Inter-State Complaints under the African Human Rights System: a Breeze of Change?

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Abstract

An inter-state procedure is provided for explicitly in the 1981 African Charter on Human and Peoples' Rights, on which the African regional human rights system is based, but the mechanism remains underused. Exploring the question why such a small number of inter-state cases have been submitted under the Africa system, the article points to the influence of a general culture of non-intervention and a preference for non-confrontational dispute mechanisms among African States; the existence of alternative channels to resolve cases involving massive or widespread violations cases; African States have over the years placed growing confidence in the ICJ; the delays associated with the DRC decision; and a pervasive ignorance of inter-state complaints processes under the African system. To overcome some of these impediments, the article notes, inter-states cases may be masked as cases brought by individuals or NGOs whose interests overlap with those of States.

Keywords

African Charter on Human and Peoples' Rights – inter-state proceedings – non-confrontational dispute resolution – NGOs – culture of non-intervention

1 Introduction

An inter-state procedure is provided for explicitly in the 1981 African Charter on Human and Peoples' Rights (African Charter), on which the African regional human rights system is based.

When the African Charter was established, a quasi-judicial body, the African Commission on Human and Peoples' Rights (African Commission), with a mandate of promotion and protection, was its only supervisory body. A judicial body, the African Court on Human and Peoples' Rights (African Court), complementing the Commission's protective mandate, has been in operation since 2006. Although both these bodies can deal with inter-state complaints or cases, the submission of these complaints or cases has been a rarity. An child-specific treaty, the African Charter on the Rights and Welfare of the Child (African Children's Charter), with its own supervisory body, the African Committee Experts on the Rights and Welfare of the Child (African Children's Committee), completes the 'African human rights system'. While inter-state complains are mentioned under the African Children's Charter,[1] this possibility has not been further elaborated in the African Children's Committee guidelines, and has not been used.

While the rationale of inter-state complaints or cases is contested, this article adopts the premise that, ideally, it provides a mechanism for a State party, in the name of and on behalf of a collective of States parties to a human rights treaty, and by extension, humanity as a whole, to call out a State for transgressing its treaty promises in respect of human rights.[2] In practice, however, inter-state complaints have been instituted mostly when a government's interests have been impaired. The handful of inter-state cases submitted so far has mostly sought to draw attention to the violation of its citizens' rights abroad, to protest the violation of the rights of 'persons belonging to minorities' which it 'feels responsible for',[3] or more broadly in the national interest. However, the inter-state mechanism is distinguishable from diplomatic protection, which allows for a State to intervene at the inter-state level in respect of injury to its own citizens by another State.

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1 Art 44 of the African Children's Charter.

2 See Søren C Prebensen, 'Inter-state complaints under treaty provisions–the experience under the European Convention on Human Rights' in G Alfredsson et al (eds) *International human rights monitoring mechanisms* (Brill Nijhoff, 2009) 533–559 at 539, noting that the first of these procedures, set up under the European Convention on Human Rights, was aimed at establishing a 'common public order of the free democracies in Europe'.

3 Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff, Leiden, 2003) at 100.

It remains a rarity for states to submit a human rights case against another state not motivated to act by their conflict with the other State, or by concern for its own nationals, but on the basis of the collective responsibility that all states have to uphold agreed upon human rights norms as a common public good. When a confluence of some of the following factors occur, the likelihood of such cases increases: the presence of widespread, serious and persistent human rights violations in the respondent State; deterioration in the relations between the two States, in the context of a charged political or legal dispute; the existence of conflict in the form of a declared or undeclared war between the two States; and the failure of attempts to amicably resolve the matter.

Although the purpose of inter-state complaints under the African Charter is not explicitly articulated, it appears to fluctuate, as it does under other international human rights treaty regimes, between serving the common interest of upholding a shared standard ('collective enforcement'), and enforcement where the complaining State has a 'direct interest in the outcome'.[4] As a measure of 'collective enforcement', an inter-state complaint is brought to address human rights violations in a State party to uphold the integrity of the system as a whole, by making real the treaty promises to victims of violations. This is therefore the quintessence of the inter-state system under human rights treaties. Experience in other systems has shown that the use in pursuance of a general public interest is often undertaken by multiple rather than single States, allowing them to 'share the diplomatic burden of instituting proceedings with other states', and only when a high threshold of human rights violations has been reached.[5]

There is little scholarly writing about the inter-state procedure under the African regional system.[6] This contribution, based on a desk review and analysis of relevant primary and secondary sources, aims to explore aspects

4 Prebensen (n 2) 556; see also Dai Tamada, 'Inter-State Communication under ICERD: From ad hoc Conciliation to Collective Enforcement?', 12(3) *Journal of International Dispute Settlement* (2021) 405–426.

5 Ibid (exemplified by the complaint to the European Commission of Human Rights in Applications 3321-3323/67 and 3344/67, *Denmark, Norway, Sweden and the Netherlands v. Greece.*

6 See eg Frans Viljoen *International human rights law in Africa* (2012) at 343–344; Frans Viljoen, 'A Procedure Likely to Remain Rare in the African System: An Introduction to Inter-State Communications Under the African Human Rights System', Völkerrechtsblog, 27.04.2021, doi: 10.17176/20210427-221127-0; Adoga-Ikong J. Adams, Edidiong Jacob Udo, and Aboh Pascal Bekonfe 'The Inter-State Complaint under the African Charter on Human and Peoples' Rights: a Lesson from the European Regional System', 2.2 *GNOSI: An Interdisciplinary Journal of Human Theory and Praxis* (2019) 126–133; Isabella Risini, and Geir Ulfstein 'Human Rights, State Complaints' in *Max Planck Encyclopedias of International Law* (2022), Oxford Public International Law (http://opil.ouplaw.com), para 23.

of this neglected topic. It starts off by locating the inter-state mechanism under the African regional system within a global context, emphasising the automatic acceptance by States parties to relevant African treaties of both inter-state and individual communications procedures. The article then explores the African Commission and African Court as avenues through which States may submit inter-state complaints, and indicates that these avenues have been sparsely used. Only three cases have thus far been submitted to the African Commission, and one to the African Court.[7] Only one of these cases, submitted to the African Commission by the DRC against Burundi, Rwanda and Uganda (the *DRC* case),[8] has been decided on its merits. The article analyses the Commission's decision in this matter, with reference to admissibility, the substantive findings, the simultaneous submission of an inter-state to the International Court of Justice (ICJ), conciliation and friendly settlement, the non-submission of individual claims arising from the same situation, fact-finding, and reparations and implementation.

Although there has, in recent times, been an increase in the use of inter-state complaints and cases within the United Nations (UN) human rights treaty system,[9] and under the European human rights systems;[10] and African States have been at the vanguard of submitting cases to the ICJ based on the principle of 'collective enforcement',[11] these developments are not necessarily presage a

7 See section 3 below.

8 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* case Communication 227/99, (2004) AHRLR 19 (ACHPR 2003) (20th Activity Report) (*DRC* case).

9 Just about a half a century since it became a possibility, the first-ever inter-state communications under the UN human rights system were submitted in 2018, to the Committee on the Elimination of Racial Discrimination (CERD), which has been in place since 1969: two by Qatar (against Saudi Arabia and United Arab Emirates) and one by Palestine (against Israel). While the complaints submitted by Qatar have been terminated, the one by Palestine was, at the end of 2023, ongoing (Inter-State communication submitted by the State of Palestine against Israel, CERD/C/100/5, 12 December 2019; decision on admissibility, 30 April 2021); see also Dai Tamada, 'Inter-State Communication under ICERD: From ad hoc Conciliation to Collective Enforcement?' 12(3) *Journal of International Dispute Settlement* (2021) 405–426.

10 Kinga Machowicz & Robert Tabaszewski 'The Inter-State Application to the European Court of Human Rights in Strasbourg–Potential Revival' 174(1) *Przeglad Sejmowy* (2023) 175–197.

11 By The Gambia against Myanmar (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 477) (*Rohingya Genocide* case); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3) and by South Africa against Israel (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*) (*Gaza Genocide* case)).

steady stream of inter-state cases in the African regional human rights system. The ICJ may well be a very specific strategic choice for African States to achieve broad geopolitical objectives, almost exclusively against non-African States.

Exploring the question why such a small number of inter-state cases have been submitted under the Africa system, the article points to the influence of a general culture of non-intervention and a preference for non-confrontational dispute mechanisms among African States; the existence of alternative channels to resolve cases involving massive or widespread violations cases; African States have over the years placed growing confidence in the ICJ (as a possible alternative to African processes); the delays associated with the *DRC* decision; and a pervasive ignorance of inter-state complaints processes under the African system. To overcome some of these impediments, the article notes, inter-states cases may be masked as cases brought by individuals or NGOs whose interests overlap with those of States.

2 Automatic Nature of Inter-state cases under the African Charter

Acceptance of inter-state communications is automatic upon ratification of or accession to the African Charter.[12] No opt-in is required; and no opt-out is allowed. The Charter inter-state procedure largely mirrors that in the International Convention on the Elimination of Racial Discrimination (ICERD).[13] None of these States parties to the African Charter has entered a reservation in respect of the relevant Charter provisions. This means that submitting inter-state communications under the African Charter was, by the end of 2023, within the competence of 54 African States.[14]

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12 Arts 49–54 African Charter. Murray (Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* Oxford University Press 2019 at 656) indicates that the Mbaye draft, on which the drafting of the African Charter is anchored, made the acceptance of inter-state complaints optional. The drafting history gives no indication why the drafters made it compulsory.

13 See ICERD arts 11–13; the important exception that there is no provision under the African Charter for referral to the International Court of Justice (ICJ). The drafters of the African Charter also drew on the European Convention, which in its original article 24, 'provided a model of a compulsory and working inter-state referral mechanism' not only to ICERD, (See David Keane, 'Inter-state cases under the International Convention on the Elimination of All Forms of Racial Discrimination' in Norman Weiss and Andreas Zimmermann (eds) *Human rights and international humanitarian law* Edward Elgar (Cheltenham, 2022) 199–224 at 208) but indirectly, at least, also to the African Charter.

14 All African Union (AU) member States that are also States parties to the African Charter, with the exception of Morocco.

The African Charter is one of only three out of all regional or UN human rights treaties to make inter-state communications 'compulsory'. In addition to the Charter, only ICERD and the European Convention of Human Rights make acceptance of the inter-state complains procedure a necessary consequence of treaty ratification.[15] In this respect, the European and African regional human rights systems differ from the inter-American, which under article 45 of the American Convention of Human Rights requires States parties to opt into accepting the possibility of inter-state cases. At the time of the adoption of the African Charter, four UN human rights treaties were in force (ICERD, ICCPR, ICESCR and CEDAW). Of these, only the ICERD contains a compulsory inter-state mechanism. The subsequent treaties (CRC, CAT, CMW, CRPD, CED) make inter-state communications optional.

The African system is the only international human rights system (at UN and regional level) which from its inception made *both inter-state and individual communications* a necessary consequence of treaty acceptance. Among UN treaties, ICERD makes inter-state communications automatic, but requires States' explicit acceptance of individual communications.[16] While inter-state communications were automatic under the European Convention of Human Rights, as it was adopted in 1950, at that time the competence of both the Commission and Court to accept individual communications was optional. For a communication to be heard by the European Commission of Human Rights, the State had to accept the Commission's competence in the matter;[17] and the matter could be referred to the European Court of Human Rights only if the State had, in addition, declared that it recognised the Court's jurisdiction.[18] This position changed in 1998,[19] when the Court became the single Convention organ, and individual submission were made automatic.

3 Avenues for Submitting Inter-state Complaints

Under the African system, there are two main avenues through which States may submit inter-state complaints: either to the African Commission on Human and Peoples' Rights (African Commission) or (directly or indirectly) to the African Court on Human and Peoples' Rights (African Court).

15 Arts 11–13 of ICERD and arts 24 of the 1950 European Convention of Human Rights.
16 Art 14 of ICERD.
17 Art 25 of the 1950 Convention.
18 Art 46 of the 1950 Convention.
19 With the entry into force of Protocol 11 to the European Convention.

3.1 *African Commission*

Inter-state communications to the African Commission may be initiated along two pathways, the one conciliatory ('communications negotiations'), and the other directly confronting the State complained against ('communications complaints').

The first option is the conciliatory procedure under articles 47 and 48 of the Charter.[20] In this instance, the complaining State 'may draw, by written communication', the respondent State's attention to its complaint or communication.[21] The State against which a communication is directed has three months to engage with the complaining State to reach an amicable resolution of the dispute, through 'bilateral negotiation or by any other peaceful procedure'.[22] The avenue is premised on the ideal or desirability of avoiding a formal approach to and potential decision by the African Commission settling an inter-state dispute. However, if the matter is not settled amicably, any of the States involved may submit the matter to the Commission.[23] Hansungule points out that 'the formal contact between the States, before the Commission's intervention, is a singularly distinctive feature of the African Charter'.[24]

This avenue foregrounds conciliation as one of the animating features of African approaches to resolving disputes.[25] It offers the respondent State an opportunity to 'decide whether to settle the complaint amicably or not', thus avoiding to 'surprise' the State with a formal communication.[26] However, the feasibility of 'communications negotiations' depends on the particular circumstances. In a situation of 'undeclared war' between two States, for example, the 'type of diplomatic contact' associated with this option would be misplaced.[27] To the extent that a successful outcome of this mediatory process would involve the Commission's facilitating role, the Commission's lacklustre practice in respect on amicable settlements does not inspire confidence.

The second option, direct inter-state communications provided for under article 49 of the Charter, allows a state to submit a communication alleging that another State has violated the provisions of the Charter directly to the Commission. This approach does not require any attempt to settle the matter

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20 Under arts 47 and 48 of the Charter.

21 Art 47 of the Charter.

22 Art 48 of the Charter.

23 Art 48 of the African Charter.

24 Michelo Hansungule 'The African Charter on Human and Peoples' Rights' in Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds) *The African Union: Legal and institutional framework A manual on the pan-African organization* (Leiden Martinus Nijhoff, 2012) 417 at 440.

25 See eg art 4(e) and (i) of the AU Constitutive Act.

26 *DRC* case (n 8), para 60.

27 *DRC* case (n 8), para 61.

amicably. This makes for a quicker process of acquiring a finding from a quasi-judicial body, but excludes a mediated settlement before approaching the Commission.

The trigger for the negotiated-settlement route is that the reasonable belief by the complaining State that another State party has violated the Charter.[28] Direct inter-state communications complaints may be triggered if the complaining State 'considers that another State party' has violated the Charter.[29] The wording in both these instances suggests that the aim of the inter-state procedure is 'collective enforcement', in the sense that a complaint by a State is provoked not by self-interest, but by the public or collective State party interest in addressing human rights violation by another State party.[30] The standing of a complaining State is thus located in the joint obligation that the treaty imposes on all parties to the treaty – *erga omnes partes* – such as in respect of the core obligations under ICERD and the obligation to prevent and punish genocide under the Genocide Convention.

3.2 *African Court*

The Court has jurisdiction over inter-state cases. Its potential personal jurisdictional scope of application is narrower than that of the Commission. While all the 54 States parties to the Charter may submit an inter-state communication to the Commission,[31] submission to the Court is possible only if *both* the complaining and respondent States are parties to *both* the African Charter and the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol).[32]

An inter-state case can reach the African Court if the Commission, under its mandate of complementarity, refers such a communication or case to the

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28 Art 47 of the Charter.

29 Art 49 of the Charter.

30 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*) - Provisional measures, [2020] ICJ Reports 5 (Order of 23 January 2020), para 41 ('any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end'); CERD Committee, Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdiction, para 67: 'the Committee finds that it has jurisdiction to hear the inter-State communication lodged by the applicant against the respondent' because the 'core provisions of the Convention have an *erga omnes* nature'.

31 By 31 December 2023, the number of States parties stood at 54 (www.au.int/treaties/), with Morocco the only AU member state not party to the Charter.

32 By 31 December 2023, the number of States parties to the Court Protocol stood at 34 (www.au.int/treaties/).

Court. In other words, an inter-state case can reach the Court indirectly, after its initial submission to the Commission, if the Commission decides to transfer such a case to the Court.[33] In the European system, the erstwhile European Commission of Human Rights, in the process of indirect submission to the Court that was in place at the time, referred two inter-state cases to the European Court of Human Rights.[34] The African Commission has by the end of 2023 not referred to the African Court any of the three inter-state cases submitted to it. The Commission's 2020 Rules do not expressly deal with the referral of inter-state cases by the Commission to the Court. However, this silence should not be understood as negating the Commission's competence under article 5(1)(a) of the Court Protocol to submit, at any stage of the proceedings before it, an inter-state case to the Court. While no criteria exist to guide what is essentially a discretionary competence, such referral would only be possible if all States involved are States parties to the Court Protocol. A lack of clear guidance does not account for the non-referral by the Commission to the Court of the *Democratic Republic of Congo v Burundi, Rwanda and Uganda* case (*DRC* case),[35] which the Commission concluded on the merits in May 2003. While this form of referral was specifically contemplated under the Commission's 2010 Rules, which were in force at the time the case was decided,[36] the DRC was at the time not a party to the Court Protocol.[37] The Commission therefore lacked the competence to refer the complaint to the Court.

But it is not only the Commission that may refer to the Court inter-state cases submitted to it. Any of the States involved in an inter-state dispute may also do so. While neither the Court Protocol nor the Court's 2020 Rules expressly mention inter-state cases, the Protocol clarifies that both the State that has 'lodged a complaint to the Commission' (under article 5(1)(b) of the

33 Under art 5(1), the Commission has an unqualified 'entitlement' to submit cases to the Court; this form of access logically also covers inter-state cases.

34 See *Ireland v United Kingdom*, Ser A 25, in which the Court on 18 January 1978 found violations of the European Convention in respect of a case referred by the European Commission, based on its 'report' of January 1976; and *Cyprus v Turkey*, Application 25781/94, referred by the European Commission to the new (post-1998) European Court based on its 'report' of 1 June 1999.

35 *DRC* case (n 8).

36 Rule 118(1) of the Commission's 2010 Rules of Procedure (If the Commission has taken a decision with respect to a communication submitted under articles 48, 49 of the Charter and the Commission considers that the State has not complied or is unwilling to comply with its recommendations … the Commission may submit the case to Court pursuant to article 5(1)(a)).

37 The DRC deposited its instrument of ratification by 2020 (having ratified the Court Protocol in 2017); Burundi ratified and deposited its instrument of ratification in 2003; Rwanda in 2003; and Uganda in 2001.

Court Protocol) and the State 'against which the complaint has been lodged at the Commission' (under article 5(1)(c) of the Court Protocol) are entitled to 'submit' the relevant inter-state case to the Court.[38] Article 5(1)(b) is applicable only to inter-state communications, since that is the only way in which a State may 'lodge' a 'complaint' to the Commission. Article 5(1)(c) comes into play both in respect of inter-state and individual communications, because a State may be subjected to a 'complaint' by other States or by individuals/NGOs.

A complaining State may well want to have the matter decided by a body with the authority to issue binding decisions, and may thus opt to refer the case lodged with the Commission to the Court. A respondent State facing a complaint by either an individual, NGO or by another state, may be less likely to approach the African Court. However, such a State may well submit to the Court an inter-state case in which the Commission arrived at an adverse decision against it. In this scenario, the Court would be approached with a view to reversing the Commission's finding.

At what stage of the proceedings before the Commission can this referral (whether by the Commission or any of the States involved) be made?[39] One possible answer to this question is that referral to the Court may take place immediately after seizure by the Commission.[40] Another possible answer is that referral would be a form of 'appeal', following only once the Commission has finalised the communication before it.[41] Such an approach would indeed pre-empt the concern that a referral at an earlier stage (for example, just after seizure) would effectively exclude the role of the Commission.[42] However,

38 Art 5(1)(b) and (c) of the Court Protocol.

39 See Fatsah Ouguergouz, 'The establishment of an African Court of Human and Peoples' Rights: a judicial premiere for the African Union' 11 *African Yearbook of International Law Online/Annuaire Africain de droit international Online* (2003) 79, 110; and Dan Juma, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper?' 4(2) *Essex Human Rights Review* (2007) 1, 10; also available at SSRN 1391482 (2007).

40 See Ouguergouz (supra n 39) at 110 (noting the Protocol's silence on the issue, he concludes that – without a contrary position in the Rules of Court – the states involved in an inter-state dispute can refer the case to the Court 'as soon as a case is brought before the Commission … on the sole condition that they are parties to the Protocol').

41 As above, contending that 'it may appear that the intention was to afford a State Party … a forum for appealing a decision of the Commission'.

42 It may be argued that since the Charter (under arts 47 and 49) provides for communications to be submitted to the Commission, the Commission should not become a mere conduit for referral of these complaints to the Court, but should at least to some extent be involved in their resolution.

the wording of the Protocol does not require that any particular stage of the proceedings has to be reached prior to referral. In this respect, the position under the African system differs from that under the Inter-American system, where the American Convention explicitly requires that petitions must be *finalised* by the Inter-American Commission before possible referral to the Inter-American Court.[43]

Although not explicitly stated, submission to the African Court of inter-state cases also appears to be possible under art 5(1)(d) of the Court Protocol, which allows a State party 'whose citizen is a victim of a human rights violation' to submit a case to the Court. This avenue to the Court is based on the principle of diplomatic protection, which entails the protection by a State of the rights of its own citizens while they are abroad,[44] rather than 'collective enforcement'.[45] This 'avenue' is similar to that allowed for under article 5(1)(b), but here, the rationale is clearly stated. Juxtaposed against article 5(1)(d), the 'collective enforcement' rationale of article 5(1)(b) is foregrounded. The formulation in article 5(1)(d) does not require the cases to have been submitted to the Commission (as articles 5(1)(a) to (c) do). On a literal and common sense reading, article 5(1)(d) allows a State party to the Protocol to submit a case against another State party to the Protocol. Both the complaining State and the State complained against need to fall under the Court's jurisdiction for the Court's personal jurisdiction to be vested. If these conditions are met, the state may refer the case directly to the Court. The only difference between articles 5(1)(b) and (d) is that the motive for referral under the latter provision is explicit, thus restricting the application of this provision to cases involving the citizen of the complaining State.

There is no legal impediment that precludes a State, under articles 47 to 49 of the Charter, from submitting an inter-state communication to the African Commission, complaining of human rights violations of its citizens by the other State.

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43 See art 61(1): 'Only the States Parties and the Commission shall have the right to submit a case to the Court.'; and art 61(2); 'In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.'

44 Edwin Borchard, *The Diplomatic Protection of Citizens Abroad: Or, The Law of International Claims* (Banks law publishing Company, 1915) vi; See also Isabella Risini, 'The Inter-State Application Under the European Convention on Human Rights: More Than Diplomatic Protection' *The Influence of Human Rights on International Law*, 2015, 69–77.

45 See Juma (n 39) at 12, noting that diplomatic protection is based on the principle that an injury to its nationals is an injury to the state; he refers to art 5(1)(d) as introducing a 'variant of the inter-state complaints mechanism;.

4 Extent of Use Thus Far

Despite the fact that the inter-state complaints mechanism is available to all States parties to the African Charter, and the possibility of submitting such cases to both the African Commission and the African Court, only four cases has thus far been submitted, three to the African Commission, and one to the African Court. This number excludes a complaint submitted by Libya against the United States, reported by a previous Chairperson to the Commission but not available in the public records, which the Commission declared 'inadmissible'.[46] One of the cases submitted to the Commission, the *DRC* case, relates to the conflict in the Great Lakes region in the aftermath of the 1994 genocide in Rwanda. It was decided on the merits at the 33rd Ordinary Session of the Commission held in May 2003. However, the Commission only made public this finding three years later – in 2006. This finding is discussed in more depth below.

It was also the Democratic Republic of Congo that submitted, on 20 August 2023, the only inter-state case to the Court, *Democratic Republic of Congo v Rwanda*, against one of the respondent States in the earlier *DRC* case.[47] By the end of 2023, no formal proceedings have started.[48] While little information about the substantive allegations are in the public domain, surrounding circumstances suggest that there would be some overlap between the substance of the earlier *DRC* case.[49] The submission of this inter-state case

46 The complaint directs itself to the presence of American forces in Chad and Zaire, see U O Umozurike, 'The African Charter on Human and Peoples' Rights: Suggestions for more effectiveness', 13(1) *Annual Survey of International and Comparative Law* (2007) 179–190, at 183, see in particular footnotes 25 and 26. In the early years of the Commission' existence, a number of individual communications were also submitted to non-African states (see Frans Viljoen, 'Introduction to the African Commission and Regional Human Rights System' in Christof Heyns (ed) *Human Rights Law in Africa* (Vol 1) (Leiden, Nijhoff, 2004) 385at 441.

47 Application 7/2023, *Democratic Republic of Congo v. Republic of Rwanda*, submitted on 20 August 2023. Under Rule 44(2)(a), 44(5)(a) and 44(1)

48 By the start of 2023, the matter was listed on the Court's website as a 'pending contentious case', but no further information was provided. In its application, the DRC also requested that the case be dealt with through an accelerated process. (No such process is provided for under either the Court Protocol or the Court Rules.) Rwanda was required to respond within 30 days to the request for an accelerated procedure; and within 90 days to the substantive application, covering jurisdiction, admissibility, merits and reparations (Rule 42(2)(a), 42(5)(a), 44(1) of the 2020 Court Rule).

49 Ongoing cross-border conflict, insecurity, and allegations of aggression and 'incursion' by Rwandan armed forces into the eastern provinces of the DRC are reported (see eg Implementation of the Peace, Security and Cooperation Framework for the Democratic

has to be seen against the background of the Nairobi and Luanda processes to mediate the conflict between the DRC and Rwanda, and efforts at mediated by, among others, the President of Angola.[50]

The Commission decided not to consider one of the other inter-states placed before it (Communication 422/12, *Sudan v South Sudan*). The Commission received this communication, submitted under article 49 of the Charter by the Sudanese Advisory Council for Human Rights within the Presidency, on 7 May 2012. At its 13th Extraordinary Session, in February 2013, the Commission decided not to be seized with this communication. This decision was presumably taken because the Commission considered that South Sudan was not bound by the African Charter as this country, which only gained independence on 9 July 2011, had not at the time ratified it.[51] South Sudan subsequently, in October 2013, deposited its instrument of ratification to the Charter. It is therefore possible for Sudan to resubmit this complaint.

The third complaint presented to the Commission, Communication 478/14, *Djibouti v Eritrea,* was withdrawn without a decision on the merits. The Commission declared it admissible at its 25th Extraordinary Session held in February 2019. However, before it could be heard on the merits, the matter was withdrawn at the instance of Eritrea, which indicated that this was 'in light of recent developments in bilateral relations between the two States …'.[52] The Commission closed the file at its 70th session in February 2022, and no decision in respect of this communication has been made public.

Republic of the Congo and the Region: report of the Secretary-General, S/2023/730, 3 October 2023 (paras 2, 8); Communiqué of the 1103rd Meeting of the Peace and Security Council held on 31 August 2022, on the Situation in the Eastern Democratic Republic of Congo (DRC).)

50 See eg Remadji Hoinathy, 'Eastern DRC peace processes miss the mark' *ISS Today* (8 February 2023) <https://issafrica.org/iss-today/eastern-drc-peace-processes-miss-the-mark> accessed 30 April 2024.

51 See Magnus Killander and Bright Nkrumah 'Human rights developments in the African Union during 2012 and 2013' 14 *African Human Rights Law Journal* (2014) 275 (raising the issue whether South Sudan as a successor State should not have been considered bound by Sudan's ratification; however, if a distinction is drawn between a successor state that continues its authority over the same territory as the 'mother' state, and a state that secedes from part of the territory of the 'mother' state, the answer may well be that South Sudan did not inherit all the international obligations of Sudan; this approach is borne out by practice, which eg required South Sudan to independently ratify the African Charter, which Sudan had ratified (already in 1986) while South Sudan was still a part of the 'original' Sudanese territory.

52 52nd and 53rd Activity Report of the African Commission on Human and Peoples' Rights, covering the period 6 December 2021 to 9 November 2022, p 10; <https://achpr.au.int/en/documents/2023-06-08/52nd-and-53rd-combined-activity-reports> accessed 30 April 2024.

5 Analysis of *DRC* Case

The only merits decision on a State complaint is now looked at in some depth.[53]

5.1 *Admissibility*

The Charter requires, for an inter-state communications to be admissible, that local remedies be exhausted "if they exist", unless the procedure to achieve exhaustion would be unduly prolonged.[54] In the *DRC* case, since the actions of the respondent States took place in the DRC itself, the Commission's position is that the question of exhaustion of local remedies did not arise.[55] Another approach is to argue that exhaustion of remedies is not required because of the massive scale of the human rights violations. It should be recalled that the African Commission in the exercise of its protective mandate routinely exempts complainants from exhausting local remedies in the context of allegation of a series of serious and massive violations of human rights.[56] In this regard, it differs from the European system.[57]

Logically, in the context of an inter-state complaint, the 'local' in the term 'local remedies' may refer to the territory or jurisdiction of the complaining State or the respondent State. This logic gives rise to two questions. First: Should the complaining State (in this instance, the DRC) have endeavoured to hold the respondent States accountable under DRC law (that is, in its own territory under its own laws)? The second question is: Should the DRC have instituted proceedings against each of the respondent States before their own domestic courts, under their respective applicable laws?

In an analogous case, which is not an inter-state case as such, but has been brought by a Ghanain individual against the eight States that have accepted direct individual access to the Court, the African Court found that it would be

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53 There are obviously more aspects of the case that justify analysis, such as the issue of provisional measures. The Commission did not request provisional measures in the DRC case. While the Commission's competence to issue "provisional measures" in respect of individual communications is provided for in the Commission's 2010 Rules of Procedure (Rule 98), there is no similar provision for inter-state cases.

54 Art 50.

55 *DRC* case (n 8), para 63 ("The [African] Commission takes note that the violations complained of are allegedly being perpetrated by the Respondent States in the territory of the Complainant State. In the circumstances, the [African] Commission finds that local remedies do not exist, and the question of their exhaustion does not, therefore, arise").

56 See eg *Social and Economic Rights Action Centre* (*SERAC*) *and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 38.

57 See Isabella Risini, *The inter-state application under the European on Human Rights* (Martinus Nijhoff, 2018) at 53 (noting that under the European system exemptions from exhaustion are more wide reaching in inter-state than in individual communications).

'unreasonable to require the Applicant to sue all the Respondent States in his own country, because this form of remedy is 'barred by sovereign immunity'.[58] It is equally unreasonable to seek recourse against each of the respondent States before their respective domestic judiciaries, as it would be very 'cumbersome' and time consuming to pursue remedies in all the respondent States. Some countries make it impossible for inter-state cases to be heard before domestic courts. Tanzania, for example, does not allow its domestic courts 'to entertain matters related to their obligations arising from international treaties'.[59] Attempts to exhaust local remedies would under those circumstances be futile, and are not required.

Under the African Charter, there is an admissibility requirement that an individual communication is only admissible before the Commission if it had not been *settled* by a similar mechanism of dispute settlement to the Commission.[60] This requirement is not applicable to inter-state communications. In any event, if the Commission had applied this rule in this case, it would have had no problem finding the matter admissible, because the matter before the ICJ was, in 2003, *pending* and not yet *settled*.

5.2 Substantive Findings

On the substance, the Commission found all three respondent States in violation of articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22 and 23 of the African Charter. The question arose whether violations of international humanitarian law (IHL) fall within the Commission's mandate. In this regard, two relevant guiding principle are (i) that a communication must be 'compatible with' the African Charter and AU Constitutive Act;[61] and (ii) that the Commission must draw inspiration from relevant human rights instruments adopted by UN specialised agencies.[62] In any event, the Commission in the *DRC* case does not find that IHL as such has been violated, but reads and interprets the African Charter, of which violations are found, in the light of IHL.[63]

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58 *Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania, Tunisia, Sahrawi Arab Democratic Republic and Mauritius Interveners*, Application 28/2018, judgment of 22 September 2022 (*Morocco Readmission* case), para 209.

59 *Morocco Readmission* case, para 210.

60 Art 56(7) of the African Charter.

61 Art 56(2) of the African Charter.

62 Art 60 of the African Charter.

63 See Frans Viljoen, 'The relationship between international human rights and humanitarian law in the African human rights system: An institutional approach' in Erika De Wet & Jann Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian*

5.3 *Multi-forum Litigation*

The *DRC* case was also submitted to the ICJ. However, the Commission makes no reference to the ICJ case, which was pending by the time the Commission reached its decision. In fact, the DRC submitted three cases related to the same subject matter to the ICJ. In February 1999, the case to the Commission against Burundi, Uganda and Rwanda was submitted. On 23 June 1999, the DRC submitted three separate cases against Burundi, Uganda and Rwanda to the ICJ. After the DRC had informed the ICJ of its intention to discontinue the proceedings instituted against Burundi and Rwanda, these two cases were struck off the ICJ's roll on 30 January 2001. On 28 May 2002, the DRC submitted a (new) case against Rwanda with the ICJ.

On 19 December 2005, the ICJ handed down its merits decision in the last of these cases, *DRC v Uganda*.[64] It found that the unlawful military intervention by Uganda was a grave violation of the prohibition on the use of force expressed in article 2(4) of the United Nations Charter. The Court also held that the Uganda Peoples' Defence Forces (UPDF) troops had committed violations of international humanitarian law and human rights law, and that these violations were attributable to Uganda. On Uganda's counter-claim, it found that the DRC violated its obligations under the Vienna Convention on Diplomatic Relations (by attacking the Embassy and committing acts of maltreatment against Ugandan diplomats at Ndjili International Airport).

On 13 May 2015, the DRC asked the Court to determine the amount of reparation owed by Uganda in the light of the failure of negotiations with Uganda on the question of reparations. On 1 July 2015, the ICJ observed that although the parties had tried to settle the question directly, they had clearly been unable to reach an agreement. It therefore required the parties to file written pleadings on the question of reparations. After obtaining the report by four independent experts and holding oral hearings, the ICJ delivered its judgment on reparations on 9 February 2022,[65] awarding US$225 million for damage to persons, US$40 million for damage to property, and US$60 million

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law in military operations (2014) 303; but also see Michaela Hailbronner, 'Laws in conflict: The relationship between human rights and international humanitarian law under the African Charter on Human and Peoples' Rights' 16.2 *African Human Rights Law Journal* (2016) 339 at 349–351.

64 ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) (*DRC v Uganda*).

65 ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Reparations, Judgment, I.C.J. Reports 2022, p. 13 <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf> accessed 30 April 2024 (*DRC v Uganda Reparations*).

for damage related to natural resources.[66] The Court allowed Uganda to pay the total amount in five yearly instalments of US$65 million each, starting on 1 September 2022.[67] It was reported that on 1 September 2022, Uganda in fact paid – and the DRC received – the first instalment of US$65 million.[68]

Two striking issues emerge from this chronological overview:

First, the Commission took more than three years before it included the decided case in its annual activity report, which was made public after it had been authorised by the Executive Council in 2006. The African Commission seems to have been influenced by the fact that a similar case to the one decided by it was pending before the ICJ. To explain this delay, which stands as an aberration in the Commission's practice, it should be noted that the ICJ merits decision on the case against Uganda was handed down on 19 December 2005. This sequence of events begs the question: Would the Commission have been more reticent to release its own decision if the ICJ came to a different conclusion?

Uganda made the following argument during the proceedings before the African Commission: 'Uganda also noted that the Democratic Republic of Congo has accused Uganda in several other fora: the UN Security Council, the ICJ, the Lusaka Initiative, and the OAU. According to the respondent State, these actions "present a dilemma to the conduct of international affairs … and adjudication", undermining the credibility of these institutions and the [African] Commission as divergent opinions may be reached.'[69] Although there is no formal requirement that the matter cannot be brought before another dispute settlement mechanism, the Commission seems to have been aware and took this into account in timing the release of its own decision.

For ordinary (individual) communications, there is an admissibility requirement that a matter is inadmissible before the Commission if it had been *settled* by a similar mechanism of dispute settlement to the Commission.[70] This requirement, set out in article 56 of the Charter, is not made applicable to inter-state communications. In any event, if the Commission applied this rule in this case, it would have had no problem finding the matter admissible, because the matter before the ICJ was, by 2003, *pending* and not yet settled.

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66 *DRC v Uganda* (n 64), para 405.

67 Ibid, para 406.

68 Patrick Ilunga 'Uganda pays first $65m to DRC as war reparations', *The East African*, 12 September 2022, <https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-pays-first-usd65m-to-drc-as-war-reparations-3945720> accessed 30 January 2024.

69 *DRC* case (n 8), para 34.

70 Art 56(7) of the African Charter.

5.4 *Conciliation and Friendly Settlement*

As the *DRC* case was submitted under article 49, there is no textual prerequisite of attempting to reconcile the parties. Taking heed of the circumstances of the case, the Commission concluded that an attempt at reconciliation would not be appropriate, as "such contacts will not be diplomatically either effective or desirable" in the particular case.[71] It added: "Indeed, the situation of undeclared war prevailing between the Democratic Republic of Congo and its neighbours to the east did not favour the type of diplomatic contact that would have facilitated the application of the provisions of Articles 47 and 48 of the [African] Charter."[72] However, the possibility of amicable settlement, set out in the Commission's rules, is still applicable but has not been used successfully in any of the relevant cases.[73]

5.5 *Inter-state and Individual Claims before the Commission*

There were no individual communications submitted related to the subject matter in the *DRC* case. It is hard to argue that the non-submission of such cases is due to practical difficulties arising from the massive and widespread nature of the violations. Although the widespread nature and multiplicity of the violations make for a complex and multi-pronged case, which may be labour-intensive and costly, there are ample examples of similar cases being successfully brought against States parties to the Charter,[74] including the DRC (as Zaire).[75] Since the Charter does not prescribe a victim requirement, the Commission has from early on in its jurisprudence accepted that an *actio popularis* may be brought to address violations of a massive scale affecting large groups of people.[76] This approach flows logically from the collective nature of the 'peoples' rights', which are guaranteed under articles 19 to 24 of the Charter. The ease with which cases could have been submitted makes the lack of complaints all the more striking.

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71 *DRC* case (n 8), para 61.

72 Ibid.

73 See 2020 Rules of Procedure of the African Commission, Rule 112.

74 See eg *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995); *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009).

75 See eg *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1998); *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

76 See *Social and Economic Rights Action Centre* (*SERAC*) *and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), para 49.

5.6 *Fact-finding and Resources*

To a large extent, the Commission relied on admissions or acknowledgements by the respondent States. It also held an oral hearing, at which Rwanda and Uganda were represented. The fact that Burundi presented no argument or evidence; and that Rwanda did not take part in the case beyond the admissibility phase to some extent hampered the ability to arrive at a full, authentic and authoritative picture. On the issue of harm by Uganda to the DRC's natural resources, the Commission found that the State's averments were reliably contradicted by the "Report of the Panel of Experts, submitted to the Security Council of the UN in April 2001 (under reference S/2001/357) identified all the Respondent States among others actors, as involved in the conflict in the Democratic Republic of Congo. The report provides evidence of the involvement of the Respondent States in the illegal exploitation of the natural resources of the Complainant State".[77]

5.7 Reparations and Implementation

Due to the delay in deciding the case, the situation had, by the time the merits decision was taken, to a large extent resolved itself. The Commission therefore took "note with satisfaction, of the positive developments that occurred in this matter, namely the withdrawal of the Respondent States armed forces from the territory of the Complainant State".[78] Perhaps to ensure that the process is fully completed, it urged the three States to withdraw their troops "immediately" from the DRC.[79] This recommendation begs the question whether the Commission communicated its 2003 decision to the States at that time (2003), or whether it only did so only when it was made public in 2006. Clearly, the effectiveness of a remedy such as the withdrawal of troops is time-sensitive.

The Commission also recommended that "adequate reparations" be paid, "according to the appropriate ways", "for and on behalf of the victims of the human rights" by the three States while their forces were in "effective control of the provinces". As with many other decisions of African Commission, it is unclear to what extent these reparations recommendations have been given effect by States.[80] However, available information strongly suggests that the

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77 *DRC* case (n 8), para 92.

78 *DRC* case (n 8).

79 Ibid.

80 See generally Frans Viljoen and Lirette Louw, 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994–2004' 101.1 *American Journal of International Law* (2007) 1–34; and Rachel Murray and Debra Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press, 2015).

government did not take any measures in response to the Commission's finding. On the other hand, reliable reports indicate that the ICJ's order for compensation is being adhered to, despite the initial expression of misgivings by the Ugandan government.[81] The open-ended and undetermined nature of the amount of reparations in the Commission's reparations finding contrasts sharply with the ICJ's elaborate and meticulously argued reparations order. Uganda's compliance can at least in part be ascribed to the meticulous research that went into determining the amount of compensation, and the extensive substantiation of all relevant issues in the ICJ's judgment.

6 Reasons for the Limited use of Inter-state under the African Regional System Complaints Thus Far

A major reason why the inter-state complaints procedure is underused across all systems and regions is because States are reluctant to be seen to engage in 'unfriendly' or hostile acts towards other States, in avoidance of antagonizing the other State and provoking retaliatory measures. Also, the procedure is viewed as 'outdated' because 'other, quicker and less formalistic mechanisms' have become available to States though which they can 'vent their concern' about serious human rights violations in other States.[82] Against this background, some of the reasons for the dearth of inter-state cases submitted to either the African Commission or Court, in particular, are considered.

6.1 *Culture of Non-intervention; Preference for Non-confrontational and Non-judicial Dispute Resolution*

A primary reason for the reluctance of States to complain against other African States lies in the general culture of non-intervention among African States.[83] One of the foundational values of both the Organisation of African Unity (OAU) and AU is "non-interference by any member State in the internal affairs

81 Uganda: ICJ decision on DRC unfair and wrong, The Independent, (<https://www.independent.co.ug/uganda-icj-decision-on-drc-unfair-and-wrong/> accessed 30 January 2024), containing a statement by the Ugandan regarding the ICJ judgment, dated 10 February 2022.

82 Nowak (n 3) at 274; see also eg art 7 of the EU Treaty, which provides for a more immediate way for States to address concerns of this nature; and the various possibilities within the ambit of the UN Human Rights Council.

83 See also Mumba Malila 'Daunting prospects: Accessing the African Court through the African Commission' (2011) 31 *Human Rights Law Journal* 61–72 at 68 (present diplomatic and political environment' making the use of art 5(1)(b) of the Court Protocol 'highly implausible').

of another".[84] For many years after its inception, the OAU adhered to a rigid notion of non-interference in the domestic affairs of other members States. For example, when then President of South Africa, Nelson Mandela, in 1993 criticised the human rights record in Sani Abacha-run Nigeria, in particular, the execution of Ken Saro-Wiwa, South Africa found itself at odds with most other African States,[85] causing a shift in South African foreign policy from an unequivocal human rights-based to a more multilateral approach.[86] This culture of non-interference has been reinforced in the African context by factors such as the weight attached to sovereignty in a post-colonial context,[87] and an overriding concern for unity and consensus within the OAU (and since its establishment, the AU). African leaders have over time shown great reluctance to openly criticise each other. At an institutional level, within the AU Executive Council, this disinclination has led to a practice *not* to "name and blame" states that have not complied with the orders of the African Court.[88] The failure of the AU to invoke the possibility of intervening in member States under the 'responsibility to protect', codified in article 4(h) of the AU Constitutive Act, bears further testimony to this hesitance to outrightly confront other AU member States.[89]

Avoidance of intervening postures align with a preference for non-confrontational and non-judicial (including quasi-judicial) dispute mechanisms. This approach is facilitated by the availability within the

84 Art 4(g) AU Constitutive Act.

85 Thabo Mbeki, 'How Abacha humiliated Mandela' 29 February 2016 <https://www.politicsweb.co.za/opinion/how-abacha-humiliated-mandela--thabo-mbeki> accessed 30 April 2024 ('Undoubtedly our Government drew its own conclusions from this painful experience with regard to the complexities of the construction of inter-state relations, including as this relates to the effective promotion of human rights.')

86 See Mbulelo Shadrack Bungane, South Africa's Human Rights Diplomacy in Africa: 1994–2008 Mbulelo Shadrack, MA dissertation, University of Pretoria, 2103, <http://hdl.handle.net/2263/43686> accessed 30 April 2024 (noting a 'move away from unilateral action to reliance on multilateral forums to deal with human rights challenges; the development of continental norms and standards, as well as strengthening continental structures; and conflict resolution and post-conflict reconstruction and development in Africa').

87 See Scott Leckie 'The inter-state complaint procedure in international human rights law: hopeful prospects or wishful thinking?' (1998) 10 *Human Rights Quarterly* 249 (1988), at 263 (referring to African states' 'shared jealously of recently gained sovereignty').

88 The Court routinely indicated, in its Annual Reports, the states that have not complied with the Court's judgments. Despite the provisions of art 31 of the Court Protocol, which requires the Court to specify 'the cases in which a state has not complied with the Court's judgment', read with the Executive Council's obligation under art 29(2) to 'monitor' the 'execution' of judgments.

89 See eg Dan Kuwali & Frans Viljoen (eds) *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (Routledge, 2013).

continent of 'many other less contentious dispute settlement mechanisms ordinarily available to the States in dispute'.[90] One example is the African Peer Review Mechanism (APRM). Hansungule notes that the 'peer pressure' that States have committed themselves to 'is very similar to the processes' under articles 47 to 49 of the Charter.[91] The similarities are that in both processes a consultative review is undertaken of a State's record, based on information provided by both the government and independent experts. However, while the APRM covers governance in a very broad sense, the focus of inter-state complaints is much more specific on human rights. Importantly, the inter-state process may conclude with the finding of an independent expert-adjudicator, while the APRM involve governmental 'peers'. In any event, the APRM is a voluntary process, which has been accepted by only 37 AU member States.[92] APRM-related visits and reviews are also relatively few and far between.

Related to these factors is the nature of matters that are likely to be referred, and the existence of alternative channels to resolve these cases. Inter-state cases are most likely to be submitted in contexts where the relationships between States had seriously broken down, where there is conflict between States, and where military force may be used or international armed conflict is imminent or real. In these circumstances, the (quasi)-judicial route is – particularly with the African continent – not the most appropriate channel to explore. Within the AU, such matters are best brought to the attention and resolved by the AU Peace and Security Council (AU PSC), thus reducing the need for recourse to inter-state complaints. Even before the AU PSC comes into play, the various regional economic communities are to be approached to endeavour to resolve such conflicts. For example, the SADC Organ for Politics, Defence and Security (Organ) was launched in June 1996 as a formal institution of SADC with the mandate to support the achievement and maintenance of security and the rule of law in the SADC region. Within ECOWAS, the Mechanism for Conflict Prevention, Management, Resolution, Pe a c e ke e p i n g, and Security has been established, and ECOWAS has played an influential role in numerous conflicts in West Africa. It would be difficult for African States to "leapfrog" or sidestep the role of these overlapping networks of conflict resolution, and to negate the importance of its belonging to these IGO s in which collectivity and solidarity are important constituent elements.

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90 Malila (supra n 83) at 68.

91 Michelo Hansungule 'The African Charter on Human and Peoples' Rights ' in Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds) *The African Union: Legal and institutional framework A manual on the pan-African organization* (Leiden Martinus Nijhoff, 2012) 417 at 441.

92 African Peer Review Mechanism (APRM), 'APRM Member States' <https://aprm.au.int/index.php/en/about/states> accessed 30 January 2024 (17 of these states have by the end of 2022 undergone any review).

For the first twenty years in the life of the African Charter (1986–2006), the Commission was the only institution to which States could potentially submit cases against other States. Approaching the Court with an inter-state case only became possible after the entry into force of the Court Protocol and the Court's operationalisation in 2006.The absence of binding judicial recourse –'impossibility of judicial resolution' – could also count as a factor inhibiting genuinely concerned States from submitting instituting inter-state complaints.[93] With the advent of the Court, a judicial institution has been introduced to complement but not replace the Commission. The Court's jurisdiction is optional, and depends on the State accepting the formal bindingness of the Court Protocol. Writing in 1988, Leckie suggested that the remote prospect of a binding decision in an inter-state case may be a factor that would limit the use of this procedure.[94] While this factor may well account for the dearth of cases between 1986 and 2006, it does not account for the fact that none of the States parties to the Court has since 2006 submitted an inter-state case to the Court. A relevant factor here may be the low level of implementation by States of the Court's judgments and the inaction of AU policy organs in response thereto.

6.2 ICJ as Alternative Forum

In so far as the judicial route is regarded as an option for resolving inter-state disputes, African States have over the years showed growing confidence in and greater openness to the ICJ. Initially, newly independent African States joined the UN, but very rarely approached the ICJ with inter-state cases.[95] One of the main reasons for this reticence to judicial resolution of disputes of an international nature was the deep mistrust of international law, which these states perceived to have colluded in legalizing and legitimizing colonial occupation and misrule.[96] Another was the underrepresentation of Africans on the Court.[97] An early exception contributed to deepen these misgivings:[98]

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93 Leckie (supra n 87) at 263.

94 Ibid: 'The impossibility of judicial resolution of human rights violations and the Commission's ability to make only recommendations will also limit the use of this procedural option.'

95 PM Munya 'The International Court of Justice and peaceful settlement of African disputes: Problems, challenges and prospects' (1998) 7(2) *Journal of International Law and Practice* 159–224.

96 See eg Siba N'zatioula Grovogui, *Sovereigns, Quasi Sovereigns and Africans: Race and Self Determination in International Law* (Minnesota: University of Minnesota Press, 1996).

97 At the time, only one of the 15 Judges were from an African State. The number of African ICJ Judges increased to two in 1963, and to three in 1973 (Munya (n 95) at 177–178.

98 See R Higgins 'The International Court and South West Africa: the implications of the judgment' (1966) 42 *International Affairs* 573–599.

In 1960, two African States – Ethiopia and Liberia – instituted proceedings against the Union of South Africa, as imperial power, before the ICJ.[99] They contended that the application of apartheid policies by South Africa in South West Africa (SWA), over which the League of Nations had granted it trusteeship, violated international law.[100] While in 1962 the ICJ dismissed all preliminary objections in the case,[101] including the objections by South Africa that the two States lacked standing, in 1966 the Court, instead of proceeding to a merits decision, revisited its previous finding and concluded, on highly contentious technical grounds,[102] that Ethiopia and Liberia lacked 'legal right or interest'.[103] The ICJ's surprising about-turn deeply disappointed not only the two States, but the Asia-Africa group more generally.[104] While this disinclination persisted during the 1970s, in the early 1980s a change occurred. On the back of two advisory opinions favourable to decolonisation and self-determination,[105] the resolution of the *Continental Shelf* case between Tunisia and Libya,[106] and greater African representation in the Court's composition, the Court from the early 1980s received a slow but steady flow of cases from African States.[107]

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99 The two States submitted two separate cases, which the ICJ on 20 May 1961 decided should be joined because they had the same interest in the proceedings.

100 Ethiopia and Liberia are not only the African States of the longest standing as sovereign entities, but were also, with the Union of South Africa and Egypt, the only African members states of the League of Nations; they brought the case as erstwhile members of the League.

101 *South West African Cases* (*Ethiopia v South Africa; Liberia v South Africa*) Preliminary Objections [1962] ICJ Report 318/9 (21 December 1962).

102 See TO Elias *Africa and the development of international law* (1998) 94.

103 *South West African Cases* (*Ethiopia v South Africa; Liberia v South Africa*) *Second Phase* [1966] ICJ Report 6 (18 July 1966) (finding that the two States lacked special, national interest in the mandate over the SWA, beyond the general legal interest of all League members.

104 It was within this group that the case was initiated as an opportunity to overcome frustration about the lack of effective international action despite the Court's Advisory Opinions on SWA (eg International Status of South West Africa (SWA), Advisory Opinion, 1950 I.C.J. (11 July)).

105 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), Advisory Opinion, I.C.J. Reports 1971, p. 16; *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, p. 12. See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, in which the ICJ concludes that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination.

106 Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (concluded in 1982).

107 Between 1960 and 1979, 3 cases were submitted by African States; 1980–1989, 4 cases were submitted; 1990–1999, 10 cases; 2000–2009, 5 cases; 2010–2019, 7 cases, and 2020–2023, 3 cases, adding up to a total of 32 cases.

A majority of cases filed by African States before the ICJ deal with border, territorial or maritime disputes and delineations.[108] Outside the ambit of these disputes, and beyond the SWA cases, only two contentious cases submitted *by African States against African States*: the 'Great Lakes' situation involving the DRC and its neighbours;[109] and the *Diallo* case brought by Guinea against the DRC.[110] In the remaining cases, African States have submitted cases against erstwhile colonial powers (UK, Belgium and France),[111] Qatar,[112] as well as Myanmar and Israel.[113] The last two cases reveal an appetite to act in the

108 Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) (concluded in 2021); Frontier Dispute (Burkina Faso/Niger) (concluded in 2013); Frontier Dispute (Benin/Niger) (concluded in 2005); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) (concluded in 2002); Kasikili/Sedudu Island (Botswana/Namibia) (concluded in 1999); Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal) (concluded 1995); Territorial Dispute (Libyan Arab Jamahiriya/Chad) (concluded in 1994); Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) (concluded in 1991); Frontier Dispute (Burkina Faso/Republic of Mali) (concluded in 1986); Continental Shelf (Libyan Arab Jamahiriya/Malta) (concluded in 1985); Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (concluded in 1982) (see also Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)).

109 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi) (concluded in 2001); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) (concluded in 2001); with Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (concluded in 2022); Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) (concluded in 2006).

110 Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (concluded in 2012).

111 *Northern Cameroons* (*Cameroon v. United Kingdom*) (concluded in 1963); Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (concluded in 2002); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v. United Kingdom*) (concluded in 2003); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v. United States of America*) (concluded in 2003); *Certain Criminal Proceedings in France* (*Republic of the Congo v. France*) (concluded in 2010); *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*) (concluded in 2028); *Immunities and Criminal Proceedings* (*Equatorial Guinea v. France*) (concluded in 2020); and *Request relating to the Return of Property Confiscated in Criminal Proceedings* (*Equatorial Guinea v. France*) (concluded in 2020).

112 *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (*Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*) (concluded in 2020)*; Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement* (*Bahrain, Egypt and United Arab Emirates v. Qatar*) (concluded in 2020).

113 *Rohingya Genocide* case (n 11); *Gaza Genocide* case (n 11).

common interest of States parties to human rights treaties, to uphold the shared values, locating these firmly within 'collective enforcement'.[114]

Uganda's reaction against the adverse finding by the ICJ in *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) embodies a bifurcated approach to international justice that is not uncommon among African States. As a matter of principle, it pledged its long-standing belief in 'the international system', but in response to the outcome in the specific case, it characterised the ICJ judgment on both the merits and reparations as 'undue interference' in 'African affairs'.[115]

6.3 *Lacklustre Performance of the African Commission*

One of the reasons is the uninspiring outcome of the one decided inter-state communication in the *DRC* case. A four-year delay between the submission of the matter (in 1999) and the Commission's decision (in 2003) meant that the most pressing circumstances have in fact already been resolved, or fundamentally changed by the time of the Commission's decision. A further three-year delay between the Commission's decision and its publication (in 2006) casts doubt on the factors motivating and guiding the Commission in its decisions. The sense of disillusionment resulting from non-implementation of the recommendations is exacerbated by the measures taken by Uganda to give effect to the ICJ's reparations order. A comparison between the reparations practices of the Commission and the ICJ shows up the Commission's weaknesses, and may undermine States' confidence in pursuing the Commission route. The submission by The Gambia is evidence of a 'belief' in the international system, pronounced in the context of return to respectability within the international community, and solidarity in transnational intergovernmental networks, in this case, the Organization of the Islamic Cooperation.[116]

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114 See eg Statement by South Africa welcoming the provisional measures ordered by the International Court of Justice against Israel, 26 January 2024: 'South Africa will continue to act within the institutions of global governance to protect the rights … and to obtain the fair and equal application of international law to all, *in the interest of our collective humanity*' (emphasis added).

115 Uganda: ICJ decision on DRC unfair and wrong, The Independent, <https://www.independent.co.ug/uganda-icj-decision-on-drc-unfair-and-wrong/> accessed 30 April 2024, containing a statement by the Ugandan regarding the ICJ judgment, dated 10 February 2022.

116 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*), Provisional Measures, Order, 23 January 2020, <https://www.icj-cij.org/en/case/178> accessed 30 April 2024. See para 43 (Myanmar submitting that the OIC is the 'true applicant' in the proceedings, and that the OIC, which is not a State and 'cannot therefore have a reciprocal acceptance of jurisdiction with the respondent

6.4 *Individual Communications as Alternative Means*

Another possible factor that may reduce the need for recourse to inter-state complaints is the prominence given by and the extent to which the African regional system is able to deal with massive or widespread violations.[117] It is understood that inter-state complaints in pursuit of the public interest are likely to be brought because 'effective remedies are not available' due to large number of complainants or the breakdown of the rule of law.[118] As the European system is less attuned to dealing with 'individual' complaints involving massive or large-scale violations, the inter-state mechanism has proven to be an useful outlet through which these concerns could be vented.[119] Under the African system, with its explicit protection of peoples' rights,[120] and a very accommodating standing regime, including *actio popularis*, there is a lesser urgency for States to submit cases on behalf of groups of victims in other States. Also, the African Commission's jurisprudence has numerous examples of non-citizens instituting cases in other States parties to the African Charter,[121] thus limiting the urgency for States to intervene on behalf of their own citizens experiencing human rights violations in other States parties to the African Charter.

6.5 *Practical Concerns*

At a very practical level, and to some extent resulting from the factors highlighted above, there is a low level of knowledge and awareness about inter-state complaints. An increased appreciation for and interest in inter-state cases before the ICJ arising from the submission of and preliminary measures orders in the *Rohingya Genocide* and *Gaza Genocide* cases is likely to leave largely unaffected the general lack of awareness of the possibility of inter-state

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State, has used The Gambia as a "proxy" in order to circumvent' the restrictions to the Court's personal jurisdiction); but also see paras 45, 46 (the Court rejecting Myanmar's preliminary objection because it saw 'no reason why it should look beyond the fact that The Gambia has instituted proceedings against Myanmar in its own name).

117 See art 58 of the African Charter; and eg *Malawi African Association and Others v Mauritania* (2000) AHRLR 61 (ACHPR 2000) and

118 Prebensen (n 2) 557.

119 See eg the submission in 1967, of Applications 3321-3323/67 and 3344/67, *Denmark, Norway, Sweden and the Netherlands v. Greece* (mass arrests, censorship, and martial law during the colonels' military dictatorship military following the 1967 coup d'état in Greece); and in 1982, Applications 9940-44/82, *France, Norway, Denmark, Sweden, and the Netherlands v. Turkey* (execution of numerous Turkish citizens, torture and illegal detention following military take-over and declaration of martial law in 1980).

120 Arts 19 to 25 of the African Charter.

121 See *Rencontre africaine pour la defense des droits de l'homme v Zambia* Communication 71/92, and *Good v Botswana* Communication 313/2005.

complaints or cases before AU human rights bodies. This knowledge gap extends to diplomats, government officials, lawyers and scholars.[122] The lack of awareness and understanding of the inter-state route through the African Court, specifically, is even more acute. While the *DRC* case has given relatively wide exposure to the possibility of an inter-state case being submitted to the Commission, there is little understanding of a similar competence to approach the Court. It is possible, though, that this may change over time, depending on the trajectory of the *DRC v Rwanda* case submitted to the Court in late 2023.

7 Blurring of Boundaries: The Distinction between Individual Complainants, Intervening Third Party States and Inter-state Complainants

The discussion on inter-state communications is premised on the existence of a clear distinguishing line between an 'inter-state' communication/case and an 'individual' communication/case. However, this is not always the case, especially in a context where NGOs (a broadened category of 'individuals', at least in the African system), may in fact not be representing civil society, but act at a government's behest.[123] A State may also avoid the inter-state complaints mechanisms by adjoining its arguments, as third party intervener, to those of an individual complainant/applicant.

In 1996, at a time of turmoil in Burundi, a Belgian-based NGO, the *Association pour la Sauvegarde de la Paix au Burundi,* instituted a complaint to the African Commission against Burundi's neighbouring States (Tanzania, Kenya, Uganda, Rwanda, Zaire (now DRC) and Zambia) for imposing sanctions against Burundi.[124] During the admissibility phase, the Commission observed as follows: "It would appear that authors of the communication were in all respects representing the interests of the military regime of Burundi".[125] However, the Commission dealt with the matter as an "individual communication". The decisions has been criticised on the basis that the logical

122 Inter-state complaints or cases are rarely discussed in writing about the Commission or Court's mandate and operation.

123 As a government 'organised' (or 'owned' or 'oriented') NGO or 'GONGO'; see Reza Hasmath, Timothy Hildebrandt and Jennifer YJ Hsu, 'Conceptualizing Government-organized Non-governmental Organizations' 15(3) *Journal of Civil Society* (2019) 267–284.

124 Communication 157/96, *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia* (*Burundi* case), published in the Commission's 17th Activity Report. See also Communications 233/99, 234/99 (joined), *Interights* (*on behalf of the Pan African Movement and others*) *v Eritrea and Ethiopia*.

125 *Burundi* case (n 124) para 63.

consequence of the finding on the nature of the applicant should have been that the NGO be considered as an "under-cover" NGO and that the matter should have been dealt with as an inter-state communication.[126] Admitting NGOs that are 'screens' for governments as individual complainants risks 'the discrediting of civil society in Africa, in spite of NGO dynamism in the area of human rights, particularly in Africa'.[127]

A State party to the Court Protocol may also be admitted as an intervening third party State, when it is not a party to a dispute but 'has in interest in a case'.[128] As Ouguergouz points out,[129] the unfortunate wording of this provision confuses the joinder of cases and the intervention by third States.[130] What is at stake in article 5(2) is not the joinder of interrelated cases by the Court, but rather an intervention by a state on the basis of its interest in a case instituted by or against other States.

The border line between an 'intervening' State and a State bringing an inter-state case can also be blurred. A individual case submitted directly to the Court under article 5(3) read with 34(6) of the Court Protocol illustrates a close alignment between the individual bringing the case and a State party to the Charter and Protocol acting as 'intervening State' in that matter – the Sahrawi Arab Democratic Republic (SADR).[131] This case claims that the eight respondent States – all the States that at the time had in place valid direct access declarations under article 34(6) of the Protocol – have violated the African Charter by allowing the African Union to readmit Morocco as a member. In particular, the case alleges that the readmission of Morocco violates the right to self-determination of the people of the SADR. Based on its interest in the case, the SADR was allowed to enter into the proceedings as an intervening State.[132] Since the SADR is a State party to the Court Protocol but has not accepted direct individual access to the Court, it did not qualify as a respondent State in

126 See AD Olinga's case discussion (2005) 5 *African Human Rights Law Journal* 424 at 427. Alain Didier Olinga, 'The embargo against Burundi before the African Commission on Human and Peoples' Rights (Note on Communication 157/96, Association for the Preservation of Peace in Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia): recent developments' 5(2) *African Human Rights Law Journal* (2005) 424–432.

127 Olinga (n 126) at 428.

128 Art 5(2) of the Court Protocol.

129 Ouguergouz (n 39) at 115.

130 Art 5(2): 'When a state party has an interest in a case, it may submit a request to the Court to be permitted to *join*' (emphasis added).

131 *Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania, Tunisia, Sahrawi Arab Democratic Republic and Mauritius Interveners*, Application 28/2018, judgment of 22 September 2022 (*Morocco AU Admission* case).

132 *Mornah v Benin & ors* (*intervention by Sahrawi*) (2020) 4 AfCLR 602 (ruling (on application for leave to intervene) of 25 September 2020.

the submitted case. The extent of overlap between the interest of the applicant (Mornah, a national of Ghana) and that of the SADR transpires from the fact that the contentions by Mornah and the SADR as intervening State were largely similar.[133] In important respects, the SADR presented a much more extensive and fully developed arguments than the applicant.

The distinct impression is created that the individual application procedure was used as an avenue to bring the respondent States before the Court in what is essentially an inter-state case. Arguably, the Court would also have had jurisdiction if the SADR brought the case as an inter-state case against the respondent States. Because the SADR has been a State party to the Court Protocol since 2013, the Court would have had personal jurisdiction to hear such an inter-state case. Understandably, the SADR may have been reluctant to take such a confrontational stance against the eight States concerned, as the core of its quarrel – the denial of the right to self-determination of the Sahrawi people – is with Morocco (and not with the eight respondent States).[134] The most significant constraint in the way of an inter-state case against Morocco is the fact that Morocco has not become a party to either the African Charter or the Court Protocol.

Adjudicators should be alert that the couching of a case as an 'individual' case may conceal a state interest, and should, when required, inquire whether the case would not have been more appropriately presented as an 'inter-state' case, in line with the principle that Principle is the 'initiation of an inter-state complaint is dependent on the voluntary exercise of the sovereign will of a State party to the Charter, which decision can only be made by States in accordance with the Charter'.[135]

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133 The Court (in the *Morocco AU Admission* case, n 131, paras 120 & 121), reiterates its consistent jurisprudence that 'any person' can bring an application 'on others' behalf without a need to demonstrate victimhood or a direct vested interest in the matter', and highlights that all 'African citizens' have a vested interest in the right to self-determination because of its 'particular importance to the African society considering the continent's history of colonialism and military occupation'. As an applicant State in an inter-state case can be seen as embodying the interest of its 'citizens', the same broad approach to standing would likely be applied to the interest of applicant States.

134 *Morocco AU Admission* case, n 131, para 17, the Court noting that 'the instant Application mainly relates to the rights and freedoms of the people of SADR'.

135 Communication 233/99-234/99, *Interights* (*on behalf of Pan African Movement and Citizens for Peace in Eritrea*) *v Ethiopia and Interights* (*on behalf of Pan African Movement and Inter African Group*) *v Eritrea*, 29 May 2003. Para 44.

8 Conclusion

Textually, the African human rights system holds much promise that inter-state complaints or cases would feature as a significant means of redressing human rights violations on the continent. In fact, the African Charter is unique among human rights treaties in making both inter-state and individual communications a necessary consequence of becoming a State party. All States parties to the African Court Protocol have the competence to submit inter-state cases to the Court and accept that other States parties may lodge cases against them. Inter-state complaints may consequently be submitted both to the African Commission and the African Court, by 54 and 34 AU member States, respectively.

The considerable potential for the submission of inter-state cases has not been realised, with only three cases having been submitted to the African Commission, and one to the Court. Only one of these cases has thus far been decided on the merits. The reasons for the rare use of inter-state complaints lie, in the first place, in the general approach of African States towards resolving inter-country disputes. Even if a particular AU member State would be prepared to raise an issue related to human rights with another African State, its preference may well be to make use of mediation or negotiation, and diplomatic and political – rather than quasi-judicial or judicial – means. Within this context, inter-state complaints are likely to remain exceptional.

Even if a State would in principle accept the suitability of approaching the Commission or Court with a human rights case, it may be dissuaded from submitting a case due to the Commission's disappointing record, and the fear that even the Court's judgments are not guaranteed effective implementation. Uncertainty about the prospect of effective case-handling may further impede submissions. It may also simply be that the option of pursuing inter-state complaints before regional bodies does not arise in the minds of government officials, lawyers and advisors, due to the relative invisibility and opaqueness of this procedure.

In the few instances of its application, the complaining State did not in the first place act to uphold the integrity of the African Charter system (in the name of 'collective enforcement'), but submitted the case to protect its national interests and the human rights of its own nationals. The submission of the *DRC* case was provoked by the complete breakdown in inter-state relations because of the illegal occupation and exploitation of the DRC's resources by forces from neighbouring States, and the dire situation in which its citizen found themselves in the eastern part of the country. The DRC v Rwanda seem

to relate to the ongoing threat to the national interest and security of the peoples of the eastern DRC.

Perhaps departing from an overly optimistic view of the African system, it is also possible that States do not experience the need to act in the 'collective public interest' because the Charter system is flexible and is able with ease to accommodate claims of massive violations. The Commission and Court allow for cases to be submitted by individuals and groups of individuals, and have been generous in exempting complainants/applicants from the exactitudes of exhausting local remedies. States may, on this basis, validate their non-submission of cases by pointing to the actual submission by victims of violations – and the concomitant findings – in these circumstances.

Against this backdrop, it seems unlikely that there will, in the near future, be a dramatic increase in the use of the inter-state mechanism under the African regional human rights system. However, the pending *DRC v Rwanda* case before the African Court may have a significant influence on this trend. In the context of greater awareness of the existence and potential relevance of the inter-state procedure, the resolution and impact of this first-ever inter-state case before the African Court may either be an accelerator for or discourage the submission of similar cases in the future.

Recent submissions by African States (The Gambia and South Africa) of two inter-state cases to the ICJ do not necessarily detract from this conclusion. These cases are against *non-African States* (Myanmar and Israel, respectively). Both cases are based on the principle of 'collective enforcement', as they seek to uphold the respondent States' human rights obligations, and invoke the standing of the applicant State to bring the case in the interest of all State parties (to the Genocide Convention). At the same time, the submission of these cases also aligns with the submitting States' broader geo-political ambitions. For The Gambia, submitting the case helps to distinguish the Adama Barrow era from the era of Yammeh's authoritarian rule, especially as his government's popular supports weakens, and aligns it with the agenda of the Organisation of Islamic Conference. For South Africa, submitting the case aligns with the African National Congress's long-standing support for Palestinian people's claims to self-determination, and bolster the government's foreign policy objective of contributing to the reconstructed new world order. The question thus remains whether the submissions of these two cases presages more frequent submission of inter-state cases by African States against African States before the ICJ.

African States may submit inter-state cases against each other before the ICJ, and have indeed done so. But they may also bring these cases to the African Court. Endowed with an expansive substantive jurisdiction, the African Court provides a plausible alternative or complementary forum for inter-state cases.

The Court's jurisdiction is however limited to African States that have accepted its jurisdiction, and that are party to the relevant treaty that is invoked. So far, no African State has submitted a case against another African State on the basis of collective enforcement of the Charter, and certainly not related to genocide.

As far as the Genocide Convention is concerned, the African Court has jurisdiction over African States parties to the Genocide Convention. By the end of 2023, 36 African States have become party to the Genocide Convention.[136] Most of them have also accepted the Court's jurisdiction.[137] Failure by Sudan to accept the Court's jurisdiction made it impossible for countries such as The Gambia and South Africa to submit an inter-state case in respect of the plausible genocide in the Darfur region of Sudan, in the early 2000s. Similarly, Ethiopia, another State in respect of which allegations of genocide have circulated, is not a party to the Court Protocol although it has ratified the Genocide Convention.

Unquestionably, African States parties to the Court Protocol may submit inter-state cases on a much wider array of human rights related topics than genocide, since the African Court's jurisdiction extends to all human rights treaties to which States parties have become party. Going by persistent non-compliance with adverse findings of the African Commission, the most egregious African violator-States may be identified. However, a number of them have not accepted the African Court's jurisdiction, even if they have at least become party to the African Charter.[138] From this perspective, the more frequent use of inter-state cases may serve as a disincentive to these States from ratifying the Court Protocol.

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136 *Convention on the Prevention and Punishment of the Crime of Genocide,* opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4> accessed 30 April 2024 (18 African UN member states are not party to this Convention, as well as the Saharawi Arab Democratic Republic).

137 The following states have accepted the Genocide Convention but not the Court's jurisdiction: Cape Verde, Egypt, Ethiopia, Guinea, Liberia, Namibia, Seychelles, Sudan, Zimbabwe.

138 Eritrea presents probably the clearest example: The African Commission has strongly condemned the violations of freedom of information and access to information by the Eritrean government and called for release of detainees conduct of speedy and fair trials; and an end to the ban on private media in two communications (*Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 108 & *Zegveld and Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) para 62). The government of Eritrea has however failed to implement the recommendations made by the Commission. The Commission in 2005 also adopted Resolution 91, condemning the arrest and continued detention of the victims of the 2001 crackdown, calling for their release and for Eritrea to comply with its international human rights obligations.

It remains to be seen whether the slowly emerging trend towards submitting inter-state cases will be used by African States in respect of other African States that are parties both to African Court Protocol and relevant human rights treaties upon which a collective compliance in situations where serious and systematic violations of human rights occur would be raised before African Court, especially to complement in situations in which complaints are not forthcoming by groups or NGOs.