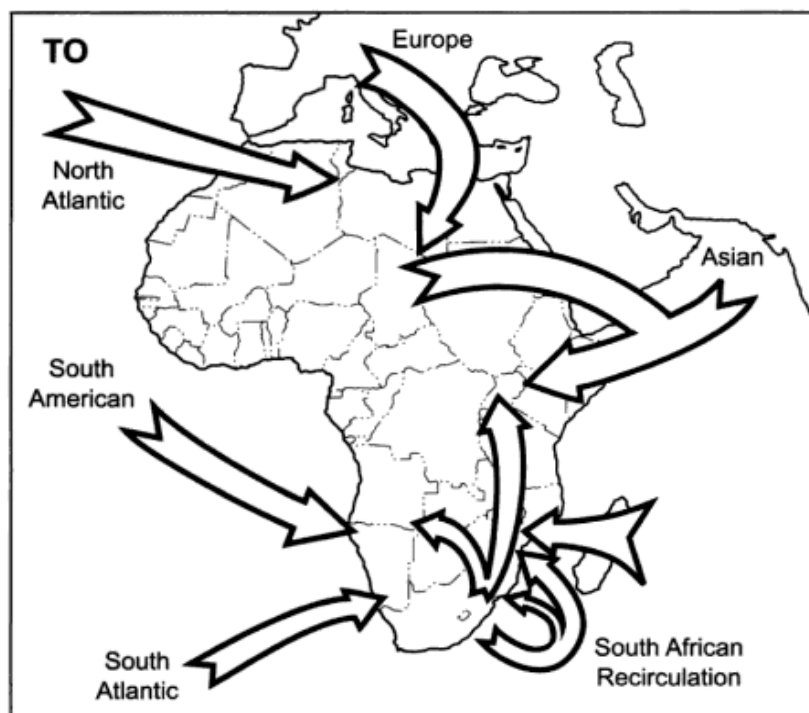
⁷⁵'Nuclear Power In South Africa, South African Nuclear Energy, World Nuclear Association' (*World-nuclear.org*, 2016)<<http://www.world-nuclear.org/information-library/country-profiles/countries-o-s/south-africa.aspx>> accessed 25 October 2016

troposphere during the monsoon season.⁷⁶ It, therefore, establishes the notion that the traversing national and regional borders is a characteristic inherent in air and thereby air pollution.

The effect of these variable winds is that in summer, emissions are transported westward while in winter, they move into the Indian Ocean and meeting with the north-easterly trade winds through which they move toward the Inter-tropical Convergence Zone.⁷⁷

According to Stohl, Africa stretches across the equator and is, therefore, subject to atmospheric transports influenced by both the easterly and westerly winds of the northern and southern hemisphere. Transport by the westerly winds is responsible for the distribution of moisture from the Indian Ocean while air from easterly winds carries emissions from central Africa to the Atlantic Ocean.⁷⁸ This dichotomy results in large-scale recirculation throughout the continent as figure 1 and 2 illustrate.

Figure 1: Schematic diagram of the pathways to Africa



⁷⁶Stohl Andreas, *Intercontinental Transport Of Air Pollution*, Springer Science and Business Media, Berlin, 2004, 120.

⁷⁷Stohl Andreas, Eckhardt Sabine, *Intercontinental Transport of Air Pollution : An Introduction*, Stohl A, *Air Pollution*, Springer Science and Business Media, Berlin, 2003, 7.

<<http://vigor.wustl.edu/capita/CapitaReports/031001IntercontinentalDustTransport/Chapters/chapter1.pdf>> accessed 26 October 2016

⁷⁸ Stohl Andreas, *Intercontinental Transport Of Air Pollution* p180-194

Figure 2: An illustration of the emissions recirculation throughout the continent

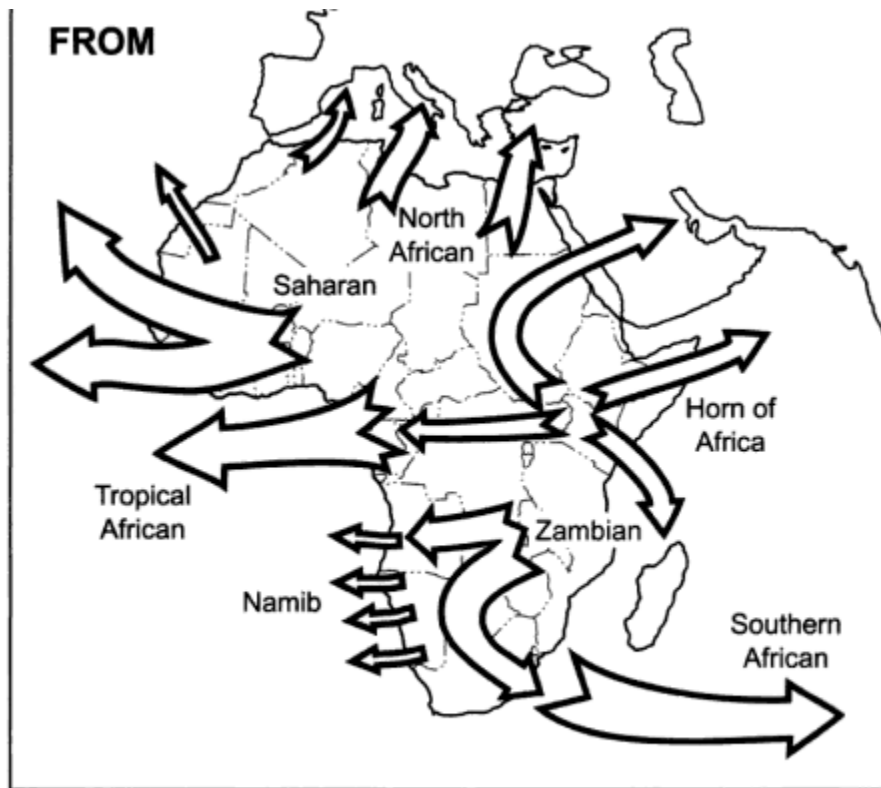


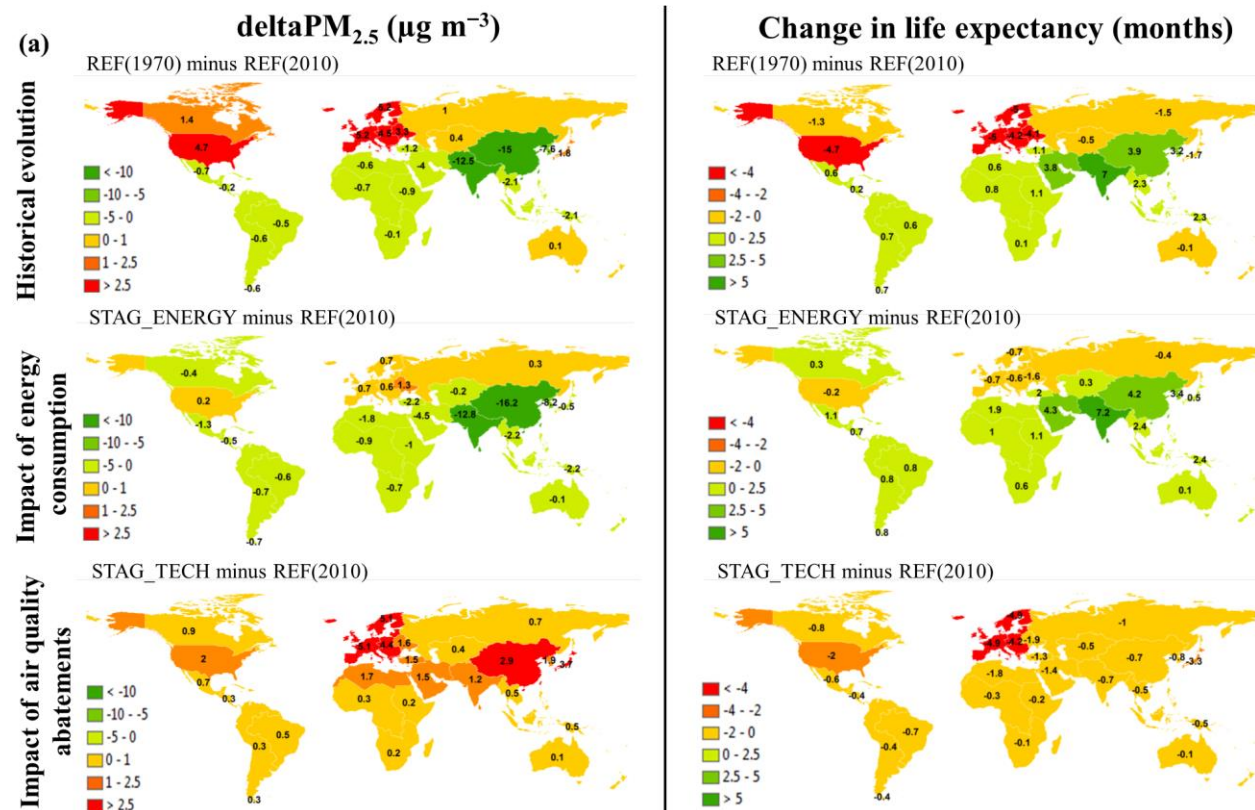
Fig. 14 Schematic diagram of the most important atmospheric transport pathway to and from the African continent

Furthermore, this point is cemented by the fact that despite Africa's slow rate of industrialisation and insignificant emissions in comparison to those of Europe, Australia and America, it still suffers the effects of their emissions.⁷⁹ This indicates the trans-national nature of emissions, and their ability to cause trans-boundary harm as is illustrated in figure 3.⁸⁰

⁷⁹'African Emissions: African Major Sources Of GHG, Emissions Per Capita, And Comparison With Emissions From Other Countries. | GRID-Arendal - Publications - Vital Climate Graphics Africa' (Grida.no, 2016) <<http://www.grida.no/publications/vg/africa/page/3113.aspx>> accessed 26 October 2016

⁸⁰Crippa M and others, 'Forty Years Of Improvements In European Air Quality: Regional Policy-Industry Interactions With Global Impacts', Atmospheric Chemistry and Physics, 16 (2016) <<http://www.atmos-chem-phys.net/16/3825/2016/acp-16-3825-2016.pdf>> accessed 25 October 2016

Figure 3:⁸¹



Conclusion:

The data depicted illustrates the manner in which carbon emissions traverse national and regional boundaries. This establishes the principle that indissociable from air pollution is the concept and risk of externality. The reason for this is that an inherent characteristic of air is that it is constantly in motion and is, therefore, incapable of being confined to national borders. It then follows that the violation of the right against air pollution is inherently trans-boundary in nature.

⁸¹ Crippa M and others, 'Forty Years Of Improvements In European Air Quality: Regional Policy-Industry Interactions With Global Impacts', 15.

CHAPTER FOUR:

FEASIBILITY OF THE APPLICATION OF ARTICLE 56(5) IN ENFORCING THE RIGHT TO AGAINST AIR POLLUTION

Introduction

This chapter analyses the nature of available remedies for the air pollution. It assesses the existing mechanisms under international law and effectiveness of their strategies in righting the violation of the right against air pollution.

Development of the Offence of Transboundary Air Pollution in International Law

The protection of the atmosphere falls characteristically within the realm of public international law and the budding field of international environmental law. It traces its origins in the inter-state relations and state sovereignty forms the basis for the duty to repair the harm caused to other states. Thus, in the 1930s, the trans-boundary consequences of air pollution were acknowledged in the litigation leading to the award of the arbitral tribunal in the *Trail Smelter* case.

The 1979 LRTAP Convention:

Until 1979, there were no formal means of restricting state emissions that caused environmental harm. The first treaty dealing with air pollution was the LRTAP Convention which required early consultations to be held between parties ‘*actually affected by or exposed to a significant risk of long-range trans-boundary air pollution*’ and the parties in which a significant contribution to such pollution originates.⁸² However, it is important to note that the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water was of 1963 was in force and had 110 signatories by 1973.⁸³

The LRTAP defines Long Range Trans-boundary Air Pollution as; “*air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one state and which has adverse effects in the area under the jurisdiction of another state at such a distance that it is not generally possible to distinguish the contribution of individual emission*”

⁸²Article 5, Convention on Long-Range Transboundary Air Pollution(LRTAP), TIAS 10541; 1302 UNTS 217; 18 ILM 1442 (1979)

⁸³ Moscow, 5th August 1963, 5th August 1963, 480 UNTS 43.

sources or groups of sources.”⁸⁴ It includes a general commitment by the parties to ‘endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution.’⁸⁵ Despite being a de facto non-binding commitment due to its vague and political generality, its significance is that it recognises a limitation on the right of state parties to emit pollutants into the air.

The lack of specific commitments and deference to state discretion to utilise the best scientific methods to manage quality indicate that compliance is largely state driven.⁸⁶ States were, therefore, the only means of redressing such environmental wrongs through consultation with the other state and other diplomatic and political means. Compliance is hinged on the assumption that air quality is a priority for the state in question. However, developing countries and those with high poverty rates often prioritise these concerns over investment in clean energy and setting emissions controls on vehicles. Therefore, where a concern is raised by the injured states international courts are the only recourse provided such offending state accepts their jurisdiction.

The 1985 Sulphur Protocol⁸⁷

Its main aim is the reduction of Sulphur emissions or their transboundary fluxes by at least 30 percent. It requires state parties to annually report their Sulphur emissions and, although it does not specify a timeline, the progress made in attaining targets along with the national mechanisms and strategies for achieving such targets.⁸⁸

1988 NO_x Protocol⁸⁹

The third Protocol to LRTAP concerns the control of emissions of nitrogen oxides or their transboundary fluxes. It introduced the concept of national emissions standards to ensure efficient enforcement.⁹⁰ Building upon the notion of cooperation in the LRTAP, it recognised the need for “*more favourable conditions for exchange of technology.*”⁹¹ It adopts a decentralized

⁸⁴Article 1(b), Convention on Long-Range Transboundary Air Pollution (LRTAP).

⁸⁵Article 2, Convention on Long-Range Transboundary Air Pollution (LRTAP).

⁸⁶Article 6, Convention on Long-Range Transboundary Air Pollution (LRTAP).

⁸⁷*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least 30 Per Cent*, 8th July 1985, 27 ILM 707.

⁸⁸Articles 4 and 6, *Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least 30 Per Cent*,

⁸⁹*The third Protocol to the LRTAP Convention concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes (1988 NO_x Protocol)*, 31st October 1988, 28 ILM 214.

⁹⁰1988 NO_x Protocol, Article 2(1).

⁹¹1988 NO_x Protocol, preambular paras.3, 6, 8 and 9.

approach to enforcement by requiring national policies and regulations for technology exchange, circulation of unleaded fuel, to establish research and monitoring programmes and develop strategies to control and reduce emissions.⁹²

1991 Volatile Organic Compounds Protocol⁹³

Article 1(9) defines Volatile organic compounds (VOCs) as “*all organic compounds of anthropogenic nature, other than methane, that is capable of producing photochemical oxidants by reactions with nitrogen oxides in the presence of sunlight*”.

The main cause of is evaporation caused by incomplete fossil fuel combustion usually during refining, distribution and use of petrol and use of products rich in solvents.⁹⁴ This protocol is novel in its approach in enforcement and particularly decentralised enforcement. In following the precedent of deference to state discretion set by its predecessors, it provides three alternative means of compliance for signatories. The first option simply entails reducing emissions by 30%. The second seeks to minimise trans-boundary harm by imposing the obligation on states whose emissions contribute to tropospheric ozone concentrations of other states to reduce the emissions in areas where such pollution originates by 30%. In order to incentivize the reduction of trans-boundary harm, such states only possess the obligation to maintain their total national emissions at 1988 levels.⁹⁵ The third option applies to parties with relatively low emissions. For these, the obligation is to ensure the 1999 levels do not surpass the 1988 levels.⁹⁶

The 1994 Sulphur Protocol⁹⁷

This protocol continues the emphasis on the use of national measures of enforcement including; for the Sulphur content of gas-oil⁹⁸ national strategies, policies, programmes and measures to control and reduce Sulphur emissions.⁹⁹

⁹²1988 NOx Protocol Articles 3, 4, 6, 7 and 8.

⁹³*Protocol concerning the Control of Emissions of Volatile Organic Compounds*, 18th November 1991, 31 ILM 568.

⁹⁴ Sands Philippe, *Principles Of International Environmental Law* (Cambridge University Press 2003), 329.

⁹⁵1991 VOC Protocol, Article 2(2)(b).

⁹⁶ 1991 VOC Protocol, Article 2(2)(c).

⁹⁷ 1994 Oslo Protocol on Further Reduction of Sulphur Emissions, which entered into force on 5 August 1998.

⁹⁸1994 Oslo Protocol, Article 2(5) (c).

⁹⁹ 1994 Sulphur Protocol, Article 4(1).

The question of whether the prohibition of causing air pollution has attained the status of the customary international law is settled by the ILC draft articles on Prevention of Transboundary Harm.¹⁰⁰

1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-Level Ozone¹⁰¹

The Protocol's objective is to control and reduce anthropogenic emissions of four pollutants i.e. VOCs Sulphur, NO_x and Ammonia. The strategy adopted in this protocol is the setting of differentiated emissions ceilings depending on the level of environmental harm caused by the emissions of a given state.

Conclusion:

This chapter depicts the institutionally dependent nature of enforcement of the right against air pollution. It illustrates the approach of international law to such violations; prevention of future harm and mitigation rather than a liability for the past or current wrong. In addition, the aforementioned instruments feature a very low number of signatories.¹⁰² This renders the majority of states a no man's land of regulation of air pollution. Although many states opt for the persuasive approach which involves providing incentives to private industry to maintain environmental standards, this is not a judicial remedy; as effective as it might otherwise be.

The African court requires remedies to be judicial and available without prolonged delay. The deferral to state discretion renders the available remedies variable depending on the commitment of the state to enforcement. Where judicial means of redress and not discretionary executive orders are available, the local remedies must be exhausted. However, where there are no such means available, domestic remedies must be deemed constructively exhausted.

¹⁰⁰ Draft article 3, 'ILC Draft Articles On Prevention Of Transboundary Harm From Hazardous Activities' (2001) <[https://cil.nus.edu.sg/rp/il/pdf/2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities-pdf.pdf](https://cil.nus.edu.sg/rp/il/pdf/2001%20Draft%20Articles%20on%20Prevention%20of%20Transboundary%20Harm%20from%20Hazardous%20Activities-pdf.pdf)> accessed 25 October 2016

¹⁰¹ 1999 *Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-Level Ozone*, 30th November 1999.

¹⁰² Twenty one for VOC, twenty eight for NO_x, twenty two for the Sulphur Protocol and the LRTAP itself with 51 out of the 56 UNECE member states.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

Introduction

This chapter outlines the findings, recommendations and conclusions of the study. The study was undertaken with the intention of establishing whether the trans-boundary nature of air pollution constructively exhausts local remedies.

Findings:

The Nature of Local Remedies

In Chapter Two, this study arrived at the finding that the goal of the article 56(5), the local remedies rule, is to ensure the wrong is redressed. Accordingly, discretionary or non-judicial, means of redress, those that are unduly prolonged and the absence of local remedies lead to the constructive exhaustion of such remedies.

Suitability of Other Means of Redress

In Chapter One this study found that the foundation for righting the wrong of air pollution was primarily tort law. This was rendered essentially inapplicable due to the difficulty in proving causation. In Chapter Four, an analysis of International law regulation revealed that many of the measures taken in international law are directed at preventing future environmental damage and mitigating the effects of historical pollution rather than assigning liability and providing redress for individuals affected by air pollution. Furthermore, signatories to the aforementioned treaties are strikingly low in number, with all of the protocols having less than 30 signatories and the LRTAP itself having merely 51 out of the 56 UNECE member states.¹⁰³

This vacuum in the law necessitates an alternative means of righting environmental wrongs. This is the justification for the use of human rights law to enforce this cardinal facet of the right to a clean and healthy environment.

¹⁰³Twenty one for VOC, twenty eight for NOx, twenty two for the Sulphur Protocol.

Applicability of article 56(5) of the African Charter to Air Pollution:

The fact that the first treaty in relation to air pollution is that on long-range Trans-boundary air pollution illustrates the fact that its trans-boundary nature and effect is implicit in the very incidence of air pollution.

A strong feature of international law mechanisms, that form the predominant means of redress for such wrongs, is that they end at the state. The state is the proverbial last mile of right enforcement and defence. With a prevalent lack of formal accountability, the remedies offered are a prima facie executive in nature. This, according to established jurisprudence of the African Commission would effectively constructively exhaust local remedies.¹⁰⁴ However, this is not a rule of the general application simply because of the state discretion in implementing international law. Where means of judicial redress exist, the procedure of the African Court necessitates that such means be exhausted prior to seeking the court's intervention.

The question only remains as to the means of redress for nationals of a third state that are affected by air pollution where the injuring state possesses such judicial remedy. In this instance, two diverging opinions emerge; that of the Commission and its fervid observers; the scholars. While the Commission has ruled that such remedies must be exhausted, commentators have deemed it an exception to the requirement to exhaust local remedies. Their justification is the impractical and unfeasible nature of the requirement to petition a court located in another country.¹⁰⁵ This Author agrees with the latter opinion for the reason that this requirement would be in violation of the requirements of availability and sufficiency of local remedies. A balance must be struck between maintaining the subsidiarity of international to national courts and the spirit and letter of the law. The procedure must not take such precedence over substance as to render the law mere 'words on paper'. Given that enforcement of the right to a clean and healthy environment was the spirit that motivated its inclusion in the African Charter, the most optimal means of enforcement are those that best facilitate this end.

¹⁰⁴ *Avocats Sans Frontieres v Burundi*, ACmHR, 23; *Achutan (on Behalf of Banda) and Another (on behalf of Chirwa and another) (Chirwa case)*, ACmHR, 1.

¹⁰⁵ Ankumah E, "The African Commission On Human And Peoples' Rights" 69.

Recommendations:

1. In any case before it, the African court should determine that air pollution, by its very nature, constructively exhausts local remedies and renders the court one of first instance.
2. The African Court should give more precedence to substance over procedure, and the practicality of the law in expanding the parameter of its constructive exhaustion doctrine to include courts in foreign states.

Conclusion:

The study has achieved its objectives and responded to the statement of the problem. The objectives were:

The overall objective was to evaluate the effectiveness of local remedies in the fulfilment of the right to a clean and healthy environment. To which end this study sought;

1. To examine the effectiveness of the legal mechanisms providing redress for violation of the right against air pollution.
2. To analyse the scope of constructive exhaustion of local remedies and its application to the right to a clean and healthy environment.

This study has enumerated that the trans-boundary nature of air pollution and the state discretion in prescribing remedies would constructively exhaust local remedies in instances where the measures taken to redress the wrong were executive or discretionary. It has further analysed the tort law and international law as means of potential redress and found them to be lacking in ensuring individual redress and, in the latter case, access to justice. In addition, it has outlined the scope of application of the constructive exhaustion doctrine to air pollution, enumerated its parameters, and identified its shortcomings.

In instances where remedies are available, even in foreign courts, the court has mandated their exhaustion. This would curtail the enforcement of the right to a clean and healthy environment by effectively barring or unduly prolonging redress for an on-going wrong.

The study has also tested and proved the hypothesis in Chapter Four by highlighting the fact that the trans-boundary nature of air pollution and the available means for its redress constructively

exhaust local remedies. The only exception this general rule is where the remedy is available in the other state.

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