

THE ADMISSIBILITY OF CASES BEFORE THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: WHO SHOULD DO WHAT?

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ABSTRACT

The inauguration of the African Court on Human and Peoples' Rights in 2006 heralded a new phase in trans-national judicial implementation of human rights in Africa, but it also brought new legal challenges with it. An important aspect of the Court's procedure that is likely to pose a primary challenge for stakeholders is the question of admissibility before the Court which appears to have been complicated by the uncertain relation between the Court and the African Commission. This article argues that there are gaps in the rules for the determination of admissibility before the Court. More crucially, the emerging admissibility regime undermines the relevance of the admissibility procedure of the African Commission. To ensure consistency between the two organs, more weight should be given to the uncontested admissibility decisions of the African Commission.

1 INTRODUCTION

Twenty years after the African Charter on Human and Peoples' Rights (African Charter)¹ entered into force and 19 years after the inauguration of the

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1 The African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 rev.5, 21 ILM 58 (1982) adopted in Nairobi, Kenya on 27 June 1981 by the Organisation of African Unity (OAU) and entered into force on 23 October 1986.

African Commission on Human and Peoples' Rights (African Commission or Commission),² the African Court on Human and Peoples' Rights (African Human Rights Court or Court) was inaugurated to complement the African Commission in the protection of human rights in Africa.³ The inauguration of the Court was the conclusion of a long and eventful journey that began with the call by the African Conference on the Rule of Law held in Lagos, Nigeria, in 1961 for the 'creation of a court of appropriate jurisdiction' to safeguard human rights on the African continent.⁴ As noted by commentators, the events following the Lagos conference led to the adoption of the African Charter in which the issue of creating a court was carefully avoided.⁵ Instead of a court, it was decided to 'concentrate on the establishment of an African Commission on Human and Peoples' Rights.'⁶ The African Commission was thus established by the African Charter and remained as its sole supervisory body until June 1998.

As a result of pressure from different quarters, but mostly following civil society criticisms that trailed the work of the African Commission, the stage was set for the Organisation of African Unity (OAU), now the African Union (AU), to give serious thought to the establishment of an African human rights court.⁷ Beginning with the production of a 'draft protocol' for an African court by Karel Vasak in 1993, at the request of the International Commission of

- 2 The Commission is established under art 30 of the African Charter and was inaugurated on 2 November 1987. See NJ Udombana *Human rights and contemporary issues in Africa* (Lagos: Malthouse Press, 2003) 125–126 for a detailed discussion of the structure and functions of the African Commission.
- 3 The first set of 11 judges of the African Court was elected on 22 January 2006 at the Eighth Ordinary Session of the Executive Council of the African Union. The Court had its first meeting in July 2006 and its second meeting from 18 to 21 September 2006. At this second meeting, the Court elected its first President and Vice President respectively, in accordance with art 21 of the Court's Protocol.
- 4 The conference was convened by the International Commission of Jurist and was attended by participants from around Africa. See Law of Lagos, reprinted in (1961) 3 *Journal of International Commission of Jurists* 9.
- 5 See eg J Harrington 'The African Court on Human and Peoples' Rights' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2000* (Cambridge: Cambridge University Press, 2003) 305, 309.
- 6 NB Pityana 'Reflections on the African Court on Human and Peoples' Rights (2004) 4(1) *African Human Rights Law Journal* 121.
- 7 The OAU which was established by the Charter of the Organisation of African Unity in 1963 was succeeded by the African Union (AU) in 2001. The Constitutive Act of the African Union (AU Act) was 'accepted' in July 2000 and entered into force in May 2001. Text of the AU Act is reprinted in C Heyns and M Killander (eds) *Compendium of key human rights documents of the African Union* (Pretoria: PULP, 2006) 4. All reference to the OAU in the African Charter would be read as the AU in this article.

Jurists, the march towards an African human rights court began in earnest.⁸ After a ‘prolonged’ drafting process, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Court’s Protocol)⁹ was adopted in June 1998 by the defunct OAU. It took nearly six more years for the Court’s Protocol to enter into force. Since then, other events have occurred, most important of which is the adoption of a protocol by African heads of state and government in 2008 to merge the African Human Rights Court with the African Court of Justice established by the Constitutive Act of the African Union to form a single court to be known as the African Court of Justice and Human Rights (African Court of Justice).¹⁰

Despite the length of time involved in the drafting of the Court’s Protocol, not every situation was covered in the Protocol and commentators have identified several shortcomings in its text. While some of these may have been legitimate accidental omissions, it has been suggested that others were deliberate omissions intended to give the African Court the opportunity to address them through its rules of procedure.¹¹ One gaping omission in the Court’s Protocol relates to the question of the admissibility of cases before the Court under its contentious jurisdiction.¹² As Ouguergouz notes about the Protocol, ‘the least that can be said is that the way it deals with this important matter (admissibility of applications) is not very satisfactory owing to its lack of clarity.’¹³ This lack of clarity is amplified by the uncertainty in the manner in which the Court’s Protocol addresses the relationship between the Court and the African Commission.¹⁴ Considering that admissibility is the first major procedural issue that litigants face, there is need for a proper understanding of the rules governing this issue.

8 See Harrington, above note 5, 308 for a detailed presentation of the drafting process.

9 OAU Doc OAU/LEG/AFCHPR/PROT (III), entered into force 25 Jan 2004.

10 The Court of Justice of the AU is established as one of the organs of the AU in the AU Act but the Protocol of the Court of Justice of the AU was adopted in 2003. By the Protocol adopted in July 2008, the African Human Rights Court is to be merged with the Court of Justice of the AU to form the African Court of Justice and Human Rights. This Protocol is yet to enter into force.

11 See for eg IAB Elsheikh ‘The future relationship between the African Court and the African Commission’ (2002) *African Human Rights Law Journal* 252, 253.

12 See art 3 of the Court’s Protocol. Art 4 of the Court’s Protocol confers advisory jurisdiction on the Court: advisory opinions may be sought by a member state of the AU, the AU or any of its organs, or any African organisation recognised by the AU.

13 F Ouguergouz *The African Charter on Human and Peoples’ Right* (The Hague: Martinus Nijhoff Publishers, 2003) 729.

14 R Murray ‘A comparison between the African and the European Courts of Human Rights’ (2002) *African Human Rights Law Journal* 195, 196 also takes the view that the Protocol does not address the relationship of the African Court and the African Commission adequately.

Expectedly, the African Human Rights Court took the opportunity of addressing this issue in the rules of procedure contained in its interim rules of court (Rules of the African Human Rights Court or Rules of Court).¹⁵ At first glance, the rules on admissibility may appear to be adequate as they do not differ much from the explicit provisions of the African Charter and the Court's Protocol, yet they leave huge gaps. Moreover, the new rules do not contemplate the merger of the Court with the Court of Justice of the AU. Accordingly, this article tries to analyse the question of the admissibility of cases before the African Human Rights Court from the perspective of the African Charter, the Court's Protocol and the Rules of Procedure of the African Human Rights Court. It also briefly considers the question of admissibility in the event of a merger between the African Human Rights Court and the Court of Justice bearing in mind the aforementioned documents and the Statute of the African Court of Justice and Human Rights.

The article will briefly reiterate the requirements for admissibility under the African Charter and examine the issue of standing before the Court as provided in the Protocol. The requirements for admissibility under the Charter are relevant to the extent that they are also the conditions for admissibility before the African Human Rights Court. In view of the literature that already exists on the conditions for the admissibility of individual complaints under the Charter, more attention will be paid to conditions for the admissibility of inter-state complaints.¹⁶ The question of admissibility will be approached from the perspective of the entity bringing a case before the Court. The article draws lessons from the experience of both the European¹⁷ and Inter-American human rights systems, taking into consideration the unique features of the African Charter and African socio-political and economic conditions.

15 The Rules of the Court were adopted in June 2008. Rule 40 thereof addresses the issue of admissibility.

16 For the admissibility of individual complaints, see F Viljoen 'Admissibility under the African Charter' in Evans and Murray, above note 5, 61. Also see Ouguergouz, above note 13, 589 and S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3(1) *African Human Rights Law Journal* 118.

17 It has been noted that the inter-state complaint mechanism under the European system is the most developed. SC Prebensen 'Inter-state complaints under treaty provisions – The experience of the European Convention on Human Rights' in G Alfredsson & Others (eds) *International human rights monitoring mechanisms* (The Hague: Martinus Nijhoff Publishers, 2001) 534.

II THE REQUIREMENTS FOR ADMISSIBILITY UNDER THE AFRICAN CHARTER

Since the African Charter empowers the African Commission to receive communications from states in what is termed ‘inter-state’ complaints,¹⁸ and from non-state entities in other communications (what is now termed ‘individual’ complaints),¹⁹ there are two sets of admissibility requirements for the submission of communications under the African Charter. These will be considered separately in this article.

A The admissibility of inter-state communications

The requirements for the admissibility of communications initiated by states are contained in articles 47 to 50 of the African Charter. According to these provisions, there are two different ways by which a state communication may be brought. The first option is contained in articles 47 and 48 of the Charter. These require a state party alleging a violation of the African Charter to notify, by way of a written communication, the state alleged to be responsible for the violation of such action. By article 48, if the parties are unable to settle the issues under article 47 within three months of the original communication, either of the two states can submit the matter to the African Commission. The communication to the African Commission has to be sent through the Chairperson of the Commission with notice to the opposing state.²⁰

The second option as contained in article 49 is that, in total disregard of the procedure in article 47, a state may elect to send a complaint of a violation of the Charter directly to the African Commission through its Chairperson. Article 50 of the Charter provides that the African Commission can only treat a matter under the state communication procedure after it has made sure that all local remedies have been exhausted.²¹ This requirement may be waived

18 Art 47 of the African Charter.

19 Art 55 of the African Charter. Although there is no express power conferred on the Commission to receive individual communications, the Commission has in practice tended to rely on art 55 of the Charter. In *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), the respondent government challenged the Commission’s competence to receive individual complaints but the Commission ruled that it had the competence to do so.

20 See Ouguergouz, above note 13, 576–581 on the admissibility of state communications.

21 An innovation sought to be introduced by rule 90 of the 2009 interim (new) Rules of the African Commission (on file with this author) is that states submitting inter-state communications should add information on measures taken to exhaust regional or international procedures of settlement or good offices and other procedures of international investigation or international

where local remedies do not exist or are likely to be unduly prolonged. The provisions in articles 47 to 50 of the African Charter remained largely theoretical as there were no inter-state communications for much of the Commission's existence. However, in 1999, the Democratic Republic of Congo (DRC) initiated a complaint against Burundi, Rwanda and Uganda.²² In this case, the African Commission took the opportunity to give its interpretation of the inter-state communication procedure as contained in the Charter.

Reacting to the objections raised by Rwanda and Uganda to the admissibility of the communication filed by the DRC, the African Commission took the view that the provisions of article 47 and 48 of the Charter, as read with rules 88 to 92 of the Commission's Rules of Procedure, were simply aimed at conciliation between states.²³ In the Commission's opinion, the procedure in article 47 is 'permissive and not mandatory' and either party may initiate proceedings where the attempt at settlement fails.²⁴ The African Commission decided further that a state initiating a complaint under article 47 is required to address the complaint to the Chairperson and to notify the respondent state in order to avoid states springing surprises on other states.²⁵ In the Commission's view, a failure to notify the respondent state of the submission of the complaint is not fatal as the Commission itself would notify the state.²⁶ Where the initiating state prefers not make contact with the respondent state and decides to approach the African Commission via the article 49 procedure, the original written communication must be addressed simultaneously to the Commission (through the Chairperson), the Secretary-General of the OAU (AU) and the respondent state.

Apart from the requirements relating to (what one may term) 'appropriate channels of communication' and the 'three months time limit' in article 48, the only other admissibility prerequisite appears to be the requirement to

settlement that have been attempted. One cannot avoid the feeling that these are intended to replace the requirement to merely show evidence of exhaustion of local remedies. It is difficult to conceive of local remedies that states could exhaust. The addition of a requirement to indicate what international mechanisms have been attempted is a more realistic issue relative to complaints brought by states and the emergence of sub-regional mechanisms make this innovation desirable. The innovation appears to be hinged on art 51 of the Charter which allows the Commission to ask for relevant information.

22 *DR Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) (*DRC Communication*).

23 See the *DRC Communication*, above note 22, para 57.

24 As above, para 58.

25 As above, paras 59 and 60.

26 As above, para 60.

exhaust local remedies. In the circumstances of the *DRC Communication*, the African Commission decided that local remedies did not exist and ‘the question of their exhaustion did not, therefore, arise.’²⁷ While article 52 requires the African Commission to prepare a report for submission to the Assembly of Heads of State and Government as well as to the states concerned after attempts at amicable settlement have failed, it is doubtful if this applies to the procedure in article 49 as article 52 makes express reference to article 48.²⁸ At least in the opinion of the African Commission, article 52 was not applicable in the *DRC Communication*.²⁹

B The admissibility of other communications

Article 56 of the African Charter contains seven conditions for the admissibility of ‘other communications’.³⁰ We shall discuss these in turn.

1 *Indicate the author of the communication*³¹

Under article 56(1) of the African Charter, the identity of the author of a communication has to be indicated even if the author requests anonymity. The requirement here is simply that the author’s identity should be known but not necessarily that the author should be the victim of the alleged violation.³² Viljoen suggests that these provisions should be ‘understood broadly to include full particulars to enable the Commission’s Secretary to remain in touch with the author.’³³ This condition may also be relevant to bar applications that are lodged for purely political or propagandist reasons.³⁴ With respect to NGOs, the African Commission has taken the view that article 56(1) is satisfied if the complaint ‘bears ... the name of one of the organisation’s

27 As above, para 63.

28 Ouguergouz, above note 13, 718–719.

29 *DRC Communication* above note 22, para 61.

30 It is significant to point out that art 56 is addressed to the Commission because in a recent human rights case before the ECOWAS Community Court of Justice, a preliminary objection on the exhaustion of local remedies as required by the African Charter was rejected on the ground that the reference in the Charter was aimed at the African Commission. See the case of *Professor Etim Moses Essien v The Republic of the Gambia and another* Suit No ECW/CCJ/APP/05/05 (delivered on 14/3/07) (unreported).

31 Generally see *Bariga v Nigeria* Communication (2000) 178 (ACHPR 1994).

32 See Ouguergouz, above note 13, 592.

33 Viljoen, above note 16, 67.

34 This is one of the explanations for the equivalent provision in the ECHR. See P van Dijk and GHJ van Hoof (eds) *Theory and practice of the European Court of Human Rights* (The Hague: Kluwer Law International, 1998) 109.

representatives.³⁵ However, as expressly provided in the Charter itself, an applicant may request his identity to be kept secret during the proceedings.

2 *Compatibility with the African Charter or OAU Charter*³⁶

Article 56(2) of the African Charter provides that a communication should be 'compatible with the Charter of the Organisation of the African Unity or with the present Charter.' This condition raises certain issues that may appear irreconcilable. As Viljoen points out, it literally gives the impression that a communication may be compatible with either the Constitutive Charter or the African Charter.³⁷ If this were the intention, there would be difficulty in situations where the two Charters are mutually exclusive. The compromise evident in the literature is that 'or' in the provision should be read conjunctively so that a communication has to be compatible with the Constitutive Charter of the AU and the African Charter.³⁸ Proceeding from the compromise of a conjunctive reading, compatibility with the Constitutive Charter would require, inter alia, respect for the principles of the AU as contained in article 4 of the AU Act. In relation to the African Charter, compatibility would require that the alleged violation should relate to a right recognised in the Charter,³⁹ to an alleged violation by a state party to the Charter, and to events that occurred within Africa after the Charter came into force.⁴⁰

3 *Language*

Under article 56(3), a communication brought before the African Commission should not be in disparaging or insulting language against the state concerned, its institutions or the OAU (AU). Some commentators have

35 *Interights v Eritrea and Ethiopia* (2003) AHRLR 74 (ACHPR 2003).

36 Art 56(2) refers to compatibility 'with the OAU Charter' or the African Charter but considering that the AU has succeeded the OAU, the actual language of the Charter is slightly modified in this art as has been done in the interim Rules of both the African Human Rights Court and the African Commission. On the requirement of compatibility, see generally *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

37 Viljoen above note 16, 68.

38 See, eg, Ouguergouz, above note 13, 593, arguing that the 'two conditions are cumulative and not exclusive and the compatibility must therefore be assessed with respect to both of these instruments at once.'

39 It is also possible to plead rights which have not been expressly enshrined in the Charter as long as it can be shown that such rights are impliedly protected in the Charter. See *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

40 See Viljoen, above note 16, 69. Also see Ouguergouz, above note 13, 593.

described this provision as a unique or original condition,⁴¹ whose aim is ‘to ensure respect for the state parties and their institutions as well as the African Union.’⁴² In *Ligue Camerounaise des Droits de l’Homme v Cameroon*, the fact that the allegations were ‘posed in disparaging and insulting language’ was cited by the African Commission as one of the reasons for declaring the communication inadmissible.⁴³

However, in *Bakweri Land Claims v Cameroon*,⁴⁴ the Respondent’s objection that ‘the communication cast such suspicions and aspersions on the Cameroonian judicial system and hence could be considered insulting under article 56(3) of the African Charter’ was rejected.⁴⁵ In rejecting the respondent’s objection, the African Commission held that it was ‘nothing but a mere allegation depicting, as it perceives it, the complainant’s comprehension of the offices it thought would not provide it with any remedies as the African Commission would demand.’⁴⁶ In the more recent *Ilesanmi v Nigeria*,⁴⁷ part of the objection raised by the respondent state was that the complaint to the Commission was written in ‘unbecoming language to unjustly and baselessly vilify leaders.’⁴⁸ The African Commission, relying on the definition of the Oxford Advanced Learners Dictionary of ‘disparaging’ and ‘insulting,’ stated that the offending words must be ‘aimed at undermining the integrity and status of the institution, and bring it to disrepute.’⁴⁹ In declaring the communication inadmissible, the Commission explained that while it has a duty to ‘protect the rights of individuals,’ it also has an obligation ‘to ensure that those institutions established within state parties to facilitate the enjoyment of these rights are also respected by the individuals.’⁵⁰

4 Source of information

By the provisions of article 56(4), a communication that is based exclusively on news gotten from the mass media is not admissible. Commentators seem to be in agreement that this provision serves as a

41 Ouguergouz, above note 13, .596.

42 Gumedze, above note 16, 130.

43 *Ligue Camerounaise des Droits de l’Homme v Cameroun* (2000) AHRLR 61 (ACHPR 1997).

44 *Bakweri Land Claims v Cameroon* (2004) AHRLR 43 (ACHPR 2004).

45 As above, 53.

46 As above.

47 (2005) AHRLR 48 (ACHPR 2005).

48 As above.

49 As above 27.

50 As above.

counterweight to the extensive rules of standing in the system.⁵¹ Considering that there is no 'victim' requirement for authors of communications, this provision serves as a filter mechanism of some sort, preventing situations where a person or body without any personal knowledge of the facts file a communication before the African Commission.

5 *Exhausting local remedies*

The requirement to exhaust local (or domestic) remedies available in a state before approaching international judicial or quasi-judicial institutions against that state is widely recognised by all major human rights treaties. Under the African Charter, this condition is stipulated in article 56(5). According to this article, such remedies must be exhausted unless it is obvious that this procedure will be unduly prolonged. This admissibility requirement has been the most contested of all the admissibility conditions in the Charter. In interpreting this provision, the Commission has basically followed the dictum of the ICJ in the *Interhandel Case*.⁵²

However, the Commission has also stressed that international mechanisms are not substitutes for the domestic implementation of human rights but are tools to assist the domestic protection of rights.⁵³ The jurisprudence of the African Commission over the years gives a clear indication of what is required under article 56(5) of the Charter. In recognition of the fact that remedies for human rights violations are either non-existent or illusory in some states, the Commission has emphasised that local remedies to be exhausted must be available, effective and sufficient.⁵⁴ The remedies provided by the state should be ordinary remedies of a judicial nature and normally be accessible to people.⁵⁵ It is also expected that the procedure for accessing the local remedies should not be unduly prolonged

51 Viljoen, above note 16, 80. Also Ouguergouz, above note 13, 599. In *Jawara v The Gambia*, above note 19, the African Commission stated that the emphasis in this requirement was on the word 'exclusive.' It therefore means that the provision does not exclude reference to media reports in proof of a case.

52 *Interhandel Case (Switzerland v USA)* ICJ Reports (1959) 25. The ICJ recognised the requirement to exhaust local remedies as a well established rule of customary international law aimed at first giving the state where violations of rights have occurred an opportunity to redress the alleged wrong by its own means within its domestic legal system before such a matter is brought to an international forum. See also *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

53 *Ilesanmi v Nigeria*, above note 47, 27.

54 As above. See also *Jawara v The Gambia*, above note 19.

55 *Interights and others v Mauritania* (2004) AHRLR 87 (ACHPR 2004). See also *Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999).

and complex.⁵⁶

6 *Be submitted within reasonable time*

Under article 56(6) of the African Charter, communications have to be submitted ‘within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.’ It is not clear what the drafters intended to say in the second limb of this article. If the Commission is already seized of the matter, it would mean that the communication has been admitted; so this provision appears to be redundant.⁵⁷ Be that as it may, the provisions in this sub-article do not set any time limit for the submission of communications and, as such, give the Commission the discretion to determine what amounts to a ‘reasonable time.’⁵⁸ In *Rabah v Mauritania*,⁵⁹ Commissioner Yasir Sid Ahmed El Hassan, in his dissenting opinion on the admissibility of the communication, held that six years between the submission of the communication and the delivery of judgment by the Supreme Court of Mauritania constituted ‘an unreasonable period in term of article 56(6) of the African Charter.’⁶⁰

7 *Res judicata*

By the provisions of article 56(7), a communication will only be admissible before the African Commission if it does not deal ‘with cases which have been settled by the states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity (presently the AU) or the provisions of the present Charter.’ Viljoen equates article 56(7) to the principle of *res judicata* (*autrefois acquit* or *autrefois convict*).⁶¹ He argues that this provision does not preclude the simultaneous submission of cases before the African Commission and a UN treaty body but obliges the complainant to be bound by the first decision so that it eliminates the possibility of ‘divergent conclusions.’⁶²

The decisions of the African Commission in applying this sub-article have not been very helpful in the analysis of the provisions.⁶³ Whatever the

56 *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR).

57 *C/f Ouguergouz*, above note 13, 611.

58 See also *Gumedze*, above note 16, 134.

59 *Rabah v Mauritania* (2004) AHRLR 78 (ACHPR 2004).

60 As above, 84. The majority did not take this view.

61 Viljoen, above note 16, 92.

62 As above. For an application of these provisions, see *Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997).

63 See, eg, *Mpaka-Nsusu v Zaire* (2000) 71 (ACHPR 1994).

interpretation given to article 56(7), it is obvious that it does not expressly refer to cases which have been 'settled' by judicial organs of the regional economic communities (RECS) in Africa. This leaves open the question whether cases already determined by judicial organs of RECs are admissible, especially since decisions of such organs are supposed to be final and binding. As RECs are not specifically established for the purpose of human rights protection, it may be desirable to give room for reference of cases from judicial bodies of RECs without necessarily opening a channel of appeal to the continental institutions.

III STANDING BEFORE THE AFRICAN HUMAN RIGHTS COURT

Article 5 of the Court's Protocol governs the right of access to the African Human Rights Court. Commentators seem to agree that this article provides for two types of access: access as of right and discretionary access.⁶⁴ Although article 5(2) also grants access to state parties by way of a right to apply to be joined to a case already before the Court, that provision is not relevant to the present discussion as it is not a right to initiate an action before the Court.

The right of access to the Court is granted by article 5(1) to the African Commission; the state which has lodged a complaint to the Commission; the state party against which the complaint has been lodged at the Commission; the state party whose citizen is a victim of a human rights violation; and African intergovernmental organisations.

Considering that the African Commission has competence to receive complaints from both state parties and non-state entities, it is expected that the Commission will exercise its power to submit both inter-state and 'other communications' to the Court. However, there is no clue as to when the Commission should submit such communications to the Court.⁶⁵ This lacuna can be a source of disputes between parties on the one hand and parties and the African Commission on the other hand. While it has been suggested that article 8 of the Protocol requires that the rules of the Court should indicate when cases should be brought before it 'bearing in mind the complementarity between the Commission and the Court',⁶⁶ the Court has failed to address this

64 For eg RW Eno 'The jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223, 229; Ouguergouz, above note 13, 717. Rule 33 of the Rules of the African Human Rights Court dealing with access to the court is essentially a reproduction of art 5 of the Court's Protocol. It sets out a list of entities entitled to file cases before the court.

65 Ouguergouz, above note 13, 719.

66 See Murray, above note 14, 199 also citing art 29(1).

issue in its interim rules. Rule 29 of the Rules of the African Human Rights Court dealing with the relation between the Court and the African Commission is completely silent on the point.⁶⁷ This would mean that the Commission might still decide to reach a decision and only submit the case in the event of a failure by the respondent state to comply with the decision.⁶⁸

With respect to the right of access by states to the Court, there are three possible entry points. A state can access the Court if it is either the complainant state or the respondent state in a complaint before the Commission. In either of these cases, a complaint involving the state should be brought before the Commission before it is taken to the Court.⁶⁹ It could be argued that the complaint in question may relate to the legislative or administrative practices of the respondent state (as is the case in the European system)⁷⁰ as well as to the rights of the citizens of the complainant state or respondent state. What is unclear is the purpose of article 5(1)(d), which deals with the third entry point – the standing of a state party alleging a violation of the rights of its citizens. It seems as if such a state does not need to submit the complaint to the African Commission before approaching the Court.⁷¹ If the requirement to submit the complaint before the Commission does not apply to complaints by states

67 This rule requires the African Commission to transmit to the Court the Commission's reports and all relevant documents concerning cases the Commission files with the Court. It also allows the Court to hear representatives of the Commission if the Court considers it necessary. Restating its right to solicit the opinion of the Commission on admissibility, the rule permits the Court to consult the Commission on procedural matters relating to the relationship between the two institutions. Considering the importance of the African Commission to the work of the Court, it is not clear why very little attention has been paid to ironing out the nature of the relationship between the two in the Court's Rules.

68 The procedure of the Inter-American system is instructive in this regard. See S Davidson *The Inter-American human rights system* (Dartmouth: Aldershot, 1997) 204, who notes that the Inter-American Commission is mandated to handle case to find a friendly settlement, failing which it must submit the case to the Inter-American Court subject to the fulfilment of all the other conditions. Rule 119 of the 2009 Interim Rules of the African Commission dealing with access to the African Court suggests that the Commission intends to submit cases only after states fail to comply with the Commission's own recommendations or where there is a situation of massive violations under art 58 of the Charter. The danger is that the Court may be dormant for as long as states are willing to comply with the recommendations of the Commission. Rule 119 (1) states 'if the Commission has take a decision with respect to a communication submitted under art 48, 49 or 55 of the Charter against a State party that has ratified the Protocol on the establishment of the African Court, and the Commission considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in rule 115, the Commission shall refer the communication to the Court and inform the parties accordingly.'

69 Ouguergouz, above note 13, 719.

70 See *Ireland v The United Kingdom*, judgment of 18 January 1978, European Court of Human Rights, Ser A, No 25.

71 Ouguergouz, above note 13, 720, who argues that art 5(1)(d) is broad enough to be interpreted in this manner.

alleging violations of the rights of citizens, there would be an unjustifiable disparity between these and other communications by states discussed above. Unfortunately, the interim rules of the Court do not provide any guidance on this point.

The last paragraph relating to access to the Court as of right refers to African intergovernmental organisations. The Protocol does not define what organisations would fall in this category; hence it can accommodate AU bodies like the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) as well as regional economic communities such as the Economic Community of West African States (ECOWAS). While it is possible to expect the ACERWC bringing a complaint to the Court against a state party to the African Charter on the Rights and Welfare of the Child as part of the overall AU mechanism, it is not so easy to predict how bodies like ECOWAS can bring cases other than requests for advisory opinions. It is also not clear what conditions need to be fulfilled for such bodies to bring cases. This is another area which needed some clarification in the Rules of the Court.⁷²

Article 5(3) grants a qualified right of access to the Court to individuals and NGOs with observer status before the African Commission. The discretion to grant access under this article lies with the Court. In exercising this discretion, the Court has to ensure first that the prospective respondent state has made a declaration in accordance with article 34(6), accepting the competence of the Court to receive a direct complaint under article 5(3). With respect to NGOs, the Court must also be satisfied that the NGO has an observer status before the African Commission. Even if these conditions are fulfilled, the Court may still deny access to an individual or NGO.⁷³ Giving the Court such broad discretion is, to say the least, potentially precarious as there is a risk of 'powerful' states interfering with the decision of the Court in politically volatile cases.

IV ADMISSIBILITY BEFORE THE AFRICAN COURT

A Introduction

As already noted, admissibility is usually the first 'obstacle' prospective

72 For instance, art 30 of the Protocol on the Statute of the African Court of Justice and Human Rights expressly lists bodies such as the ACERWC and national human rights institutes as entities entitled to submit cases before the African Court of Justice and Human Rights.

73 Art 5(3) of the Court's Protocol. Rule 33 of the Rules of the Court acknowledges the requirement of the art 34 (6) declaration but does not indicate a discretion where the declaration has been made.

litigants must overcome for their cases to be entertained. Important as it is, the Court's Protocol and the Rules of the Court devote very little space to it. The only specific mention of admissibility in the Court's Protocol is in article 6. This article allows the Court to consider the views of the African Commission when determining the question of admissibility as well as to consider article 56 of the African Charter. Article 6 is not comprehensive enough to cater for all the possible cases that the Court will be faced with. It could be argued that the Court has broad discretion to lay down detailed conditions under which it will consider cases, but the issue of the workable relationship between the Court and the Commission remains a sticking point. The question is – which body should be responsible for determining the admissibility of cases before the Court? Also important is the question relating to who should have the onus of demonstrating that a given case has satisfied the conditions for admissibility in each situation listed in article 5. Against expectations, the interim Rules of the Court have also failed to engage with these issues. Although it contains a general statement on the right of the Court to examine its own jurisdiction and the admissibility of cases,⁷⁴ the Rules merely reproduce the conditions for admissibility in article 56 of the African Charter without more.⁷⁵ These issues will be the focus of discussion in the remaining part of this article.

Before the Court became operational, there was some confusion as to what conditions should be considered in determining the admissibility of a case under each sub article and paragraph of article 5. In her treatment of the question of admissibility before the Court, Harrington stated that:

Article 6, 'Admissibility of cases,' refers to article 56 of the Charter, making admissibility conditions the same for both bodies. The only peculiarity is the possibility that article 6 leaves it open for the Court to 'request the opinion of the Commission' on the admissibility (article 6(1) of cases or to 'transfer them to the Commission' (article 6(3)). These provisions seem inappropriate for communications referred by the Commission and thus, presumably, already found admissible and fully considered. Thus, these provisions must be intended to apply to communications brought by states, or by whatever NGOs are eligible, directly to the Court under articles 5(1)(b), (c), (d) and (e), 5(3) and 34(6).⁷⁶

One cannot agree more that the conditions in article 56 are as applicable in certain cases before the Court as they are before the Commission. Rule 40 of

74 See rule 39 of the Rules of the Court, which states that the Court shall conduct a preliminary examination of its jurisdiction and admissibility in accordance with arts 50 and 56 of the African Charter and rule 40 of the Rules of the Court.

75 See rule 40 of the Rules of the Court reproduced on the following page.

76 Harrington, above note 5, 322.

the Rules of the Court affirms this position. It states as follows:

Pursuant to the provisions of article 56 of the Charter to which article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

- (1) disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
- (2) comply with the Constitutive Act and the Charter;
- (3) not contain any disparaging or insulting language;
- (4) not based exclusively on news disseminated through the mass media;
- (5) be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- (6) be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
- (7) not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African union, the provisions of the Charter or any legal instrument of the African Union.

The follow-up question however is whether these are the same conditions that should apply to cases brought by states (in any of the three capacities previously identified) and to cases brought by the African Intergovernmental Organisations. A *prima facie* reading of rule 40 gives the impression that the provisions of article 56 of the African Charter apply to all applications before the Court. Notwithstanding the provisions in the Rules, as regards state communications, it is doubtful whether the provisions of article 6(2) requiring the Court to take the admissibility conditions in article 56 of the African Charter into account in considering the admissibility of cases should apply, as the African Charter itself does not make article 56 applicable to state parties.⁷⁷ In relation to Intergovernmental Organisations, considering that the Charter does not make any clear provisions for cases from those bodies, and as it is likely that if they have to initiate cases before the Court, it would be on behalf of an individual or a group of individuals, the provisions in article 56 could be applicable. With respect to cases brought by the individual, the relevant NGOs or the Commission on behalf of an individual, there is no doubt that the admissibility conditions in article 56 of the Charter apply. The difficulty in the Rules in this regard could have been avoided had the Rules provided for separate procedures for inter-state communications under

⁷⁷ Also Ouguergouz, above note 13, 731–732.

articles 48 and 49 of the Charter on the one hand, and individual communications under article 55 of the Charter on the other hand.⁷⁸

The other part of the admissibility puzzle arises out of the second limb of article 6(1) of the Court's Protocol which allows the Court to seek the opinion of the African Commission in deciding admissibility and from article 6(3) which allows the court to consider the transfer of cases to the Commission. As Harrington rightly notes, there is a possibility for the Court to request the opinion of the Commission on admissibility or transfer cases to the Commission. She immediately points out that this cannot apply to cases referred by the Commission.⁷⁹ These possibilities suggest that the Court should be guided by the admissibility decisions of the Commission. The dilemma that arises is whether this means that the cases referred by the Commission would no longer attract a consideration of admissibility by the Court. Viljoen argued that 'the Court is mandated to (re)consider the question of admissibility under article 6(2) of the Protocol.'⁸⁰ Viljoen's view has received support from rule 39 of the interim Court's Rules by which the Court permits itself to conduct a preliminary examination of its own jurisdiction and the admissibility of any application. But it also raises other complications. For example, if the Commission's opinion on admissibility could be good enough for the Court to seek it under article 6(1) or even transfer a case to it under article 6(3), one wonders why the Court would be re-considering a case brought by the Commission when admissibility has already been considered. In order to analyse these issues critically, the question of admissibility under each paragraph of article 5 of the Protocol will be examined separately.

B Cases brought by the African Commission

In relation to inter-state cases, the Commission should determine whether the admissibility conditions applicable to the procedures under articles 48 and 49 of the Charter have been satisfied.⁸¹ Similarly, with respect to cases initiated by individuals or NGOs, the Commission has to make a determination under article 56 of the Charter. The Charter does not permit the Commission to entertain a communication without addressing the question of admissibility.

78 The approach of the African Commission in this regard is preferable.

79 Harrington, above note 5, .322.

80 Viljoen, above note 16, 95.

81 Rules 90 of the Interim Rules of the Commission requires communications to be accompanied with information on measures already taken in respect of a matter and 91(4) of the interim rules which requires the rapporteurs in cases before the Commission to prepare reports on admissibility of communications support this position.

By rule 39 of the Rules, the Court has the power to examine the scope of its own jurisdiction and the admissibility of every case. While the Court's authority in this regard cannot be questioned, one has to wonder about the justification for reopening the admissibility consideration if the respondent state has not raised a challenge on the point. Further, there is the question of who should bear the onus of demonstrating that the admissibility conditions have been satisfied. Rule 39(2) of the Rules of the Court provides that the Court may request the parties to furnish any factual information. What is not clear is whether the term 'parties' refers strictly to states and the alleged victim or whether it also includes the African Commission where the Commission has submitted a case.⁸² In any event, the Commission would have submitted a full report at the point of referring the case to the Court; it would thus be unnecessary to require the Commission to make submissions on admissibility.

Perhaps the earlier practice of the European system may provide useful lessons here. Murray has suggested that 'where the African Commission submits a case to the Court under article 5(1), it may be instructive to compare its European counterpart's subsequent role in the Court proceedings,' especially in view of the need for consistency between the two organs.⁸³ Consistency here need not be that the Court must agree with the decision of the Commission but rather that there should be compelling evidence of misinterpretation or misapplication of the admissibility requirements to warrant the Court to take a differing position. According to Murray, it is the European Commission on Human Right (ECmHR) that decided on the admissibility of cases before the European Court.⁸⁴ Tomuschat agrees with this observation.⁸⁵ Under the pre-1998 European system, no appeal could lie against the admissibility decision of the ECmHR where the decision was in the affirmative. On the other hand, where the decision was that the case was admissible, the ECmHR itself (following the appropriate procedure) could reverse the decision when it was evident that the relevant conditions for

82 The confusion is not helped by the Commission's Interim Rules as they also fail to clarify the role of the Commission in the admissibility consideration of the Court. Rule 124(1)(a) provides that the Commission shall invite the complainant to pursue a case that the Commission has submitted even though rule 124(1)(b) allows the Commission to appoint a rapporteur to represent it before the Court.

83 Murray, above note 14, 202.

84 Murray, above note 14, 203

85 C Tomuschat *Human Rights: Between idealism and realism* (Oxford: Oxford University Press, 2003) 5.

admissibility had not been fulfilled.⁸⁶ Kriiger has noted that the effect of this decision was that the proceedings were terminated and the European Convention did not provide for any means for the issue to be reopened either by the ECmHR itself or by way of an appeal to another body. However, such a decision did not preclude a new application upon the discovery of new facts.⁸⁷

It must be pointed out that this approach of the old European system appears to have unduly favoured the respondent states against the applicants. Should this be adopted under the African system, there is a high risk of abuse in favour of states. In this regard, the rule providing for the resubmission of communications and the review of admissibility decisions in the light of new evidence is a welcome development.⁸⁸ However, by the operation of the rules of the African Human Rights Court, states retain undue advantage in the sense that they can prompt the Court to revisit the admissibility decision of the Commission whereas individuals and NGOs do not have such opportunities. This perhaps provides a strong motivation for expanding the scope of access by individuals to the Court.

Nevertheless, it must be pointed out further that although the decision of the ECmHR on admissibility was seemingly final, there were cases in which the European Court of Human Rights (ECtHR) reopened such decisions. While it recognised the competence of the ECmHR and took the view that admissibility questions had to be raised before the ECmHR first, the ECtHR also felt that it was competent to determine the admissibility of a case brought before it.⁸⁹ Merrills interpreted this not to mean that the ECtHR had ‘usurped the functions of the Commission’ but that the ECtHR had merely reserved a right to be the final arbiter of the scope of the European Convention.⁹⁰ The Belgian government prompted this role of the European Court in the ‘*Vagrancy*’ Cases.⁹¹ The Belgian government had invited the ECtHR to pronounce on the admissibility of the complaints to which the case related, and to declare these complaints inadmissible for failure to comply with the conditions contained in the old article 26 of the European Convention. The ECmHR’s reaction was that the Court had no jurisdiction. In resolving the

86 Van Dijk and van Hoof, above note 34, 107.

87 HC Kriiger ‘The European Commission of Human Rights’ (1980) 1 *Human Rights Law Journal* 66.

88 Rule 110(2) of the 2009 Interim Rules of the Commission.

89 See *De Wilde, Ooms and Versyp v Belgium* (‘*Vagrancy*’ Cases) Series A, No 12, [1971] 1 ECHR 373. Also see van Dijk and van Hoof, above note 34, 107.

90 JG Merrills *The development of international law by the European Court of Human Rights* (1993) 10 as cited by Murray, above note 14, 198.

91 *Vagrancy Cases*, above note 89.

dispute, the ECtHR concluded that ‘once a case is duly referred to it ... the Court is endowed with full jurisdiction and may thus take cognisance of all the questions of fact and of law which may arise in the course of the consideration of the case.’⁹² It therefore was impossible to see how questions concerning the interpretation and application of article 26 raised before the Court during the hearing of the case could fall outside its jurisdiction.

In *Airey v Ireland*, the ECtHR stated that:

The Court has established two principles in this area. One is that the Commission’s decisions by which applications are accepted are without appeal; the other is that, once a case is referred to it, the Court is endowed with full jurisdiction and may determine question as to admissibility previously raised before the Commission. ... A combination of these principles shows that, when considering such questions, the Court is not acting as a court of appeal but is simply ascertaining whether the conditions allowing it to deal with the merits of the case are satisfied.⁹³

This decision of the ECtHR was not received without some controversy. Within the Court itself, at least four judges gave dissenting opinions in which they separately took the view that the Court should not have reopened the question of admissibility of a case referred by the Commission, where the Commission had already made a decision on admissibility.⁹⁴ The dissenting judges were of the opinion that the Convention did not give the Court jurisdiction as a court of appeal over the Commission.⁹⁵ In their analysis of this issue, van Dijk and van Hoof have argued that the ECtHR might have arrived at this conclusion by viewing article 45 of the ECHR in isolation from the other provisions concerning the supervisory procedure provided for in the Convention. In their view, the (old) article 27 of the ECHR gave the ECmHR exclusive competence with respect to questions of admissibility and that the ECHR did not create a hierarchical division of competence between the organs.⁹⁶ Notwithstanding the dissenting opinions, it was fairly settled in the practice (before the abolition of the two-tier system) that the ECtHR had the competence to reopen questions of admissibility.

Unlike the European system, the Inter-American human rights system still maintains a two-tier system for the protection of human rights. As with the

92 As above, 49.

93 32 EurCtHR Ser A (1979), [1979] 2 EHRR 305.

94 See the ‘*Vagrancy*’ Cases, above note 89, 50–56.

95 See Judge Wold, as above.

96 Van Dijk and van Hoof, above note 34, 208.

European system, competence over procedural issues had been the source of dispute between the organs of the Inter-American system. In reaction to preliminary objections raised by respondent states against alleged procedural impropriety by the Inter-American Commission (IACmHR), the Inter-American Court of Human Rights (IACtHR) has had to deliver certain rulings, including one that touches on the competence to determine the question of admissibility with respect to cases referred by the IACmHR.⁹⁷ In its ruling on the preliminary objection raised by the respondent state in the *Velasquez Rodriguez Case*, the IACtHR decided that it had full competence to review the procedure of the IACmHR insofar as matters relating to the submission of a case to the Court were concerned.⁹⁸ Relying on article 62(1) of the American Convention on Human Rights (ACHR), the IACtHR held that ‘its [the Court’s] power to examine and review all actions and decisions of the Commission derives from its character as the sole judicial organ in matters concerning the Convention.’⁹⁹ However, here also, it is settled that the question of admissibility must not be raised for the first time before the Court, as the IACmHR is the competent organ to make the first determination on admissibility.¹⁰⁰

Like in the European system, the decision of the IACtHR to reopen questions of admissibility in cases referred by the IACmHR has not gone uncontested. In the *Velásquez Rodríguez v Honduras*,¹⁰¹ the IACmHR argued against the IACtHR’s decision to review questions of fact and law afresh. In reaction, the IACtHR held that the ACHR granted it full jurisdiction over all issues such that it was not bound by any previous decision of the IACmHR.¹⁰² The IACtHR emphasised that it was the sole judicial institution in the system and not a court of appeal from the decisions of the IACmHR.¹⁰³ Though the decision stood, the important point here is the opinion of the IACmHR that that it had competence over the issue of admissibility.

This discussion shows that in a two-tier arrangement involving a commission and a court, the latter may reconsider the admissibility of cases referred to it by the commission, even when the commission has already

97 See Davidson, above note 68, 73.

98 [1988] Inter-Am Ct HR (Ser C) N04 (*Velásquez Rodríguez Case*).

99 As above, para 33.

100 *Ganagram-Panday v Surinam* (Preliminary objection) Inter-Am Ct HR, 4 December 1991, Ser C, Nos 12, 131, 146, 151, 162, 164 and 176, reprinted in (1992) 13 *Human Rights Law Journal* 142, para 39–40.

101 *Velásquez Rodríguez Case*, above note 98.

102 As above.

103 As above.

pronounced on the issue of admissibility. The approach of the African Human Rights Court in this regard can therefore not be faulted.

However, the question of admissibility must first come before the Commission. Accordingly, where a state fails to raise admissibility issues before the Commission, it should be deemed to have waived the right to challenge the admissibility of the case before the Court.¹⁰⁴ Furthermore, the Court should reopen the admissibility question only if the respondent state raises it. In other words, the Court should not re-examine the issue of admissibility of its own accord.

As to who must demonstrate that admissibility conditions have been satisfied, both the Rules of the Court and the Rules of the Commission are not very helpful. Sir Humphrey Waldock, who represented the European Commission for Human Rights in *Lawless v Ireland*,¹⁰⁵ described the functions of the European Commission thus:¹⁰⁶

The function of the Commission before the Court, as we understand it, is not litigious: it is ministerial. It is not our function to defend before the Court, either the case of the individual as such, or our opinion simply as such. Our function, we believe, is to place before you all the elements of the case relevant for the determination of the case by the Court.

The problem with this position is that it does not establish how the admissibility determination would be carried out, especially where the victim or complainant is not before the Court. Thus, in the early cases before the ECtHR, it appears that the ECmHR took on the duty of arguing the admissibility before the Court by submitting its proceedings, including the admissibility decision and appearing before the Court to make oral arguments.¹⁰⁷ However, in later cases, relying on rule 30 of its Rules of Procedure, the ECtHR allowed interested complainants to take part in proceedings before it, provided that they were represented by counsel.¹⁰⁸ In these later cases, the complainant, through counsel, could re-argue the admissibility issue.

Similarly, under the Inter-American system, the IACtHR can make an order for the IACmHR to forward its records of proceeding and to make oral arguments before the Court. Here also, interested complainants may be

104 See *Ganagram-Panday v Suriname*, above note 100, para 40.

105 *Lawless v Ireland*, European Court of Human Rights (1 July 1961), Ser A 3 (1961).

106 Quoted in D Shelton *Remedies in international law* (Oxford: Oxford University Press, 2005) 193.

107 See, eg, *Zimmermann and Steiner v Switzerland* Judgment of 13 July 1983 Ser A, No 66, 11.

108 See eg, *H v France* 24 October 1989, Series A, No 162-A.

represented by counsel, who can present arguments (including on admissibility) separately from those advanced by the IACmHR.¹⁰⁹ The procedure that allows counsel representing the victim to participate in the admissibility argument before the court helps to preserve the objectivity of the Commission.

Although the Rules of the Court do not provide any guidance, the Interim Rules of the Commission tilt towards allowing representatives of the complainant to argue admissibility before the Court. With respect to states, this should not be a problem. With respect to individuals, it raises challenges for indigent litigants as the Rules of the Court do not provide for legal aid even though the interim Rules of the Commission envisage legal aid for appearance before the Commission.

C Cases brought by the state party which has lodged a complaint to the Commission

As already noted, a state party to the African Charter can lodge a complaint before the African Commission either by adopting the procedure in articles 47 and 48 of the Charter or the procedure in article 49 of the Charter. Articles 47 and 48 provide for a conciliation procedure for inter-state communications. Article 49 of the Charter provides for contentious inter-state communications.

Article 5(1)(b) of the Court's Protocol provides that a state party which has lodged a complaint before the Commission is entitled to lodge a complaint to the Court. However, both the Protocol and the Rules of the Court are silent on the question of the admissibility of such cases, especially as regards the exhaustion of local remedies. There are three possible types of complaints a state can bring against another state. The first would be a complaint brought by the state against another state on behalf of a victim or victims of a human rights violation, which victim(s) may or may not be citizen(s) of the complaining state.¹¹⁰ The second type would be where the complaint is not about a violation against any particular victim, but is a complaint against the legislative, administrative, judicial measures or practices, which supposedly violate the African Charter.¹¹¹ Though violations against specific victims may

109 See, eg, *Neiar Alegria & Others v Peru* (Preliminary Objections), Inter-Am Ct HR, 11 December 1991, Ser C, No 13 131, 158, 160, 171–3, reprinted in (1992) 13 *Human Rights Law Journal* 146.

110 Arts 47–54 do not preclude a state to institute an inter-state complaint where its citizens are victims of an alleged violation of the Charter.

111 While there is no express provision in support of this, it is possible to base such a complaint on art 1 of the Charter. The practice in the European system could be a model here even though the

form evidence of the violation occasioned by these, no decision is sought in favour of such victims. The third possible type of complaint would be in situations where the respondent state is alleged to have carried out the violations within the territory of the complaining state.¹¹²

In the first type of complaint, the requirement to exhaust local remedies would be self-evident.¹¹³ In such cases, the alleged victim(s) must have exhausted available remedies in the respondent state. The provisions in rule 40 of the Rules of the Court which require states to exhaust local remedies should therefore also apply to these types of complaints. By contrast, it is unlikely that the requirement to exhaust local remedies would be necessary in respect of the second type of complaints¹¹⁴ because they normally are ‘abstract complaints.’¹¹⁵ Similarly, the requirement to exhaust local remedies would not apply to the third type of complaint.¹¹⁶

D Cases brought by the state party against which the complaint has been lodged at the Commission

The discussion on cases submitted under article 5(1)(b) is applicable to cases submitted under article 5(1)(c). The latter deals with access to the Court by a state party against whom a complaint has been lodged. What could be said here is that, apart from dissatisfaction with the decision of the Commission on the merits, a state against which a complaint has been filed at the Commission either by another state party or by a non-state entity may decide to raise objections on the admissibility of the case. Notwithstanding the various arguments that a court under a two-tiered system is not a court of appeal, it would be expected that the objections by the state may not only challenge the admissibility of the case before the Court, but also the admissibility of the original complaint before the Commission.

Based on the experience of the other regional systems, the Court needs to discourage respondent states from filing frivolous objections against the admissibility decisions of the Commission, especially because this would give

normative basis may be different. See, eg, the case of *Ireland v The United Kingdom*, above note 70.

112 The circumstance of the *DRC communication*, note 22 above, is illustrative of this type of complaint.

113 Ouguergouz, above note 13, 732–733.

114 See *Ireland v The United Kingdom*, above note 70.

115 Van Dijk and van Hoof, above note 34, 129, citing *Greece v The UK Application 176/56*, Yearbook II (1958–1959) 182, 184.

116 The African Commission took this view in the *DRC Communication*, above note 22.

states an unfair advantage since the Court would not review inadmissibility decisions of the Commission.¹¹⁷ More importantly, it should be established as a rule that a respondent state that has not challenged the admissibility of a complaint at the level of the Commission, or that deliberately ignored the proceedings at the Commission thereby allowing the Commission to decide on admissibility without hearing from the state, should not be heard to complain before the Court.¹¹⁸

E Cases brought by the state party whose citizen is a victim of a human rights violation

Article 5(1)(d) of the Court's Protocol deals with access to the Court by a state party whose citizen is a victim of a human rights violation. It can be argued that such a state party has two options. The first is for it to bring the complaint before the Commission first. In this case, the Commission would make the decision on admissibility. The second would be to bring it directly before the Court.¹¹⁹ In this case, the decision on admissibility must be made by the Court. But since the Commission would not have played any role in the process, the Court may elect to seek the Commission's advice on admissibility.

Considering that the very essence of article 5(1)(d) is that a citizen of the state must be a victim of an alleged violation, the requirement to exhaust local remedies should be a compulsory condition for admissibility. However, articles 47 and 48 of the Charter, which deal with inter-state communications, do not stipulate this requirement. Neither do the Rules of the Court.

F Cases brought by African intergovernmental organisations

Article 5(1)(e) deals with access by African intergovernmental organisations. Such organisations are not states and are therefore not covered by the provisions relating to state communications. Accordingly, the admissibility of these cases would have to be considered in light of article 56 of the Charter on individual complaints, if only because such organisations would be alleging violations of individual rights.

As there is nothing in the African Charter to prevent intergovernmental organisations from filing complaints before the African Commission, the

117 Van Dijk and van Hoof, above note 34, 209.

118 See, eg, *Ganagram-Panday v Suriname*, above note 100. See also Merrills, as quoted by Shelton, above note 106.

119 Ouguergouz, above note 13, 719–720.

Commission arguably has the competence to determine the admissibility of cases brought under article 5(1)(e). Alternatively, the Court can seek the opinion of the Commission on the question of the admissibility of such cases.

G Cases brought by individuals and non-governmental organisations

The determination of admissibility under article 5(3) appears to be the most straightforward. Article 6 of the Court's Protocol relating to admissibility and rule 40 of the Rules of the Court setting out the conditions for admissibility arguably deal with cases brought by individuals and NGOs under article 5(3) of the Court's Protocol. Ouguerouz notes: 'It is patently clear from a reading of the first paragraph of this article (article 5) that it relates solely to cases brought before the Court by an "individual" or a "non-governmental organisation."' ¹²⁰ The Court has an automatic and express competence to determine admissibility of cases that come under this category. However, article 6(1) also gives the Court an option to request the opinion of the Commission in that regard.

V ADMISSIBILITY BEFORE THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

By the Protocol on the Statute of the Court of Justice and Human Rights, a Human Rights Chamber is envisaged to inherit the human rights jurisdiction of the African Human Rights Court when the African Court of Justice replaces it. ¹²¹ Since it is a merged court, the African Court of Justice and Human Rights has a wider mandate and access to it is also wider. Currently, there are no specific rules for determining the admissibility of cases before this Court but there is allowance for new innovations when this Court adopts its own rules. ¹²² However, since the access provisions are similar to those of the African Human Rights Court and most of the applicable legal documents would be the same, it is submitted that the discussion above applies *mutatis mutandis* to the admissibility of human rights cases before the African Court of Justice and Human Rights. ¹²³

120 As above, 729–30.

121 Arts 1, 2 and 5 of the Protocol of the African Court of Justice and Human Rights and art 16 of the Statute of the Court annexed to the Protocol.

122 Art 27 of the Statute of the African Court of Justice and Human Rights.

123 See arts 30, 31 and 34 of the Statute of the African Court of Justice and Human Rights.

VI CONCLUSION

This article sought to examine the provisions of the Protocol and the Rules of the African Human Rights Court insofar as they relate to the admissibility of communications before the African Human Rights Court. It has demonstrated that both these documents fail to address the question of admissibility properly. While it is possible to see this as a positive development, as it gives room for the Court to develop the rules progressively, the uncertainties created may occasion injustice to victims of human rights. In trying to find solutions to the shortcomings identified, the article has drawn heavily, although cautiously, from the experiences of both the European and the Inter-American systems.

Of particular concern is the ambivalence in the Rules about the role of the Commission and Court on the issue of admissibility. The Commission ought to be given a greater role in deciding on the admissibility of cases, including by according a measure of respect to the admissibility decisions of the Commission. The two-tier system we have would be a mere waste of time and resources if the Court were to revisit every procedural and substantive issue that the Commission makes a decision on. The Court was not established as an appeal mechanism over the decisions of the Commission. The two organs have to work in collaboration, with a clear division of labour. Where there are overlaps in their functions, each organ must be sensitive to the need for sustaining a durable working relationship with the other, without of course jeopardising the rights of the parties before them.