# Fluctuating standards of proof at the African Court: a case for principled flexibility

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**ABSTRACT:** This article focuses on the application of standards of proof in cases before the African Court on Human and Peoples' Rights, a relatively under-studied area. It argues that the Court applies fluctuating standards of proof depending on facts of each case and, while this phenomenon is not uncommon in international practices, it nonetheless has negative implications for human rights protection when this fluid application of standards of proof is not properly calibrated. The application of a high standard of proof in admissibility decisions, as the article argues, risks making the African Court less accessible. Similarly, the article contends that in merits and reparations decisions, a strict approach to evidence that entails application of a high standard of proof has led to inappropriate dismissal of what arguably are valid claims in some cases. To address these challenges, the article suggests that a flexible yet principled evidentiary approach to questions of standards of proof can guide the Court towards fairer and more consistent decisions.

**TITRE ET RÉSUMÉ EN FRANÇAIS:**

**La fluctuation des standards de preuve à la Cour africaine des droits de l'homme et des peuples: pour une flexibilité principielle**

**RÉSUMÉ:** Cette contribution porte sur l'application des modes de preuve dans les affaires portées devant la Cour africaine des droits de l'homme et des peuples qui reste un aspect relativement peu exploré. La contribution avance que la Cour applique des normes fluctuantes concernant l'administration de la preuve en fonction des faits de chaque affaire. Si ce phénomène n'est pas rare dans la pratique judiciaire internationale, il a néanmoins des implications négatives sur la protection des droits de l'homme lorsque cette application fluide des modes de preuve n'est pas correctement calibrée. L'application d'un standard élevé en matière de recevabilité risque de rendre la Cour africaine moins accessible. De même, la contribution relève que dans les jugements sur le fond et les réparations, l'application d'un standard de preuve élevé dans certains cas a conduit au rejet inapproprié de demandes qui pourraient être fondées. Pour relever ces défis, la contribution suggère qu'une approche souple mais fondée sur des principes en matière de standard de preuve peut mener la Cour à rendre les décisions plus équitables et cohérentes.

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# 1 INTRODUCTION

There is general acknowledgment that evidentiary practices in international human rights adjudication have received little attention.[1] This fact also holds true for the African Court on Human and Peoples' Rights (African Court) as there is a scarcity of comprehensive research on how the Court assesses evidence.[2] Through a critical examination of the Court's approaches to standards of proof in determining applications before it, this article hopes to contribute to filling this gap in literature. The article argues that the African Court applies different and fluctuating standards of proof depending on the stage of adjudication, the facts in issue and even the orders sought by applicants. It attempts to rationalise what informs the Court's choices regarding standards of proof and the implications on human rights protection, an endeavour largely missing from the Court's own jurisprudence and reviewed literature. Based on gaps identified through the analyses, the article argues for a different approach to application of standards of proof at the Court for fairer and more consistent decisions. In terms of methodology, the article dissects relevant rulings and judgments of the Court on admissibility, merits and in reparations claims. The cases discussed were selected based on relevance from a search of all instances where evidence issues (including standards of proof) are addressed by the Court in the African Court Law Reports covering judgments and orders of the Court from 2009 to 2020 and from the Court's website for 2021 and 2022

1 Some of the works where this is acknowledged include R Murray 'Evidence and fact-finding by the African Commission' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: the system in practice 1986-2006* (2008) 139; C Roberts 'Reversing the burden of proof before human rights bodies' (2021) 25 *International Journal of Human Rights* 1682 1; T Stirner *The procedural law governing facts and evidence in international human rights proceedings: developing a contextualised approach to address recurring problems in the context of facts and evidence* (2021) 3-4.

2 Some sources that discuss evidentiary practices at the African Court include R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2012); SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 25; Roberts (n 1); The International Federation for Human Rights *Admissibility of complaints before the African Court: practical guide* (2016) 101-102.

decisions. This case law analysis juxtaposes the Court's practices on standards of proof with those of similar international courts and treaty bodies and simultaneously weaves the discussion with a review of relevant literature and feedback from the author's interviews with judges and members of the Registry at the African Court, held in the period between March to June 2022.

The article is structured as follows: this introduction is followed by an overview of practices on standards of proof in common law and civil law systems in part 2. This is relevant because, as the article argues, both systems have informed the African Court's approaches to the issue. Part 3 gives a summary of international practices on standards of proof and the aim here is to paint a global picture that will inform and situate the article's critique of practices at the African Court. In part 4 the article descriptively and analytically delves into the Court's approaches to standards of proof in its admissibility, merits and reparations decisions for an understanding of the state of play on the issue. Part 5 is constructive, relying on the findings of the article in the previous part to project what a different approach to application of standards of proof at the Court could look like, before drawing a conclusion in part 6.

## 2 COMMON LAW AND CIVIL LAW TRADITIONS ON STANDARDS OF PROOF

The conceptions and practices of the African Court on standards of proof, like other international courts and treaty bodies, are rooted in domestic practices on the same and these differ in common law and civil law legal systems. It is worthwhile to provide an overview of the differences not only because the African Court consists of judges with common law and civil law backgrounds but also because the divide has a bearing on how the African Court applies standards of proof. However, before turning to these differences, an apt starting point is to briefly highlight some definitions of the term 'standard of proof'. One description of the term is that it 'relates to the quantum or degree of proof',[3] while another author defines it as 'the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen'.[4] For a final example, Del Mar has described the term 'standard of proof' as one that 'marks a point somewhere along the line between two extremes: a mere conjecture at one end, and absolute certainty at the other. Proof furnished in support of a particular proposition must meet or surpass this point for a judicial finding in favour of the proposition to be made.'[5]

3 CF Amerasinghe *Evidence in international litigation* (2005) 232.

4 P Kinsch 'On the uncertainties surrounding the standard of proof in proceedings before international courts and tribunals' in G Venturini & S Bariatti (eds) *Diritti Individuali E Giustizia Internazionale, Liber Fausto Pocar* (2009) 427.

5 K del Mar 'The International Court of Justice and standards of proof' in K Bannelier, T Christakis & S Heathcote (eds) *The ICJ and the evolution of international law: the enduring impact of the Corfu Channel case* (2012) 98.

In common law legal systems, four standards have crystallised. The first, and which also requires a low degree of satisfaction, is the *prima facie* standard. It simply requires that 'evidence produced is indicative of the proposition claimed'.[6] This standard 'means that the adjudicative body decides provisionally on the basis of evidence submitted by one party, mostly the applicant'[7] and in the international context often applies at the admissibility stage.[8] The second standard is the preponderance of evidence, also known as the balance of probabilities. The most-cited definition of this standard is that given by Lord Denning in *Miller v Minister of Pensions* where he stated:[9]

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

The third standard at common law is the stricter 'beyond reasonable doubt' standard that is applied in criminal cases. It demands 'a high degree of cogency' and means the 'evidence weighs heavily in one direction'.[10] It requires that 'the proposition being presented is supported with evidence of a nature that there can be no reasonable doubt as to the factual validity of the proposition.'[11] While this standard does not require absolute certainty or 'proof beyond a shadow of doubt' as Lord Denning put it in *Miller v Minister of Pensions*,[12] it requires that the proposition made is 'virtually indisputable, given the evidence'.[13] A fourth standard of proof falling between the preponderance of evidence and the beyond reasonable doubt standards has also been articulated, often referred to as the 'clear and convincing evidence' standard. This exceptional standard applies in specific civil cases such as those related to *habeas corpus* proceedings, immigration and psychiatric placement.[14] To meet this standard, 'the party with the burden of proof must convince the arbiter in question that it is *substantially* more likely than not that the factual claims that have been made are true'.[15] The standard is commonly expressed in judgments as 'clear, cogent and convincing', 'clear, satisfactory and convincing', and

6 JA Green 'Fluctuating evidentiary standards for self-defence in the International Court of Justice' (2009) 58 *International and Comparative Law Quarterly* 163, 166.

7 R Wolfrum 'Taking and assessing evidence in international adjudication' in TM Ndiaye & R Wolfrum (eds) *Law of the sea, environmental law and settlement of disputes: Liber Amicorum Judge Thomas A Mensah* (2007) 355.

8 F Viljoen 'Fact-finding by UN human rights complaints bodies: analysis and suggested reforms' (2004) 8 *Max Planck Yearbook of United Nations Law* 55.

9 *Miller v Minister of Pensions* (1947) 2 ALL ER 372, 373-374.

10 Wolfrum (n 7) 354.

11 Green (n 6) 167.

12 *Miller* (n 9) 373.

13 Green (n 6) 167.

14 S Wilkinson 'Standards of proof in international humanitarian and human rights fact-finding and inquiry missions' 17, https://www.geneva-academy.ch/joomla tools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf (accessed 24 July 2023).

15 Green (n 6) 167.

'clear and irresistible', among other similar phrases.[16] This standard has had application at the domestic level on the African continent. For example, the Kenyan Supreme Court has determined that in all election petitions in the country, 'an intermediate standard of proof, one beyond the ordinary civil litigation standard of proof on a balance of probabilities, but below the criminal standard of beyond reasonable doubt, is applied'.[17] The Supreme Court in the same case justified this intermediate standard as follows:[18]

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

In the civil legal tradition, the standard is not based on probabilities or dependent on whether the matter is civil or criminal. The standard is a subjective one and the threshold is 'the conviction of the judge, based on the evidence submitted'.[19] This civil law approach has also been described as one where 'the judge is required to have a conviction or belief regarding the truth of the fact in issue'.[20] Some authors describe (in French) this level of conviction as *l'intime conviction du juge*[21] or 'an inner, deep-seated, personal conviction of the judge'.[22] In a nutshell, if a judge in the civil law system considers that they are persuaded by an argument, then the standard of proof has been met.[23]

To conclude, the reviewed literature points out that international courts and tribunals usually do not articulate in detail the standard of proof applied in assessing evidence.[24] Related to this, there are propositions that 'the international regime appears to reflect the civil law tradition, in which all that is needed is that the court be persuaded, without reference to a specific standard'.[25] As will be demonstrated in this article, the African Court has adopted a hybrid approach by administratively identifying the applicable standard of proof (preponderance of evidence) but in practice flexibly determining the degree of persuasion required without express reference to any specific standard of proof. This reality, as the article will show, potentially complicates adjudication of human rights claims at the Court and is a cause for concern as inappropriate application of a high standard

16 KM Clermont 'Procedure's magical number three psychological bases for standards of decision' (1986-1987) 72 *Cornell Law Review* 1115, 1119.

17 *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR (*Odinga* case) para 148.

18 *Odinga* case (n 17) para 150.

19 Amerasinghe (n 3) 233.

20 J Sladič & A Uzelac 'Assessment of evidence' in Ve Rijavec, T Keresteš & T Ivanc (eds) *Dimensions of evidence in European civil procedure* (2016) 119.

21 A Riddell & B Plant *Evidence before the International Court of Justice* (2009) 125.

22 KM Clermont & E Sherwin 'A comparative view of standards of proof' (2002) 50 *American Journal of Comparative Law* 243, 246.

23 Riddell & Plant (n 21) 125.

24 Amerasinghe (n 3) 232.

25 EV Ospina 'Evidence before the International Court of Justice' (1999) 1 *Journal of the International Law Association* 203.

makes the African Court less accessible or leads to dismissal of arguably valid claims. However, before problematising this flexible approach to the question of standards of proof at the African Court, the next part provides an overview of international practices on the same.

## 3 INTERNATIONAL PRACTICES ON STANDARDS OF PROOF

This part provides an overview of the approaches to standards of proof by the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the African Commission on Human and Peoples' Rights (African Commission) and the Human Rights Committee (HRC). I do this not for a comprehensive comparative analysis, which is beyond the scope of this article, but to place the practices of the African Court in the proper context of what generally transpires in peer adjudicative bodies. The discussion will provide a basis for (i) propositions that the African Court is acting consistently with practices in other international courts in certain respects but not in others; (ii) suggestions to emulate progressive approaches by other institutions; and (iii) arguments in favour of adopting unique practices given the Court's context.

Although in a strict sense the ICJ is not a human rights court and is mainly preoccupied with resolving inter-state disputes, its approaches to standards of proof is akin to human rights courts and bodies and, so, a brief scan of its practices is warranted. The ICJ articulates different standards of proof, even within one case, and some of the expressions that implicitly refer to the standard of proof in different cases include 'no room for reasonable doubt'; 'on the basis of a balance of evidence'; 'on a balance of probabilities'; 'with a high degree of probability'; 'beyond possibility of reasonable doubt'; 'free from any doubt'; 'not sufficient … to constitute decisive legal proof'; 'falling short of conclusive proof'; among others.[26] Stirner suggests that the ICJ applies a 'contextualised standard of proof' and that the standard varies depending on specifics of each case.[27] He further notes that 'the applicable standard of proof correlates with the nature of the allegations made against the respondent state' which in practice means that alleged violations of the Genocide Convention, for example, are serious and require a high level of certainty.[28] One of the judges, however, has criticised the ICJ for a lack of clarity on applicable standard of proof in the following words:[29]

> Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court (who already will know they bear the burden of proof) as to what is

26 Del Mar (n 5) 99; Riddell & Plant (n 21) 125.

27 Stirner (n 1) 124-125.

28 Stirner (n 1) 125.

29 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ (6 November 2003) (2003) ICJ Reports 2003, Separate opinion of Judge Higgins para 33.

> likely to satisfy the Court ... The principal judicial organ of the United Nations should ... make clear what standards of proof it requires to establish what sorts of facts.

The ECtHR articulated the applicable standard of proof at the Court for the first time in the case of *Ireland v United Kingdom* noting that 'the Court adopts the standard of proof beyond reasonable doubt but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumption of fact'.[30] Importantly, the Court has clarified that this standard is not similar to that applicable in criminal cases at the domestic level, the distinction being that:[31]

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

In the same case, and related to standard of proof, the ECtHR determined that the level of persuasion necessary for reaching a particular conclusion is 'intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake'.[32] In this regard, it can be observed that the ICJ and ECtHR seem to concur on application of a contextualised standard of proof. Further, the ECtHR has observed that in its approach to evidence and proof there are 'no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions.'[33]

Importantly, the European Court has also stated that in its determinations on proof it does take into account the difficulties that applicants may encounter in accessing evidence. In *Merabishvili v Georgia* the Court observed that 'it is sensitive to any potential evidentiary difficulties encountered by a party'.[34] In discussing practices at the African Court in part 4, I examine a similar commitment by the African Court and question the consistency of its application.

Turning to the IACtHR, the literature reveals a similarly flexible approach to application of standards of proof. Paúl has pointed out that the Court rarely refers to standard of proof and where it has explicitly done so, this is attributable to mistranslation of English versions of its judgments. He adds that lack of reference to standard of proof at the Inter-American Court is explained by the strong influence from civil

30 *Ireland v the United Kingdom* ECHR (18 January 1978) Application 5310/71 para 161.

31 *Nachova & Others v Bulgaria* ECHR (6 July 2005-GC) Applications 43577/98 and 43579/98 para 147.

32 As above.

33 *El-Masri v The Former Yugoslav Republic of Macedonia* ECHR (13 December 2012) Application 39630/09) para 151.

34 *Merabishvili v Georgia* ECHR (28 November 2017) Application 72508/13 para 315.

law tradition 'where this notion is largely absent'.[35] Discussions on standard of proof at the IACtHR often refer to the *Velásquez-Rodríguez* case where the Court appears to have articulated a distinct standard of 'proof in a convincing manner'.[36] The Court's standard has also been said to be somewhere between preponderance of evidence and proof beyond reasonable doubt.[37] Related to the applicable standard of proof, the Inter-American Court has determined that it also considers circumstantial evidence, indications and presumptions 'so long as they lead to conclusions consistent with the facts'.[38] Stirner notes that two important insights may be drawn from the *Velásquez-Rodríguez* case on the applicable standard of proof at the Court: first, that the Court avoids a rigid rule and retains some level of discretion; and, second, that this discretion is applied to modify the applicable standard of proof depending on the facts of each case.[39] Amerasinghe draws parallels between the ICJ and the IACtHR on the requirement of 'convincing evidence'. As regards the degree of certainty needed by both courts he observes that the evidence 'need not point to absolute certainty as such but must be convincing'.[40] It is important to note, however, that although the Court rejected a rigid approach in the *Velásquez-Rodríguez* case, it still found that it 'must determine what the standards of proof should be in the instant case'.[41] Arguably, the Court implicitly distinguished useful flexibility from being indeterminate on the question of standard of proof, which in my view is undesirable.

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

35 Á Paúl 'In search of the standards of proof applied by the Inter-American Court of Human Rights' (2012) 55 *Revista Instituto Interamericano de Derechos Humanos* 60.

36 Amerasinghe (n 3) 239; R Murray 'Evidence and fact-finding by the African Commission' in Evans & Murray (n 1) 161.

37 Amerasinghe (n 3) 239.

38 *Godínez Cruz v Honduras* IACHR (20 January 1989) Case 8,097 para 136.

39 Stirner (n 1) 138.

40 Amerasinghe (n 3) 241.

41 *Velásquez-Rodríguez v Honduras* IACHR (29 July 1988) Ser C 4 para 127.

42 Murray (n 1) 159.

43 As above.

44 Murray (n 1) 160.

succeed at the merits stage.[45] The issue of standard of proof at the admissibility stage was extensively argued upon in a communication before the Commission in the case of *Mohammed Abdullah Saleh Al-Asad v Djibouti*. In its inquiry on compliance with the admissibility condition under article 56(2) of the African Charter on Human and Peoples' Rights (African Charter) (that communications must be compatible with the Charter), the Commission determined that complainants only need to make out a *prima facie* case regarding 'compatibility *ratione materiae'*. This, according to the Commission, was because 'the alleged violations would be substantively revisited with more rigour at the merit stage'.[46] However, the Commission took the view that the complainant needed to 'conclusively substantiate' his case regarding 'compatibility *ratione temporis'*, 'compatibility *ratione personae',* and 'compatibility *ratione loci*'.[47] The threshold of proof here is clearly that of beyond reasonable doubt and the demerits of this raised standard of proof at the admissibility stage is further discussed in part 4.1 of this article.[48]

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

A common thread from the international practices as seen above is discernible. International courts and treaty bodies do not favour a rigid approach to application of standards of proof. The nature of facts and allegations in a particular case determine the standard of proof applied.

45 As above; also see F Viljoen & C Odinkalu *The prohibition of torture and ill-treatment in the African human rights system: a handbook for victims and their advocates* (2014) 98, where the authors note that the Commission requires at the admissibility stage 'some prima facie evidence of an attempt to exhaust local remedies'. Other authors note that 'the author of the communication must definitively convince the Commission as to the veracity of the claims made therein'. For this, see SR Leteipan & M Kamunyu 'Litigating before the African Commission on Human and Peoples' Rights: a practice manual' (2017) *Equality Now Publication* 32.

46 *Mohammed Abdullah Saleh Al-Asad v Djibouti* Communication 383/10, African Commission on Human and Peoples' Rights para 143.

47 *Al-Asad* (n 46) paras 144-146.

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

49 D McGoldrick cited in Y Tyagi *The UN Human Rights Committee, practice and procedure* (2011) 543.

50 Stirner (n 1) 143, 147.

51 Viljoen (n 8) 77.

There are, nonetheless, notable distinguishing features. The ECtHR has adopted an often cited 'rule' on what the applicable standard is (beyond reasonable doubt) even while in practice insisting that the demanded standards of proof will vary depending on circumstances of each case. The IACtHR and the Human Rights Committee seem to have solidified an identifiable requirement for 'convincing evidence' even though this is not consistently required in all cases. The African Commission, for its part, does not seem to have one particular standard but rather a variety of terms used to refer to the applicable standard in each case. This article argues (see part 5 below) that there is value in determining what the applicable standard of proof is and this applies both to when a tribunal has a general or well-established rule on the standard to be applied and when standards are determined based on peculiarities of each case. With the above context in mind, the following part examines how the African Court applies standards of proof and how similar or different its practices are in view of the highlighted international practices.

## 4 PRACTICES ON STANDARD OF PROOF AT THE AFRICAN COURT

On the face of it, the issue of the applicable standard of proof at the African Court appears settled because the Court has identified this as the 'preponderance of evidence' in one of its publications.[52] However, the said publication only addresses the standard of proof in reparations claims and is silent on whether this standard is also applicable in admissibility and merits decisions. Further to this, a word search for the phrase 'preponderance of evidence' or its equivalent, namely, 'balance of probabilities' in the four available African Court Law Reports covering judgments and orders of the Court from 2009 to 2020 reveals that the Court has not expressly used these phrases in any case.[53] This is the same for all decisions of the Court from 2021 and 2022, and my conclusion is that the formally-declared or endorsed standard of proof at the African Court has not explicitly been referred to or analysed in the Court's case law. Instead, the Court has developed a practice of referring to some words and phrases that point to the Court determining the degree of persuasion expected, established or lacking in its analysis of evidence or expected proof. However, it is useful to note that some literature suggests that reference to terms such as 'sufficiency' and 'reasonableness' of evidence by international courts have been understood to indicate that the standard being applied is preponderance of evidence.[54] In practice, as the next parts will

52 African Court 'Fact sheet on filing reparation claims' (Revised October 2020), https://www.african-court.org/wpafc/wp-content/uploads/2020/10/FACT-SHEET-ON-FILING-REPARATION-CLAIMS-Revised-October-2020.pdf (accessed 24 July 2023).

53 The reports can be found at https://www.african-court.org/wpafc/african-court-law-reports/ (accessed 24 July 2023).

54 Wilkinson (n 14) 49.

demonstrate, the African Court not only uses such terms that allude to application of the preponderance of evidence standard but has also used others that suggest application of the higher standard of 'clear and convincing evidence' and even required what seems like absolute proof and therefore applied the beyond reasonable doubt standard. The article contends that applying a high standard of proof in the highlighted instances is detrimental to protection of human rights through the platform of the Court.

## 4.1 Admissibility decisions

The African Court's decisions on admissibility of cases is guided by article 56 of the African Charter which is restated in Rule 50 of the Court's Rules. Applications filed before the Court must comply with the following seven conditions: (1) indicate their authors; (2) be compatible with the Constitutive Act of the African Union and the African Charter; (3) not written in disparaging or insulting language; (4) not be based exclusively on news disseminated through the mass media; (5) be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged; (6) be submitted within a reasonable period from the time local remedies are exhausted; and (7) not deal with cases that have been settled by the states involved. I demonstrate in this part that the Court applies more than one standard of proof. Admittedly, the seven admissibility conditions entail different complexities and the threshold of proof required to establish them may logically vary. However, the main proposition in this part is that it is undesirable for the Court to apply a very high standard of proof at this preliminary stage of adjudication. I get this point across through an analysis of selected cases.

In *Peter Joseph Chacha v Tanzania* the African Court seemed to have applied different standards of proof on two admissibility requirements, namely, compatibility with the AU Constitutive Act and the Charter and exhaustion of local remedies. On compatibility with the Act and Charter, the Court applied the *prima facie* standard by noting that the applicant's stated facts 'revealed a *prima facie* violation of his rights … therefore, the requirements of article 3(1) of the Protocol and article 56 (2) of the Charter [had] been met'.[55] On the requirement to exhaust local remedies, the Court relied on the decision of the African Commission in *Anuak Justice Council v Ethiopia* where the Commission had faulted the complainant in that case for not having provided 'concrete evidence or demonstrated sufficiently' that his apprehensions on the effectiveness of local remedies constituted a barrier to exhausting these remedies and that he was simply 'casting

55 *Peter Joseph Chacha v Tanzania*, ACtHPR, Application 3/2012, Ruling (28 March 2014) para 123.

aspersions' based on 'isolated or past incidence'.[56] The Court has adopted this position by the Commission in other cases[57] and by reference to 'concrete evidence' or 'sufficiency' of evidence, it has arguably required something more than a *prima facie* threshold.

A second example of a case in which the Court applied the *prima facie* standard is *Leon Mugesera v Rwanda*. On the question of exhaustion of local remedies, the Court observed that when an applicant adduces *prima facie* evidence in support of claims of having exhausted local remedies, the burden of proof shifts to the respondent state. In the absence of evidence from the state to the contrary, the Court concluded that 'it [had] no reason to consider that the domestic remedies were not exhausted'.[58]

Turning to the Court's assessment of evidence where the respondent state contests admissibility on the ground of unreasonable delay before seizing the Court, the early *Nobert Zongo* case is instructive. The Court established the principle 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', a position adopted in subsequent cases.[59] In its earlier jurisprudence (2013-2018) and particularly in cases against Tanzania, the Court accepted certain explanations from applicants as sufficient to explain the delays in seizing the Court. In *Alex Thomas v Tanzania*, for example, the Court found a period of three years and five months before seizure of the Court not to constitute undue delay as the applicant was lay, indigent, incarcerated and had attempted to use extraordinary measures and that these reasons 'constitute sufficient grounds' to explain the time taken to submit his application.[60] In *Mohamed Abubakari v Tanzania* the Court found the period of three years and three months taken to file the case to be reasonable as the applicant was in prison, was indigent, could not afford a lawyer and had no legal representation in domestic courts, was illiterate and unaware of the existence of the Court. These circumstances, according to the Court, '[justified] some flexibility in assessing the reasonableness of the timeline for seizure of the Court'.[61] This approach has been adopted by

56 *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) para 58, cited in *Peter Joseph Chacha v Tanzania* (n 55) para 144. This position was also adopted by the Court in *Diakite Couple v Mali*, ACtHPR, Application 9/2016, Ruling (28 September 2017) para 53; see also *Chacha* (n 55) para 143, citing *Kenyan Section of the International Commission of Jurists & Others v Kenya* (2004) AHRLR 71 (ACHPR 2004).

57 *Diakite Couple* (n 56) para 53; aee also *Chacha* (n 55) para 143, citing *Kenyan Section of the International Commission of Jurists* (n 56).

58 *Leon Mugesera v Rwanda*, ACtHPR, Application 12/2017, Judgment (27 November 2020) paras 33-34.

59 *Beneficiaries of the Late Norbert Zongo & Others v Burkina Faso* ACtHPR, Application 13/2011, Ruling on Preliminary Objections (21 June 2013) para 121. Other cases that have adopted this position include *Mohamed Abubakari v Tanzania*, Application 7/2013, Judgment (3 June 2016) para 91; *Alex Thomas v Tanzania* ACtHPR, Application 5/2013, Judgment (20 November 2015) para 73.

60 *Alex Thomas* (n 59) para 74.

61 *Mohamed Abubakari* (n 58) para 92.

the Court in other cases.[62] In terms of the standard of proof in considering the reasonableness of time taken to seize the Court, the *Kijiji Isiaga v Tanzania* case suggests that the plausibility test is applied, which some literature associates with the *prima facie* standard. Wolfrum suggests that when an international tribunal is applying the standard of *prima facie* evidence, it is in fact assessing 'whether the application meets a plausibility test on the basis of the evidence submitted in its support'.[63] In *Kijiji Isiaga* the Court accepted a period of two years and 11 months as reasonable because the applicant was 'a lay, indigent and incarcerated person without the benefit of legal education or assistance' and these circumstances made it 'plausible that the applicant may not have been aware of the Court's existence and how to access it'.[64]

However, in the more recent admissibility decisions by the Court (2019-2022), a stricter standard has been applied in assessing reasonableness of time. The Court now demands specific proof of the grounds it previously accepted as constituting good justifications to explain delays in approaching the Court. As an example, in *Godfred Anthony and Ifunda Kisite v Tanzania* it found that a delay of five years and four months was unreasonable, noting that 'although the applicants [were] also incarcerated and thus restricted in their movement, they [had] not asserted or provided any proof that they [were] illiterate, lay, or had no knowledge of the existence of the Court. The applicants [had] simply described themselves as indigent'.[65] Similarly, in *Livinus Daudi Manyuka v Tanzania* it found a delay of five years and six months to be unreasonable, pointing out that 'aside from the blanket assertion of indigence the applicant [had] not attempted to adduce evidence explaining why it took him five years and six months to file his application'.[66] Importantly, regarding standard of proof, the Court required what was a seemingly higher degree of persuasion (than, say, preponderance of evidence) by stating that 'in the absence of any *clear and compelling justification* for the lapse of five years and six months before the filing of the application, the Court finds that this application was not filed within a reasonable time'.[67] Similarly, in *Hamad Mohamed Lyambaka v Tanzania* the Court concluded that in the absence of 'clear and compelling' justification, the delay of five years and 11 months was unreasonable.[68]

62 *Kennedy Owino Onyachi & Charles John Mwanini Njoka v Tanzania* ACtHPR, Application 3/2015, Judgment (28 September 2017) para 67; *Christopher Jonas v Tanzania* ACtHPR, Application 11/2015, Judgment (28 September 2017) paras 53-54.

63 Wolfrum (n 7) 355.

64 *Kijiji Isiaga v Tanzania* ACtHPR, Application 32/2015, Judgment (21 March 2018) para 55.

65 *Godfred Anthony and Ifunda Kisite v Tanzania* ACtHPR, Application 15/2015, Ruling (26 September 2019) para 48.

66 *Livinus Daudi Manyuka v Tanzania* ACtHPR, Application 20/2015, Ruling (28 November 2019) para 54.

67 *Livinus Daudi Manyuka* (n 66) para 55 (my emphasis).

68 *Hamad Mohamed Lyambaka v Tanzania* ACtHPR, Application 10/2016, Ruling (25 September 2020) para 50.

To confirm that the Court indeed has in more recent times raised the standard of proof in assessing compliance with the admissibility condition of filing cases within reasonable time, three dissenting judges in *Igola Iguna v Tanzania* acknowledged the following:[69]

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

The application of a high standard of proof at the admissibility stage has also been a contentious issue at the African Commission. An *amicus* brief by the Centre for Human Rights in the case of *Mohammed Abdullah Saleh Al-Asad v Djibouti* rightly rejected the Commission's application of the beyond reasonable doubt standard at the admissibility stage (instead of the *prima facie* standard) in inquiring whether alleged violations had taken place in the territory of the respondent state (compatibility *ratione loci*) while assessing compliance with article 56(2) of the Charter.[70] The higher standard of proof, it was argued, was especially unsuitable in an extraordinary rendition case where the state controlled the relevant evidentiary material.[71]

To conclude this part, it is evident from the above summary of cases that the African Court has in some instances required applicants to meet more than the *prima facie* standard of proof at the admissibility stage. From the overview of international practices on admissibility decisions, applying a high standard of proof at this stage as the African Court does in some cases is not jurisprudentially backed by practices in peer institutions. The appropriateness of this seemingly stricter standard of proof is, in my view, questionable for this preliminary stage of the adjudication and arguably makes the African Court less accessible to applicants, including the most vulnerable such as prisoners. A relevant observation here is that, just as the three dissenting judges note in the *Igola Iguna* case, another author who is based at the Court points out the emerging pattern where the Court finds periods above five years to constitute undue delay.[72] Based on these insiders' perspectives, one could argue that the Court instrumentally applies a higher standard of proof not necessarily for or only based on legal reasons but to also give effect to an unwritten

69 *Igola Iguna v Tanzania* ACtHPR, Application 20/2017 Judgment (1 December 2022), Joint Dissenting Opinion of Justices Ben Kioko, Dennis Dominic Adjei and Tujilane Rose Chizumila paras 16-17 (my emphasis).

70 *Amicus curiae* submission by the Centre for Human Rights, University of Pretoria and others in the case of *Al-Asad* (n 46) paras 17-19.

71 *Al-Asad* (n 46) para 19.

72 MJ Nkhata 'What counts as a "reasonable period"? An analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications' (2022) 6 *African Human Rights Yearbook* 151.

institutional policy to cap the period considered reasonable to seize the Court to five years after exhaustion of local remedies.

The next part examines what transpires in merits decisions and shows that application of fluctuating standards of proof is a reality here as well.

## 4.2 Merits decisions

To start with, in cases where respondent states do not submit responses to applications, the African Court has adopted the position that if the applicant adduces *prima facie* evidence of a violation, the claim will succeed.[73] Where both sides participate in the proceedings, the Court has used expressions regarding evidence and proof that suggest both the preponderance of evidence standard and a higher standard than this apply. Examples here include the need for applicants to 'substantiate' claims, 'sufficiency' of evidence and 'satisfactory' explanations. In *Alex Thomas v Tanzania* the Court established what can loosely be said to be the general rule regarding the threshold of proof needed to establish claims. It stated that 'general statements to the effect that a right has been violated is not enough. More substantiation is required.'[74] This has been repeatedly cited in other cases.[75] Related to this, claims by applicants have been dismissed because they were 'not adequately substantiated'.[76] It has also found that there was failure to 'satisfactorily explain' the claims.[77]

A common expression by the Court pointing to the required standard of proof is with regard to 'sufficiency' of the evidence.[78] I use three cases here to illustrate this. While rejecting a claim for violation of the right to a fair trial in the *Thobias Mang'ara Mango* case, the Court found that 'the applicants [had] not provided sufficient evidence to show that the procedures followed by the domestic courts … violated their right to a fair trial'.[79] In *Kijiji Isiaga v Tanzania* it alluded both to the need to substantiate claims and sufficiency of evidence by pointing

73 *Mugesera* (n 58) para 44; *Armand Guehi v Tanzania* ACtHPR, Application 1/2015, Judgment (7 December 2018) paras 133-134.

74 *Alex Thomas* (n 59) para 140.

75 See similar holdings in the following cases: *Dismas Bunyerere v Tanzania* ACtHPR, Application 31/2015, Judgment (28 November 2019) para 79; *George Maili Kemboge v Tanzania* ACtHPR, Application 2/2016, Judgment (11 May 2018) para 51; *Mgosi Mwita Makungu v Tanzania* ACtHPR, Application 6/2016, Judgment (7 December 2018) para 70.

76 *Isiaga* (n 64) para 86; *Majid Goa alias Vedastus v Tanzania*, Application 25/2015, Judgment (26 September 2019) para 78.

77 *Amiri Ramadhani v Tanzania* ACtHPR, Application 10/2015, Judgment (11 May 2018) para 60.

78 *Wilfred Onyango Nganyi & 9 Others v Tanzania* ACtHPR, Application 6/2013, Judgment on Reparations (18 March 2016) para 52; *Thobias Mang'ara Mango & Shukurani Masegenya Mango v Tanzania* ACtHPR, Application 5/2015, Judgment (11 May 2018) para 95; *Sébastien Germain Marie Aïkoue Ajavon v Benin* ACtHPR, Application 62/2019, Judgment (4 December 2020) para 203; *Isiaga* (n 64) para 90.

79 *Mango* (n 78) para 95.

out that 'the mere allegation that the Court of Appeal did not properly examine the evidence supporting his conviction is not sufficient to find a violation of his right not to be discriminated against. The applicant should have furnished evidence substantiating his contention.'[80] As a final example, the Court in *Komi Koutche v Benin* noted that 'the applicant challenges the efficiency of the entire judicial system of the respondent state without providing sufficient information to prove it'.[81] I observe here that the African Court has not elaborated what 'substantiation' or 'sufficiency' of evidence entails. However, this is not limited to the African Court as Buergenthal J in his Separate Opinion in the *Oil Platforms* case at the ICJ noted as follows:[82]

> One might ask, moreover, where the test of 'insufficient' evidence comes from …and by reference to what standards the Court applies it? What is meant by 'insufficient' evidence? Does the evidence have to be 'convincing', 'preponderant', 'overwhelming' or 'beyond a reasonable doubt' to be sufficient? The Court never spells out what the relevant standard of proof is.

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

However, there are instances where the Court seems to require a higher standard of proof and one instance that I highlight in this regard is where applicants before the African Court allege that judges in national courts were biased. In *Alfred Agbesi Woyome v Ghana*, for example, the Court established the principle that 'the impartiality of a judge is presumed and *undisputable evidence* is required to refute this presumption'.[83] On a similar claim in the case of *Sébastien Germain Marie Aïkoue Ajavon v Benin*, the Court stated that 'the impartiality of a judge is presumed and … *compelling evidence* is needed to rebut this presumption'.[84] In another case, *Fidele Mulindahabi v Rwanda*, the applicant had claimed that two judges of Rwanda's Supreme Court were not impartial and the Court took the view that such claims 'must be

80 *Isiaga* (n 63) para 86; *Majid Goa* (n 76) para 90.

81 *Komi Koutche v Benin* ACtHPR, Application 20/2019, Ruling (25 June 2021) para 93.

82 *Oil Platforms* case (n 29) Separate opinion of Judge Buergenthal 286 para 41.

83 *Alfred Agbesi Woyome v Ghana* ACtHPR, Application 1/2017, Judgment (28 June 2019) para 128 (my emphasis). Justice Niyungeko in his dissenting opinion in this case thought the majority expected the applicant to adduce impossible proof since 'he cannot access the deliberations of the Court which occur naturally in private session and are covered by the principle of confidentiality'; see para 18 of Dissenting Opinion of Judge Gerard Niyungeko.

84 *Sébastien Germain Marie Aïkoue Ajavon v Benin* Application 62/2019, Judgment (4 December 2020) para 293 (my emphasis).

*irrefutably proven* by the party alleging it'.[85] Closely related to this, the Court has also held that an applicant who claimed that Mali's Electoral Management Body had not compiled the electoral list in a transparent manner was required to adduce evidence 'corroborated by *irrefutable proof*'.[86]

Given the above choice of words, my argument is that the African Court in these instances was applying a higher standard of proof than preponderance of evidence. Use of phrases such as 'indisputable evidence', 'compelling evidence' and 'irrefutable proof' in my view suggest application of a standard proximate to the beyond reasonable doubt standard. The alternative view is that at the very least, these phrases suggest application of the intermediate standard of 'clear and convincing evidence', meaning a lower threshold than the beyond reasonable doubt standard but certainly something more than the preponderance of evidence applies. In an interview with a judge of the Court, I asked whether the Court raises or lowers the standard of proof depending on the issue before the Court. The judge acknowledged that 'the standard possibly fluctuates' but added that the general understanding at the Court is that the applicable standard of proof is the balance of probabilities because matters before the Court are civil in nature (and not criminal).[87] This, however, is not a shared view among all judges. Another judge I interviewed took the view that the Court's standard of proof oscillated 'between preponderance of evidence and convincing proof' and that the standard applied 'depends on what the issue is, the claimed violations as well as what is prayed for by the applicants'.[88] As with admissibility decisions, the Court seems to apply more than one standard of proof in merits decisions and this was confirmed by feedback from my interviews at the Court. It is also clear that the Court applies a stricter standard when it considers claims to be more consequential in their nature or perhaps politically sensitive, such as allegations of a biased domestic court or electoral management body as seen above. This proposition is supported by the observation made by the Court in the *Alfred Agbesi Woyome* case where it stated that 'whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding.'[89]

While requiring more cogent proof for what it considers to be more 'serious' claims is reasonable and consistent with international

85 *Fidele Mulindahabi v Rwanda* ACtHPR, Application 4/2017, Judgment (26 June 2020) para 70 (my emphasis).

86 *Oumar Mariko v Mali* Application 29/2018, Judgment (24 March 2022) para 153 (my emphasis).

87 Interview with a judge of the African Court on Human and Peoples' Rights (Arusha, 22 March 2022).

88 Interview with a judge of the African Court on Human and Peoples' Rights (Arusha, 24 March 2022).

89 *Woyome* (n 83) para 128. The Court was citing C Okpaluba & L Juma 'The problems of proving actual or apparent bias: an analysis of contemporary developments in South Africa' (2011) 14(7) *Potchefstroom Electronic Law Journal* 261.

practice, I suggest that it would be helpful to litigants if the Court was more explicit on when it raises the standard of proof and for what types of claims, even if this is done within the facts of each decision. Related to this, part of its case management should entail a routine of asking for additional evidence where such claims are made, before a final determination on whether the cogent proof anticipated establishes the claim. I elaborate on this suggestion further in part 5. Finally, the next part looks at the standards of proof applied in reparation claims.

## 4.3 Reparations claims

While the African Court is not explicit on the applicable standard of proof in other stages of its proceedings, this is not the case with reparations. The Court's Fact Sheet on Filing Reparations stipulates that the applicable standard of proof is 'the preponderance of evidence' in considering reparations claims.[90] According to this publication, this means that 'the applicant carries the burden of providing proof to show that what has occurred is more probable than not'.[91] The Fact Sheet further clarifies that the African Court, as a human rights court, 'is not bound to apply the standard strictly, but like other regional human rights courts may remain flexible, allowing for the circumstances of each case to be considered and remaining sensitive to victim conditions of vulnerability affecting their access to evidence'.[92] I suggest that the flexibility promised by the Court here is one meant to allow the Court latitude to apply a lower (not a higher) standard than the identified preponderance of evidence standard. However, as will be shown in this section, in some instances the Court applies a high standard and the negative impact of this is inappropriate dismissal of more reparations claims.

Besides the above-mentioned Fact Sheet, a comparative study commissioned by the Court on the law and practice of reparations for human rights violations also addresses the issue of standard of proof. The study found that some international criminal courts and human rights courts have found that 'the standard of proof required during the reparations phase is one of preponderance of the evidence'.[93]

The study further clarifies that application of this standard means victims must show that it is more probable than not that they are entitled to reparations requested and that 'all aspects of reparations claims, including the victims' identities, the harm suffered, and causation, are subject to this standard'.[94] The study concludes, after a review of practices in a number of courts, that 'institutions with the

90 Fact Sheet on Filing Reparation Claims (n 52) 6.

91 As above.

92 As above.

93 African Court 'Comparative study on the law and practice of reparations for human rights violations' (2019) 32, https://www.african-court.org/wpafc/wp-content/uploads/2020/11/Comparative-Study-on-the-Law-and-Practice-of-Reparations-for-Human-Rights-Violations.pdf (accessed 24 July 2023).

94 African Court (n 93) 32.

power to impose binding judgments on reparations generally adopt one of two approaches with respect to the standard of proof, applying either a preponderance of the evidence standard or a flexible case-by-case approach'.[95] The discussions in this part show that the case-by-case approach has resulted in some inconsistencies. Additionally, with a generally strict approach to evidence in reparations decisions as I will demonstrate, the Court also misses some opportunities to take into account difficulties of accessing documentary evidence associated with reparations claims.

The Court has adopted distinct approaches to proof of moral and material prejudice in reparations claims. On moral prejudice, the Court's position is that 'the requirement of proof is not as rigid rather the Court can make assumptions in the applicant's favour'.[96] The practice of the Court therefore has been to presume moral prejudice when a violation is established and award moral damages without requiring specific proof. An applicant is nonetheless required to do slightly more in terms of evidence when claiming moral damages for indirect victims. In *Mohamed Abubakari v Tanzania* it held that determination of moral damages to those closest to the applicant is on a case-by-case basis and further that 'before the Court can order reparations for moral damage to these persons, there must be proof of affiliation between them and the applicant'.[97]

In contrast to the above approach on moral damages, the Court strictly requires specific proof before awarding damages for material prejudice. In claims for loss of income for example, the Court has found that a business contract, business licence or delivery notes are not sufficient proof and that applicants ought to also submit further evidence such as bank statements or tax certificates to prove income earned from business.[98] In the *Wilfred Onyango Nganyi* case the Court rejected the applicants' reasons for not availing required evidence, namely, that 'receipts were misplaced due to long passage of time'. The Court found that 'the explanation provided is not sufficient proof'.[99] Makunya suggests that the Court should review its approach to standards of proof in reparations claims. He observes:[100]

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

95 African Court (n 93) 33.

96 *Majid Goa* (n 76) para 84.

97 *Mohamed Abubakari v Tanzania* ACtHPR, Application 7/2013, Judgment on Reparations (3 June 2016) paras 59-60.

98 *Nganyi* (n 78) paras 30-43.

99 *Nganyi* (n 78) para 52.

100 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1246.

While the Court's publication provides that the preponderance of evidence is the applicable standard in determining reparations claims, its practices point to the fact that it generally applies a higher standard. The *Wilfred Onyango Nganyi* case mentioned above illustrates this. My contention is that if the Court was guided by the measure that a fact is established if it is 'more probable than not' it should have found that the applicant who presented a business contract, licence and delivery notes as evidence was more likely than not earning income from it. This is especially the case because the applicant made the plausible argument that he lost evidence owing to his long stay in prison. By rejecting the applicant's claim for loss of income in these circumstances and being very particular on required documentary proof, the Court was either applying the higher 'clear and convincing' standard or the 'beyond reasonable doubt' standard by demanding conclusive proof. Data from my fieldwork at the Court aligns with this conclusion. One of the judges I interviewed held the view that, in practice, the Court expects applicants to meet a higher standard of proof but it 'has not defined what kind of higher standard it is'. This, according to the judge, is particularly the case because 'unless there is a document, the Court tends to say there is no proof'.[101]

A similarly higher standard of proof seems to be applied by the Court in cases where the applicant prays for release from prison as part of their reparations claims. In *Alex Thomas v Tanzania* the Court observed that 'an order for the applicant's release from prison can be made only under very specific and/or compelling circumstances'.[102] This position was restated in *Mohamed Abubakari v Tanzania*, where the Court again declined to grant an order for release of the applicant from prison, stating that 'such a measure could be ordered by the Court itself only in special and compelling circumstances'.[103] In an interview with an officer of the Court, I asked why the Court did not order release of applicants in these cases and the response was that 'the Court thought it would have been going too far to order a release'.[104] This perhaps shows the convergence of legal and extra-legal considerations in determining what standard of proof to apply. Notably, the Court has in more recent decisions ordered release of applicants having found that they had established the 'special and compelling' circumstances such as detention for six years after conclusion of prison term[105] and failure to avail certified copies of proceedings that prevented an applicant from lodging an appeal for 20 years.[106] From the decisions, it is clear that for an applicant to be successful in some types of reparations claims, they must prepare to meet the 'clear and convincing evidence' standard and which essentially entails providing extraordinary circumstances. There is little doubt, in my view, that the

101 Interview with a judge of the African Court (Arusha, 22 March 2022).

102 *Thomas* (n 59) para 157.

103 *Abubakari* (n 59) para 234.

104 Interview with an officer of the African Court (Arusha, 12 April 2022).

105 *Robert John Penessis v Tanzania* ACtHPR, Application 013/2015, Judgment (28 November 2019) paras 163-164.

106 *Makungu* (n 75) paras 84-86.

Court in such circumstances employs a higher standard than what it declares is applicable for reparations, namely, preponderance of evidence.

The above conclusion must however be nuanced by pointing out that the Court is not always as strict in requiring proof of reparations claims. It has in some instances awarded damages in equity, even where evidence is unavailable. In the *Konate* case, for example, the Court accepted the claim for loss of income despite noting that the applicant '[had] not produced documentary evidence' to support his claim. It nonetheless held that 'it [was] more appropriate to consider the matter in terms of equity' and awarded the applicant.[107] The Court's position on the implications of inaccessible, unavailable or lost evidence on reparations claims was best articulated in *Anudo Ochieng Anudo v Tanzania* (Judgment on Reparations) where it held:[108]

> In deciding whether supporting documents are required with respect to particular claims for damages, human rights bodies and courts must proceed on a case by case basis and are especially sensitive to the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances ... Where evidence is unavailable or limited for any of these reasons, courts frequently look to 'the internal consistency, the level of detail, and the plausibility of the applications vis-à-vis the evidence as a whole'. It is also common to award some reparations in fairness, even where documentation of damages is incomplete or non-existent, particularly where it is logical that at least some damages would have been incurred as a direct result of the violations established.

While the respondent state in this case had challenged the claim for loss of income on grounds that the applicant had not provided balance sheets, accounting and bank transaction records (consistent with what the Court has previously required), the Court excused the applicant from providing such. It held that 'taking into consideration the circumstances in which he was expelled from the territory, the normal standard of material evidence cannot be applied to him strictly'.[109] The dissenting judges in the *Anudo Ochieng Anudo* case while contrasting the finding of the Court in the *Wilfred Onyango Nganyi* case (discussed above) faulted the majority decision for appreciating difficulties in producing evidence in *Anudo* and not in *Wilfred*. They further observed that 'this example only goes to confirm that the Court is inconsistent in its rulings on reparations awarded for the alleged loss of income'.[110]

I note in conclusion that the African Court in theory (as provided in its publication) informs that it applies the preponderance of evidence standard in reparation claims. However, in practice it in most cases applies a higher or stricter but unarticulated standard. In other cases, it is more flexible and invokes equity and fairness to avoid demanding for specific evidence in support of reparations claims. This fluidity,

107 *Lohé Issa Konaté v Burkina Faso* ACtHPR, Application 4/2013 Judgment on Reparations, 5 December 2014 para 96, paras 42-43.

108 *Anudo Ochieng Anudo v Tanzania* ACtHPR, Application 12/2015, Judgment on Reparations, 2 December 2021 paras 31-32.

109 *Anudo* (n 108) para 44.

110 *Anudo* (n 108) paras 24-26.

however, has a downside to it as the Court struggles to remain consistent even when faced with similar facts as seen above. In general, more often than not, the applicant who does not support a reparation claim for material prejudice with specific documents fails on the basis of lack of (sufficient) evidence. Bensaoula Chafika J has expressed a minority view which, if adopted by the Court, could mitigate against dismissal of a majority of reparations claims. In *Joseph John v Tanzania* she held as follows:[111]

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

Chafika J essentially is calling for a more proactive African Court on the question of evidence, which would translate to the Court exhausting its administrative mechanisms in management of cases (to request for more evidence) before dismissing claims for lack of evidence or failure to adduce sufficient evidence. If this minority view becomes a consistent reality at the Court in the future as I suggest it should, more reparation claims would be determined on the basis of evidence rather than lack of evidence. This is particularly the case where applicants can produce the evidence required by the Court, if directed to do so, and in the process avoid dismissing claims for lack of evidence.

## 5 WHAT COULD A DIFFERENT EVIDENTIARY APPROACH LOOK LIKE?

With the above discussion of the African Court's practices on standards of proof in the different stages of adjudication, this part sums up some propositions on why clarity on applicable standards of proof at the Court matters. I also suggest three ways in which this clarity and fairness (particularly from the applicant's standpoint) in applying standards of proof can be enhanced and in a more coherent and principled approach. As the African Commission has observed, 'pitching the appropriate standard of proof is germane to the validity of the conclusion to be derived'.[112] The reviewed literature equally supports the need for clarity on the issue. Wolfrum notes that while being explicit on the standard of proof does not rid judgments of subjectivity, 'identifying the standard of proof and explaining why a particular conclusion was reached provides for more transparency and forces the adjudicating body to deal with this point intensively in its deliberations'.[113] Roberts has observed that the flexibility favoured by

111 *Joseph John v Tanzania* ACtHPR, Application 5/2018, Dissenting Opinion (22 September 2022) paras 1-2. As the judge rightly points out, Rules 51 and 55 of the Court's Rules allow the Court to be proactive in requiring evidence from parties.

112 *Al-Asad* (n 46) para 142.

113 Wolfrum (n 7) 355.

international human rights courts on questions of the burden and standard of proof is a welcomed feature because it allows them to 'adjust their standards to the distinctive features of each individual case' and therefore avoid dismissing cases on formal technicalities. However, he adds that lack of clarity on applicable standards makes it possible for 'claims to be inappropriately dismissed, should the deciding body not take fully into account externally-imposed limitations on the evidence a claimant is able to bring forward'.[114] In his view, greater clarity would avoid 'more disparate range of results' from these courts and 'ensure fairer and more consistent outcomes'.[115] In view of the above arguments, with which I agree, I have some suggestions that the African Court could consider as relates to application of standards of proof.

First, I propose that the Court should consistently take into account difficulties applicants face in accessing evidence, especially in reparations claims, and calibrate the applicable standard of proof accordingly. As feedback from my interviews with some judges at the Court showed, a strict approach to evidence applies in reparations claims and in most cases applicants without supporting documents are unsuccessful in their claims. Practices at the Inter-American Court where flexibility has, for example, extended to awarding reparations on condition that missing evidence is provided to relevant authorities *after* the judgment can inspire the African Court.[116] To the Court's credit, it has exercised flexibility in some reparations decisions where applicants had difficulties accessing evidence.[117] However, inconsistencies in this regard still require the Court's attention.

Second, I suggest that the Court should resolve the divided loyalty to common law and civil law traditions as sources of influence on how it applies standards of proof. For example, while the Court is clear that *one* standard (preponderance of evidence) applies in determining reparations claims, its case law and views from some judges show this and a higher but undefined standard are implicitly applied. The strict insistence on documentary proof in reparations claims (even with plausible explanations for why evidence is missing in some cases) arguably reveals a bench that seeks an 'inner, personal conviction' of the judges or to be persuaded as to the truth of the claims made and without a predetermined standard as a guide, an approach typical in civil law legal systems. The African Commission has attempted to settle the uncertainty (in admissibility decisions) by holding that 'there cannot be adopted a single standard of proof that can be applied uniformly regardless of the admissibility condition and the

114 Roberts (n 1) 3.

115 Roberts (n 1) 15.

116 *Case of the Caracazo v Venezuela* IACHR, Reparations and Costs (29 August 2002) para 73; *Case of Gomes Lund & Others ('Guerrilha Do Araguaia') v Brazil* IACHR, Preliminary Objections, Merits, Reparations and Costs (24 November 2010) para 120.

117 *Mgosi Mwita Makungu v Tanzania* ACtHPR, Application 6/2016, Judgment on Reparations (23 June 2023) para 32; *Anudo* (n 108) para 44.

circumstances of the case at hand'.[118] I propose that the Court should similarly clarify its approach in its publications and case law, but with the understanding, in my view, that requiring applicants to meet a higher standard than the preponderance of evidence in human rights adjudication should be exceptional and buttressed by cogent justifications.

Finally, I submit that the Court should clearly communicate its evidence requirements in each case to make it possible for applicants to prepare to meet the fluctuating standards of proof, whether this is with regard to a particular stage of adjudication or specific claims in a case. In this respect, the minority view by Chafika J, as discussed earlier, is a sound one and should perhaps be mainstreamed at the Court. Rule 51 of the Court's Rules provides that 'during the course of the proceedings and at any other time the Court deems it appropriate, call upon the parties to file any pertinent document or to provide any relevant explanation'. I suggest that given the existence of this Rule, a pro-human rights approach for the Court should be to call for more or specific evidence in every case before it is dismissed for lack of (sufficient) evidence. Commendably, the Court does this[119] and the challenge is for it to be consistent in this approach. To conclude, the three suggestions made here are by no means exhaustive nor are they the ultimate fix for the difficult, contentious and subjective dynamics associated with applying standards of proof in adjudication at the African Court or indeed any other court. They could, however, be a useful starting point to fairer and more consistent jurisprudence from the Court.

## 6 CONCLUSION

This article set out to examine the practices of the African Court on standards of proof as a contribution to the relatively under researched area of evidentiary practices in international human rights adjudication. It has shown that while the Court identifies the preponderance of evidence as the applicable standard (expressly stating so regarding reparations claims), in practice the Court implicitly applies varying standards and which have to be 'read in' from the various expressions used by the Court. Placed in the context of international practices, the article has demonstrated that the African Court's approaches are by and large consistent with practices in peer institutions where facts and allegations in each case determine the standard to be applied. However, this reality contradicts the legal fiction that a particular standard applies as depicted in a publication by the Court and in the views of some of the judges interviewed. The article has highlighted practical implications of the Court's fluidity in applying standards of proof, including making it less accessible when a high standard is inappropriately applied in admissibility decisions. Further,

118 *Al-Asad* (n 46) para 143.

119 See, eg, *Anaclet Paulo v Tanzania* ACtHPR, Application 20/2016, Judgment on Merits and Reparations para 16; *Mango* (n 78) para 8.

there is uncertainty as to the threshold of proof that will suffice for some claims where the Court implicitly applies a higher standard with demands for more cogent proof. Additionally, more reparations claims are dismissed where specific documentary proof is not adduced and this is in line with a general consensus among judges interviewed who acknowledge existence of a particularly strict approach to evidence (or a higher standard of proof) in reparations claims. To address some of these negative implications, the article has suggested three ways in which the African Court can retain the current fluidity in application of standards of proof that is evidently the rule of thumb internationally, but to proceed in a more principled way. In this respect, I have suggested that in applying standards of proof, the Court should consider exercising greater sensitivity to the difficulties that some applicants have in accessing evidence, resolve the conflicting common law and civil law influences on its practices on standards of proof and clearly communicate its evidentiary requirements to the parties in the course of proceedings. These proposals, while not being the ultimate solution to the challenges identified, hold the promise of fairer and more consistent decisions from the Court.