

## CHAPTER 1 INTRODUCTION

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### 1.1 Background and problem statement

International law is classically defined as the body of law that regulates relations between states.<sup>1</sup> However, since the Second World War, international law has not only been regulating relations between states but has developed to include as one of its “principle aims” the “protection of the human rights of the individual against her or his own government”.<sup>2</sup> The adoption of the Universal Declaration on Human Rights by the United Nations General Assembly in 1948 could be cited as the beginning of the development of human rights regimes at the global, regional and national levels.<sup>3</sup> The development of human rights regimes at the global and regional levels was accompanied by the adoption of various treaties defining the normative frameworks for the promotion and protection of human rights.<sup>4</sup> More than fifty years since the

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<sup>1</sup> J Dugard *International Law – A South African Perspective* (2000) 1.

<sup>2</sup> Dugard (2000) 234.

<sup>3</sup> There are three regional human rights systems in the world namely the European, Inter-American and African.

<sup>4</sup> At the global level the Universal Declaration inspired the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition to these two principle global human rights instruments various other specialised human rights treaties have also been adopted at the global level such as the Convention on the Elimination of All Forms of Discrimination against Women or the Convention on the Rights of the Child. The founding treaties of regional human rights systems have also been inspired by the

adoption of the Universal Declaration, the process of norm setting is largely complete. The focus should now shift to the implementation of these norms.<sup>5</sup> Enforcement or implementation mechanisms have been established to ensure compliance with treaty norms at the global and regional levels.<sup>6</sup>

This study aims to contribute towards the improved implementation of human rights norms. In particular, the focus is on the strengthening of the African regional human rights system through an analysis of state compliance with the findings of the body mandated with the implementation of treaty norms. The African regional human rights system is based on the normative framework provided by the African Charter on Human and Peoples' Rights (African Charter). The African Charter was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) on 27 June 1981 and entered into force on 21 October 1986.<sup>7</sup> In terms of the African Charter, the African Commission on Human and Peoples' Rights (African Commission) is established to ensure compliance with the Charter's norms.<sup>8</sup> In fulfilling its protective mandate, the African Commission has developed a well established practice of receiving and considering individual complaints alleging violations by state parties of the African Charter.<sup>9</sup> In finding a state party in violation of the African Charter, the Commission has further developed a practice whereby it not only lists the articles violated by a state party but also recommends remedial

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Universal Declaration and following the global examples regional systems also adopted specialised human rights treaties such as the African Charter on the Rights and Welfare of the Child.

<sup>5</sup> The United Nations High Commissioner for Human Rights in 1996 stated that "[i]n general, I believe that we all agree that there is no shortage of international human rights standards. Nor, unfortunately, is there a shortage of situations demanding improvement of respect for human rights. Our basic challenge is to implement human rights standards and make human rights meaningful in people's lives" (UN Doc.E/CN4/1996/50/Add.1 quoted in G Mugwanya 'Realizing universal human rights norms through regional human rights mechanisms: Reinvigorating the African system' (1999) 10 *Indiana International & Comparative Law Review* 40). See also C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483.

<sup>6</sup> An example of an enforcement mechanism is the European Court of Human Rights while the Inter-American Commission on Human Rights could be described as an implementation mechanism.

<sup>7</sup> All 53 member states of the OAU (now African Union) have ratified the African Charter.

<sup>8</sup> The African Commission is established under article 30 of the African Charter and its mandate is set out in article 45. The mandate of the African Commission is two-fold, it has to both promote and protect the rights guaranteed in the African Charter. The African Commission held its first session in Addis Ababa, Ethiopia, in November 1987.

<sup>9</sup> The Commission developed the practice of considering complaints from individuals, groups of individuals and non-governmental organisations (NGOs) in accordance with articles 55-58 of the African Charter.

measures to be adopted by the state party concerned. The Commission's jurisprudence and practice in this regard is well documented.<sup>10</sup>

The same cannot be said of the process that follows once the Commission has forwarded its findings to a state party found to have violated the African Charter. Very little is known about the status of state compliance with the African Commission's recommendations.<sup>11</sup> The African Commission has no policy in place to monitor state compliance with its recommendations. Even though the Commission has made some attempts at follow-up in the past, these efforts were few and far apart and have not developed into an established practice.<sup>12</sup> Therefore, complaints about a lack of compliance with its findings by Commissioners amount to mere speculation in the absence of accumulated data and any policy on follow-up.<sup>13</sup>

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<sup>10</sup> See for instance NS Rembe *The System of Protection of Human Rights under the African Charter on Human and Peoples' Rights: Problems and Prospects* (1991); EA Ankumah *The African Commission on Human and Peoples' Rights – Practice and Procedures* (1996); UO Umozurike *The African Charter on Human and Peoples' Rights* (1997); R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) and M Evans & R Murray *The African Charter on Human and Peoples' Rights – The System in Practice, 1986-2000* (2002).

<sup>11</sup> This is not a phenomenon that is peculiar to the African system. Paulson in analysing compliance with the final judgments of the International Court of Justice (ICJ) quoted Judge Jennings of the ICJ who stated that “[i]t is ironic that the Court's business up to the delivery of judgment is published in lavish detail, but it is not at all easy to find out what happened afterwards” (C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434).

<sup>12</sup> The Commission has reported that it had sent letters to state parties calling on them to implement the Commission's decisions (*Communication Procedure*, Information Sheet no 3 at 17). The Commission has also on occasion made use of promotional visits or visits for protective reasons to follow-up on the status of state compliance (See objectives of the *Report of the African Commission's Promotional Mission to Burkina Faso*, 22 September to 2 October 2001, DOC/OS(XXXIII)/324b/l). The Commission has further on occasion incorporated follow-up measures as part of its findings in deciding individual communications by calling on state parties to report back to it upon submitting its next periodic report in terms of article 62 on the measures it had taken to comply with the Commission's recommendations (See communication no 211/98 *Legal Resource Foundation v Zambia*, 14<sup>th</sup> Annual Activity Report).

<sup>13</sup> During the 22<sup>nd</sup> Session of the Commission the Chairman stated “that none of the decisions on individual communications taken by the Commission and adopted by the Assembly had ever been implemented” (R Murray 'Report on the 1997 sessions of the African Commission on Human and Peoples' Rights- 21<sup>st</sup> and 22<sup>nd</sup> sessions: 15-25 April and 2-11 November 1997' (1998) 19 *Human Rights Law Journal* 170). On another occasion the Commission stated that “the attitude of state parties ... with the exception of Cameroon has been to generally ignore its recommendations” (*Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach* DOC/OS/50b(XXIV), 24<sup>th</sup> ordinary session, Banjul, 22-31 October 1998).

Commentators on the African regional human rights system have often cited the absence of “teeth” in the system when it comes to the enforcement mechanisms provided for in the African Charter,<sup>14</sup> but have not undertaken any studies on the steps taken by states upon having received the Commission’s findings. With the entry into force of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Protocol), the establishment of an African Court to add “teeth” to the system is almost a reality.<sup>15</sup> The African Court will co-exist with the African Commission. Due to reasons relating to admissibility and based on the experiences of the Inter-American system, it is likely that the African Commission will continue to consider the majority of individual complaints lodged in the system.<sup>16</sup> Even if all cases could potentially be referred to the Court by the Commission, this will most probably not happen initially. It should ideally not be allowed for it will result in a prolonged process while the violations of human rights continue unabated. It is argued in this study that the implementation of the African Commission’s recommendations will continue to be a priority for the African system notwithstanding the fact that the system is strengthened with the establishment of an African Court. The strengthening of the African Commission should not be put on hold in favour of establishing the African Court.<sup>17</sup>

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<sup>14</sup> See for instance CE Welch *Protecting Human Rights in Africa- Roles and Strategies of Non-governmental Organisations* (1995) 151-153.

<sup>15</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (OAU/LEG/MIN/AFCHPR/PROT (1) Rev. 2) entered into force in January 2004, a month after the fifteenth instrument of ratification was deposited.

<sup>16</sup> Article 5(3) of the Protocol provides that non-governmental organisations (NGOs) with observer status before the Commission and individuals may institute cases directly before the Court but only if the state party against which such a case is instituted has made a separate declaration to this effect under article 34(6) of the Protocol. Of the 19 states that have ratified the Protocol only Burkina Faso has so far made a declaration under article 34(6). In the Inter-American regional human rights system individuals do also not have direct access to the Inter-American Court of Human Rights. This has led to a situation where no contentious cases were received by the Court in the first six years of its existence and only 46 cases have been decided on the merits in the past 20 years. A list of all the Court’s judgments on the merits can be accessed at: [http://www.corteidh.or.cr/seriec\\_ing/index.html](http://www.corteidh.or.cr/seriec_ing/index.html). Date accessed: 19 November 2004.

<sup>17</sup> See Ankumah on the debate that preceded the establishment of an African Court: The gradualist view supported the establishment of an African Court but lobbied for the improvement of the African Commission before creating another institution (Ankumah (1996) 194). Murray reported that during the consideration of the Draft (Nouakchott) Protocol (OAU/LEG/EXP/AFCHPR/PROT(2)) at the 22<sup>nd</sup> ordinary session of the African Commission “it was noted that one of the problems facing the Commission at present was the lack of political will and compliance with its decisions and that attempts should be made to ensure those decisions of the Court were observed and could be sanctioned by, for example, withdrawal of ratification of the Protocol after non-adherence to a certain number of decisions. Ultimately, the

An analysis of state compliance with the recommendations of the African Commission will contribute to a better understanding of the regional protection of human rights, and may contribute to its improvement by recommending the transformation of the regional system of follow-up. The ideal is to create a system where state compliance is the norm, in other words where states adhere to the recommendations of the African Commission and the judgments of the upcoming African Court consequent to a finding of violation. The study is undertaken as new African institutions unfold. The New Partnership for African Development (NEPAD) is, on the face of it, an economic initiative. However, without the guarantee of human rights protection and the accountability of African leaders for human rights atrocities, foreign investors will not commit themselves to this initiative. In another new development on the continent, the African Union (AU) replaced the Organisation of African Unity (OAU). This transformation does not affect the mechanisms that functioned under the OAU and therefore the African Commission will function under the AU as it did under the OAU.

It is against this background that this study sets out in chapter 2 to firstly establish what happened in the cases where the Commission found a state party in violation of the Charter and issued recommendations. It is only possible to empirically determine the status of state compliance with the Commission's recommendations by first following up on all the cases where the Commission found a violation and issued recommendations since its inception. Another issue that is investigated in chapter 2 is whether state compliance by African states, which are party to both the African Charter and the First Optional Protocol to the International Covenant on Civil and Political Rights (First Optional Protocol to the ICCPR), differs. In other words, an effort is made to determine whether state compliance by African states is better with the UN global system than with the regional system. In order to improve state compliance in the African system, the factors that influence compliance both negatively and positively have to be identified. In chapter 3 these factors are identified with reference to the findings in chapter 2, while also taking into account existing theories on state compliance with international law by international law and international relations scholars. The factors that impact positively on state compliance will form the basis of subsequent recommendations to improve state compliance in the African system.

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effectiveness of the Court would depend on the effectiveness of the Commission which should be strengthened first" (Murray (1998) 171).

In chapter 4, this study analyses the promotional and protective mandate of the African Commission as well as the Commission's relationships with other role players in the system such as NGOs, National Human Rights Institutions and various organs of the African Union. This is done to determine how, in fulfilling its existing mandate, the Commission can incorporate a follow-up mechanism that takes cognisance of the factors that influence state compliance.

Upon having determined the potential functioning of a follow-up mechanism in the African system, chapter 5 undertakes a comparative analysis of the experiences of other treaty bodies in adopting follow-up mechanisms to improve the status of state compliance with their findings. The experiences of the Committee of Ministers under article 32 of the European Convention on Human Rights before the entry into force of Protocol 11 is analysed in comparison to the experiences of the Inter-American Commission on Human Rights and the United Nations Human Rights Committee. The aim is to identify best practices from each system to guide the African Commission in the formulation of a follow-up mechanism.

As mentioned, the African system will soon be strengthened with the establishment of an African Court on Human Rights. The Protocol establishing the Court, unlike the African Charter, provides specifically for measures to monitor state compliance with the judgments of the Court.<sup>18</sup> The Protocol does not however deal with these measures in detail and it will be up to the African Court and the organs of the African Union to develop these measures in their Rules of Procedure. In chapter 6, a comparative analysis of the established practices of the European Court of Human Rights and the Inter-American Court of Human Rights in monitoring compliance with their judgments is given to inform the evolution of the African system.

Finally, this study concludes in chapter 7 with the formulation of recommendations aimed at improving state compliance with the findings of the African Commission and ensuring state compliance with the judgments of the upcoming African Court. It may be argued that many of the factors influencing state compliance with the recommendations of the African Commission are political in nature and could be addressed by strengthening the African Union to function effectively or by improving the legitimacy of governance in Africa. Effecting substantial political reform on the African continent is however a process that would take much time and one which

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<sup>18</sup> Article 29(2) of the Protocol.

falls outside the scope of this study. This study focuses on improving state compliance with the recommendations of the African Commission through an analysis of legal factors that could contribute to state compliance.

## 1.2 Aim of the study

The aim of this study is to strengthen the African regional human rights system through an analysis of state compliance with the recommendations of the African Commission in an effort to identify the factors that influence compliance and to use this information to improve state compliance. Not only does this study aim to improve state compliance with the Commission's recommendations, but it also aims to formulate recommendations to ensure compliance with the judgments of the future African Court.

## 1.3 The significance of the study

Although the literature on the African regional human rights system is limited in comparison to other regional systems, the functioning of the African Commission in fulfilling its promotional and protective mandate has received considerable attention.<sup>19</sup> Previous studies on the individual complaints mechanism have dealt in detail with issues such as the admissibility of complaints, the Commission's findings on the merits and the recommendations issued by it upon finding a state in violation of the Charter.<sup>20</sup> However, apart from mentioning the lack of a follow-up policy and the weak enforcement powers of the Commission, no study has dealt with the process that ensues once the Commission has forwarded its findings to a state party. Due to the lack of a follow-up policy in the African system, there is also no database on the implementation of the findings of the Commission. As a result, the status of state compliance with the Commission's findings has, apart from speculation, never been empirically established or comprehensively discussed.

It is in addressing these *lacunae* that the significance of this study becomes apparent:

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<sup>19</sup> See the literature review below, section 1.5.  
<sup>20</sup> As above.

- Firstly, through a series of follow-up efforts this study has documented the steps that have or have not been taken by state parties to implement the recommendations issued by the Commission since its inception.
- Through an empirical analysis of the steps taken by state parties to implement the Commission's recommendations, the status of state compliance with the Commission's recommendations has been determined for the first time.
- Through an analysis of the above findings, factors that influence state compliance in the African system have been identified. Identifying factors that influence state compliance is not only significant to the formulation of recommendations to improve state compliance but also contributes to the existing literature on the theory of state compliance with international law.
- The UN Human Rights Committee, Inter-American Commission on Human Rights and the Committee of Ministers in the European system (before Protocol 11) have all adopted measures to improve state compliance with their findings. The significance of a comparative analysis of the practices they have adopted lies in the fact that examples of best practices from each system can be identified to guide the African system in developing its own policy on follow-up.
- The Protocol establishing an African Court makes provision for the supervision of the execution of the Court's judgments. This is a new procedure in the African system since the Commission has no policy on follow-up. Not only the Court, but also the organs of the African Union that are mandated to play a role in the supervision of the execution of the Court's judgments, will have to include measures dealing therewith in their Rules of Procedure. Through a comparative analysis of the practices in the European and Inter-American system, this study identifies best practices in these systems to guide the African Court and AU organs in drafting Rules of Procedure and in establishing practices on supervising compliance.
- Lastly, the significance of this study lies in filling the *lacuna* left by the lack of a follow-up policy in the African Commission by recommending an ideal



follow-up mechanism. Such a mechanism should function within the Commission's existing mandate, make use of its relationships with other bodies in the system and should be informed by the factors that influence compliance as identified in this study.

#### **1.4 Terminology**

For the purposes of this study, the following concepts, frequently used in the study, are briefly clarified here: "decision", "judgment", "findings", "recommendations", "implementation", "execution" and "compliance".

##### "Decision" and "judgment"

In this study a reference to "decision" in the context of the African Commission refers to the written conclusion reached by the Commission upon having considered a communication lodged under the individual complaints mechanism. A "decision" is understood here as to include the facts of a case, the procedure followed in a case, legal arguments on admissibility and on the merits as well as a conclusion as to whether a state party has violated the African Charter accompanied by recommendations should a violation be found. In other words, reference to "decision" is to the complete written text on a communication. The term "judgment" is used instead of "decision" to refer to the conclusions reached by a court.

##### "Finding" and "recommendation"

Where the term "finding" is used in this study in connection with the African Commission, it should be understood as a reference to the concluding part of the Commission's "decisions". In other words, "findings" of the African Commission include both the list of articles of the African Charter found by the Commission to have been violated by a state party as well as the "recommendations" issued by the Commission. The remedies issued by the Commission upon having found a state party in violation of the African Charter are referred to as "recommendations". Instead of using the phrase "order", the Commission uses terminology such as "appeals", "urges" or "requests" in issuing remedies to a state party instead of "order". In this study references to "findings" and "recommendations" are used interchangeably, as arguments about the "implementation" of the one relates directly to that of the other.

“Implementation” and “execution”

For the purposes of this study, “implementation” should be understood as the steps a state party must take to give domestic effect to the “findings/recommendations” of the African Commission or other body of similar status. The term “execution” is used in reference to a “judgment” of a court that must be given effect in the national legal system of a state party.

“Compliance”

While “implementation” is understood as the individual steps a state party has to take to give effect to a finding, “compliance” refers to the end-result. In other words, where there is full “compliance”, all the recommendations of the African Commission have been implemented fully. But where there is only partial “compliance” or no “compliance”, a state party has either taken only some of the steps recommended or has not taken any such steps.

## 1.5 Literature review

Since the entry into force of the African Charter in 1986 and the establishment of the African Commission in the following year, international law scholars have analysed, commented and often criticised the provisions of the Charter and the practices and procedures of the African Commission.<sup>21</sup> Almost every aspect of the Commission’s promotional and protective mandate has been the focus of scholarly analysis.<sup>22</sup> The same is true of the individual complaints procedure of the Commission.<sup>23</sup> Scholars

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<sup>21</sup> See for instance: Rembe (1991); W Benedek ‘The African Charter and the Commission on Human and Peoples’ Rights: How to make it more effective’ (1993) 1 *Netherlands Quarterly of Human Rights* 25; KO Kufuor ‘Safeguarding human rights: A critique of the African Commission on Human and Peoples’ Rights’ (1993) 18 *Africa Development* 65; Ankumah (1996); Umozurike (1997); Murray (2000); VO Nmehielle *The African Human Rights System – Its Laws, Practice and Institutions* (2001); and Evans & Murray (2002).

<sup>22</sup> To list but a few examples: R Murray ‘On-site visits by the African Commission on Human and Peoples’ Rights: A case study and comparison with the Inter-American Commission on Human Rights’ (1999) 11 *African Journal of International and Comparative Law* 460; S Gutto ‘The reform and renewal of the African regional human and peoples’ rights system’ (2001) 2 *African Human Rights Law Journal* 175; J Harrington ‘Special rapporteurs of the African Commission on Human and Peoples’ Rights’ (2001) 2 *African Human Rights Law Journal* 247; V Dankwa ‘The promotional role of the African Commission on Human and Peoples’ Rights’ in M Evans & R Murray *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2000* (2002) 335; and GJ Naldi ‘Interim measures of protection in the African system for the protection of human and peoples’ rights’ (2002) 1 *African Human Rights Law Journal* 1.

<sup>23</sup> See for instance: CA Odinkalu ‘The individual complaints procedures of the African Commission on Human and Peoples’ Rights: A preliminary assessment’ (1998) 8

and human rights activists have undertaken detailed studies of all aspects of the Commission's practices in deciding individual communications focussing on aspects such as: admissibility,<sup>24</sup> decisions on the merits<sup>25</sup> and the remedies.<sup>26</sup>

No study has however been undertaken to focus solely on the implementation of the Commission's findings or recommendations.<sup>27</sup> Most commentators have referred to the weak enforcement powers of the Commission or the fact that the Commission has no policy in place to follow up on the implementation of its findings.<sup>28</sup>

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*Transnational Law and Contemporary Problems* 359; and I Österdahl *Implementing Human Rights in Africa – The African Commission on Human and Peoples' Rights and Individual Communications* (2002).

<sup>24</sup> On admissibility see: F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray *The African Charter on Human and Peoples' Rights – The System in Practice, 1986-2000* (2002) 61; H Onoria 'The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* 1; S Gumede 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.

<sup>25</sup> On the jurisprudence of the Commission see: R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412; R Murray 'Digest of foreign cases: African Commission on Human and Peoples' Rights, October 1996-June 1998' (1999) 15 *South African Journal on Human Rights* 105; and M Van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 167.

<sup>26</sup> GJ Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681.

<sup>27</sup> The African Commission has on a few occasions attempted to follow up on the steps states have taken to implement its decisions. Some scholars have briefly referred to these follow-up efforts of the Commission: Ankumah (1996) 72-73; Murray (2000) 21, 56 and F Ougergouz *The African Charter on Human and Peoples' Rights – A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 657. These scholarly works are used as sources to verify some of the follow-up findings recorded in chapter 2.

<sup>28</sup> See for instance: M Mutua 'The African human rights system – A critical evaluation' (2000) 12. Available at: <http://hdr.undp.org/publications/papers.cfm>. Date accessed: 29 November 2004; Murray (2000) 21 and C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 155. In 2002 a report was produced to provide a comparative analysis of the principles used by regional and international human rights bodies in awarding remedies to victims of human rights violations. The report was commissioned by the Institute for Human Rights and Development in Africa. CL Turner & HT Tamrat *A Comparison of Remedies, Damages, Compensation, and Compliance in Regional and International Human Rights Systems* (2002) unpublished report on file with author. The report also dealt briefly with the enforcement mechanisms of regional and international human rights bodies. As far as the African system is concerned, the report only mentioned that there "is no documented enforcement of the decisions by the Commission" and while the report noted the absence of any enforcement mechanism in the system it did not formulate recommendations to address these *lacunae* (Turner & Tamrat (2002) 6-7).

Scholars of the African system have also commented in some depth on the establishment of an African Court on Human and Peoples' Rights. The debate preceding the drafting of the Protocol establishing the Court,<sup>29</sup> the drafting history of the Protocol,<sup>30</sup> the provisions of the Protocol<sup>31</sup> and comparisons between the Protocol and founding treaties of other regional human rights Courts have formed the focus of scholarly works.<sup>32</sup> Some of these works have examined the provisions in the Protocol that provide for the supervision of the execution of the Court's judgments.<sup>33</sup> As this examination usually formed part of a broader analysis of the Protocol and future functioning of the Court as a whole, the issue of state compliance with the Court's judgments has not been the subject of detailed analysis.

In contrast to the shortage of scholarly contributions on questions of state compliance in the African regional human rights system, studies dealing specifically with issues of follow-up and enforcement mechanisms have been published in relation to other regional and international human rights bodies,<sup>34</sup> and in respect of the International

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<sup>29</sup> Ankumah (1996) 194; Nmehielle (2001) 249 and A O'Shea 'A critical reflection on the proposed African Court on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 285.

<sup>30</sup> B Kioko 'The road to the African Court on Human and Peoples' Rights' (1998) 10 *The African Society of International and Comparative Law – Tenth Annual Conference* 70 and J Harrington 'The African Court on Human and Peoples' Rights' in MD Evans & R Murray *The African Charter on Human and Peoples' Rights – The System in Practice, 1986-2000* (2002) 305.

<sup>31</sup> RW Eno 'The jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223 and IAB Elsheikh 'The future relationship between the African Court and the African Commission' (2002) 2 *African Human Rights Law Journal* 252.

<sup>32</sup> EK Quashigah 'The African Court of Human Rights: Prospects, in comparison with the European Court of Human Rights and the Inter-American Court of Human Rights' (1998) 10 *Annual Conference/African Society of International and Comparative Law* 59; D Padilla 'An African Human Rights Court: Reflections from the perspective of the Inter-American system' (2002) 2 *African Human Rights Law Journal* 185 and R Murray 'A comparison between the African and European Courts of Human Rights' (2002) 2 *African Human Rights Law Journal* 195.

<sup>33</sup> Nmehielle (2001) 301-304; Padilla (2002) 192-193; Murray (2002) 215-217 and Harrington (2002) 324-326.

<sup>34</sup> In reference to the UN Human Rights Committee see: M Schmidt 'Follow-up mechanisms before UN human rights treaty bodies and the UN mechanism beyond' in AF Bayefsky (ed) *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (2000) 233; I Boerefijn 'The role of treaty bodies in enhancing follow-up' (2001) A paper delivered at a SIM Conference 28-29 September 2001. Available at: <http://www2.law.uu.nl/english/sim/publ/conference/boerefijn.pdf> and M Schmidt 'The Follow-up activities by UN human rights treaty bodies and the OHCHR' (2003) available at: [http://www.abo.fi/institut/imr/ILA\\_papers.htm](http://www.abo.fi/institut/imr/ILA_papers.htm). On the European Human Rights system, see: P Leuprecht 'The execution of judgments and decisions' R St J Macdonald, F Matscher, & H Petzold (eds) *The European System for the Protection of Human Rights* (1993) 791; R Macdonald 'Supervision of the execution of the judgments of the European Court of Human Rights' in R Dupuy (ed) & LA Sicilianos (coordinator) *Melanges en L'Honneur de Nicolas Valticos – Droit et Justice* (1999)

Court of Justice (ICJ).<sup>35</sup> These works form the background against which further analysis is undertaken, in terms of which comparison between these systems and the African system are made.<sup>36</sup>

Finally, this study aims to contribute to the existing literature on state compliance with international law. This is a field where scholars of international law and international relations have developed analytical frameworks and theories to explain state compliance with international law mainly employing the “normative” or “realist” approaches.<sup>37</sup>

## 1.6 Research method

The research method followed in this study proceeds through three phases, namely, a literature review, empirical data collection by way of field work and an analysis of the material gathered.

In the first phase, a literature and internet search and review of the existing material available on the research topic was undertaken. The literature review brought to light the fact that very little is known about the status of state compliance with the Commission’s recommendations or the factors that affect state compliance in the African system.

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417 and LF Zwaak ‘The effects of final decisions of the supervisory organs under the European Convention on Human Rights’ in AF Bayefsky (ed) *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (2000) 255. On the Inter-American Human Rights System, see: T Buergenthal ‘Implementation in the Inter-American Human Rights System’ in *International Enforcement of Human Rights: Reports Submitted to the Colloquium of the International Association of Legal Science* (1985) 57; and KD King-Hopkins ‘Inter-American Commission on Human Rights: Is its bark worse than its bite in resolving human rights disputes?’ (2000) 35 *Tulsa Law Journal* 421.

<sup>35</sup> On the International Court of Justice, see: C Paulson ‘Compliance with final judgments of the International Court of Justice’ (2004) 98 *American Journal of International Law* 434 and C Schulte *Compliance with Decisions of the International Court of Justice* (2004).

<sup>36</sup> A work that followed a similar approach on a much smaller scale was that of Higgins, see R Higgins ‘Africa and the Covenant on Civil and Political Rights during the first five years of the *Journal*: Some facts and some thoughts’ (1993) 5 *African Journal of International and Comparative Law* 55.

<sup>37</sup> A Chayes & AH Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); LR Helfer & A Slaughter ‘Toward a theory of effective supranational adjudication’ (1997) 107 *Yale Law Journal* 273; HH Koh ‘Why do nations obey international law?’ (1997) 106 *Yale Law Journal* 2599 and OA Hathaway ‘Do human rights treaties make a difference?’ (2002) 111 *Yale Law Journal* 1935.

Since the African Commission has no follow-up policy to monitor the steps taken by a state party to implement the Commission's recommendations, the Secretariat of the Commission has never compiled data on the status of state compliance with the Commission's recommendations. It therefore follows that in order to undertake an analysis of the status of state compliance in the African system, this study first has to determine the status of state compliance through various follow-up efforts. The second phase of the study therefore consists of field work to gather information about the steps taken by state parties to implement the recommendations issued by the Commission since its inception. The research method adopted in this phase consists of compiling a table listing all the communications published from the seventh Annual Activity Report, onwards, in respect of which the Commission found a state party in violation of the Charter and recommended remedies to be adopted by the state party. During interviews with Commissioners, the Secretariat of the Commission, representatives of state parties, members of National Human Rights Institutions and NGOs, information about follow-up on the implementation of the Commission's recommendations was collected. Where available, the information gathered by way of interviews was also cross-referenced with media reports and *vice versa*.

In particular, follow-up information was gathered as follows:

- From 29 April to 1 May 2002, I participated in the 'Workshop on Human Rights Litigation in Africa', held in Pretoria, South Africa. The workshop was organised by the Institute for Human Rights and Development in Africa (IHRDA) and the Kenyan and Swedish sections of the International Commission of Jurists. The workshop included a discussion on strategies that might be utilised to overcome obstacles and achieve implementation of the Commission's recommendations. The participants were representative of various African and international NGOs that have previously been party to individual communications lodged with the Commission. I conducted interviews with the participants to establish what happened in the cases to which they were party upon having received the Commission's findings.<sup>38</sup>
- I attended the 31<sup>st</sup> Ordinary Session of the African Commission held from 2 to 16 May 2002 in Pretoria, South Africa. During the Session I interviewed

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<sup>38</sup> In most instances the representatives from the NGOs that were interviewed agreed to follow-up questions via email. During interviews held at the workshops preceding the Commission's Sessions and during the Sessions contacts were made with representatives from a number of Nigerian NGOs that enabled me to undertake a field trip to Nigeria in 2002.

representatives from various NGOs, state parties and several Commissioners including the Chair and Vice-Chair of the Commission.

- From 14 to 16 October 2002, I attended a 'Workshop on litigation in front of the African Commission' organised by IHRDA in Banjul, The Gambia. A session of this workshop specifically focused on exploring ways to achieve implementation of the Commission's recommendations. I conducted interviews with some of the participants who were representatives of NGOs that have been party to communications before the African Commission. I also interviewed Dr David Padilla, former Assistant Executive Secretary of the Inter-American Commission on Human Rights, who participated in the workshop as a specialist on the Inter-American regional human rights system. The Inter-American Commission adopted a follow-up mechanism to improve compliance with its findings in 2001.
- From 17 to 23 October 2002, I attended the 32<sup>nd</sup> Ordinary Session of the African Commission held in Banjul, The Gambia. I interviewed relevant role players during the course of the Session. During this period I also visited the Secretariat of the Commission in Banjul and conducted research in the Documentation Centre.
- From 23 to 27 October 2002, I undertook a field trip to Lagos, Nigeria. Of the 44 communications investigated in this study 19 cases were against Nigeria. Therefore a field trip was undertaken to Lagos where most of the NGOs that have lodged complaints with the African Commission are based. Interviews were conducted with representatives from the following NGOs: Constitutional Rights Project, Civil Liberties Organisation, Media Rights Agenda, Huri-Laws, Legal Defence and Assistance Project and the Social and Economic Rights Action Centre.
- From 12 to 14 May 2003, I attended the NGO Forum that preceded the 33<sup>rd</sup> Ordinary Session of the African Commission held in Niamey, Niger. I conducted interviews with the relevant role players.
- From 15 to 19 May 2003, I attended the 33<sup>rd</sup> Ordinary Session of the African Commission held in Niamey, Niger. I interviewed the relevant role players.
- From 3 to 5 November 2003, I attended the NGO Forum that preceded the 34<sup>th</sup> Session of the African Commission held in Banjul, The Gambia.
- From 6 to 10 November 2003, I attended the 34<sup>th</sup> Ordinary Session of the African Commission held in Banjul, The Gambia. I interviewed the relevant role players.

During the third and final phase of this study, the material gathered during the field work was analysed to determine and explain the status of state compliance with the

African Commission's recommendations. These findings in turn formed the basis for further analysis, including the formulation of recommendations to improve state compliance under the African system.

In comparing the African human rights system with comparable experiences in the UN, European and Inter-American human rights systems this study employs the comparative method. A micro approach is followed in that the systems are not compared in detail, but with reference to a specific issue – mechanisms to establish state compliance with the decisions of the relevant human rights bodies.

## **1.7 Overview of chapters**

Chapter 1 sketches the background to the study and outlines the problem to be addressed in the chapters that follow. It also states the aim and significance of the study, in the light of previous work done in this field. Some limitations inherent in the study are also identified.

In chapter 2, the status of state compliance with the African Commission's recommendations is established through an empirical analysis of the steps state parties have taken to implement the recommendations of the African Commission. This chapter includes a table listing all the communications, in which the Commission has found a state party in violation of the Charter and issued recommendations, decided by the Commission as published since its 7<sup>th</sup> Annual Activity Report. The table also lists the information gathered on the implementation of the Commission's recommendations. In order to compare state compliance under the African Charter with state compliance by African states under the First Optional Protocol to the ICCPR, another table is included with follow-up information on the implementation of the Committee's views. Based on these tables, the status of state compliance in both systems is empirically determined and analysed.

The factors that influence state compliance in the African system are identified in chapter 3. This process is undertaken within the framework of the existing theories on state compliance with international law in general. These theories have formed the focal point of various studies by international law and international relations scholars.

In chapter 4, the promotional and protective mandate of the African Commission is



analysed in an effort to determine how the Commission in fulfilling its existing mandate can incorporate a follow-up mechanism that takes into account the factors that influence state compliance as identified in chapter 3. The Commission's relationships with NGOs, NHRIs and various organs of the African Union are also analysed with the same goal in mind.

In chapter 5, a comparative analysis is undertaken of the measures for improving state compliance adopted by the Committee of Ministers of the Council of Europe (before the entry into force of Protocol 11 to the European Convention on Human Rights), the Inter-American Commission on Human Rights and the UN Human Rights Committee.

In chapter 6, a comparative analysis is undertaken of the measures adopted in the European and Inter-American regional human rights systems to ensure compliance with the judgments of the European and Inter-American human rights Courts. The provisions of the Protocol establishing an African Court dealing with the supervision of the judgments of the Court are examined and recommendations for the future functioning of the monitoring system are formulated.

Finally, chapter 7 summarises the conclusions drawn in this study and sets out recommendations to improve state compliance under the African system.

## **1.8 Limitations to the study**

The main limitations to this study can be linked to the three different stages of the study.

Firstly, during the process of gathering information on the steps states have taken to implement the Commission's recommendations, the following limitations should be noted:

- Very little of the information gathered was forthcoming from state parties. This is due to the fact that the state representatives interviewed during the sessions of the Commission often were not aware of the Commission's findings against their country. Alternatively, if they were aware of the case, they did not have any knowledge of the steps taken by the state to remedy the violations. Communicating with state representatives once they have returned home from the session of the Commission also proved difficult.

- Apart from the cases where NGOs lodged complaints on behalf of other NGOs, it was not possible to trace any of the victims that were party to the complaints. As a result, the information gathered on implementation was for the most part provided by NGOs that had taken communications to the Commission on behalf of individuals. Even so, some of the staff members that have been involved with a complaint at the time of submission and in subsequent processes before the Commission have moved on by the time the interviews were conducted. In such instances, other representatives within the NGO provided information.
- Files on communications, kept by the Secretariat in Banjul, that have been finalised long ago, are also not publicly accessible. Should they have contained any information on follow-up, that information could not be accessed.
- The following time limitation needs to be acknowledged. This study set out to establish follow-up with all the communications where the Commission found a state party in violation of the African Charter as published from its 7<sup>th</sup> Annual Activity Report onwards. The time frame of this study stretched until 31 December 2004. The 17<sup>th</sup> Annual Activity Report was due to be adopted at the third ordinary session of the Assembly of the AU in July 2004, but as a result of a procedural objection by Zimbabwe the adoption of the Activity Report was suspended.<sup>39</sup> This study therefore only considered the Commission's findings as published from the 7<sup>th</sup> to the 16<sup>th</sup> Annual Activity Reports.
- This study is also limited in that it does not cover interim measures. This is so, because the African Commission has not adopted separate decisions dealing with these measures. In so far as compliance with interim measures can be derived from the implementation efforts of state parties, this aspect is included in the study.

These deficiencies in the process of information-gathering cast some doubt about the accuracy and reliability of some of the data, because as complete a picture as possible could not be painted. Efforts to overcome potential inaccuracies include

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<sup>39</sup> AU Doc Assembly/AU/Dec 49 (III), Decision on the 17<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples' Rights, Doc EX.CL/109 (V) para 4. The effect of this decision is discussed in section 4.7 of chapter 4.

reliance on more than one source, cross-checking of data and the use of secondary sources (such as news paper reports).<sup>40</sup>

Secondly, limitations to this study should be noted with reference to the process of empirically determining the status of state compliance based on the implementation efforts of state parties.<sup>41</sup> In order to establish the status of state compliance, it was necessary to first categorise implementation efforts as compliant, partially compliant or non-compliant. There are many variables at stake in developing a system for categorising implementation efforts.<sup>42</sup> Another study using different criteria to determine categories of compliance might reach different results as to the status of state compliance. The UN Human Rights Committee for instance uses different criteria as opposed to the Inter-American Commission on Human Rights in determining whether a state party has complied with its findings.<sup>43</sup> This study therefore does not claim to have accurately determined the status of state compliance with the recommendations of the African Commission. But as it is currently the only empirical attempt at determining compliance in the African system, it is believed that the categorisation of state compliance is a good starting point from where factors that influence compliance could be identified.

A third set of limitations to this study refers to the scope of the recommendations formulated to improve the status of state compliance in the African system. Although this study has identified factors that influence state compliance that are political in nature it is not within the scope of this study to formulate recommendations to incorporate issues that are strictly speaking within the field of international relations scholars.

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<sup>40</sup> These problems are more extensively discussed in section 2.2.1 of chapter 2, see in particular fn 12.

<sup>41</sup> This aspect is covered in more detail in section 2.3.1 of chapter 2.

<sup>42</sup> For a more detailed discussion on the limitations of developing a system to categorise implementation efforts see section 2.3.1 of chapter 2.

<sup>43</sup> See section 2.3.1 of chapter 2 for a discussion on the criteria used by the UN Human Rights Committee as opposed to the criteria used by the Inter-American Commission in categorising state compliance with its findings.

## CHAPTER 2

### A SURVEY AND ANALYSIS OF THE STATUS OF STATE COMPLIANCE WITH THE RECOMMENDATIONS OF THE AFRICAN COMMISSION IN COMPARISON TO THE STATUS OF AFRICAN STATE COMPLIANCE WITH THE VIEWS OF THE UN HUMAN RIGHTS COMMITTEE

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  - 2.2.2 Table A: Implementation of the recommendations of the Commission
- 2.3 Status of state compliance with the recommendations of the African Commission
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- 2.6 Table E: Comparative analysis of state compliance with the recommendations of the African Commission and African state compliance with the views of the Human Rights Committee
  - 2.6.1 Interpreting the comparative findings on the status of state compliance in the African system as compared to the UN system
- 2.7 Conclusion

## 2.1 Introduction

Although the African Commission on Human and Peoples' Rights (African Commission or Commission) held its first ordinary session in 1987, it was only in 1994, with the publication of its 7th Annual Activity Report, that the Commission for the first time published its findings on communications decided under the individual complaints procedure.<sup>1</sup> Since the 7th Annual Activity Report all subsequent Activity Reports include a separate annexure dealing with communications. These communications were considered in terms of the individual communications procedure under article 55 of the African Charter. The jurisprudence of the African Commission has therefore been recorded and should in theory be readily accessible.<sup>2</sup> The individual complaints procedure has also been well documented in scholarly works on the African system.<sup>3</sup>

However, very little is known about the process that follows once the Commission has found a state party in violation of the African Charter under the individual complaints procedure.<sup>4</sup> The African Commission has no policy in place to follow up on the steps taken by state parties to implement its recommendations.<sup>5</sup> As a result, the Commission has no record of the status of state compliance with its recommendations. Although it has often been suggested that states do not comply with the Commission's recommendations, this contention has not been empirically substantiated.<sup>6</sup>

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<sup>1</sup> An overly strict interpretation of article 59 of the African Charter on Human and Peoples' Rights (African Charter), the confidentiality clause, initially kept the Commission from publishing its findings on individual complaints.

<sup>2</sup> The jurisprudence of the Commission is available on the Commission's website at: <http://www.achpr.org>.

<sup>3</sup> See section 1.5 of chapter 1.

<sup>4</sup> According to Dankwa "[n]o effective mechanism has been developed by the Commission for monitoring the implementation of its recommendations" (EVO Dankwa 'The African system for the protection of human rights: The tasks ahead' (1998), page 4, paper prepared for the National Human Rights Commission of Nigeria, African Human Rights Day Celebration, Nigeria Institute of International Affairs, Victoria Island, Lagos, Nigeria (on file with author)).

<sup>5</sup> R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 21. The Commission has on a few occasions attempted to follow-up on the implementation of its recommendations through promotional and protective missions to state parties or by incorporating follow-up measures as part of its findings on individual communications (see fn 12 of chapter 1). These efforts of the Commission are discussed in more detail in chapter 4 of this study. It should however be highlighted that in view of the fact that these follow-up efforts have been inconsistent no established practice on follow-up has developed.

<sup>6</sup> See fn 13 of chapter 1.

In the absence of certainty about the status of state compliance with the Commission's recommendations, any examination of factors that influence compliance in the African regional human rights system will be premature. In this chapter, an attempt is therefore made to determine the status of state compliance with the Commission's recommendations. This survey is to form the basis for subsequent analysis. In order to determine the status of compliance, the steps states have taken to implement the Commission's findings had to be determined through independent research. In the first part of this chapter an explanation is given of how this data was gathered, which cases were selected for follow-up and how the data should be interpreted. The implementation efforts of state parties are reflected in Table A. Based on a categorisation of the findings in Table A, the status of state compliance with the Commission's recommendations is categorised. The findings on state compliance are reflected in Table B and are followed by a brief explanation of factors that have affected the outcome of compliance.

Many of the African states that are party to the regional human rights system are also party to the global human rights system established under the International Covenant on Civil and Political Rights (ICCPR) and the individual complaints procedure under the First Optional Protocol to the ICCPR.<sup>7</sup> In contrast to the African system, where very little is known about the implementation of the Commission's recommendations, the Human Rights Committee has an established follow-up mechanism through which it has since 1991 recorded follow-up information on state compliance with its views.<sup>8</sup> In the second part of this chapter, the steps that have been taken by African states to implement the views of the Human Rights Committee are captured (Table C). Based on these findings and using the same categorisation system that was applied in relation to the African system, in Table B, the status of state compliance with the views of the Committee is categorised in Table D. This analysis is undertaken in order to give a holistic view of compliance by African states with the decisions of human rights bodies and to determine in particular if state compliance by the same states varies according to the regional and global human rights systems

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<sup>7</sup> The Human Rights Committee (Committee) is the treaty body established under the ICCPR to ensure compliance with treaty norms. Under the Optional Protocol it is the Committee which is mandated to receive and consider individual communications alleging violations of the rights guaranteed in the ICCPR (article 1).

<sup>8</sup> The Committee adopted follow-up procedures in 1990 and from 1991 onwards it has followed up on all the views issued where a state party was found in violation of the ICCPR (See M Schmidt 'Follow-up mechanisms before UN human rights treaty bodies and the UN mechanism beyond' in AF Bayefsky (ed) *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (2000) 233). See chapter 5 for a detailed discussion of the follow-up procedures adopted by the Human Rights Committee.

that applies. Against this background, the chapter concludes with a discussion on Table E, in which state compliance with the recommendations of the African Commission is compared to state compliance by African states with the views of the Human Rights Committee.

## **2.2 Implementation of the recommendations of the African Commission**

### **2.2.1 Background on establishing follow-up with the Commission's recommendations**

As stated above, no record exists of the steps that state parties have taken to implement the findings of the African Commission. The information recorded in Table A below is an attempt to fill this *lacuna*. The information reflected in Table A was gathered over a period of three years.<sup>9</sup> As mentioned earlier, the Commission only started publishing its decisions on individual communications from its 7th Annual Activity Report. In this study, an attempt is made to gather information on compliance with all the communications decided by the Commission as published from its 7th Annual Activity Report to its 16th Annual Activity Report.<sup>10</sup> This statement must be clarified: Only cases in respect of which the Commission has found a state party in violation of the Charter, whether its findings were accompanied by recommendations or not, are listed in Table A.<sup>11</sup>

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<sup>9</sup> Follow-up information was gathered over a three year period that stretched from January 2002 up to December 2004. Follow-up was established through a series of interviews with the relevant role players such as the Commissioners, members of the Secretariat, representatives of state parties, representatives of National Human Rights Institutions and representatives from Non-Governmental Organisations (NGOs). Information on follow-up was also gathered from the records of the African Commission in the few instances where it did attempt to establish follow-up or where state parties did offer information on follow-up. The main sources of such information were the reports of the Commission on its missions for promotional or protective reasons and state reports submitted in accordance with article 62 of the African Charter. Where scholarly works on the African Commission's jurisprudence have made reference to the steps taken by state parties to give effect to the Commission's findings on individual communications this was also noted. Finally, information on follow-up was gathered or verified from media reports. See further section 1.6 of chapter 1 on the research methodology adopted in this study. In particular a summary is given of the field work undertaken to establish follow-up. See also section 1.8 for a brief discussion on some of the limitations to establishing follow-up with the findings of the Commission.

<sup>10</sup> This covers jurisprudence of the Commission over a period of nearly ten years stretching from 1993-2003.

<sup>11</sup> Those cases where the Commission only ruled on admissibility are not included for that obviously meant the case did not proceed any further. Also cases where the Commission reported that an amicable settlement was reached are not included. An attempt was initially made to determine the details of these amicable settlements

The information gathered (in Table A) on the implementation of the Commission's recommendations represents the first coordinated attempt at gathering information on this topic in the African system. Due to a number of difficulties encountered in undertaking an exhaustive study of this nature, the research findings recorded in Table A do not claim to be a complete or fully accurate account on implementation.<sup>12</sup> The findings in Table A nevertheless conform to the requirements of this study. In other words, even if the findings in Table A are not complete, they still form the background against which, for the first time, the status of state compliance with the recommendations of the African Commission is determined and analysed.<sup>13</sup>

In interpreting Table A, the following should be taken into account: (1) The columns indicating the communication number, particulars of the parties involved, facts of the communication, findings and subsequent recommendations were taken directly from the respective Annual Activity Reports, as the Commission reported it. (2) The last

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nothing came of it due to the fact that no access was granted to the specific files of the Commission and when approached the Commissioners could not give details as to what these settlements entailed.

<sup>12</sup> Most of the limitations to gathering information on follow-up related to difficulties experienced in gathering first hand information on follow-up from the various role players. The following problems were experienced in this regard: Firstly, the African Commission's Secretariat is based in The Gambia making communication difficult and even where the author did visit the Secretariat strict rules around confidentiality prohibited the author from accessing files of communications finalised years ago, which should have been publicly accessible. Secondly, it was not possible to trace any of the victims that were party to communications apart from the cases where NGOs lodged complaints on behalf of other NGOs. As a result most of the information gathered was provided by NGOs that have taken complaints on behalf of victims. Even though the same NGOs still enjoy observer status with the Commission or attend its Sessions staff turnovers within the NGOs meant that the individuals who filed the complaints do not necessarily attend the Sessions anymore leading to a situation where facts around implementation amount to hearsay from colleagues within the same organisation. The same was true often to a larger extent with regard to representatives from state parties that were found to have violated the African Charter. Most state parties it seemed did not dedicate specific government officials to the work of the African Commission. This resulted in a situation where officials that attended the Sessions of the Commission, when approached for an interview, were often not even aware of previous decisions against their country. Following up with representatives from NGOs and state parties alike proved difficult once they returned to their home countries after the Sessions of the Commission, where most of the interviews were held to gather information on implementation. Furthermore, as would become clear from a reading of the findings below, opposing views were often recorded whilst establishing follow-up from the state party on the one hand and NGOs on the other hand. These opposing views were recorded here for it embodies some of the factors that influence compliance that will be discussed in chapter 3 below. In as far as it demonstrates the political will (or lack of it) on the part of state parties and the strained relationships that often exist between state parties and NGOs within a country. Lastly, media coverage of the African regional human rights system is poor in Africa and only in a few cases did the implementation of the findings of the Commission by a state party receive media exposure.

<sup>13</sup> This is done in the next section in Table B.



column, setting out the steps taken by state parties to implement the Commission's recommendations, reflects the research results of this study.

## 2.2.2 Table A: Implementation of the recommendations of the African Commission

Comm. No.	Parties	Summary of facts	Violations found	Recommendations	State implementation
<b>7<sup>th</sup> Annual Activity Report: 1993-1994</b>					
64/92  68/92  78/92 (joined)	Krishna Achuthan v Malawi  Amnesty International v Malawi  Amnesty International v Malawi	Alleged wrongful detentions and denial of rights.	Arts 4, 5, 7	Not stipulated, but the case was referred to the Assembly of Heads of State and Government (AHSG).	No specific information could be obtained. The AHSG did not act under art 58(2) of the African Charter in respect of a finding by the African Commission that a series of serious or massive violations existed.
47/90	Lawyers Committee for Human Rights v Zaire	Arbitrary arrests, detention and torture by the Zairian government.	Not stipulated.	Not stipulated but the Commission admitted evidence of the existence of a series of serious and massive violations and referred the situation to the AHSG. <sup>14</sup>	No implementation. The AHSG did not act under art 58(2) of the African Charter in respect of a finding by the African Commission that a series of serious or massive violations existed.
<b>8<sup>th</sup> Annual Activity Report: 1994-1995</b>					
59/91	Embga Mekongo Louis Cameroon v Cameroon	False imprisonment, miscarriage of justice.	Art 7	Commission found that the individual did suffer damages. Recommended that the quantum of damages, to be paid by the government, should be determined under the law of	According to Cameroon the government is experiencing difficulties in locating Mr Mekongo and therefore could not proceed in compensating him under the law of Cameroon. <sup>15</sup>

<sup>14</sup> The AHSG never conducted these in depth studies and therefore the Commission stopped referring cases of serious and massive violations to them (Comment made by Commissioner Dankwa during a lecture at the University of Pretoria, 14 May 2002).

<sup>15</sup> This response was delivered by the state representative of Cameroon delivering Cameroon's initial state report, in accordance with article 62 of the Charter, before the African Commission at its 31<sup>st</sup> ordinary session on 6 May 2002 in Pretoria, South Africa. Both Commissioners Pityana and Johm enquired, during the examination of the state report, as to the status of implementation of recommendations given by the Commission against Cameroon.



				Cameroon.	
60/91	Constitutional Rights Project (in respect of Akamu, Adegan and others) v Nigeria	Alleged that the Robbery and Firearms (Special Provisions) Decree No. 5 of 1984 which created tribunals composed of members of the armed forces and police in addition to judges violated the right to be tried by an impartial tribunal. It also excluded the right to appeal against decisions of the tribunal.	Arts 7 (1) (a), (c) and (d)	Recommended that the government of Nigeria should free the complainants. At the 17 <sup>th</sup> Session the Commission decided to bring the file to Nigeria for the planned mission in order to verify that the complainants have been released.	The complainants were not released but their death sentences were eventually commuted to terms of imprisonment. The sentences were commuted by a local court in the case of <i>Registered Trustees of the Constitutional Rights Project v The President of Federal Republic of Nigeria and two others</i> . <sup>16</sup>
64/92  68/92 78/92 (joined)	Krischna Achutan (on behalf of Banda); Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi	Shootings by police officers. Overcrowding and acts of beating and torture in the prisons of Malawi. Extremely poor quality of food, denial of access to adequate medical care. Massive and arbitrary arrests of office workers and trade unionists and	Art 4, 5, 6, Art 7(1)(a), (c), (d)	The Commission did not make any recommendations. <sup>17</sup>	Vera Chirwa received MK 5,5 million as compensation from the government. The government amended its legislation to outlaw Traditional Courts such as the Southern Region Traditional Court that tried Vera and Orton Chirwa. <sup>18</sup>

<sup>16</sup> Unreported judgment of the High Court of Lagos State, 5 May 1993, Suit No m/102/93. The African Commission relied on old rule 109 (now rule 111) of its Rules of Procedure to order interim measures and requested a stay of execution of the complainants until the Commission had fully considered the merits of the communication. The Constitutional Rights Project relied on these interim measures when it filed suit in the High Court of Lagos. Ankumah reported that "the state argued *inter alia* that the trial in which the individuals had been convicted was conducted under a decree which could be ousted by the courts". According to her "[t]he court correctly reasoned that it was not investigating the validity of the decree but found it appropriate to issue an injunction while the case was still under consideration by the Commission ... partly as a result of the Commission's intervention, the death sentences were eventually commuted to terms of imprisonment" (EA Ankumah *The African Commission on Human and Peoples' Rights – Practices and Procedures* (1996) 72-73).

<sup>17</sup> The Commission noted that Malawi had undergone important political changes after the submission of the communications. The Commission, therefore, went on to state that principles of international law stipulated that a new government inherited the previous government's international obligations, including the responsibility for the previous government's mismanagement. It stated that "although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses" (Paragraphs 11-12 of the present communication).

<sup>18</sup> Commissioner Chirwa approached a lawyer, Vivanyimba, and together they prepared a claim of 21,5 million British Pounds. This amount was formulated in reference to the value of the property confiscated by the previous government, pain and suffering, medical expenses, and loss of earnings amongst other factors. After meeting with the President, a compromise was reached in the amount of 5,5 million Mluzi. Commissioner Chirwa remarked that neither she nor her late husband was honoured in any other way. Before the Commission's finding the

		church leaders. Banda was not allowed recourse to the national courts and was detained indefinitely without trial. Chriwas were tried without counsel.			
87/93	The Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v Nigeria	The Civil Disturbances (Special Tribunal) Decree No. 2 of 1987 did not provide for any judicial appeal against the decisions of the special tribunals	Art 7(a), (c) and (d)	Recommended that the government of Nigeria should free the complainants. At the 17 <sup>th</sup> Session the Commission decided to bring	The sentencing of Zamani Lakwot and 6 others to death by hanging was commuted to life imprisonment and they were eventually released from prison. <sup>19</sup>

President did, however, offer Vera Chirwa a number of government positions which she declined, except for position of Chair of the Gender Commission which she held for a time. Commissioner Chirwa also approached the National Compensation Tribunal established under article 137 of the Constitution of the Republic of Malawi adopted on 16 May 1994. Article 137 reads as follows: "There shall be a National Compensation Tribunal which shall entertain claims with respect to alleged criminal and civil liability of the government of Malawi which was in power before the appointed day and which shall have such powers and functions as are conferred on it by this Constitution and an Act of Parliament". Her application, however, was not lodged within the requisite time frame, and was not considered. Whether the latter two actions resulted from the Commission's findings is questionable, the allocation of compensation on the other hand could maybe have been influenced by the decision (no direct link due to lack of allocating remedies on the Commission's side). (Information gathered by Frans Viljoen during an interview with Commissioner Vera Chirwa, on 22 September 2002, in Blantyre, Malawi). According to Ibrahima Kane, the government of Malawi also amended its legislation to ensure that traditional courts, such as the Southern Region Traditional Court that tried Vera and Orton Chirwa, are now a thing of the past. (Interview held with Mr Kane, legal officer for Interights, during the 33<sup>rd</sup> ordinary session of the African Commission held in May 2003 in Niamey, Niger).

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According to the Constitutional Rights Project (CRP), there was a lot of pressure on the government of Nigeria to comply with the Commission's findings. CRP therefore attributes the commuting of the sentences to two factors: 1) the communication itself; 2) the widespread international publicity that Lakwot's case enjoyed. This case 'placed CRP on the map' in the words of Agnes Olowu, legal officer at CRP. (Remarks made by Agnes Olowu during an interview held at the CRP offices in Lagos, Nigeria, on 28 October 2002). In a separate interview, held during the 33<sup>rd</sup> ordinary session of the African Commission, Kolawole Olaniyan previously from CPR currently working as legal advisor for Amnesty International, confirmed that the Commission's decision played a deciding role in the commuting of the sentences and eventually the release of the victims. He explained that the CPR first launched the case of Zamani Lakwot and six others in the High Court of Lagos. The High Court held that the government was bound by the African Charter, which is incorporated into national legislation in Nigeria, and ruled that the executions should not be carried out. Armed with the ruling of the High Court, CPR approached the African Commission. The Commission in turn held that the victims should be freed. The government in the meantime did commute their sentences to life imprisonment. Olaniyan also attributed the commuting of the sentences to the widespread advocacy campaign run by CPR. Murray referred to this communication as one where the Commission did follow up on the state's actions and found that "[i]n case 87/93 the death sentences passed on the subjects were commuted to five years imprisonment. The fate of the subjects of communication 60/91 is not known" (Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights, Second Extraordinary Session, Kampala, 18-19 December 1995, DOC.II/ES/ACHPR/4 at 6 quoted in R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 56). It is apparent from the various sources on follow-up to this case that there are discrepancies amongst them. Some reported that the sentences were commuted to sentences of life

		and prohibited the courts from reviewing any aspect of the operation of the tribunal. Tribunal was composed of members of the armed forces and the police in addition to judges. The defence counsel was constantly harassed and intimidated.		the file to Nigeria for a planned mission in order to make sure that the violations have been repaired.	
101/93	Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria	The Legal Practitioners (Amendment) Decree of 1993 established a new governmental body "Body of Benchers" for the disciplining of legal practitioners previously the function of the Nigerian Bar Association. New body obstructed free association. The Decree excluded recourse to the Courts and was given retroactive force.	Arts 6, 7 and 10	Recommended that the Decree should be annulled.	The Decree was not annulled and stayed in existence until the new government came into power in 1999. <sup>20</sup>
39/90	Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon	After serving a five-year sentence and being placed under subsequent house arrest the accused was not reinstated as magistrate although others who have been condemned under similar conditions were reinstated.	Arts 6, 7(1)(b) (d), 15	The Commission recommended that the government of Cameroon draw all the necessary legal conclusions to reinstate the victim in his rights.	According to Cameroon Mr Mazou was reinstated in the judiciary (not clear though if this is in the position of magistrate). Cameroon, however, stated that the reconstruction of his career and the recovery of the rights violated by

imprisonment, others reporting that the victims were freed and the Commission itself reporting that the sentences were commuted to five years imprisonment.

20

According to Onyeisi Chiemeke a member of the Civil Liberties Organisation (CLO) an NGO based in Lagos, Nigeria. He also mentioned that even though the Decree was not annulled, the Nigerian Bar Association did not function properly from 1992-1998 as a result of multiple cases pending at the time against it in local courts (Statement made during an interview held on 28 October 2002 in Lagos, Nigeria at the offices of CLO).



					his imprisonment posed problems for the government. It was mentioned by the state representative of Cameroon that compensation was offered to Mr Mazou but he declined it. In this sense the state proclaimed they have reached a dead end. <sup>21</sup>
<b>9<sup>th</sup> Annual Activity Report: 1995-1996</b>					
25/89, 47/90, 56/91, 100/93 (joined)	Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire	Allegations of torture, arbitrary arrests, detention without trial, extra judicial executions. Persecution of Jehovah's Witnesses, including arbitrary arrests and exclusion of access to education. Failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine violates the right to physical and mental health. Closure of universities and secondary schools violates the right to education.	Arts 4, 5, 6, 7, 8, 16 and 17	The Commission held that the facts constituted serious and massive violations of the Charter and referred the situation to the AHSG. <sup>22</sup> The Commission also requested that a mission be received in the country but Zaire never responded.	No implementation. The AHSG did not act under art 58(2) of the African Charter in respect of a finding by the African Commission that a series of serious or massive violations existed.
74/92	Commission Nationale des Droits de l'Homme et des Libertes v Chad	Journalists were harassed, directly and indirectly. Restricting public access to information. Alleged arbitrary arrests, detention without trial, extra judicial killings, forced	Arts 4, 5, 6, 7	The Commission found that there have been serious and massive violations of human rights in Chad.	No specific information could be obtained. The AHSG did not act under art 58(2) of the African Charter in respect of a finding by the African Commission that a series of serious

<sup>21</sup> Comments made by the state representative of Cameroon during the delivery of its initial state report, in accordance with article 62 of the African Charter, before the Commission on 6 May 2002 at the 31<sup>st</sup> ordinary session held in Pretoria, South Africa.

<sup>22</sup> See fn 13 above.



		disappearances and torture. government's failure to investigate assassinations and prosecute perpetrators.			or massive violations existed.
129/94	Civil Liberties Organisation v Nigeria	The Constitution (Suspension and Modification) Decree No. 107 of 1993 suspended the Constitution and specified that no decree promulgated after December 1983 could be examined by a Nigerian Court. The Political Parties (Dissolution) Decree No. 114 of 1993 dissolved political parties, ousted the jurisdiction of the courts and nullified the domestic effect of the African Charter.	Arts 7, 26	The Commission found that the act of the Nigerian government to nullify the domestic effect of the Charter 'constitutes a serious irregularity'.	No specific information could be obtained.
<b>10<sup>th</sup> Annual Activity Report: 1996-1997</b>					
27/89, 46/91, 49/91, 99/93 (joined)	Organisation Mondiale Contre La Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Interfricaine des Droits de l'Homme v Rwanda	The expulsion from Rwanda of Burundi nationals based on their ethnic origin in 1989, without recourse to a competent court. Arbitrary arrests and summary executions based on ethnic origin (Tutsi's). Detention of women, children and the aged in deplorable conditions.	Arts 4, 5, 6, 7, 12(3), 12(4), 12(5)	The Commission held that the facts constituted serious or massive violations of the African Charter and the Commission urged the government to adopt measures in conformity with its decision.	By the time the Commission took a decision on the merits of this case (October 1996) the situation in Rwanda was completely different due to the genocide of 1994. <sup>23</sup>
71/92	Recontre Africaine pour	Mass expulsion of 517 West Africans	Arts 2, 7(1)(a) and	The Commission	The victims were not compensated

<sup>23</sup>

According to a representative of the Rwanda National Human Rights Commission, interviewed during the 32<sup>nd</sup> ordinary session held in Banjul, some of the Tutsis referred to in this communication did return to Rwanda but were subsequently massacred in the 1994 genocide. He further highlighted the fact that the communication did not stipulate any specific recommendations and that the situation has since changed considerably in Rwanda.



	la Defense des Droits de l'Homme v Zambia	from Zambia on 26,27 February 1992 on grounds of being illegally in Zambia. The individuals were arbitrarily detained, some up to two months, and deprived the right to have their cause heard.	12(5)	merely stated, "it resolves to continue efforts to pursue an amicable resolution in this case".	for the violation of their rights. <sup>24</sup> According to representatives of the government, measures were however taken to ensure that the same violations would not recur in future, without redress to courts. <sup>25</sup>
103/93	Alhassan Abubakar v Ghana	Detained without charge or trial for 7 years. Alleged that on return to Ghana the complainant will be arrested for escaping from prison.	Arts 6, 7(1)(d)	The Commission urged the government to take steps to repair the prejudice suffered.	The victim returned to Ghana. <sup>26</sup>
<b>11<sup>th</sup> Annual Activity Report: 1997-1998</b>					
159/96	Union Inter Africaine des	The expulsion of West African	Arts 2, 7(1)(a),	The Commission,	The government did not take any

<sup>24</sup> According to Maria Mapani, Principal State Counsel for Zambia, the government in theory wanted to compensate the victims but due to difficulties in identifying and tracing them this was not possible (Statement made during an interview with Me. Mapani on 8 May 2002 in Pretoria, South Africa). The Institute for Human Rights and Development in Africa (IHRDA), an NGO based in The Gambia, agrees with the fact that in theory the government was prepared to pay compensation but interpret the government's request for more details, regarding the victims, as a method for stalling and inevitably ignoring their responsibility. (Comments made by Julia Harrington, Executive Director of IHRDA, during an interview held at the 31<sup>st</sup> ordinary session of the African Commission in Pretoria, South Africa).

<sup>25</sup> Since the expulsion of West Africans from Zambia, measures have been put in place to train and sensitise judges, magistrates and immigration officers and policies were developed to deal with foreigners in accordance with international law. These were all measures taken by the government to ensure that the same violations will not recur in Zambia, according to the Principal State Counsel for Zambia (Statement made during an interview with Me. Mapani on 8 May 2002 in Pretoria, South Africa). Ibrahim Kane, legal officer for Interights, highlighted the fact that mass expulsion of foreigners have not recurred in Zambia and that should it happen again the victims will have recourse to the judiciary. Since he was personally involved in this case he reported that the communication attracted much attention and publicity and pressurised the government to change its policies. Interights had a meeting with the government in 1998 and met with the Minister for Foreign Affairs. It was however difficult to determine not only the details of those expelled but also their damages since there were no administrative records kept. Since then legislation was enacted to prohibit a similar occurrence in future. He further mentioned the fact that Zambia never came back to the African Commission to report on the measures they have taken and that no further meetings took place with the government (Comments made during the 'Workshop on Human Rights Litigation in Africa' held in Pretoria from 29 April – 1 May 2002, under the auspices of the Institute for Human Rights and Development in Africa and the Kenyan and Swedish Sections of the International Commission on Jurists). In another interview held with Sadikh Niass, *Secrétaire aux Relations Exterieurs* for RADDHO the Senegalese NGO that instituted the complaint, the African Commission some years ago recommended that RADDHO and Interights should meet with the Zambian government to address the complaint. Niass highlighted the fact that implementation becomes more difficult as time progresses, especially in cases like the one at hand, where "refugees" have relocated to various countries and cannot be traced (Interview held by Frans Viljoen during the 35<sup>th</sup> ordinary session, in Banjul, The Gambia, on 24<sup>th</sup> May 2004).

<sup>26</sup> According to Commissioner Dankwa, a national of Ghana (Information obtained during an interview held on 23 May 2003 during the 33<sup>rd</sup> ordinary session of the African Commission).



	Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Recontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Senegal and Association Malienne des Droits de l'Homme v Angola	nationals from Angola in 1996. Their rights to property, family and the right to have their case heard before national courts.	12(4)(5), 14, 18	with regard to damages for prejudice suffered, urged the Angolan government and the complainants to draw all the legal consequences arising from the present decision.	steps to implement the Commission's request. <sup>27</sup>
<b>12<sup>th</sup> Annual Activity Report: 1998-1999</b>					
102/93	Constitutional Rights Project and Civil Liberties Organisation v Nigeria	In June 1993 the Federal Military government announced the annulment of the 12 June election results. Several decrees were promulgated ousting the jurisdiction of the courts and reinstating the decision of the Nigerian government to annul the results. The government suppressed public expression by arresting and detaining many persons among them journalists. The government before and after the elections seized	Arts 1, 6, 9 and 13	The Commission appealed to the government of Nigeria to release all those who were detained for protesting against the annulment of the elections; and to preserve the traditional functions of the court by not curtailing their jurisdiction.	Persons arrested shortly after the annulment of the elections in 1993 were released based on the decisions of the lower courts. The second set of detainees, however, who were mostly arrested in 1994 accused of canvassing for the instalment of the 1993 June winner of the elections, were not released despite local court decisions. They were held under a decree known as DN2, Decree No 2, and only received their freedom with the

<sup>27</sup>

In a similar case of arbitrary mass expulsion of West Africans from Zambia, communication 71/92, 10<sup>th</sup> Annual Activity Report, it was reported above that the government of Zambia adopted legislation to ensure that similar violations of the African Charter could not recur in future. This is not the case with the government of Angola. It has not taken any steps to avoid a recurrence of arbitrary expulsions following the Commission's decision on communication 159/96. It therefore comes as no surprise that another incident of arbitrary mass expulsion of West Africans from Angola was reported in May 2004 (*IHRDA denounces expulsion of West Africans from Angola*, 11 October 2004, available at: [http://www.countrywatch.com/cw\\_wire.asp?vCOUNTRY=63&UID=1254915](http://www.countrywatch.com/cw_wire.asp?vCOUNTRY=63&UID=1254915); B Muritala & M Bah *Angola gov't sued for deporting Gambians*, 12 October 2004, available at: [http://www.observer.gm/artman/publish/printer\\_3482.shtml](http://www.observer.gm/artman/publish/printer_3482.shtml)).



		thousands of copies of magazines.			death of Sani Abacha, the then Head of State. <sup>28</sup>
105/93, 128/94, 130/94, 152/96 (joined)	Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria	By Decree the Nigerian government proscribed the publication of two magazines. Newspaper vendors selling these magazines were arrested. The government also proscribed 10 newspapers published by four different media organisations. The Newspaper Decree No. 43 of 1993 was promulgated and made it an offence punishable by fine or a term of 7 years imprisonment to own, publish or print a newspaper not registered under the Decree. The decisions of the Registration Board could not be challenged. The Decree was given retroactive commencement. Two national courts declared the Decree null and void without any	Arts 6, 9(1)(2), 7(1)(c), 7(2), 14, 16	The Commission requested the government of Nigeria to take the necessary measures to bring its law into conformity with the Charter.	By the time the Commission decided this case on its merits, 31 October 1998, the proscribed magazines were functioning again and the detained editor had been released. <sup>29</sup>

<sup>28</sup> According to Onyeisi Chiemeké, member of CLO, who initiated this case in front of the African Commission (Statement made during an interview held on 28 October 2002 in Lagos, Nigeria at the offices of CLO). Agnes Olowu from the Constitutional Rights Project confirmed that the recommendations of the Commission were not implemented in this case. She further mentioned that many people were arrested for their efforts to implement this decision (Statement made during an interview held on 28 October 2002 in Lagos, Nigeria).

<sup>29</sup> Media Rights Agenda (MRA) filed both this communication and another (140/94, 141/94, 145/95 together with Constitutional Rights Project and Civil Liberties Organisation against Nigeria) in 1993 and 1994. In both communications MRA asked for the release from detention of newspaper and magazine editors and the lifting of the ban on proscribed papers and magazines. MRA did not ask for compensation, because it was not the Commission's practice to award compensation in those years. Since the Commission took several years to come to a decision on the merits of these cases most of the relief asked for initially was not applicable anymore (editors were released and papers were functioning again whilst most decrees were repealed with Abadja's death). MRA therefore went back to the Commission (in regard to both communications) and asked for compensation to be awarded to those unlawfully detained and for the losses incurred in the seizure and closure of newspapers and magazines. The Commission never addressed MRA's request for compensation (Information supplied by Edetaen Ojo, Executive Director of MRA, during an interview held in Lagos, Nigeria on 28 October 2002).



		<p>result. The seizure of 50 000 copies of 'Tell' magazine without recourse to national courts.</p> <p>The arbitrary arrest and detention of a magazine editor and denial of access to medical care whilst in detention.</p>			
<p>137/94, 139/94, 154/96, 161/97 (joined)</p>	<p>International PEN, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa Jr.) and Civil Liberties Organisation v Nigeria</p>	<p>In regard to Mr Saro-Wiwa allegations of arbitrary arrest and detention in deplorable conditions were filed. Allegations of torture whilst in detention, as well as the denial of access to legal representation and medical care whilst in detention.</p> <p>In regard to the 16 other Ogoni's allegations of arbitrary arrest, detention without charge, torture and denial of access to legal representation were lodged.</p> <p>The Civil Disturbances (Special Tribunal) Decree No.2 of 1987 stipulated that a tribunal dominated and appointed by the executive be instituted.</p> <p>Denial of due process rights and the harassment of defence counsel, bribing of witnesses and evidence of bias on the part of the tribunal members themselves were alleged.</p> <p>The execution of Mr Saro-Wiwa and eight co-defendants</p>	<p>Arts 5, 16</p> <p>Arts 6, 7(1)(d), 1</p> <p>Arts 4, 7(1)(a) (b)(c)(d)</p> <p>Arts 9(2), 10(1), 11, 26, 16</p> <p>Art 1</p>	<p>The Commission held that in ignoring its obligations to institute provisional measures, Nigeria has violated article 1. The Commission also found Nigeria in violation of article 1 for ignoring its decision in communication 87/93 on the establishment of the Civil Disturbances Tribunal.</p>	<p>The government of Nigeria ignored the interim measures issued by the Commission and executed Mr Saro-Wiwa and eight others. The government did not repeal Decree No 2 until the death of General Abacha.</p>



		after a request from the Commission to adopt provisional measures to prevent the executions.			
212/98	Amnesty International (on behalf of Banda and Chinula) v Zambia	Both Banda and Chinula were unlawfully deported from Zambia to Malawi based on their political convictions. Denied redress through national courts in Zambia. Chinula was prevented from returning to Zambia on threats of imprisonment. It was also alleged that their rights to freedom of conscience, association, dignity and family were violated.	Arts 2, 7(1)(a), 8, 9(2), 10, 18(1)(2)	Zambia must be required to allow the return of William Steven Banda with a view to making application for citizenship by naturalisation. No evidence was led before the Commission for compensation. No award for compensation is called for. The government of Zambia should be required to return the body of John Lyson Chinula who died in exile in Malawi. <sup>30</sup>	Exactly three years after the Commission's decision, the Zambian Minister of Home Affairs, Lackson Mapushi, announced on 5 May 2002 his Ministry's reversal of Banda and Chinula's deportation order. He stated that he had studied the matter closely and consequently found that the deportation of the two was not justified and invited them to return to Zambia unconditionally. <sup>31</sup>
<b>13<sup>th</sup> Annual Activity Report: 1999-2000</b>					
140/94, 141/94, 145/95 (joined)	Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria	The proscription of newspapers and magazines and the subsequent close down and confiscation of these premises by military decrees. The arbitrary arrest and detention of 6 pro-democracy activists. Decrees	Arts 5, 6, 7(1)(a), 9(1), 9(2) and 14	The Commission "invited" the government to take all necessary steps to comply with its obligations under the Charter.	Only "The Guardian" mid-way in the course of its ban or proscription received a reprieve, but the reprieve did not come about as a result of the decision of the Commission.

<sup>30</sup>

Paras 47 and 48 of the communication.

<sup>31</sup>

'The government has invited former Lusaka governor under the UNIP regime William Banda and Lusaka businessman Majid Ticklay to return to Zambia unconditionally' (*The Post* 5 May 2002 at <http://www.zamnet.zm/zamnet/post/homenews.html>. Date accessed: 5 May 2002). From 9-13 September 2002 the African Commission undertook a promotional visit to Zambia. Commissioner Chigovera, who led the visit, engaged with the Justice Ministry around the implementation of the findings of the Commission in the case of Banda and Chinula. The Ministry confirmed that the President had revoked the deportation order and that the government has authorised that the remains of Chinula, who died in exile, be repatriated to Zambia for reburial (See page 10 of the *Report of the Promotional Visit to the Republic of Zambia*, 9-13 September 2003). According to the Principal State Counsel for Zambia, Maria Mapani, the political tension, which underlined this case, called for a political statement and attempts at mediation or arbitration rather than the normal legal avenues. She also commented on the fact that in her opinion the decision to return the deportees was not premised on the Commission's findings but rather due to political motivations. (Statement made during an interview with Me. Mapani on 8 May 2002 in Pretoria, South Africa).



		no. 6, 7 and 8 of 1994 violated the rights to freedom of expression, association and ousted the jurisdiction of the courts.			Rather, it was the result of a deal cut between the owners of "The Guardian" and the government. This led to the resignation of some of the top editorial staff of "The Guardian". The other proscribed media editors served their term without any adherence to the Commission's recommendations. <sup>32</sup>
143/95, 150/96 (joined)	Constitutional Rights Project and Civil Liberties Organisation v Nigeria	The State Security (Detention of Persons) Amended Decree no. 14 of 1994 and Decree no.2 of 1984 have prohibited any court in Nigeria from issuing a writ of habeas corpus or any prerogative order for the production of any person detained. Resulting in the detention without trial of many human rights activists.	Arts 5, 6, 7(1)(a), (c) and (d), and 26	The Commission recommended that the government of Nigeria bring their laws in line with the Charter.	These Decrees stayed in force until General Sani Abacha's death. <sup>33</sup>
148/96	Constitutional Rights Project v Nigeria	Eleven soldiers accused of a coup in 1990 tried twice and found innocent but kept in prolonged detention under deplorable conditions.	Art 6	Urges the government of Nigeria to respect the judgments of its courts and to release the eleven soldiers.	The eleven soldiers were released but never received any compensation. <sup>34</sup>

<sup>32</sup> Facts related by Onyeisi Chiemeké, member of the NGO Civil Liberties Organisation (CLO). He also noted that in regard to communication 141 some of those arrested were released mid way through, whilst some escaped into exile of which the best example is Chief Anthony Enahoro. Chiemeké further highlighted the fact that it is important to take note that many of the acts complained of in these communications abated before the Commission made its recommendations known (Statements made during an interview held on 28 October 2002 in Lagos, Nigeria at the offices of CLO and subsequent email correspondence).

<sup>33</sup> Confirmed by both Civil Liberties Organisation and Constitutional Rights Project during separate interviews held at their respective offices in Lagos, Nigeria in October 2002.

<sup>34</sup> The Commission recommended that the government of Nigeria should respect the judgments of its domestic courts and should therefore accordingly release the eleven soldiers and compensate them as stipulated by the decision handed down in a domestic court of Nigeria. The soldiers were released but were never compensated (Follow-up established during an interview with Agnes Olowu (member of the NGO Constitutional Rights Project) held in Lagos, Nigeria, on 28 October 2002).



151/96	Civil Liberties Organisation v Nigeria	Civilians tried by a Military Tribunal established under the Treason and Treasonable Offences (Special Military Tribunal) Decree which precluded the jurisdiction of ordinary courts and allowed no appeal from its judgments. The accused were denied access to legal representation or their families and were detained without charges. The accused were defended by military lawyers appointed by government. The accused were held in military detention under inhuman and degrading conditions.	Arts 5, 7(1)(a), (c), (d) and 26	The Commission appealed to the government of Nigeria to permit the accused a civil re-trial with full access to lawyers of their choice, and improve the conditions of their detention.	There was no retrial of the accused and they were only released in July 1998 at the death of General Sani Abacha. The accused upon release were not granted state pardon, except for the incumbent president Olusegun Obasanjo. <sup>35</sup>
153/96	Constitutional Rights Project v Nigeria	Detention without charge.	Arts 6, 7(1)(a) and (d)	The Commission appealed to the government of Nigeria to charge the detainees or release them.	The detainees were charged and their case was to be finalised late in 2002. <sup>36</sup>
206/97	Centre for Free Speech v Nigeria	Unlawful arrest, detention, trial and conviction of four journalists by a military tribunal. Accused were tried in secret and denied access to legal counsel of their choice. Under military decrees no appeal was allowed against the court's findings.	Arts 6, 7(1)(a), (c) and 26	The Commission urged the government of Nigeria to release the four journalists.	The journalists were eventually released. <sup>37</sup>
215/98	Rights	The arbitrary arrest	Arts 5, 6,	The	While out on bail

<sup>35</sup> According to Onyeisi Chiemeké, member of the NGO CLO (Statement made during an interview held on 28 October 2002 in Lagos, Nigeria at the offices of CLO).

<sup>36</sup> According to Agnes Olowu, legal officer at CRP (Remarks made by Agnes Olowu during an interview held at the CRP offices in Lagos, Nigeria, on 28 October 2002).

<sup>37</sup> According to Kolawole Olaniyan, previously a legal officer at Constitutional Rights Project (Established during an interview held at the 33<sup>rd</sup> ordinary session of the African Commission, in Niamey, Niger).



	International v Nigeria	and detention, in a military detention camp, of a student identified as a relative of Ken Saro-Wiwa. Torture and the denial of access to family members and legal representation. Violations of the right to freedom of movement and the right to freely leave and return to your country.	7(1)(c), 12(1)(2)	Commission did not make any recommendations.	Mr Wiwa, on the advice of human rights lawyers, fled to Benin where he was granted refugee status by the Office of the High Commissioner for Refugees and subsequently he was granted refugee status by the United States. The government of Nigeria never responded to the findings of the Commission. <sup>38</sup>
147/95 149/96 (joined)	Sir Dawda K Jawara v The Gambia	The communication alleges the suspension of the Bill of Rights, the banning of political parties, the restriction of freedom of expression, movement and religion. The arrest and detention of people without charge, torture and extra-judicial killings. The ousting of habeas corpus by Military Decree. Disregard for the judiciary and the rule of law.	Arts 1, 2, 6, 7(1)(d), 7(2), 9(1)(2), 10(1), 11, 12(1)(2), 13(1), 20(1), 26	The Commission urged the government of The Gambia to bring its laws in conformity with the provisions of the Charter.	These recommendations were apparently not implemented. <sup>39</sup> Mr Jawara has however returned to The Gambia and his political party is still in existence. <sup>40</sup>
205/97	Kazeem Aminu v Nigeria	The arbitrary arrest, detention and alleged torture by Nigerian security officials based on political motivations. The denial of access to medical treatment and the inhuman and degrading treatment of the accused. The	Arts 3(2), 4, 5, 6, 10(1)	The Commission requested the government of Nigeria to take the necessary measures to comply with its obligations under the Charter.	No information could be obtained.

<sup>38</sup> See paras 15-17 and 31 of the communication.

<sup>39</sup> According to facts supplied by Julia Harrington, Director of the Institute for Human Rights and Development in Africa, during the 'Workshop on Human Rights Litigation in Africa' held in Pretoria from 29 April – 1 May 2002.

<sup>40</sup> According to Ibrahima Kane, legal officer for Interights, during an interview held in Niamey, Niger, during the 33<sup>rd</sup> ordinary session of the African Commission.

		accused went into hiding for fear of prosecution by the Military government.			
48/90 50/91 52/91 89/93 (joined)	Amnesty International v Sudan Comite Loosli Bachelard v Sudan Lawyers Committee for Human Rights v Sudan Association of Members of the Episcopal Conference of East Africa v Sudan	All the communications deal with the situation in Sudan between 1989-1993. Allegations of arbitrary arrests, detention without trial and extra-judicial killings of thousands of people. The 1990 National Security Act allowed for detention without access to family or lawyers for up to 72 hours and granted security forces powers of arrest, entry and search. Allegations of wide spread torture and ill treatment of political prisoners. Individuals sentenced to death were not allowed to appeal to a higher court. The creation of special courts functioning in violation of due process rights. The violation of the right to freedom of religion.	Arts 2, 4, 5, 6, 7(1)(a), (c) and (d), 8, 9, 10, 26	The Commission recommended <i>strongly</i> to the government of Sudan to put an end to these violations in order to abide by its obligations under the African Charter.	The Sudanese government did adopt a new Constitution and repealed the emergency laws, which seriously jeopardised human rights. <sup>41</sup>
54/91	Malawi African Association v	These communications	Arts 2, 4, 5, 6,	The Commission	The Commission's recommendations

<sup>41</sup>

In an interview held with the governmental delegation from Sudan on 19 October 2002, during the 32<sup>nd</sup> ordinary session in Banjul, the delegates were initially unaware of the decision against Sudan. Upon showing them the Commission's findings the delegates, representing the Ministry of Justice in Sudan, reiterated that the situation in Sudan has changed considerably since the time the communication was filed. They maintained that the oppressive legislation has "all" been removed from the statute books. While considering these communications the African Commission from 1-7 December 1996 sent a mission to Sudan, consisting of three Commissioners (Commissioners Dankwa, Kisanga and Rezag-Bara). It was reported in the Commission's final decision that "the mission was able to verify on the ground elements of the four communications under consideration" yet it was also stated that "this mission must be considered as part of its human rights promotion activities and does not constitute a part of the procedure of the communications" (See paragraphs 26 and 46 of the communication). The African Commission gave no specific recommendations in this case probably because of the ongoing civil war and other factors that motivated the Commission to conclude that "to change so many laws, policies and practices will of course not be a simple matter" whilst also noting "that the situation has improved significantly" (paragraph 83 of the communication).



61/91	Mauritania Amnesty International v Mauritania	relate to the situation prevailing in Mauritania between 1986-1992. Denial of due process rights during a serious of trials related to the <i>Manifeste de Negro – Mauritiens opprimes.</i>	7(1)(a)(b)(c)(d), 9(2), 10(1), 11, 12(1), 14, 16(1), 18(1), 26	declared that in Mauritania, during the period 1989-1992, grave or massive violations of human rights occurred as proclaimed by the African Charter. The Commission made a thorough list of recommendations to the government of	have not been implemented. Animosity between the Mauritanian government and the NGO's who filed the communications with the Commission run high. This was reflected during the 31 <sup>st</sup> ordinary session <sup>43</sup> and the 32 <sup>nd</sup> ordinary session <sup>44</sup> of the Commission.
98/93	Ms. Sarr Diop, Union Interfricaine des Droits de l'Homme and RADDHO v Mauritania	Discrimination and arbitrary detention on the basis of race especially against black Mauritians from the South.			
164/97-196/97	Collectif des Veuves et Avants-droit v Mauritania				
210/98 (joined)	Association Mauritanienne des Droits de	Allegations of			

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The Commission recommended to the government: 1) "To arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned. 2) To take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation of the deprivations of the victims of the above-cited events. 3) To take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations. 4) To reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all the legal consequences appertaining thereto. 5) As regards the victims of degrading practices, carry out an assessment of the status of such practices in the country with a view to identify with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication. 6) To take appropriate administrative measures for the effective enforcement of Ordinance n° 81-234 of 9 November 1981, on the abolition of slavery in Mauritania". The Commission assured Mauritania of its full cooperation and support in the application of the above-mentioned measures.

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In delivering their initial state report at the 31<sup>st</sup> ordinary session of the Commission, in accordance with article 62 of the Charter, the governmental delegation of Mauritania (headed by the Minister of Justice) stated the following in regard to the implementation of recommendations: 1) Refugees have returned to Mauritania and were reinstated in their rights, property and jobs. 2) Those previously employed by the government were reinstated in their positions or given access to pensions, those employed by the private sector were given assistance but might still be experiencing problems. 3) Compensation might still be a problem although they stated that those who did apply were compensated. 4) Social systems were put in place to assist the refugees upon return to Mauritania. In conclusion, the government remarked that its views the recommendations against Mauritania as a thing of the past, which should not surface at every session of the Commission, however they were open for further comments and suggestions from the Commission but will be surprised if that would be the case. The Institute for Human Rights and Development in Africa, who worked in close collaboration with other NGO's and especially with the victims (widows) of these human rights abuses reported during the 31<sup>st</sup> ordinary session that the recommendations against Mauritania did not appear to have been considered by the Mauritanian government. They highlighted the fact that some 40 000 Mauritians were still living as refugees outside the country and that reparations were not paid or provided for by the government. It was also pointed out that the government did not bring about an independent enquiry in order to prosecute those responsible for the human rights violations.

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During the 32<sup>nd</sup> ordinary session, held in Banjul from 17 to 23 October 2002, there was a strong NGO presence from Mauritania calling on the government of Mauritania to implement the specified recommendations. The Mauritanian NGO's formed a coalition headed by the Institute for Human Rights and Development in Africa (based in The Gambia) to coordinate strategies for implementation. Amongst other strategies they undertook to bring proof to the Commission at its next session as to the non-compliance of the Mauritanian government, they also planned to meet with strategic governmental officials in Mauritania and work towards creating international pressure on the government through extensive media coverage.





	l'Homme v Mauritania	torture whilst in detention. Prison conditions were cruel, inhuman and degrading. The expulsion of 50 000 people from Mauritania based on their political beliefs. The loss of property at the hands of security officers due to the expulsion to Senegal and Mali. Allegations of deaths in detention and widespread extra-judicial killings. Allegations of the enslavement of blacks in Beidane houses.		Mauritania. <sup>42</sup>	
<b>14<sup>th</sup> Annual Activity Report: 2000-2001</b>					
97/93	John K. Modise v Botswana	The complainant alleged that he was unjustly deprived of his real nationality and after an amicable settlement could not be reached between the parties the case was reopened before the Commission.	Arts 3(2), 5, 12(1), 12(2), 13(1), 13(2), 14, 18(1)	The Commission urged the government of Botswana to take appropriate measures to recognise Mr. Modise as its citizen by descent and also compensate him adequately for the violations of his rights occasioned.	The Attorney General of Botswana agreed during the Commission's 31 <sup>st</sup> ordinary session to implement the recommendations of the Commission upon receiving a written request from the Commission in this regard, together with specifications on implementation. <sup>45</sup> The government of Botswana since then has agreed in principle to award Mr Modise citizenship by birth, which will also then apply to his children. <sup>46</sup>

<sup>45</sup> Notes taken during the 31<sup>st</sup> ordinary session, which was held from 2-16 May 2002 in Pretoria, South Africa.

<sup>46</sup> This agreement from the government of Botswana is the result of follow-up efforts by Interights, a London-based NGO that represented Mr Modise. A brief summary of these follow-up efforts are given here in a bid to explain why the government is only in agreement on the issue of citizenship and not compensation: The government of Botswana, while appearing as respondent in the hearings before the Commission agreed that the African Charter formed part of its Constitutional dispensation and furthermore gave an undertaking during the public session of the 31<sup>st</sup> Ordinary session of its willingness to implement the Commission's findings. As a result Chidi Odinkalu, legal officer for Interights, approached the Attorney-General of



223/98	Forum of Conscience v Sierra Leone	The trial of 24 soldiers by the Court Martial was not consistent with due process rights guaranteed under the African Charter. The soldiers were sentenced to death without the right of appeal to a higher tribunal. The soldiers were consequently executed.	Arts 4, 7(1)(a)	The Commission did not make any recommendations.	The Commission sent a delegation to Freetown on a promotional mission between 14 and 19 February 2000, the subject of the complaint was taken up with relevant government officials including the Attorney General of Sierra Leone. <sup>47</sup> Legislation was passed granting soldiers the right of appeal to the Court of Appeal or subsequently to the Supreme Court. <sup>48</sup>
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Botswana during the 31<sup>st</sup> ordinary session to discuss implementation. Following this discussion Interights was formally invited to Gaborone where a meeting took place with the Attorney-General and the Permanent Secretary for Political Affairs in the Office of the President. It was agreed at this meeting that Interights would draft a Memorandum of Agreement providing for the following: (1) granting Mr Modise citizenship by birth and (2) compensating Mr Modise for all damages suffered in the different phases of the communication, which was first lodged in 1993. Before the Memorandum of Agreement could be submitted to the Attorney-General the latter left his position for a career in politics. During the same period the children of Mr Modise however decided to take the matter into their own hands and approached the media to force the government to address not only the issue of citizenship but also compensation. The government responded by indicating that they never had a written agreement to compensate Mr Modise. In the absence of a new Attorney-General Interights met in December 2003 with the Permanent Secretary for Political Affairs in the Office of the President. It was resolved that Mr Modise had to send the Office of the President a formal request and the President would then “find a way” to implement the Commission’s recommendations. After the media intervention by Mr Modise’s children the government was however reluctant to pay compensation to a person they described as a “political opponent”. Mr Modise does nevertheless already have a passport and it is only a matter of administration and he could receive citizenship by birth as agreed to in principle by the government, which would then grant his children an equal status (Information gathered during interviews held during the 32<sup>nd</sup>, 33<sup>rd</sup>, 34<sup>th</sup> and 35<sup>th</sup> ordinary sessions of the African Commission with Ibrahim Kane and Chidi Odinkalu both senior legal officers of Interights). Commissioner Dankwa reported that on a promotional visit to Botswana, he “took up with the relevant authorities a communication by J K Modise on the alleged deprivation of his citizenship. The assurance given to me that the President of Botswana had granted citizenship to Modise turned out to be true, although the communication lingered before the Commission thereafter for years because the complainant was not satisfied with the type of citizenship granted to him. Counsel for Modise persuasively argued later that he was entitled to citizenship by birth, which placed no limitation on his civil and political rights” (V Dankwa ‘The promotional role of the African Commission on Human and Peoples’ Rights’ in MD Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2000* (2002) 345). Commissioner Dankwa’s follow-up efforts were in relation to the *Modise* case as adopted in the 10<sup>th</sup> Annual Activity Report, before Modise came back to the Commission to ask for recognition of his right to citizenship by birth.

<sup>47</sup> Paragraph 10 of Communication 223/98 setting forth the procedure followed by the Commission.

<sup>48</sup> The Commission “noted with satisfaction that the law has been amended, subsequent to the mission to Sierra Leone, to bring it into conformity with the Charter” (Par 21 of Communication 223/98). According to Thomas MacLean, member of the NGO Forum of Conscience, the

224/98	Media Rights Agenda v Nigeria	Arbitrary arrest and detention of a newspaper editor and 3 staff members. Denial of access to legal representation, doctors and family members. Tried by a military tribunal composed of members of the executive. Denial of the right to appeal under the Treason and other Offences (Special Military Tribunal) Decree no.1 of 1986 establishing the tribunal.	Arts 3(2), 5, 6, 7(1)(a-d), 9, 26 and Principle 5 of the UN Basic Principles on the Independence of the Judiciary	The Commission urged the Republic of Nigeria to bring its laws in conformity with the provisions of the Charter.	With the death of General Sani Abacha, the newspaper editor was still on trial for treason and it was only sometime thereafter that he was released. <sup>49</sup>
225/98	Huri-Laws v Nigeria	Harassment and persecutions of key members of staff of the Civil Liberties Organisation (an NGO based in Nigeria). Arbitrary arrest and detention of staff members in accordance with Decree No.2 of 1984 (as amended in 1990), torture, denial of access to legal representation, doctors and family	Arts 5, 6, 7(1)(a)(d), 9, 10(1), 12(1)(2), 14	The Commission did not make any recommendations.	Decree no 2 of 1984 (as amended in 1990) was repealed. The Commission's silence on awarding remedies and compensation, however, was noted by Huri-Laws and they raised the issue again at the 31 <sup>st</sup> ordinary session of the Commission held in Pretoria 2-16 May 2002. <sup>50</sup>

Commission helped significantly in speeding up the passing of the new law by sensitising and pressurising the government. He commented that the government of Sierra Leone responds to outside pressure. He also attributed the government's compliance to the mobilisation of civil society within Sierra Leone (Comments made during the 'Workshop on Human Rights Litigation in Africa' held in Pretoria from 29 April to 1 May 2002, under the auspices of the Institute for Human Rights and Development in Africa and the Kenyan and Swedish Sections of the International Commission on Jurists).

<sup>49</sup> Media Rights Agenda (MRA) approached the Commission to recommend the payment of compensation to the editor upon finding a violation of the Charter. The Commission did not make any such recommendations, neither did it address the issue upon MRA's request (Information supplied by Edetaen Ojo, Executive Director of MRA, during an interview held in Lagos, Nigeria, on 28 October 2002).

<sup>50</sup> Huri-Laws in addressing the Commission at its 31<sup>st</sup> ordinary session in May 2002 stated that "they will not fail to use this opportunity to urge the Commission to follow up on Huri-Laws' Communication no 225/98 ... without an order from the African Commission, the victims of arbitrary detention in this case, one of whom spent five months in prison, have no opportunity to obtain compensation at the national level due to them as enunciated in section 6(6) of the 1999 Constitution of Nigeria ... Huri-Laws and the CLO, therefore, call upon the African Commission to urge the Federal government of Nigeria to apologise to the victims of the violations committed and to pay them compensation" (statement distributed during the 31<sup>st</sup> ordinary session). During an interview held with Frances Ogwo on 28 October 2002 at the Huri-Laws offices in Lagos, Nigeria, it became apparent that the situation has not changed from

		members. Detention in cruel, inhuman and degrading circumstances. Violations of the right to access to information and freedom of association.			
231/99	Avocats Sans Frontieres (on behalf of Gaetan Bwampamye) v Burundi	Accused was tried and sentenced to death in the absence of his defence counsel.	Art 7(1)(c)	The Commission requested Burundi to draw all the legal consequences of its decision; and to take appropriate measures to allow the reopening of the file and the reconsideration of the case in conformity with the laws of Burundi and the pertinent provision of the African Charter. It called on Burundi to bring its criminal legislation in conformity with its treaty obligations emanating from the African Charter.	The recommendations of the Commission were not implemented due to the fact that Burundi's domestic legislation did not provide for the reopening of criminal cases. <sup>51</sup>
232/99	John D. Ouko v Kenya	Detention without trial for a period of 10 months under inhuman and degrading	Arts 5, 6, 9, 10, 12(1)(2)	The Commission urged the government of Kenya to	According to the Kenyan Department of Foreign Affairs the Commission's

the 31<sup>st</sup> to the 32<sup>nd</sup> ordinary sessions of the Commission. Huri-Laws have not received any response from the Commission and were planning to appeal in writing to both the government of Nigeria and the Commission and if financially possible address the issue again in public at the next session of the Commission.

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The *Association Burundaise pour la Defense des Droits des Prisonniers* (ABDP) an NGO based in Bujumbura, Burundi, explained that it has lobbied for the implementation of the Commission's recommendations, but in the absence of any domestic legislation to provide for the reopening of criminal cases, its efforts were to no avail. In order to ensure that criminal cases could in future be reopened on the domestic level, following a decision by an international judicial institution or a quasi-supranational institution, ABDP on 3 September 2004 approached the Parliament of Burundi to amend the existing legislation (Explanation provided by ABDP during an interview with Frans Viljoen at the 36<sup>th</sup> ordinary session of the African Commission held in Dakar, Senegal).



		circumstances. Allegations of torture whilst in detention. Eventual fleeing from the country due to the accused's political opinions.		facilitate the safe return of the complainant to the Republic of Kenya, if he so wishes.	findings have not been officially communicated to the government. <sup>52</sup>
204/97	Mouvement Burkinabe des Droits de l'Homme et des Peuples (MBDHP) v Burkina Faso	The suspension, discharge and removal of magistrates in 1987 with only a few reinstated and no compensation paid to the rest. Allegations of the undermining of the rule of law. Kidnappings and extra-judicial killings due to the expression of political opinions.	Arts 3, 4, 5, 6, 7(1)(d), 12(2)	The Commission recommended that the Republic of Burkina Faso draws all the legal consequences of its decision, in particular by: 1) Identifying and taking to court those responsible for the human rights violations cited above; 2) Accelerating the judicial process of the cases pending before	Efforts of the government of Burkina Faso to comply with the Commission's recommendations are documented in the Commission's report on its promotional visit to Burkina Faso in 2001. <sup>53</sup>  The government also reported on its implementation efforts in its 2 <sup>nd</sup> periodic report delivered at the 35 <sup>th</sup> ordinary session of the Commission. <sup>54</sup>

<sup>52</sup> Comments made during the 31<sup>st</sup> ordinary session of the African Commission in Pretoria, South Africa. According to Professor Hansungule, Professor of Law at the Centre for Human Rights at the University of Pretoria, who enquired as to the implementation of this decision during a visit to the offices of the Attorney-General of Kenya in 2003 this communication has not been implemented due to its highly political nature (Interview held with Prof Hansungule at the Centre for Human Rights at the University of Pretoria in May 2003).

<sup>53</sup> Communication 204/97 was finalised by the African Commission during its 29<sup>th</sup> ordinary session, held from 23 April to 7 May 2001 in Tripoli, Libya. Within the same year, from 22 September to 2 October 2001, Commissioner Isaac Nguema undertook a promotional visit to Burkina Faso. Commissioner Nguema in meeting with the Minister of Justice and Promotion of Human Rights, Boureima Badini, inquired as to the level of implementation of the recommendations set forth in communication 204/97. The Minister in his response raised the following issues: (1) "Burkina has accepted the decision taken by the Commission in the matter MBDHP against the government of Burkina"; (2) "The decisions taken by the Eminent Persons Commission that looked into other matters besides the Norbert Zongo case, all cases of human rights violations such as the Dabo Boukari (the student mentioned in the communication) and others that are identified for the purpose of determining damages owed to victims or those entitled to it should be implemented"; (3) "In each of these cases, a consensus is about to be reached even though each of the interested parties could still seek legal remedy"; (4) "There has been a lot of speculation on the outstanding cases, which forced me (the Minister) to ask the civil society, including NGOs, to know whether the government's intervention in the on-going legal proceedings was appropriate? The civil society responded in the negative to my question". Amongst the recommendations forwarded in the Report on the Promotional Visit, Commissioner Nguema once again called on the government of Burkina Faso to "proceed as soon as feasible with the implementation of the decision" against the government (See *Report of the African Commission's Promotional Mission to Burkina Faso*, 22 September – 2 October 2001, DOC/OS(XXXIII)/324b/i, paras 126-130 and 143).

<sup>54</sup> During the 35<sup>th</sup> ordinary session of the African Commission, held in June 2004 in Banjul, The Gambia, Burkina Faso presented its 2<sup>nd</sup> periodic report, in compliance with article 62 of the African Charter. This report covered the period from October 1998-December 2002. As part of their report the government of Burkina Faso reported on the measures taken by it to comply with the Commission's recommendations in communication 204/97 as follows: (1) "In August

				the courts; 3) Compensating the victims of the human rights violations stated in the complaint.	Civil society, however, has a different take on the government's efforts and these are also reflected here. <sup>55</sup>
211/98	Legal Resources Foundation v Zambia	Alleged that the Constitution (Amendment) Act of 1996 is	Arts 2, 3(1), 13	The Commission strongly urged the Republic of	According to the Minister of Justice, Zambia has initiated a process

2001, the government of Burkina Faso indicated by letter to the Commission that it had taken note of the decision and that it would examine it with a view to complying with the decision"; (2) The government reported that it had adopted a number of "general measures aimed at compensating the victims and legal heirs of victims of political violence ... this has made it possible to compensate some of the victims of human rights violations identified in the communication by the MBDHP"; (3) The government has put in place a compensation fund for the victims of political violence; (4) Decree No 2002-437/PRES/PM of October 14 2002 was passed to provide for the settlement of compensation for the legal heirs of 16 people who had lost their lives. "This decree applied to the heirs of Guillaume Sessouma and Oumarou Clement Ouedraogo, who were both referred to in the Commission's decision as victims of violations of the rights enshrined in the Charter"; (5) "Other cases, involving the burning of two cars belonging to Halidou Ouedraogo, and the careers of Halidou Ouedraogo and Christophe Compaore, the so-called case of the Kaya Nabio of Nahouri, and the case of the school children who were killed in Garango are currently before the compensation fund for the victims of political violence"; (6) The government further elaborated as to the status of cases pending before the domestic courts and those already finalised; (7) With regard to the *Dabo Boukary* case (to which the communication made direct reference as to the whereabouts of the student) it was reported that the case was still pending before the courts as it was "only" brought to the court in 2000 and the investigation in the case was still underway; (8) "The Oumarou Clement Ouedraogo case is also before the courts, although a decision has already been made by the compensation fund for the victims of political violence to pay compensation in this case". In conclusion the government further undertook to "continue to deploy all efforts to find the appropriate solution to all the situations that remain pending" (See III Compliance with the decision of the ACHPR concerning communication no 204/97, *MBDHP v Burkina Faso* in *Periodic Report of Burkina Faso to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights*, October 1998-December 2002, page 25-26).

<sup>55</sup> According to the MBDHP, Burkina Faso has not implemented the Commission's recommendations. The MBDHP also stated that the Commission was aware of this state of affairs since they did send a mission, led by the Chairman of the Commission Isaac Nguema, to Burkina Faso from 22 September to 3 October 2001. The MBDHP reported that they drafted a memorandum upon receiving the findings of the Commission and submitted the memorandum to various prime ministers and to the state's President Blaise Compaore but to no avail. They further organised press conferences to publicise the findings of the Commission. The Minister of Justice and Promotion of Human Rights reacted to this and published an article, dated 13 July 2001, stating that, "*Dans la mesure ou les conclusions de la CADHP vont dans le sens des mesures de reconciliation nationale, le gouvernement les examinera avec la plus grande attention ... (adding further on that) Qu'il convient de noter que les conclusions de la CADHP n'ont aucun caractere obligatoire*". (In cases where the conclusions of the Commission are towards national reconciliation, the government will examine them carefully ... adding further that it is appropriate to note that findings of the Commission have no binding character). According to MBDHP, this quote summarises the government's uncooperative stance on the implementation of the Commission's recommendations. (Comments made by Christof Compaore, member of the MBDHP, during the 'Workshop on Human Rights Litigation in Africa' held in Pretoria from 29 April –1 May 2002, under the auspices of the Institute for Human Rights and Development in Africa and the Kenyan and Swedish Sections of the International Commission on Jurists). According to Professor Salif Younaba (from the University of Burkina Faso), the government of Burkina Faso did establish a Commission to compensate the victims and their families but he further highlighted the fact that families refused to accept the compensation where the perpetrators were not identified and brought to justice (Interview held by Frans Viljoen during the 35<sup>th</sup> ordinary session of the African Commission, 26 May 2004).



		discriminatory, divisive and violates the human rights of 35 percent of the Zambian population. The Constitution provides <i>inter alia</i> that anyone who wants to contest the office of the President has to prove that both parents' are/were Zambian citizens by birth or descent.		Zambia to take the necessary steps to bring its laws and Constitution into conformity with the African Charter. The Commission requested the Republic of Zambia to report back to it upon submitting its next country report in terms of article 62 on measures taken to comply with these recommendations.	to revise its Constitution. <sup>56</sup> The Minister further, reported that the Commission's findings have been brought under the attention of Cabinet.
218/98	Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria	Allegations of unfair, unjust and unlawful trials conducted under military decree in military tribunals sentencing 6 to death. The tribunals were constituted of members of the executive and armed forces with no right of appeal to a higher court.	Arts 7(1)(a) and (c)	The Commission urged the Government of the Federal Republic of Nigeria to bring its laws in conformity with the Charter by repealing the offending Decree. It requested the Government of the Federal	The victims were not compensated. They were however released in early 1999, before the civilian government took over power, without the granting of state pardon and before the Commission made its recommendations known. The decree on the

<sup>56</sup>

During an interview held with Maria Mapani, she commented that reviewing the Constitution of Zambia would be a difficult and long process that would include consulting various stakeholders and the principal of state sovereignty could play a big role. She further mentioned that the communication, as of May 2002, had not been officially communicated to the government (Principal State Counsel for Zambia, interview held on 8 May 2002, in Pretoria, South Africa) Geoffrey Mulenga, legal officer for the Legal Resources Foundation, also underlined the fact that these recommendations have not yet been fully implemented and referred to the government's reluctance in amending the Constitution: He argued that many stakeholders should play a role in constitutional reform (Comments made during the 'Workshop on Human Rights Litigation in Africa' held in May 2002 in Pretoria, South Africa). From 9 to 13 September 2002, Commissioner Chigovera undertook a promotional visit to Zambia. Follow-up was established with the findings of the Commission in the cases decided against Zambia. In regard to this communication, the Minister of Justice informed the delegation that Zambia was in the process of undertaking constitutional revision and reported further that the decision of the Commission had been brought to the attention of the Cabinet and would be inscribed into the order of the day (*Report of the Promotional Visit to Zambia* para 7). During a subsequent interview with Ibrahim Kane, legal officer for Interights, it was confirmed that a revision of the Constitution of Zambia has been initiated. (Interview held during the 33<sup>rd</sup> ordinary session of the African Commission in May 2003). It is however, predicted that the process of constitutional review in Zambia will take several years to complete.



				Republic of Nigeria to compensate the victims as appropriate.	other hand has not been repealed. <sup>57</sup>
<b>15<sup>th</sup> Annual Activity Report: 2001-2002</b>					
155/96	The Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v Nigeria	The communication alleged that the military government of Nigeria has been directly involved in oil production through the state oil company, and that these operations have caused environmental degradation and health problems resulting from, the contamination of the environment among the Ogoni People". <sup>58</sup> The communication further noted the Nigerian army's role in ruthless operations that left thousands of Ogoni villagers, dead or homeless and destroyed their food resources.	Arts 2, 4, 14, 16, 18(1), 21 and 24	The Commission appealed to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the Ogoniland listing specific recommendations. <sup>59</sup> The Commission further urged the government of the Federal Republic of Nigeria to keep the African Commission informed of the out come of the work of: The Federal Ministry of Environment, <sup>60</sup> the Niger Delta	The NDDC in conformity with its mandate has addressed issues of health since July 2002 in the Niger Delta, through the building of health centres and by providing health personnel. <sup>63</sup>

<sup>57</sup> Onyeisi Chiememe, member of CLO, provided these facts. He also stated that the decree in question could only be used in a military regime and under the current civilian government there is a law in place, recognised by the Constitution of 1999, which deals with treason (Comments made during an interview held on 28 October 2002 in Lagos, Nigeria at the offices of CLO).

<sup>58</sup> Para 1 of the Communication.

<sup>59</sup> 1) "Stopping all attacks on Ogoni communities and leaders by Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory; 2) Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations; 3) Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations; 4) Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and 5) Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations".

<sup>60</sup> The Federal Minister of Environment was established to address environmental and environment related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoni land.





					Development Commission <sup>61</sup> and the Judicial Commission of Inquiry. <sup>62</sup>	
<b>16<sup>th</sup> Annual Activity Report: 2002-2003</b>						
222/98 and 229/99 (joined)	The Law Offices of Ghazi Suleiman v Sudan	Communication 222/98 dealt with the arrest of three complainants in the absence of fair trial procedures. The complainants were detained without charge and were refused contact with their lawyers and families. Communication 229 similarly dealt with the arrest, detention and trial of 26 civilians before a military court in the absence of fair trial procedures. All the complainants were released at the end	Arts 5, 6, 7(1)		The Commission urged the government of Sudan to bring its laws in conformity with the African Charter and requested the government of Sudan to duly compensate the victims.	During the 35 <sup>th</sup> ordinary session of the Commission the government of Sudan presented its periodic report in conformity with article 62 of the African Charter. In a circular distributed during the Session it was highlighted that the government of Sudan has not implemented any of the decisions published in the 16 <sup>th</sup> Annual Activity Report. <sup>64</sup>

<sup>61</sup> The NDDC was enacted into law to address the environmental and other social related problems in the Niger Delta area and other oil producing areas of Nigeria.

<sup>62</sup> The Judicial Commission of Inquiry was inaugurated to investigate the issue of human rights violations.

<sup>63</sup> According to Ndidi Bowei, senior legal counsel for SERAC, these efforts have only reached about 3000 people whilst the Niger Delta stretches across five states. She also highlighted the fact that the NDDC has only made efforts thus far to address medical issues in the Niger Delta but has not touched on issues of food production or environmental clean-up without which the Ogoni people cannot make a living due to widespread pollution (Information obtained during an interview held in October 2002 during the 32<sup>nd</sup> ordinary session of the African Commission). In a separate report published by the National Human Rights Commission (NHRC) of Nigeria, the NHRC highlights the fact that the NDDC has promised wide spread consultation with the local communities in the Niger Delta in the development of a master plan but as of March 2003 none of these communities have been approached. Amongst the recommendations forwarded by the Human Rights Commission to address the situation in the Niger Delta they mentioned that "[t]he NHRC should investigate the petitions/complaints from other towns and villages and should document the cases with the aim of integrating them into the required periodic report to be submitted to the African Commission on Human and Peoples' Rights. A copy of the report can also be submitted to the National Assembly to aid it in its legislation". See "NHRC explores Niger Delta" in *Human Rights Newsletter*, Jan-March, 2003, vol.4, no.1, pages 6-7. According to Ibrahima Kane, legal officer for Interights, a major problem with the recommendations of the Commission lies in the fact that the Commission failed to define the term collective rights, in other words the Commission failed to explain who is part of the group that should receive the relief and how to go about implementation (Comments made during an interview held in Niamey, Niger, during the 33<sup>rd</sup> ordinary session of the African Commission).

<sup>64</sup> Curtis Doebbler, the author of communication 236/2000, distributed an information sheet (on file with author) entitled "Information relevant to the consideration of Sudan's state report to the African Commission on Human and Peoples' Rights". In this document it was not only outlined that Sudan has not implemented any of the recommendations forwarded in communications 222/98, 229/98, 228/99 and 236/2000 but it also requested the Commission "to keep the item of the implementation of these decisions on its agenda and to request the government of Sudan to report to the Commission about the action it has taken to implement these decisions until they have been fully implemented in accordance with the African Commission's decision".



		of 1999 following a pardon granted by the President of Sudan on the condition that the victims renounce their right to appeal.			
228/99	The Law Offices of Ghazi Suleiman v Sudan	The complaint was submitted on behalf of Mr Ghazi Suleiman, the principal partner in the Law Firm of Ghazi Suleiman. The complaint alleged that the National Security Act of 1994, as amended in 1996, suspended the right to freedom of expression, assembly, association and movement.	Arts 6, 9, 10, 11 and 12	The Commission requested the government of Sudan to amend its existing laws to provide for <i>de jure</i> protection of the human rights to freedom of expression, assembly, association and movement.	See above.
236/2000	Curtis Francis Doebbler v Sudan	The complaint was lodged on behalf of eight students who were arrested, convicted and sentenced to fines and or lashes for acts such as girls kissing, wearing trousers, dancing with men etc. The complaint alleged that the punishment meted out was grossly disproportionate and constituted cruel, inhuman and degrading punishment.	Art 5	Requested the government of Sudan to (1) immediately amend the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments; (2) abolish the penalty of lashes; and (3) take appropriate measures to ensure compensation of the victims.	See above.
241/2001	Purohit and Moore v The Gambia	The complaint dealt with various aspects of the legislation governing mental health in The Gambia, as well as the conditions at the Psychiatric Unit	Arts 2, 3, 5, 7(1)(a) and (c), 13(1), 16 and 18(4)	The Commission forwarded detailed recommendations relating to the transformation of the legislation	The government has not taken any steps to implement the Commission's recommendations. <sup>66</sup>



		of the Royal Victoria Hospital.		governing mental health in The Gambia. <sup>65</sup> It further requested the government to report back to the African Commission when it submits its next periodic report in terms of article 62 of the African Charter on the measures taken to comply with the recommen-  dations and directions of the African Commission.	
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<sup>65</sup> The Commission strongly urged the government of The Gambia to: (a) "Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter on Human and Peoples' Rights and International Standards and Norms for the protection of mentally ill or disabled persons as soon as possible; (b) Pending (a), create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release; and (c) Provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia".

<sup>66</sup> According to Moore, one of the complainants (non-compliance confirmed in email correspondence between Paul Moore and Frans Viljoen (on file with Frans Viljoen)).

## 2.3 Status of state compliance with the recommendations of the African Commission

### 2.3.1 Categorising implementation efforts

Based on the steps taken by state parties to implement the recommendations of the African Commission, as recorded in Table A, the status of state compliance with the Commission's recommendations is systematically analysed in Table B. In order to determine the status of state compliance, the implementation efforts of the state parties need to be categorised. After more than ten years of following up on the implementation of their views, the Human Rights Committee in this regard states the following: "Attempts to categorise follow-up replies are necessarily imprecise".<sup>67</sup> Due to a number of reasons, the categorisation process followed in Table B can also not be classified as a precise or accurate reflection of state compliance.<sup>68</sup> The findings nevertheless represent the only attempt up to date at categorising state compliance with the recommendations of the African Commission. Even if Table B is not an entirely accurate reflection, it still forms the background against which to identify factors that influence state compliance in the African system.

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<sup>67</sup> In July 1990, during the Committee's 39<sup>th</sup> Session, it established a follow-up procedure to its views under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights and created the mandate of a Special Rapporteur on Follow-Up (See *Official Records of the General Assembly*, 45th Session, Supplement No 40 (A/45/40), annex XI. With reference to the difficulties in categorising follow-up replies see *Report of the Human Rights Committee*, Official Records of the General Assembly, 54th Session, No. 40 (A/54/40), par 459).

<sup>68</sup> The specific reasons that made the categorisation process difficult will be discussed below. There does not even seem to be consensus between the Inter-American Commission on Human Rights and the UN Human Rights Committee as to how to categorise implementation efforts by state parties. According to the Annual Report of the Inter-American Commission, the Commission "evaluates whether or not compliance with its recommendations is complete and not whether it has been started". The Commission therefore evaluates the status of compliance as it stands at the time of publishing its Annual Report. The Commission also made a point of only following up on the decisions it took since 2001 when it decided to adopt a follow-up procedure (See *2002 Annual Report of the Inter-American Commission on Human Rights*, Section D – Status of compliance with the recommendations of the IACHR, OEA/Ser.L/VII:117 Doc.1rev.1 par 108. Available at: <http://www.cidh.oas.org/annualrep/2002eng/chap.3h.htm>. Date accessed: 3 July 2004). The Human Rights Committee on the other hand adopted its follow-up procedure already in 1990 and undertook not only to follow-up on views adopted from then on but also to follow-up in retrospect on the communications decided before 1990. The Committee furthermore approach the categorisation of state compliance as either satisfactory in that states "displayed a willingness ... to implement the Committee's views or to offer the applicant an appropriate remedy". This contrasts with a finding a state party's efforts to be "unsatisfactory" where it constitutes "less than substantial compliance" (See *Report of the Human Rights Committee*, Official Records of the General Assembly, 51st Session, No. 40 (A/51/40) par 427).

The classification of state compliance with the recommendations of the African Commission was done in terms of three broad categories, namely: full compliance, partial compliance and non-compliance. In Table B, this categorisation is applied to all the communications set out in Table A. Instead of listing the cases according to the Annual Activity Report in which they were published, cases are grouped together, in alphabetical order, according to the state parties involved.

A state party is deemed to have “fully complied” with the recommendations of the Commission if it has implemented all the recommendations of the Commission or (as in the case of Botswana) it has sufficiently expressed the political will to comply with the substance of the Commission’s recommendations and has already taken significant steps in this process.<sup>69</sup> It is however very difficult to say if a state expresses the necessary political will to implement a communication fully. This classification is therefore a subjective one and is open to criticism.

The second category, “partial compliance”, refers to communications where the state party’s implementation efforts relate only to one aspect or some aspects of the Commission’s recommendations. It could also represent instances where a state party has implemented some elements of all the recommendations, but has not given complete effect to the recommendations. Categorising state responses as “partial compliance” is more troublesome than is the case where there is full compliance. This is primarily due to the fact that a finding of “partial compliance” most probably indicates that the process is still ongoing and that, although a state party has attempted to implement the recommendations of the African Commission, it has yet to finalise the process. Some recommendations, such as those formulated in 2001 against Nigeria in the *SERAC* case,<sup>70</sup> will require a more extended period of time to implement. As the decision is relatively recent, it was a choice that had to be made on the evidence gathered in Table A to decide that although there is very little compliance at the moment, a process has been undertaken. Thus, the *SERAC* case

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<sup>69</sup> It has been reported in the Botswana media that “[a] former prohibited immigrant is said to have been offered P100 000 compensation. The Attorney General, Ian Kirby, has said that the government is engaged in secret negotiations to resolve the dispute over the citizenship of John Modise. Kirby said he is involved in the secret talks with representatives from the Office of the President and Modise” (D Dithato ‘State in secret talks with Modise’ *Mmegi* 24 August 2004, available at: <http://www.mmegi.bw/2004/August/Wednesday25/4971943961307.html>. Date accessed: 26 August 2004).

<sup>70</sup> Communication 155/95, 15<sup>th</sup> Annual Activity Report.

has been classified as “partial compliance”. If, however, the situation remains static over the next two years, for instance, then it should be classified as an example of non-compliance.

The third category, termed “non-compliance”, is in turn divided into three sub-categories, namely: a category on clear non-compliance, a category on communications that were recently decided, and a category on cases where no information on follow-up could be established. The total of all three these categories will however count towards the status of non-compliance with the Commission’s recommendations, as the end result of all three sub-categories is non-implementation of the Commission’s recommendations.

The sub-category on “clear non-compliance” refers to state parties that did not implement any of the Commission’s recommendations. It also refers to situations where state parties did not accept the findings of the Commission, challenging it on factual or legal grounds while indicating that it will not implement the Commission’s recommendations due to these reasons.

The second sub-category on recent decisions refers to the recommendations that were published in the 16<sup>th</sup> Annual Activity Report of the African Commission (in July 2003). These cases have all been categorised under non-compliance. Although these communications were relatively recently decided, it was made clear by the authors of these communications that a year later (2004), at the 35<sup>th</sup> ordinary session of the Commission, no steps had been taken by the respective governments.<sup>71</sup>

The third sub-category refers to cases where there was no information forthcoming from either state parties or the victims or NGOs who filed the communications on behalf of victims. In most of these cases, due to factors such as an ongoing civil war for instance, the conclusion was drawn that the recommendations were not implemented, based on the circumstantial evidence.

Even from the definitions of the various categories it is clear that this is a very subjective process and that a different conclusion on the status of state compliance could very possibly be reached should a different system have been used. Some of the difficulties encountered in classifying the implementation efforts of states relate to

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<sup>71</sup> See fn 64 above.

the problematic causal connection between Commission findings and government action, factual disputes about implementation, the lack of a clear remedy and the fact that implementation is not a static but a dynamic process. These four factors are now discussed briefly.

A general problem with the categorisation process relates to the determination of causality. In classifying a state party's efforts as "full compliance", where a highly publicised case for instance caused significant international pressure to be exerted on a state party, it is not clear whether the relief sought by the victim came about as a result of the Commission's recommendations or whether it was due to international pressure. Questions of causality also come into play in situations where for instance a civil war existed during the submission of the complaint or where a military dictator was in power at the time, but when the Commission's recommendations are made known, these situations have changed considerably.

There may also be factual disputes about compliance. It was difficult to categorise cases where the state party argued that it implemented the Commission's findings while NGOs held the opposite view. In such circumstances, the varying responses were considered carefully. The benefit of the doubt was given to the version of the NGOs in instances where doubt persisted.

Another difficulty arose in situations where the Commission found a state in violation of the Charter but did not specify any recommendations. This meant that it was entirely up to the state party to decide which steps to take to give effect to the Commission's finding. This, in turn, made it difficult to determine if all the necessary steps were taken, thus complicating the classification of the state's response.

Compliance is not a static process. By its very nature, this study provide snapshot of implementation at a particular time. In general, efforts have been made to present as accurately a picture as possible as at 31 December 2004. As indicated above, the category into which a particular communication falls may (and is bound to) change. In that sense, the study (and any similar study) remains a "work-in-progress".

Also, under the principle of state responsibility, compliance is the responsibility of the state, not of transient governments. The study departs from this premise in categorising state compliance. However, the case of Nigeria is treated differently. After the dramatic regime change in 1998, and in the context of a civilian government

replacing a military government, a number of the Commission's recommendations were complied with.<sup>72</sup> These recommendations were not implemented during the period of the Abacha dictatorship. To earmark all these cases as instances of "clear compliance" would in my view present a distorted picture. These cases have consequently been categorised as instances of non-compliance. It should be noted, though, that if the temporal scope within which to measure compliance is extended beyond 1998/ 1999 (when Abacha died and the civilian government was installed, respectively), Nigeria has complied at least partially in 10 more cases. This would imply full or partial compliance or partial compliance in 14 of the 19 cases against Nigeria. Compliance mostly took the form of the repeal of decrees, which could be viewed as a factor directly related with the change from a military to a democratic government. In other words, the obligation on the state to comply is in line with its political policies and is not the same as for instance the obligation to pay compensation, which has not been paid to any of the victims detained unlawfully during the Abacha regime. The post-Abacha government has not fully complied in at least one case, by not paying compensation to victims.<sup>73</sup>

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<sup>72</sup> This does not mean that the new government immediately implemented the Commission's recommendations. In communication no 102/93 *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, of which the Commission was seized in 1993 was only decided on the merits in October 1998. This was after the Commission, at the 24<sup>th</sup> ordinary session in October 1998, was furnished by the complainants with "a supplementary submission on pending communications on Nigeria basically urging the Commission to continue consideration of communications against Nigeria including the instant one because the violations have not abated, and the change in government following the death of General Sani Abacha has not changed any state responsibility of Nigeria" (See par 38 of the communication).

<sup>73</sup> See Communication 225/98 in Table A.





**2.3.2 Table B: State compliance with the recommendations of the African Commission**

State parties and communications	Full compliance	Partial compliance	Non-compliance		
			Clear non-compliance	Recent decisions (non-compliance assumed)	No information (non-compliance assumed)
<b>Angola</b>  Comm. 159/96			X		
<b>Botswana</b> <sup>74</sup>  Comm. 97/93	X				
<b>Burkina Faso</b>  Comm. 204/97		X			
<b>Burundi</b>  Comm. 231/99			X		
<b>Cameroon</b>  Comm. 59/91  Comm. 39/90	X		X		

<sup>74</sup> It is believed that the political will exists to fully implement the Commission's recommendations.



<b>Chad</b> Comm. 74/92					X
<b>The Gambia</b> Comm. 147/95, 149/96  Comm. 241/2001			X		X
<b>Ghana</b> Comm. 103/93		X			
<b>Kenya</b> Comm. 232/99			X		
<b>Malawi</b> Comm. 64/92, 68/92, 78/92  Comm. 64/92, 68/92, 78/92		X			X
<b>Mauritania</b> Comm. 54/91, 61/91, 98/93, 164/97-196/97, 210/98			X		
<b>Nigeria</b> Comm. 60/91  Comm. 87/93  Comm. 101/93  Comm. 129/94  Comm. 102/93  Comm. 105/93, 128/94, 130/94, 152/96		X  X		X  X  X	X



Comm. 137/94, 139/94, 154/96, 161/97			X		
Comm. 140/94, 141/94, 145/95			X		
Comm. 143/95, 150/96			X		
Comm. 148/96		X			
Comm. 151/96			X		
Comm. 153/96	X				
Comm. 206/97	X				
Comm. 215/98			X		
Comm. 205/97					X
Comm. 224/98			X		
Comm. 225/98			X		
Comm. 218/98			X		
Comm. 155/96		X			



<b>Rwanda</b> Comm. 27/89, 46/91, 49/91, 99/93			X		
<b>Sierra Leone</b> Comm. 223/98	X				
<b>Sudan</b> Comm. 48/90, 50/91 52/91, 89/93  Comm. 222/98, 229/99  Comm. 228/99  Comm. 236/2000			X	X  X  X	
<b>Zaire (now DRC)</b> Comm. 47/90  Comm. 25/89, 47/90, 56/91, 100/93			X  X		
<b>Zambia</b> Comm. 71/92  Comm. 212/98  Comm. 211/98	X  X	X  X			
			<b>21</b>	<b>4</b>	<b>4</b>
<b>Total: 17 state parties, 44 communications</b>	<b>6</b>	<b>9</b>	<b>29</b>		

### **2.3.3 Analysing the findings on state compliance with the Commission's recommendations**

From a categorisation of the empirical data, set out in Table B, it is evident that the Commission has since its inception until the publication of its 16<sup>th</sup> Annual Activity Report in 2003 found state parties in violation of the provisions of the African Charter in 44 communications. These communications involve 17 of the 53 states that are party to the African Charter. The following conclusions are drawn from this statistical analysis: Firstly, it is clear that very few communications filed with the Commission, since it was established in 1987, have resulted in a finding of a violation of the African Charter. Secondly, the individual complaints procedure is either not well known on the continent or difficult to access - it is impossible that only 17 states out of a possible 53 have violated the African Charter in a continent where human rights violations are reported to be rife.

However, the greater significance of Table B lies in the conclusions regarding the status of state compliance with the recommendations of the African Commission. In categorising the implementation efforts of state parties, as recorded in Table A, the following results are documented: (1) In only 6 (or 14%) of the 44 communications analysed did state parties comply fully with the recommendations of the African Commission. (2) In 9 (or 20%) of the cases, state parties partially complied with the Commission's recommendations. (3) In the majority of cases, 29 (or 66%) out of a possible 44, state parties did not comply with the Commission's recommendations.

If the empirical findings on non-compliance are analysed in terms of the three sub-categories into which levels of compliance were divided, it is still clear that unambiguous (or "clear") non-compliance was recorded in the majority of cases, namely in 21 (or 48%) out of the 44 cases. Four cases were categorised as recently decided and therefore could maybe still be complied with. These states have yet to start implementing the Commission's findings. So: While recognising the possibility of imminent compliance, these cases are placed under the general rubric of "non-compliance", because a year and a half (the period between July 2003 and 31 December 2004) has lapsed since the adoption of the Annual Activity Report in which these decisions have been made public.<sup>75</sup> The last sub-category listed cases where no information on compliance was available, although based on circumstantial

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<sup>75</sup> Assembly/AU/Dec 11 (II), taken at Maputo in July 2003.

evidence, such as the system of governance or political instability or due to ongoing civil wars, it is assumed that there was no compliance. Four cases were recorded in this category.

As a result of the empirical findings in Table B it can be concluded that there is an overall lack of state compliance with the recommendations of the African Commission.

## **2.4 Implementation by African states of the views of the UN Human Rights Committee**

### **2.4.1 Background to interpreting the table on follow-up with the Committee's views**

As explained in the introduction to this chapter, the African states that are party to the African Charter are mostly also party to the global human rights system operating under the United Nations Human Rights Committee (Committee). Under the individual communications procedure, set out in the Optional Protocol to the ICCPR, the Committee has found African states in violation of the provisions of the Protocol from as early as 1981.<sup>76</sup> In this part of the chapter, the status of state compliance by African states with the views of the Committee is assessed in an effort to establish whether compliance levels differ between the regional and global systems.

The steps that African state parties have taken to implement the views of the Committee are documented in Table C below. In contrast to the African Commission, the Human Rights Committee has as early as 1990 adopted a follow-up policy to follow up on all the views in respect of which it found a state in violation of the ICCPR.<sup>77</sup> The Committee adopted a system whereby it followed up on the implementation of all the views issued since its inception and not only those views issued from the date it adopted a follow-up policy. Therefore, while the information on the implementation of the Commission's recommendations had to be established through various follow-up efforts, the information in Table C is not here documented

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<sup>76</sup> *Aumeeruddy-Cziffra et al. v Mauritius*, communication 35/1978, adopted in 1981. The Committee refers to its findings as views which include its finding on the violation of specific provisions of the ICCPR as well as its recommendations on how a state should remedy the violations. The Committee's practice in deciding communications is discussed in detail in chapter 5.

<sup>77</sup> See fn 67 above. A detailed discussion of the Committee's follow-up mechanism is given in chapter 5.

for the first time, but is extracted from the Committee's Annual Reports.<sup>78</sup> Table C forms the basis for further analysis to establish the status of state compliance by African states with the views of the Human Rights Committee.

#### 2.4.2 Table C: Implementation by African states of the views of the UN Human Rights Committee

Comm. No.	Parties	Summary of facts	Violations found	Views	State implementation
711/1996 (adopted in 2000)	Dias, Carlos v Angola	Failure to investigate crimes committed by persons in authority; harassment of the author and impossibility to return to Angola.	Art 9(1)	Adequate measures to protect the author's personal security from threats of any kind.	On 21 January 2001, the author of the complaint visited the OHCHR and reported that the state party had not implemented the Committee's recommendations. <sup>79</sup>
458/1991 (adopted in 1997)	Mukong v Cameroon	Allegations of cruel, inhuman and degrading treatment whilst	Art 7 and 9(1)	The Committee urged the State party to grant Mr Mukong	The state party did not implement the views of the HRC. <sup>80</sup>

<sup>78</sup> Parties are listed in alphabetical order according to state parties and do not reflect the order in which they were decided by the Human Rights Committee (HRC). This is done because the Committee in adopting a follow-up mechanism in 1990 decided to follow up and report on the status of implementation on all cases decided since 1979. Therefore, specific Annual Reports do not necessarily reflect only cases decided during a specific session of the Committee (See Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), annex XI). All the cases decided against African states since the establishment of the Committee until 2003 are listed here in Table C.

<sup>79</sup> Chapter IV. Follow-up activities under the Optional Protocol. CCPR A/56/40, vol 1 (2001). In subsequent reports of the Human Rights Committee the situation did not change (See CCPR A/57/40, vol 1 (2002) and CCPR A/58/40, vol 1 (2003)). In 2002 it was reported that the Special Rapporteur for Follow-Up on Views "met with representatives of the state party at the Committee's seventy-fourth session in March 2002, the delegation informed the Special Rapporteur that information would be supplied. To this date this has not been received" (See CCPR A/57/40, vol 1 (2002) par 231). As of April 2004 this situation has not changed (See *Follow-Up Progress Report submitted by The Special Rapporteur for Follow-Up on Views*, CCPR/C/80/FU/1 (2004)).

<sup>80</sup> On 16 July 1997 the Special Rapporteur for Follow-up on Views met with the Permanent Representative of Cameroon and discussed the state's failure to implement the Committee's recommendations in the Mukong case. The Permanent Representative stated "that he would convey the Committee's concern to the State party authorities but further indicated that the State party should have some margin of discretion in deciding not only on the amount of compensation to be given to the author, but also on the principle of compensation. Even if compensation were to be paid to the author on an ex gratia basis, that would not necessarily imply an admission of responsibility on the part of the State party" (See *Overview of follow-up replies received and of the Special Rapporteur's follow-up consultations during the reporting period*, CCPR A/52/40, vol I (1997) par 532). As of April 2004 Cameroon has not reported



1994)		in detention in a jail in Cameroon. Jail conditions below international minimum standards. Violation of freedom of expression.		appropriate compensation for the treatment he was subjected to, to investigate his allegations of ill-treatment in detention, to respect his rights under article 19 of the Covenant, and to ensure that similar violations do not occur in the future.	
630/1995 (adopted in 2001)	Mazou v Cameroon	Unfair dismissal from public service; undue delay.	Arts 25(c) and 2	To reinstate the author in his career, with all the attendant consequences under Cameroonian law.	By a <i>note verbale</i> of 5 April 2002, the state party informed the Committee that the author had been reintegrated into the judicial corps, and that his career is following its normal course. <sup>81</sup>
428/	Bozize v	Violation of the	7, 9, 10,	Recommended	By <i>note verbale</i> of

back to the Committee on any measures taken to implement its recommendations (See CCPR/C/80/FU/1 (2004)).

<sup>81</sup>

The following additional follow-up information was received from the state party: "The state party, however, noted that there is no right to "reconstitution" of the author's career. It was open to the author to apply to the relevant administrative authority to this end, but to date he had not done so. As such, this element of the author's claim should be considered admissible. In any event, grade advancement is not automatic and depends on a variety of individual factors including budgetary resources. Moreover, the author had not made an application to the Ministry of Justice for advancement as was open to him. The state party undertook to guard against a future recurrence of delays in handling similar claims". The Committee declared the communication settled as the "state party has complied with the Views". See *Follow-Up Progress Report submitted by The Special Rapporteur for Follow-Up on Views, CCPR/C/80/FU/II (2004)*.





1990 (adopted in 1994)	Central African Republic	right to a fair trial.	14(3)(c)	the author's immediate release as well as compensation for the treatment to which he had been subjected.	14 March 1996, the state party informed the Committee that Mr Bozize was released from detention after restoration of multi-partism in 1992. <sup>82</sup>
16/1977 (adopted in 1983)	Mbenge et al v Democratic Republic of the Congo	Political persecution, political refugee.	Arts 6 (2), 14 (3)(a), (b), (d) and (e)	Recommended compensation to be paid to the authors.	No follow-up reply was ever received from the state party and according to the author the views of the Committee were never implemented. <sup>83</sup>
933/2000 (adopted in 2003)	Adrien Mundy, Busyo, Thomas Ostudi Wongodi, Rene Sibum Matubuka et al. v DRC	Unfair dismissal of judges, arbitrary arrest and detention and independency of the judiciary.	Arts 25(c), 14(1), (9) and 2(1)	Inter alia: (a) reinstatement of the victims in the public service and in their posts, with all the consequences that implies, or, if necessary, in similar posts;	By letter of 10 October 2003, the state party informed the Committee that "le Gouvernement de la Republique Democratique du Congo a chargé le Ministre de la Justice de

<sup>82</sup> The state party further reported that Mr Bozize was "allowed to travel to France, where he established temporary residence. Mr Bozize founded his own political party in France and was a presidential candidate for the general elections in 1992 and in 1993. The state party added that Mr Bozize has subsequently been reintegrated into the country's civil service, that he is entirely free in his movements and that he enjoys all civil and political rights guaranteed under the Covenant" (See Chapter VIII Follow-up activities under the Optional Protocol, CCPR A/51/40, vol I (1996) par 457). The HRC categorised the state parties' follow-up reply as satisfactory.

<sup>83</sup> The author of the complaint on 3 June 2002 sent a letter to the Committee stating that the state party, "both before and after the change of regime, had failed for over a decade to give effect to the Committee's Views. The author has remained without use of his property and has not been compensated for his losses. The authorities ensured that certain property of other persons was returned to them, but the author had not been treated in like fashion" (*Follow-Up Progress Report submitted by the Special Rapporteur for Follow-Up on Views, CCPR/C/80/FU/I (2004)*).



				(b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non- reinstatement. The state party should ensure that a dismissal measure can be taken only in accordance with the provisions of the Covenant.	l'application de la resolution du Dialogue Inter- Congolais relative au cas des 315 magistrats civils et militaires revoqués". <sup>84</sup>
Eight other compla ints <sup>85</sup>	Against DRC				No follow-up was received in respect of any of these cases, in spite of repeated reminders over a number of years

<sup>84</sup> (See [www.bayefsky.com/./pdf/drcongo\\_ccpr\\_follow\\_juris.pdf](http://www.bayefsky.com/./pdf/drcongo_ccpr_follow_juris.pdf)). (Unofficial translation): "That the government of the DRC has involved the Minister of Justice to apply the decision of the Inter-Congolese Dialogue in respect the 315 dismissed civil and judicial officers". Committee further reported that one of the authors informed the Committee, through an email dated 9 December 2003, that the Presidential Decree, "which was the subject of the Committee's Views and on the basis of which the authors had lost their jobs, had been annulled on 25 November 2003". The email further mentioned that none of the authors had received any compensation but it did not state whether any of the authors had been reinstated in their posts (See *Follow-Up Progress Report submitted by the Special Rapporteur for Follow-Up on Views*, CCPR/C/80/FUII (2004)).

<sup>85</sup> *Luyeye v Zaire*, case no 90/1981 (adopted 1983); *Muteba v Zaire*, case no 124/1982 (adopted 1984); *Mpandanjila et al. v Zaire*, case no 138/1983 (adopted 1986); *Mpaka Nsusu v Zaire*, case no 157/1983 (adopted 1986); *Miango v Zaire*, case no 194/1985 (1987); *Birindwa and Tshisekedi v Zaire*, case no 366/1989 (adopted 1993); *Tshishimbi v DRC*, case no 542/1993 (adopted 1996); *Gedumbe v DRC*, case no 641/1995 (adopted 2002).

					addressed to the state party. <sup>86</sup>
414/ 1990	Essono v Equatorial Guinea	Cruel, inhuman and degrading treatment of victim whilst in prison. Membership of opposition political party leads to arrest and detention, allegedly violating author's right to freedom of expression.	Arts 7, 9(1)(2)(4), 10(1), 19(1) and (2)	The Committee concluded that the state party was under an obligation to provide the victim with an appropriate remedy including appropriate compensation for the treatment he was subjected to.	No follow-up information was forwarded by state party; the views of the Committee were not implemented. <sup>87</sup>
468/ 1991	Bahamonde v Equatorial Guinea	Violation of fair trial procedures, arbitrary arrest and detention, violation of freedom of movement by	Arts 9 (1)(3), 12 (1)(2), 14(1) and 26	To guarantee the security of the victim's person, to return confiscated property to him	No follow-up information was forwarded by state party; the views of the Committee were not implemented. <sup>88</sup>

<sup>86</sup> The Human Rights Committee has repeatedly made efforts to remind the state party of its obligations under the Optional Protocol to implement the Views of the Committee. Apart from written reminders the Special Rapporteur for Follow-Up to Views has also made various efforts in 1996, 2001 and 2003 to meet with representatives of the state party of the Permanent Mission of the state party to the United Nations. As of April 2004 no response has been received from the state party as to measures taken to implement the Committee's Views (See CCPR A/51/40, vol I (1996); CCPR A/56/40, vol I (2001); CCPR A/57/40, vol I (2002); and CCPR/C80/FU/1 (2004)).

<sup>87</sup> The Committee reported in July 1996 that the Special Rapporteur and the Chairman of the Committee met with the counsellor of the Permanent Mission of Equatorial Guinea to the United Nations to discuss implementation of the Committee's views in communications 414/1990 and 468/1991. The state party representative expressed that he regretted the fact that the Committee took a decision in these cases without visiting Equatorial Guinea. He indicated in reference to case no 414/1990, "in which the author was also holder of a Spanish passport", that "Equatorial Guinea could not allow foreigners to mix in the internal affairs of the country". He further mentioned that "the new Minister for External Affairs had given assurances that a detailed follow-up reply would be sent to the Committee shortly, he was unconvinced however that either author merited any compensation". The Committee expressed its "serious concern over the attitude of the state party" (See Chapter VIII Follow-up activities under the Optional Protocol, CCPR A/51/40, vol I (1996) pars 442-444). Despite numerous other reminders the state party has yet to report back to the Committee on measures it took to implement the Committee's Views (See CCPR A/58/40, vol I (2003)).

<sup>88</sup> As above.



		confiscating the author's passport.		or to grant him appropriate compensation, and that the discrimination to which he has been subjected be remedied without delay.	
440/1990 (adopted in 1994)	El Megreisi v Libyan Arab Jamahiriya	Arbitrary arrest and detention, prolonged incommunicado detention amounts to degrading, inhuman and cruel treatment.	Arts 7, 9, 10(1)	To take effective measures (a) to secure his immediate release; (b) to compensate Mr Mohammed El-Megreisi for the torture and cruel and inhuman treatment to which he has been subjected and (c) to ensure that similar violations do not occur in the future.	No follow-up reply has ever been received from the state party. The author of the complaint has informed the Committee that his brother was released in March 1995, compensation however remains outstanding. <sup>89</sup>
49/1979	Marais v Madagascar	Lack of fair trial procedures and imprisonment in grave circumstances.	Arts 7, 10(1), 14(3)(b) and (d)	To provide the victim with effective remedies for the violations	As of 2003 the state party has not provided any follow-up information. <sup>90</sup> The

<sup>89</sup>  
<sup>90</sup>

See CCPR A/52/40, vol I (1997).

The Special Rapporteur met with the Counsellor of the Permanent Mission of Madagascar to the United Nations on 4 April 1997 concerning non-implementation of the Committee's recommendations and "insisted that the state party take some form of remedial action to give effect to the Committee's Views, either by amending legislation, granting compensation to the author, or providing another remedy" (See Chapter VIII Follow-up activities under the Optional Protocol, CCPR A/52/40, vol I (1997), par 543). Madagascar as of June 2003 has never



				suffered and to ensure that they do not reoccur in future. The Committee noted that they would welcome the release of the victim.	author of the case informed the Committee that he was released from detention. <sup>91</sup>
115/1982	Wight v Madagascar	Inhuman conditions of detention and violation of fair trial principles.	Arts 7, 10(1), 14(3)(b)	Take effective measures to remedy the violations suffered and prevent their reoccurrence in future.	As of 2003 the state party has not provided any follow-up information. <sup>92</sup> The author of the case informed the Committee that he was released from detention. <sup>93</sup>
35/1978 (adopted in 1981)	Aumeeruddy-Cziffra et al. v Mauritius	The Immigration (Amendment) Act of 1977 and the Deportation (Amendment) Act of 1977 discriminated in their effects against women who were married to foreign nationals.	Arts 2(1), 3 and 26	It was recommended that Mauritius should amend the offending Acts.	In a response dated 15 June 1983, the Ministry of External Affairs, Tourism and Emigration reported that “the two impugned Acts have now been amended by the Immigration (Amendment) Act of 1983 (Act no 5 of 1983) and the Deportation

responded to these requests and no follow-up reply has been forwarded in terms of four cases against Madagascar, namely: case no 49/1979 *Marais v Madagascar*; case no 115/1982 *Wight v Madagascar*; case no 132/1982 *Jaona v Madagascar*; and case no 155/1983 *Hammel v Madagascar* (See CCPR A/58/40, vol I (2003)).

<sup>91</sup>

<sup>92</sup>

<sup>93</sup>

See CCPR A/52/40, vol I (1997).

See fn 87 above.

See fn 88 above.



					(Amendment) Act of 1983 (Act no 6 of 1983) which were passed by Parliament on Women's Day, 8 March 1983, so as to remove the discriminatory effects of those laws on grounds of sex". <sup>94</sup>
760/1997 (adopted in 2000)	Diergaard v Namibia	Rehoboth Baster Community: Self-government, right to enjoy their own culture, unfair hearing and a lack of language legislation.	Art 26	To allow the authors to respond in other languages than the state party's official one in a non-discriminatory manner.	The state party implemented the views of the Committee and reported to the Committee by means of a <i>note verbale</i> of 28 May 2002. <sup>95</sup>
919/2000 (adopted)	Muller and Engelhard v Namibia	Discrimination in assumption of spouse's	Art 26		The state party implemented the views of the

<sup>94</sup> See International Covenant on Civil and Political Rights. Human Rights Committee. *Selected decisions under the Optional Protocol* (CCPR/C/OP/2) (United Nations Publication, Sales No. 89.XIV.1), vol 2. The Committee classified the state parties' response as satisfactory (See CCPR A/51/40, vol 1 (1996)).

<sup>95</sup> The Special Rapporteur noted that the state party had complied with the Committee's views (See CCPR/C/80/FU/1 (2004)). In the *note verbale* the state party reported that "its Constitution does not prohibit the use of languages other than English in schools, and the authors did not claim that they had established a non-English school and had been asked to close it. The state party states that there are no private courts, and no law barring the traditional courts of the authors from using their language of choice. Persons appearing before the official English-speaking tribunals are provided state-paid interpreters in any of the 12 state languages, and proceedings do not continue if interpreters are unavailable. The authors' community's proceedings are conducted, as others, in the language of choice, but all communities' proceedings are recorded in the official language of English. The state party notes that no African State provides translations for all persons wishing to communicate in non-English languages, and that, contrary to the previous regime, civil servants must work all over the country. If a civil servant speaks a non-official language, she or he will endeavour to assist a person using that language. The state party refers to a circular of the Minister of Justice of 9 July 1990 to the effect that civil servants may receive and process non-English correspondence, but should respond in writing in English" (See CCPR/C/80/FU/1 (2004)).

ted in 2002)		surname.			Committee and reported to the Committee by means of a <i>note verbale</i> of 23 October 2002. <sup>96</sup>
386/ 1989 (adop- ted in 1994)	Koné v Senegal	Detained for four years pending the commencement of trial.	Art 9(3)	Recommended that compensation should be awarded to the author.	The President of Senegal gave instructions to the state party's Minister for Justice to make an ex gratia payment to Mr Koné, as compensation for the duration of his pretrial detention. <sup>97</sup> The author subsequently rejected the amount of compensation offered to him as inadequate. <sup>98</sup> At the sixty-first Session of the HRC, the state party informed the Committee that the

<sup>96</sup> The state party noted in the *note verbale* that it took the following steps: "It informed the authors, through their legal representative (the Legal Assistance Centre, Windhoek) that they may proceed, under the Aliens Act 1937, to assume as family name the surname of the wife in accordance with procedures laid down by the aforementioned Act. Further, the government has published the Committee's views on the website of the Human Rights and Documentation Centre of the University of Namibia, a body devoted to human rights education and information. As far as the government of the state party is concerned, it is argued that it is not within the government's power to dictate to the courts of law of Namibia, including the Supreme Court, what should be their discretion with respect to the award of costs in matters before them. Due to the principle of separation of powers, the government cannot interfere with the order of costs awarded to the successful party in the matter in question". The Special Rapporteur noted that the state party had complied with the Committee's Views (See CCPR/C/80/FU/1 (2004)).

<sup>97</sup> The Committee noted that Senegal's follow-up reply was satisfactory (See Chapter VIII Follow-up activities under the Optional Protocol, CCPR A/51/40, vol I (1996), paras 432 and 461).

<sup>98</sup> The author communicated his rejection of the offer to the Committee by letter dated 29 April 1997 (See CCPR A/52/40, vol I (1997)).



					compensation offered had been increased. <sup>99</sup>
839/1998, 840/1998, 841/1998 (adopted in 2001)	Mansaraj et al.; Gborie Tamba; Sesay et al. v Sierra Leone	No right of appeal by conviction from court martial. The HRC under rule 86 requested the government of Sierra Leone to stay the execution of the authors whilst their communications were under consideration. Twelve of the authors were executed on 19 October 1998.	Arts 6 and 14(5)	To Committee recommended that some of the authors should be provided with an effective remedy. <sup>100</sup> The Committee considered that they should be released unless Sierra Leonian law provides for the possibility of fresh trials that do offer all the guarantees required by art 14 of the Covenant. The Committee also considered that the next of kin of those executed should be offered an appropriate remedy which should entail compensation.	On 5 April 2002 by means of a <i>note verbale</i> , the state party informed the Committee of the following steps it took: “a right of appeal from courts martial had been re-instated but that it was otherwise not in a position to comply with the views, as the Committee “did not have jurisdiction to hear the complaint”. <sup>102</sup> At the 74 <sup>th</sup> Session the Special Rapporteur met with a state party representative who indicated further that six persons in question had been released. <sup>103</sup>

<sup>99</sup> See CCPR A/53/40, vol I (1998).

<sup>100</sup> Anthony Mansaraj, Alpha Saba Kamara, Nelson Williams, Beresford R. Harleston, Bashiru Conteh and Arnold H. Bangura.

<sup>101</sup> Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh, Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara,





422-424/1990 (adopted in 1994)	Aduayom et al v Togo	Removal from university employment of Togolese citizens openly critical of the state party's President.	Arts 19 and 25 (c)	Recommended the payment of compensation determined on the basis of a sum equivalent to the salary which the authors would have received during the period of non-reinstatement starting from 30 June 1988.	By a <i>note verbale</i> , dated 24 September 2001, the state party stated the following in reference to Mr Aduayom et al., "the state party contended that the withdrawal of the charges did not indicate that the acts charged had not taken place, and accordingly it was not possible to pay any compensation. The state party argued that the authors were seeking to politically destabilise the country, and that accordingly its actions were justified under article 19(3) of the Covenant, and no compensation was payable. As to art
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Abdul Karim Sesay, Kula Samba, Victor L. King and Jim Kelly Jalloh were executed regardless of the interim measures invoked by the HRC.

102

See CCPR A/57/40, vol I (2002) par 249.

103

See CCPR A/57/40, vol I (2002) par 249. The State Rapporteur viewed the government of Sierra Leone's response as only partial fulfilment of the Committee's views as is clear from his recommendations made in 2004: "Although welcoming the state party's decision to amend its legislation and information that it has released six living authors, the state party should reconsider its decision not to grant the families of the deceased victims compensation as requested by the Committee, so as to fully implement the Committee's views" (See CCPR/C/80/FU/I (2004)).



					25, the state party contended that this article was inapplicable to persons already having had access to, or who were in, the public service. Accordingly, rather than compensation, one could only speak of regularisation of the authors' situation, which had occurred". <sup>104</sup>
505/ 1992 (adop- ted in 1996)	Ackla v Togo	Togolese citizen prohibited from entering his home district and native village.	Art 12(1)	Recommended measures to immediately restore Mr Ackla's freedom of movement and residence, as well as appropriate compensation.	The state party, by <i>note verbale</i> of 24 September 2001, reported with respect to Mr Ackla that "his allegations of state restrictions upon his movement and the confiscation of his house were demonstrably false and that a mission was invited to confirm this". <sup>105</sup>
314/ 1988	Bwalya v Zambia	Violation of fair trial guarantees,	Arts 9(1)(3), 12,	Grant the victim an appropriate	The Committee reported that a

<sup>104</sup> See CCPR A/57/40, vol I (2002), par 251. The Special Rapporteur noted that no further action was proposed under the follow-up procedure (See CCPR/C/80/FU/I (2004)).

<sup>105</sup> See CCPR A/57/40, vol I (2002), par 251. The author informed the Committee, through a letter dated 4 December 2000, "that his right to a fair hearing continued to be denied". He enclosed various documents in substantiation (See CCPR A/56/40, vol I (2001), par 199). Even though the state party obviously did not implement the views of the Committee the Special Rapporteur did not recommend any further action to be taken under the follow-up procedure (See CCPR/C/80/FU/I (2004)).



(adopted in 1994)		arrest and detention for merely belonging to another political party, restrictions of author's freedom of movement.	19(1), 25(a) and 26	remedy including compensation.	satisfactory reply was received. <sup>106</sup>
326/1988 (adopted in 1994)	Henry Kalenga v Zambia	Violation of the right to freedom of expression, violation of fair trial guarantees, inhuman and degrading treatment of author.	Arts 9(2)(3), 10(1), 12(1) and 19	To provide the author with an appropriate remedy and to grant him compensation.	The Committee reported that a satisfactory reply was received. <sup>107</sup>
390/1990 (adopted in 1996)	Lubuto v Zambia	Death penalty for robbery with a fire arm, violation of fair trial proceedings.	Art 6(2), 14(3)(c)	Recommended that the state party commute the sentence and provide an appropriate remedy.	No follow-up reply from the government of Zambia in spite the fact that the Special Rapporteur met with representatives of the government on 20 July 2001 and requested a formal reply. <sup>108</sup>
768/1997	Mukunto v Zambia	Denial of access to court.	Art 14(1)	Recommended the payment of	The author informed the HRC

<sup>106</sup> The state party's follow-up reply, dated 3 April 1995, was not published (See CCPR A/52/40, vol I (1997)). In an interview with Maria Mapani, Principal State Counsel for Zambia, she confirmed that the complainant was compensated. Interview held during the 31<sup>st</sup> ordinary session of the African Commission in Pretoria, South Africa.

<sup>107</sup> As above. In an interview with Maria Mapani, Principal State Counsel for Zambia, she confirmed that the complainant was compensated. Interview held during the 31<sup>st</sup> ordinary session of the African Commission in Pretoria, South Africa.

<sup>108</sup> See CCPR A/56/40, vol I (2001) par 200.



(adopted in 1999)				compensation for the undue delay in deciding the authors compensation claim for the illegal detention he suffered in 1979.	that the state party had paid him US\$ 5000 compensation which he regarded as insufficient of his claim for US\$ 80 000 and pointed out that the state party had not published the Committee's views. <sup>109</sup> The state party indicated that "both parties had agreed that the sum of \$5000 compensation was a full and final settlement, and supplied a signed undertaking of full satisfaction by the author of a sum of 20 million Kwacha". <sup>110</sup>
821/1998 (adopted in 2000)	Chongwe v Zambia	Attempted murder of the chairman of the opposition alliance.	Arts 6(1) and 9(1)	The HRC recommend: "Adequate measures to protect the author's personal security and life from threats of any kind. The	The state party through correspondence between its Attorney-General and the author provided the author with assurances that the state party

<sup>109</sup>  
<sup>110</sup>

See CCPR A/57/40, vol I (2002) par 253.  
As above. The Special Rapporteur viewed the state party's action as compliance with the Committee's recommendations (See CCPR/C/80/FU/1 (2004)).



				<p>Committee urged the state party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the person responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were</p>	<p>would respect his right to life and invited him to return to its territory.<sup>111</sup> As for compensation none has been paid.<sup>112</sup> The author reiterated his fears for his safety if he returned and pointed out that the state party had provided compensation in other Optional Protocol cases, he repeated his request for a full remedy.<sup>113</sup></p>
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<sup>111</sup> Initially the state party through a *note verbale* dated 23 January 2001, challenged the Committee's views alleging non-exhaustion of domestic remedies by the author. On 20 October 2001 the Special Rapporteur met with the representative of the Zambian mission and explained that the case could not be reopened and that Zambia had enough time to make submissions (See CCPR A/56/40, vol I (2001)). By *note verbale* of 14 November 2001, the state party provided the HRC with copies of the correspondence between the Attorney General and the author. In a *note verbale* of 13 June 2002, the state party reiterated that the "new President had confirmed to the author that he was free to return. Indeed the state hoped that he would do so and then apply for legal redress. Mr Kaunda, who was attacked at the same time as the author, is said to be a free citizen carrying on his life without any threat to his liberties" (See CCPR/C/80/FU/1 (2004)).

<sup>112</sup> The issue of compensation was also the topic of much correspondence between the HRC, the author and the state party. By *note verbale* of 10 October 2001, the state party "contended that the Committee had not indicated the quantum of damages payable, much less the directed payment of US\$2,5 million claimed by the author". In *note verbale* of 14 November 2001, the state party in reference to compensation stated that "the Attorney-General indicated to the author that this would be dealt with at the conclusion of further investigations into the incident, which had been hindered by the author's earlier refusal to cooperate". On 28 February 2002, the state party further noted that "the domestic courts could not have awarded the quantum of damages sought, that the author had fled the country for reasons unrelated to the incident in question, and that while the government saw no merit in launching a prosecution, it was open to the author to do so". The author on the other hand, pointed out in a letter dated 26 April 2002, that the state party had provided compensation in other Optional Protocol cases and requested a full remedy (See CCPR/C/80/FU/1 (2004)).

<sup>113</sup> As above. The author indicated in a letter dated 26 April 2002, that there has been further attempts upon Mr Kaunda's life by state agents and he noted that "no action had been taken on the conclusions of a recent commission of inquiry into torture of suspects in the 1997 attempted coup attempt" (See CCPR/C/80/FU/1 (2004)). The Special Rapporteur recommended no further action under the follow-up procedure (See CCPR/C/80/FU/1 (2004)).

				responsible for the shooting and hurting of the author the remedy should include damages to Mr Chongwe.	
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## 2.5 Status of state compliance with the views of the UN Human Rights Committee

### 2.5.1 Categorising implementation efforts by African state parties

In this section, state compliance by African states with the views of the UN Human Rights Committee is categorised in Table D, based on the implementation efforts listed in Table C. Table D alphabetically lists the implementation efforts by state parties, categorised in terms of the same criteria as used in respect of the African Commission (set out in Table B above).

### 2.5.2 Table D: State compliance with the views of the Committee

State parties and complaints	Full Compliance	Partial Compliance	Non-Compliance
Angola Comm. 711/1996			X
Cameroon Comm. 458/1991  630/1995	X		X
Central African Republic Comm. 428/1990	X		
Democratic Republic of Congo (Zaire) Comm.			



16/1977			X
933/2000		X	
90/1981			X
124/1982			X
138/1983			X
157/1983			X
194/1985			X
366/1989			X
542/1993			X
641/1995			X
Equatorial Guinea Comm. 414/1990			X
468/1991			X
Libyan Arab Jamahiriya Comm. 440/1990		X	



<b>Madagascar</b> Comm. 49/1979  115/1982		X  X	
<b>Mauritius</b> Comm. 35/1978	X		
<b>Namibia</b> Comm. 760/1997 919/2000	X  X		
<b>Senegal</b> Comm. 386/1989	X		
<b>Sierra Leone</b> Comm. 839/1998, 840/1998, 841/1998		X	
<b>Togo</b> Comm. 422- 424/1990  505/1992			X  X
<b>Zambia</b> Comm. 314/1988  326/1988  390/1996  768/1997  821/1998	X  X   X		X
<b>Total: 13 state parties, 31 complaints</b>	<b>9</b>	<b>6</b>	<b>16</b>



### 2.5.3 Analysing the findings on state compliance with the Committee's views

From the findings in Table D, it is apparent that the Human Rights Committee has, since its inception until 2003, finalised 31 individual communications against 13 African states. In Table D, the implementation efforts of these states are categorised. The following results are recorded: (1) In only 9 (or 29%) cases out of the total of 31 did African states fully comply with the views of the Committee. (2) Partial compliance with the Committee's views was recorded in 6 cases (or 19%). (3) In the majority of cases, namely, 16 (or 52%) out of the 31 cases, African states did not comply with the Committee's views. From these empirical findings it can be concluded that in most of the cases decided against African states, the views of the Human Rights Committee were not implemented.

It would therefore seem that state compliance with the findings of both the African Commission and the Committee is poor. In Table E below, a closer analysis of the findings on the status of state compliance in the regional system as opposed to the global human rights system is undertaken, followed by a comparative analysis of the findings.

### 2.6 Table E: Comparative analysis of state compliance with the recommendations of the African Commission and African state compliance with the views of the Human Rights Committee

Human rights system	Full Compliance (% of cases)	Partial compliance (% of cases)	Non-compliance (% of cases)
African Commission	14%	20%	66%
Human Rights Committee	29%	19%	52%

In this table, the empirical findings on state compliance as set out in Table B, on the African Commission, and in Table D, on the Human Rights Committee, are expressed as percentages of the total number of communications investigated in each of the tables. This is done in order to give a comparative overview of state compliance in each of the systems.

### 2.6.1 Interpreting the comparative findings on the status of state compliance in the African system as compared with the UN system

From an analysis of the findings in Tables B and D, dealing respectively with the status of state compliance in the African and UN system, it is evident that in most of the cases investigated in both systems there is non-compliance with the recommendations of the Commission and views of the Committee. In Table E, the compliance rates were recorded for both systems and the following was found: (1) The full compliance rate with the views of the HRC stands at 29%, with a 52% non-compliance rate.<sup>114</sup> (2) With respect to the Commission's recommendations, a 14% full compliance rate and a 66% non-compliance rate was recorded.

The first conclusion to be drawn here is that the non-compliance rate in both systems is consistently above the 50% mark. It is therefore apparent that there is a lack of state compliance with the findings of human rights treaty bodies in Africa. Based on the statistics in Table E, it would seem though that African state parties are more compliant with the UN system than with the regional human rights system (29% compared to the 14% compliance rate in the African system, that is, a difference of 15%). However, upon closer analyses, and focussing on the compliance records of the five states that were found in violation of both the African Charter and the ICCPR, it becomes clear that there was no difference between the adherence or non-adherence of a state party to either system.<sup>115</sup> In other words, where states are party to both systems, they either consistently implement or ignore the views or recommendations.

<sup>114</sup> As mentioned above the Human Rights Committee has been monitoring state compliance with its recommendations since 1991. The Committee has consistently reported a full compliance rate of 30% with all its views. Therefore, a finding of a 29% full compliance rate by African states with the views of the Committee seems to indicate that the compliance rate of African states although very low is not any worse than the global compliance rate with the Committee's views.

<sup>115</sup> Interpreting the table: C = full compliance; PC = partial compliance; NC = non-compliance

Country	African Commission	Human Rights Commission
Angola	NC	NC
Cameroon	C, NC	NC, C
Sierra Leone	C	PC
Zaire	NC	NC
Zambia	C, PC, PC	C, C, C, PC, NC

These were the only five countries that overlap between the two systems. From this tabular overview, it appears that state parties' behaviour does not differ from one system to the other.

A factor that should be noted in respect of any empirical conclusions drawn from the findings in Table B and Table D on the status of state compliance relates specifically to the findings on non-compliance and could possibly explain why the rate of non-compliance is consistently so much lower than the rate of full compliance or partial compliance: In the African regional system, 19 of the 44 communications examined were decided against Nigeria (during the military government of General Sani Abacha). Of these cases, 13 were never implemented. A similar situation is observed in the UN system, where 10 of the 31 complaints were lodged against the former Zaire (now the Democratic Republic of Congo), with 9 of these classified as instances of non-compliance. A theoretical explanation for this phenomenon most probably lies in the fact that these complaints were not lodged in an effort to necessarily receive the relief asked for, but rather to mount international pressure in an effort to oust the non-democratic government of the day.

## **2.7 Conclusion**

This chapter set out to determine the status of state compliance with the recommendations of the African Commission. In order to do this, the steps state parties have taken to implement the Commission's recommendations had to be determined in the absence of any existing database to this effect. The lack of a follow-up policy within the African Commission should therefore be noted as one of the first issues to be addressed in improving state compliance with the Commission's recommendations. The findings in Table A represent the only coordinated and documented effort to date to follow-up on the implementation of the Commission's recommendations. By way of empirical data, the conclusion is that there is an overall lack of state compliance with the Commission's recommendations, with a non-compliance rate of 66%.

Secondly, this chapter also determined the status of state compliance by African states with the views of the Human Rights Committee. Based on the implementation efforts of African states as documented by the Committee through its follow-up procedures, the status of state compliance with the Committee's views was determined. It was found that for the most part, in 52% of the cases investigated, African states did not comply with the views of the Committee. Through a comparative analysis of the compliance rates in the African system and the UN system, it was further found that although it seems that states are slightly more compliant with the UN system, an analysis of five states which have been party to

communications in both systems seem to indicate that state behaviour is uniform across the two human rights systems.

The conclusion to be drawn is that African states, in the African and UN systems, have not complied with the findings of the treaty bodies in more than half of the cases to which they were party. Based on the findings in this chapter, the factors that influence compliance are identified in the next chapter. It has now been established that there is a lack of state compliance. This raises questions about the factors that influence state behaviour. Once these factors have been identified, recommendations attempting to improve state compliance with the recommendations of the African Commission can be formulated.

**CHAPTER 3**  
**FACTORS INFLUENCING STATE COMPLIANCE WITH THE FINDINGS OF THE**  
**AFRICAN COMMISSION**

- 3.1 Introduction
- 3.2 Factors influencing state compliance based on theories of state compliance with international law
- 3.3 Factors influencing state compliance with the recommendations of the African Commission
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- 3.4 Conclusion

### 3.1 Introduction

State parties to the African Charter on Human and Peoples' Rights (African Charter or Charter) have not complied with the recommendations issued by the African Commission on Human and Peoples' Rights (African Commission or Commission) in the majority of communications decided by the Commission.<sup>1</sup> In the previous chapter, the overall lack of state compliance with the Commission's recommendations has been established on the basis of empirical evidence.<sup>2</sup> However, it was also found that state parties fully complied with the Commission's recommendations in six cases, while partial compliance was recorded in nine cases.<sup>3</sup>

If the African Commission is to improve the status of state compliance with its recommendations, the reasons for the current status of state compliance first have to be analysed. In other words, the factors that influence state compliance in the African system have to be identified. The findings of the previous chapter form the background against which factors that have influenced state compliance with the Commission's recommendations are isolated in this chapter. The factors that have influenced states to fully comply in the six cases mentioned above, as well as the recurring factors that have resulted in non-compliance in the majority of cases decided by the Commission, are central to the discussions in this chapter.

International law scholars and international relations scholars have struggled with questions such as "Why do nations obey international law?"<sup>4</sup> or "Do human rights treaties make a difference [to state practices]?"<sup>5</sup> Comprehensive studies have been undertaken in the past to gauge the impact of treaties on the domestic level.<sup>6</sup> The implementation of the recommendations or views of treaty bodies in national law is one of the indicators of the possible impact that treaties have in national law and on the state practice of parties to these treaties. Therefore, any efforts undertaken here to explain state compliance or non-compliance with the recommendations of the African Commission should be viewed as only one part of the bigger question as to

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<sup>1</sup> See Table B, section 2.3.2 of chapter 2.

<sup>2</sup> As above.

<sup>3</sup> As above.

<sup>4</sup> HH Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599.

<sup>5</sup> OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935.

<sup>6</sup> See for example C Heyns & F Viljoen *The United Nations Human Rights Treaties on the Domestic Level* (2001) or for a summary of the main findings and recommendations see C Heyns & F Viljoen 'The impact of the United Nations Human Rights Treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483.

compliance with treaties in international law as a whole. The existing theories on state compliance with international law are therefore briefly analysed in this chapter, in an effort to extract from these theories factors which influence state compliance.

In the second part of this chapter, these factors are applied to elucidate the findings in chapter 2 of this study with reference to the legal instrument or treaty that underlies the system, the nature of the case and the main role players in the African regional human rights system, namely: the regional political umbrella body, the treaty body, the state parties and Non-Governmental Organisations (NGOs) or victims.

Factors that have influenced state compliance with the Commission's recommendations will also be relevant to discussions on state compliance with the judgments of the African Court on Human and Peoples' Rights.<sup>7</sup> These factors will have to be taken into account not only if the African Commission is to improve state compliance with its findings, but also if the Court is to ensure that states comply with its judgments. The findings in this chapter will therefore form the background against which to formulate recommendations towards achieving full compliance with the decisions of treaty bodies, including the to-be-established Court in the African regional human rights system.

### **3.2 Factors influencing state compliance based on theories of state compliance with international law**

The scholarly works on theories of state compliance with international law can broadly be categorised into three main schools, namely, the realist school,<sup>8</sup> normative school<sup>9</sup> and those authors that subscribe to a hybrid view combining realist and normative theories.<sup>10</sup> The theories on state compliance ascribed to by these main schools are briefly analysed here, not to identify a particular theory to explain state compliance in the African system, but to distil from these theories factors that influence state compliance.

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<sup>7</sup> For a discussion on the Court refer to chapter 6.

<sup>8</sup> See e.g. Hathaway (2002) 1935 and LR Helfer & A Slaughter 'Toward a theory of supranational adjudication' (1997) 107 *Yale Law Journal* 331-335.

<sup>9</sup> See e.g. A Chayes & AH Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) and TM Franck 'Legitimacy in the international system' (1988) 82 *American Journal of International Law* 67.

<sup>10</sup> See e.g. Koh (1997) 2599.

The realist school includes theories on structural realism, institutionalism and liberalism, which all differ primarily according to Hathaway “in the types and sources of interests that they claim motivate country decisions”.<sup>11</sup> The realist school holds that states comply with international law not based on the obligations that arise out of the ratification of a treaty, but out of self-interest. According to this school the rate of treaty ratification is high amongst state parties, but in the absence of any factors motivating them to comply with the provisions of the treaty out of state-interest, the compliance rate is very low.<sup>12</sup>

As such, the realist school departs from the premise that adherence to the rules of international law depends on a continuous cost-benefit analysis, in terms of which states weigh up all the options to determine whether compliance, partial compliance or non-compliance will serve their interests best.<sup>13</sup> From this line of reasoning it would follow that a fear of sanctions could be an important factor influencing compliance. Other predictors of compliance are, from this perspective, the fear of damaging international trade relations or losing access to international funding, should human rights treaty obligations not be complied with. Within the realist school, it could also be reasoned that states comply with treaty obligations on the basis of reciprocity.

According to the theory on liberalism, state behaviour in the international sphere is directly informed by a state’s domestic system of governance.<sup>14</sup> Factors that could influence state compliance would therefore also be based on state-interest, but in this instance state-interest is determined by the domestic political policies of a state. Factors associated with a democratic political order, such as freedom of association and freedom of expression, could therefore result in NGOs and civil society pressurising states to comply with their international obligations arising from treaty body findings.<sup>15</sup> From the above, it is evident that according to the realist school,

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<sup>11</sup> Hathaway (2002) 1944.

<sup>12</sup> It is interesting to note that in the African system all 53 member states of the African Union (previously Organisation of African Unity) have ratified the African Charter. Ratification has therefore been achieved across the board, but as shown in chapter 2 the non-compliance rate with the recommendations of the African Commission is as high as 66% (See Table E of chapter 2).

<sup>13</sup> Hathaway (2002) 1951-52.

<sup>14</sup> Hathaway (2002) 1953.

<sup>15</sup> According to Helfer & Slaughter, “[l]iberal democratic governments will be more likely to comply with supranational legal judgments than are other states because international legal obligations mobilise domestic interest groups that in turn pressure the government to comply” (LR Helfer & A Slaughter (1997) 331-335).



state compliance with international law is not based on legal foundations but rather on a system of balancing state interests.

The normative school, as opposed to the realist school, bases its theories on state compliance with international law on the normative framework put in place by the founding treaty.<sup>16</sup> Ratification of a treaty and the legal, moral and ethical obligations that accompany ratification motivate for state compliance. Factors affecting state compliance that could be distilled from the normative school are firstly those associated with the text of the treaty from which the international obligations flow. In other words, the legitimacy of the founding treaty influences state compliance.<sup>17</sup> Factors such as the strength of the legal norms or whether the rights guaranteed are limited in terms of the national law of states, such as claw-back clauses, influence state compliance. Other factors relate to provisions on confidentiality, and the extent of publicity of the treaty body system. Another factor that influences state compliance is the strength of the enforcement powers provided for the treaty body in the founding treaty.

Another group of factors, which are also closely associated with the founding treaty, relate to the treaty body system put in place by the treaty.<sup>18</sup> The institutional legitimacy of the treaty body is an important factor in establishing state compliance with its findings. Factors such as the independence of the members of the treaty body, the work experience and work ethic of the members affect the institutional legitimacy of the treaty body. However, the treaty body framework put in place by the founding treaty is not limited to the treaty body and state parties, but also involves other role players such as NGOs, civil society and the international community. The resultant interaction between these various role players within the treaty framework also influences state compliance.<sup>19</sup> The interaction between the various role players contributes to pressurising state parties to comply with their treaty obligations.<sup>20</sup>

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<sup>16</sup> Chayes & Chayes (1995) 2.

<sup>17</sup> According to Franck's fairness model "rules that are not fair exert little compliance pull" (Franck (1988) 67).

<sup>18</sup> Refer to the managerial model formulated by the Chayeses according to which states obey international law not out of fear of sanctions but as a result of their interaction with the system put in place through the normative framework of the founding treaty (Chayes & Chayes (1995) 2).

<sup>19</sup> Chayes & Chayes (1995) 25.

<sup>20</sup> Hathaway (2002) 1957.

The third school of theories on state compliance may be categorised as a hybrid system incorporating aspects of both the realist and normative schools. According to this school, factors that influence state compliance are based on the internationalisation of the treaty norms in the domestic legal system of a state party.<sup>21</sup> In effect, this translates into an argument that state compliance is influenced by the level of domestic incorporation of a treaty, whether it has been domesticated through the adoption of legislation, whether domestic courts rely on treaty provisions to interpret legal problems domestically, or whether treaty body findings can be enforced or implemented through domestic courts. The last factor would require the adoption of enabling legislation by a state party.

The hybrid school also incorporates aspects of interaction between role players, but in this case refers not necessarily only to the role players incorporated into the treaty framework but also to the interaction between domestic actors such as government personnel and the treaty body.<sup>22</sup> It is the government personnel that need to prepare state reports, respondent arguments on individual communications or attend sessions of the treaty bodies. It is government personnel who have to draft legislation to domesticate treaty provisions and who must ultimately implement the findings of treaty bodies. Therefore, important factors that influence state compliance are whether a specific governmental department has been designated as a focal point between a state party and the treaty body, whether a governmental department has been designated as a focal point to implement the findings of treaty bodies, the quality of designated staff, whether enabling legislation is in place to provide for the reopening of criminal cases domestically following the finding of a treaty body, and whether a system is in place to provide the treaty body with follow-up information.

The factors influencing state compliance, distilled from the theories on state compliance with international law, also play a role in explaining the status of state compliance with the recommendations of the African Commission. In the next section, the focus is specifically on the African system, but reference is made throughout to the factors identified above. The factors that influence state

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<sup>21</sup> Koh (1997) 2599, 2655-56.

<sup>22</sup> Koh argued that compliance depends on a “transnational legal process” in which “transnational actors” such as foreign policy personnel or NGOs lay down norms of conduct through repeated interaction with the treaty system which in turn result in norm internalisation at a domestic level through executive, legislative and judicial processes (Koh (1997) 2599).

compliance in the African system are not restricted to any one of these schools, but are derived from all three approaches discussed above.

### **3.3 Factors influencing state compliance with the recommendations of the African Commission**

Full compliance with the recommendations of the African Commission has been recorded in only six of the 44 communications surveyed in the previous chapter.<sup>23</sup> The factors that influenced states to comply with the Commission's recommendations in these six communications are briefly analysed here, in an effort to determine which of these factors could inform improved state compliance in future. As will become apparent from the analysis below, there is no single factor that explains full compliance in all six communications discussed here. In each instance, a combination of two or more factors influenced states to fully comply with the Commission's recommendations.

The factors that influenced states in cases where partial compliance has been recorded are also referred to in the discussions below, since these factors mostly overlap with full compliance.<sup>24</sup> Non-compliance with the Commission's recommendations has been recorded in the majority of the 44 communications analysed in this study.<sup>25</sup> Again, in each of these cases a combination of factors led to a state party not complying with the Commission's findings. Recurring factors linked to cases of non-compliance are also highlighted.

#### **3.3.1 The role of the regional political umbrella body**

With the adoption of the OAU Charter on 25 May 1963, the Organisation of African Unity (OAU) was established as the regional political body for the African continent.<sup>26</sup> The African Charter was drafted and adopted under the auspices of the OAU. The

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<sup>23</sup> Full compliance has been recorded in reference to the following state parties: (1) Botswana (communication no 97/93); (2) Cameroon (communication no 39/90); (3) Nigeria (communication no 153/96 and communication no 206/97); (4) Sierra Leone (communication no 223/98); (5) Zambia (communication no 212/98).

<sup>24</sup> Partial compliance has been recorded in 9 of the 44 communications (See Table B in section 2.3.2 of chapter 2).

<sup>25</sup> See Table B of section 2.3.2 of chapter 2. Even if the cases where no information could be established through follow-up efforts and those cases that were classified as too recent to determine compliance are ignored then non-compliance was still recorded in 20 of the 44 communications.

<sup>26</sup> See section 4.7 of chapter 4 for a detailed discussion on the relationship that existed between the Commission and the OAU and its successor the African Union.

OAU was replaced as regional political body by the African Union (AU) with the adoption of the AU Constitutive Act in July 2000. The AU held its first session in July 2002. Most of the communications to which follow-up was established in the previous chapter were decided while the OAU was the regional political body.<sup>27</sup>

The OAU Charter was adopted at a stage when state sovereignty was high on the agenda of member states, while human and peoples' rights did not feature strongly. As a result, human rights issues continued to take a back seat on the OAU's agenda. This state of affairs is evident from its lack of interaction with the African Commission even where provision for such interaction was specifically made in the African Charter. The OAU did not provide a platform for discussing the findings of the African Commission on individual communications. Although the African Charter provided for the Assembly of Heads of State and Government (AHSG) to adopt the Annual Activity Reports of the African Commission,<sup>28</sup> with its decisions on individual communications attached thereto, this process never resulted in any debate amongst member states. In the absence of any debate on or sanctions arising from the communications where states were found in violation of the Charter, there was no political pressure within the regional system to comply with the Commission's recommendations.

One of the recurring themes in the cases where non-compliance with the Commission's recommendations have been recorded relate to cases where the Commission made a finding that the facts revealed a series of serious or massive violations.<sup>29</sup> Under article 58 of the African Charter, such cases have to be referred to the ASHG. In all the cases where non-compliance has been recorded following a finding on serious and massive violations of the Charter, the Commission reported that it had referred the cases to the AHSG. However, the AHSG never took any

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<sup>27</sup> This study followed up on all communications published until the 16<sup>th</sup> Annual Activity Report. Only the 15<sup>th</sup> and 16<sup>th</sup> Reports were adopted by the African Union (AU), which replaced the OAU as regional political body in July 2002.

<sup>28</sup> Article 59 of the African Charter.

<sup>29</sup> See Table A, section 2.2.2 of chapter 2. The following communications were referred to the AHSG after a finding of serious and massive violations and were never complied with and no steps were ever taken by the AHSG: (1) Communication nos 64/92, 68/92 and 78/92 *Krishna Achutan v Malawi and Amnesty International v Malawi*, 7<sup>th</sup> Annual Activity Report. (2) Communication no 47/90 *Lawyers Committee for Human Rights v Zaire*, 7<sup>th</sup> Annual Activity Report. (3) Communications nos 25/89, 47/90, 56/91 and 100/93 *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire*, 9<sup>th</sup> Annual Activity Report.

steps on the cases referred to it under article 58.<sup>30</sup> As a result, the Commission stopped referring cases revealing serious or massive violations to the AHSG.<sup>31</sup> In the absence of any further action on the part of the AHSG or the Commission upon finding states in violation of the Charter in cases revealing serious or massive violations, it comes as no surprise that non-compliance has been recorded in all these cases.<sup>32</sup>

Another recurring theme amongst those communications where non-compliance has been recorded relates to two inter-related aspects, namely the type of political regime in power and ongoing civil conflict within a state party.<sup>33</sup> However, it must be noted that where these factors were present the Commission also often found serious or massive violations of the Charter. Thus, factors influencing compliance are often the result of a combination of factors, rather than of just one factor. The OAU Charter did not provide for any sanctions against state parties under any circumstances.<sup>34</sup> As a result, military coups or authoritarian governments could continue their OAU membership and participate in the meetings of the AHSG without any fear of

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<sup>30</sup> According to Commissioner Dankwa, the AHSG never conducted in depth studies under article 59 of the African Charter, therefore the Commission stopped referring cases of serious and massive violations to the AHSG (Comment made by Commissioner Dankwa during a lecture at the University of Pretoria, 14 May 2002).

<sup>31</sup> The following communications also revealed serious and massive violations, but the Commission had stopped referring these cases to the AHSG: Communication no 74/92 *Commission Nationale des Droits de l'Homme et des Libertes v Chad*, 9<sup>th</sup> Annual Activity Report; communication nos 27/89, 46/91, 49/91 and 99/93 *Organisation Mondiale Contre La Torture and Association Internationale des Juristes, Union Interfricaine des Droits de l'Homme v Rwanda*, 10<sup>th</sup> Annual Activity Report.

<sup>32</sup> See the communications listed in fns 28 and 29 above.

<sup>33</sup> These factors will also fall within the ambit of the discussions on factors influencing state compliance in relation to state parties. Factors relating to the system of governance and political stability in a state are discussed here in reference to the role of the OAU. Of the 19 communications decided against Nigeria, non-compliance was recorded in 13 cases. These cases were almost all filed with the Commission during the military dictatorship of General Sani Abacha. Another example where the Commission's findings were not implemented due to the political order of the day is the cases against Malawi. Non-compliance with the Commission's recommendations against Chad and Rwanda could be explained in terms of the civil conflict that existed within these countries at the time the communications were filed and decided (See Table B, section 2.3.2 of chapter 2).

<sup>34</sup> Gutto identified "the lack of existence and/or efficacy of external enforcement mechanisms and effective sanctions" as a factor that has affected state compliance with international agreements and he further cited the "deliberate breach" of such agreements as often being informed "by a calculated risk of not being caught or punished" (See SBO Gutto *The rule of law, human and peoples' rights and compliance/non-compliance with regional and international agreements and standards by African states* pages 5-6, a paper prepared for presentation at the African Forum for Envisioning Africa held in Nairobi, Kenya, 26-29 April, 2002. Available at: <http://www.worldsummit2002.org/texts/ShadrackGutto2.pdf>. Date accessed: 20 July 2004).

exclusion or confrontation on their human rights records even in the face of the African Commission's findings. The OAU's Central Organ of the Mechanism for Conflict Prevention, Management and Resolution only existed on paper and did not assist in effectively addressing conflict on the continent.<sup>35</sup>

The weakness of the OAU is an important factor leading to the lack of state compliance with the recommendations of the Commission. The answer lies in the strengthening of the regional political system, a goal that has to some extent been reached through the reforms of the OAU, which culminated in the establishment of the AU. Some of the weaknesses that existed in the OAU have been addressed by the AU. Firstly, the AU Constitutive Act includes references to the protection of human and peoples' rights amongst its objective and founding principles.<sup>36</sup> It would therefore seem that the AU is more dedicated to the protection of human rights than its predecessor.<sup>37</sup> Secondly, whereas the OAU provided no platform for debate on the Annual Activity Reports of the Commission, the AU Assembly has delegated this task to the Executive Council,<sup>38</sup> which resulted in the first debate on the Commission's report and work during the discussion of the 17<sup>th</sup> Annual Activity Report.<sup>39</sup> Although this also resulted in the Activity Report not being adopted, it should be seen in light of the fact that this was the first time the activities of the Commission were debated in this forum. Hopefully, this would create a future precedent as far as debating the Commission's findings are concerned. This was also the first occasion on which the regional political body called upon member states to implement the decisions of the African Commission.<sup>40</sup>

The AU Constitutive Act further provides that "governments which shall come to power through unconstitutional means shall not be allowed to participate in the

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<sup>35</sup> See section 4.7 of chapter 4.

<sup>36</sup> Articles 3(e),(h) and 4(m) of the Constitutive Act.

<sup>37</sup> See however the arguments in section 4.7 of chapter 4 in relation to the fact that the African Commission has not been included amongst the principle organs of the AU and the possible negative impact this could have on issues such as resource allocation.

<sup>38</sup> Decision of the Assembly of the AU, second ordinary Session, 10-12 July 2003, Maputo, Mozambique DOC.Assembly/AU/7(II).

<sup>39</sup> See F Viljoen 'Recent developments in the African regional human rights system' (2004) 2 *African Human Rights Law Journal* 347.

<sup>40</sup> See *Decision on the 17<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples' Rights*, DOC.EX.CL/109(V), Assembly/AU/Dec.49(III) par 3: "The Assembly urges all member states to cooperate with the ACHPR, and the various mechanisms it has put in place, and implement its decisions in compliance with the provisions of the African Charter on Human and Peoples' Rights".

activities of the Union”.<sup>41</sup> The possibility therefore exists for sanctioning participation of states where the leadership came to power through military coups. The Peace and Security Council (previously, under the OAU, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution) is one of the organs of the AU. In future, cases involving a state party where the Commission’s recommendations could not be implemented due to civil conflict may be taken up by the Council.<sup>42</sup>

It would therefore seem that some of the problems associated with the weak regional political platform of the OAU have been addressed with its transformation into the AU. Whether the AU will actually take action on these issues theoretically available to it will have to be seen.

### 3.3.2 The role of the legal framework

The foundation for the African regional human rights system was laid in 1981 with the adoption of the African Charter by the OAU. As indicated above, the decisions of the OAU was guided by principles of state sovereignty rather than human rights objectives. As a result, the African Charter has often been described as the weakest of all regional human rights treaties.<sup>43</sup> The member states of the OAU adopted a regional human rights system with weak enforcement mechanisms.<sup>44</sup> From a survey of the factors that have influenced state compliance in the six cases where full compliance was recorded, it is apparent that in four of these cases the African Commission had made some attempt at following up on the steps taken by state parties to implement its recommendations.<sup>45</sup> The African Charter does not provide

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<sup>41</sup> Article 30.

<sup>42</sup> See the arguments in support of such a potential role for the Council in section 4.7 of chapter 4.

<sup>43</sup> See section 4.2 of chapter 4.

<sup>44</sup> The African Charter only provides for a Commission and not a Court to enforce the provisions of the Charter. The drafters of the African Charter therefore did not intend for the decisions of the Commission to be binding on the state parties. It is only through the progressive interpretation of its mandate that the Commission not only developed a process whereby it makes recommendations to state parties that were found to have violated the African Charter but they also expect the recommendations to be implemented. See the discussions in sections 4.4.2.1 (a) and (b) of chapter 4.

<sup>45</sup> In the communications (where full compliance was recorded, see fn 23) decided against Botswana, Sierra Leone, Cameroon and Zambia the Commission made some attempts at following-up on the implementation of its recommendations by the state parties. In the case of Botswana the Commission enquired as to the status of implementation during the public session at its 31<sup>st</sup> ordinary Session (see Table A, chapter 2). The Commission send a delegation to Sierra Leone on a promotional mission during which it inquired as to the status of state compliance with its decision

for a follow-up mechanism. The lack of such a provision in the Charter could therefore be described as a factor that has influenced state compliance with the Commission's recommendations in the majority of cases where non-compliance was recorded.

Despite the lack of a clear follow-up mechanism, the Charter may be interpreted as compelling states to comply with the findings of the Commission. The question as to the legally binding nature of the recommendations of the African Commission should be explained with reference to article 1 of the African Charter and the Commission's own views, as set out in its jurisprudence, on the status of its findings. Article 1 of the Charter reads as follows:

The member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

The Commission has said the following of article 1:<sup>46</sup>

Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of article 1. If a state party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this article. Its violation, therefore, goes to the root of the Charter.

It has further been argued that not only does article 1 bind state parties, but that the adoption of "other measures" to give effect to the rights enshrined in the Charter refer to the implementation of the Commission's recommendations.<sup>47</sup> The Charter has been supplemented through interpretation by the Commission. In the *Saro-Wiwa* case, the Commission found Nigeria in violation of article 1 of the Charter as a result

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(see Table A, chapter 2). In the cases decided against Cameroon and Zambia follow-up efforts were also undertaken but in these cases implementation was already completed and it should be seen as an effort to establish the status of compliance, rather than in the other two cases cited above, where the Commission's efforts could be described as encouraging compliance through follow-up. One of the cases where partial compliance was recorded by Burkina Faso follow-up also played a role. The Commission sent a promotional mission to Burkina Faso which inquired as to the steps taken to implement its recommendations and in delivering its state report, under article 62 of the African Charter, Burkina Faso reported on the steps taken to implement the Commission's recommendations (Communication no 204/97 *Mouvement Burkinabe des Droits de l'Homme et des Peuples (MBDHP) v Burkina Faso*, 14<sup>th</sup> Annual Activity Report – see Table A, chapter 2).

<sup>46</sup> Communication nos 147/95, 149/96 *Sir Dawda K Jawara v The Gambia*, 13<sup>th</sup> Annual Activity Report, par 233.

<sup>47</sup> Viljoen & Louw (2004) 7.



of ignoring a previous decision of the Commission.<sup>48</sup> It is therefore apparent that the Commission views its findings as binding on state parties and expects implementation of its decisions, an approach similar to that adopted by the UN Human Rights Committee on the legal status of its views.<sup>49</sup> It is conceivable that the compulsion implied by article 1 has in some instances contributed to state compliance.

### 3.3.3 The role of treaty bodies

Factors that influence state compliance as they relate to the African Commission are discussed here in relation to the institutional legitimacy of the body, the legal status of its findings, the remedies recommended by the Commission, publication of its findings and the Commission's lack of a follow-up policy. In identifying these factors, reference is frequently made to the experiences of the UN Human Rights Committee as some of these factors have been examined in some depth by commentators on the UN human rights treaty system.<sup>50</sup>

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<sup>48</sup> Communication nos 137/94, 139/94, 154/96 and 161/97 *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights on behalf of Ken Saro-Wiwa v Nigeria*, 12<sup>th</sup> Annual Activity Report concluding paragraph.

<sup>49</sup> Naldi has confirmed that through "an analyses of the Commission's decisions in individual communications in recent times does suggest that the Commission is generally becoming more robust in carrying out its protective mandate. In addition, an expectation of compliance with its decisions in individual communications does appear to have been engendered. This approach would appear to be required under article 1 of the Charter" (GJ Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 684). Also see R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 54-55 and Österdahl (2002) 154-155. On the legal status that the Human Rights Committee ascribe to its views issue under the individual complaints procedure, Davidson has stated that following: "It is, in fact, my contention that the Committee has, in recent views, taken the explicit step of declaring them to be legally binding ... the rationale for this is a matter of speculation, but it does seem to represent a conscious policy on the part of the HRC" (See JS Davidson 'Intention and effect: The legal status of the final views of the Human Rights Committee' (2001) 125 *New Zealand Law Review* 13).

<sup>50</sup> See for instance A Byrnes 'An effective complaints procedure in the context of international human rights law' in AF Bayefsky (ed) *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (2000) 139; E Evatt 'The future of the human rights treaty system: forging recommendations' in AF Bayefsky (2000) 287 and I Boerefijn 'The role of treaty bodies in enhancing follow-up', a paper delivered at a conference focussing on follow-up to the outcome of the work of the HRC and the Committee on Economic, Social and Cultural Rights (SIM Conference 28-29 September 2001). Available at: <http://www2.law.uu.nl/english/sim/publ/conference/boerefijn.pdf>. Date accessed: 23 June 2003.

**(a) Institutional legitimacy of the African Commission**

The institutional legitimacy of the African Commission influenced by the following factors: (1) the independence of the Commissioners; (2) the experience and integrity of the Commissioners; (3) whether the Commissioners are regionally representative of the system; and (4) the work ethic of the Commissioners.<sup>51</sup> In the experience of the African Commission, Commissioners were appointed in the past without possessing the necessary legal or human rights backgrounds and often Commissioners still kept close political ties, as ambassadors or civil servants, with their own state parties.<sup>52</sup> As a result, the institutional legitimacy of the African Commission could not be ranked very high amongst state parties. This would explain why the Commission could not in the past rely on its own legitimacy, in the absence of coercive measures, to compel state parties to participate in the individual complaints procedure or to comply with the Commission's recommendations.<sup>53</sup> Tomuschat has summarised the importance of institutional legitimacy as follows:<sup>54</sup>

The views of the Human Rights Committee gain their authority from their inner qualities of impartiality, objectiveness and soberness. If such requirements are met, the views of the Committee can have a far reaching impact, at least vis-à-vis such governments which have not out rightly broken with the international community and ceased to care anymore for concern expressed by international bodies. If such a situation arose, however, even a legally binding decision would not be likely to be respected.

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<sup>51</sup> Evatt has warned that "treaty bodies must take seriously all issues which bear upon the effectiveness of their work. Consistently with that obligation, the treaty bodies must do so conscientiously and with full commitment to the principles of impartiality. The integrity of the committees, their own acceptance of high ethical standards and their insistence on the quality in all their work are the only real weapons that they have". Evatt (2000) 289.

<sup>52</sup> See a detailed discussion on the composition of the African Commission, outlining all these issues, in section 4.3 in chapter 4.

<sup>53</sup> Helfer and Slaughter summarised the importance of institutional legitimacy in the absence of coercive measures as follow: "International tribunals lack a direct coercion mechanism to compel either appearance or compliance ... they instead rely on factors such as own legitimacy, legitimacy of any judgment reached, the strength and importance of the international legal rules governing a specific dispute" (Helfer & Slaughter (1997) 285). From an analysis of the jurisprudence of the African Commission it is evident that the Commission often took decisions based on the evidence provided by the complainant with no response forthcoming from the state party, a factor that could attest to whether state parties view the Commission as a legitimate body or not.

<sup>54</sup> C Tomuschat 'Evolving procedural rule: The United Nations Human Rights Committee's first two years of dealing with individual communications (1980) 1 *Human Rights Law Journal* 331.

**(b) Legal status of the Commission's findings**

It has been argued that the Commission's findings, which include its recommendations, are not legally binding and therefore state parties are not obliged to comply therewith.<sup>55</sup> Arguments in favour of the non-binding nature of the Commission's recommendations are usually based on arguments that in terms of the African Charter the Commission's mandate to decide individual communications is not clear,<sup>56</sup> the Commission issues "recommendations" as remedies<sup>57</sup> and the Commission is a quasi-judicial body.<sup>58</sup>

These arguments could be refuted in reference to the established practices of the Commission. The Commission has interpreted its mandate in a progressive manner and developed its Rules of Procedure accordingly to enable it from its third Ordinary Session to receive and consider individual communications from individuals, groups of individuals and NGOs on behalf of individuals.<sup>59</sup> The Commission's established

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<sup>55</sup> The government of Nigeria, in refusing to implement the findings of the Commission in a number of cases decided against it under the military dictatorship of General Abacha, stated that the Commission acted in a "judicial role in pronouncing on the validity of domestic laws and interpreting various provisions of the Charter" (See 'Account of Internal Legislation of Nigeria and the Disposition of the Charter of African Human and Peoples' Rights', Second Extraordinary Session, Kampala, 18-19 December 1995, DOC.II/ES/ACHPR/4). For an analysis of the status of the findings of the African Commission see F Viljoen & L Louw 'The status of the findings of the African Commission: from moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1. The arguments briefly outlined here were the basis for the development of most of the arguments in the journal article and will be cross referenced accordingly.

<sup>56</sup> In terms of the African Charter the Commission can receive and consider inter-state and "other" communications. It does not use the term individual communications. From article 58 of the Charter it would further appear that the Commission can only issue recommendations in cases revealing a series of serious or massive violations. Murray has observed that article 58 "would appear to suggest that not only does the Commission have no jurisdiction in separate individual cases unless they are of an urgent nature, it also has no formal power to take the initiative itself" R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 413. Viljoen & Louw (2004) 4.

<sup>57</sup> It has been argued that not only does the Commission not have the competence to issue remedies but when it does it is couched as "invitations", "requests" or "appeals" and is generally referred to by the Commission as recommendations, which it is reasoned are not legally binding. See I Österdahl *Implementing Human Rights in Africa – The African Commission on Human and Peoples' Rights and Individual Communications* (2002) 154-155 and N Enonchong 'The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197. Viljoen & Louw (2004) 6-7.

<sup>58</sup> NS Rembe *The System of Protection of Human Rights under the African Charter on Human and Peoples' Rights: Problems and Prospects* (1991) 26. Viljoen & Louw (2004) 13.

<sup>59</sup> Viljoen & Louw (2004) 5.

jurisprudence is evident of its practice to consider individual communications. In response to arguments by the government of Nigeria,<sup>60</sup> questioning the competence of the Commission to decide individual communications the Commission responded as follows:<sup>61</sup>

While by promulgating the Charter the OAU has indirectly “requested” the Commission’s interpretation through the communications procedure, the procedure more properly falls under article 45(2). This charge to ensure protection clearly refers to the Commission’s duties under articles 55 to 59 to protect the rights in the Charter through the communications procedure. The Commission therefore cannot accept the government’s contention that in deciding communications it has acted outside its capacity.

The African Commission has developed an established practice of recommending remedial measures to state parties and has justified its competence to do so.<sup>62</sup> It has also been argued that “the subsequent approval by the Assembly of the Commission’s findings earmarks these findings as legally binding on member states”.<sup>63</sup> This argument is based on the adoption of the Annual Activity Reports of the Commission by a decision of the Assembly of the AU. According to the Rules of Procedure the decisions of the Assembly are legally binding and thus it was argued that the “Assembly, as ‘parent’ institution, takes legal responsibility for the findings of the Commission by way of its act of ‘adoption’”.<sup>64</sup>

This study therefore contends that on the basis of the Commission’s jurisprudence, its established practices and the adoption of the Commission’s findings by the AU Assembly, the Commission’s findings are legally binding.<sup>65</sup> Alternatively, it is contended that these findings are no longer merely morally or ethically binding on state parties. The legally binding status of a treaty body’s findings is however only

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<sup>60</sup> ‘Account of Internal Legislation of Nigeria and the Disposition of the Charter of African Human and Peoples’ Rights’, Second Extraordinary Session, Kampala, 18-19 December 1995, DOC.II/ES/ACHPR/4).

<sup>61</sup> As above.

<sup>62</sup> See Table A of chapter 2 for a list of the wide ranging remedies the Commission has ordered in the past. The Commission has justified its competence to issue remedies as follows: “When the Commission concludes that a communication describes a real violation of the Charter’s provisions, its duty is to make that clear and indicate what action the government must take to remedy the situation” (‘Account of Internal Legislation of Nigeria and the Disposition of the Charter of African Human and Peoples’ Rights’, Second Extraordinary Session, Kampala, 18-19 December 1995, DOC.II/ES/ACHPR/4).

<sup>63</sup> Viljoen & Louw (2004) 9.

<sup>64</sup> Viljoen & Louw (2004) 10.

<sup>65</sup> See also the discussion in section 3.3.2, on the legal status of the Commission’s findings in reference to the obligations article 1 of the Charter places on state parties.

one factor that influences state compliance and as shown in the African system, this has not been a contested feature, as only Nigeria has thus far questioned the legal status of the Commission's findings.

**(c) Quality of findings**

The implementation of treaty body findings is dependent on the will of state parties. Instead of coercing states into compliance through sanctions, which is a difficult exercise in the field of international law, the persuasive force of the treaty body's findings should be increased.<sup>66</sup> The persuasive force of the findings of the African Commission could be influenced by a number of factors. The following are highlighted as they relate to the quality of the decisions and findings of the Commission: (1) the format of the decision,<sup>67</sup> (2) whether the decision is well reasoned,<sup>68</sup> (3) whether separate dissenting opinions are allowed amongst the members of the treaty body in deciding a complaint,<sup>69</sup> (4) whether the finding clearly indicates the nature of the violation and the remedial steps to be taken.<sup>70</sup>

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<sup>66</sup> "A preoccupation with outcomes places factors enhancing persuasion in the foreground" (Viljoen & Louw (2004) 19).

<sup>67</sup> The decisions of the African Commission, as published in its 7th Annual Activity Report, were very short and merely indicated the facts of the complaint and the Commission's findings without necessarily indicating any remedial actions for implementation by the state party. This has changed significantly and the Commission now issues detailed decisions of several pages long stating the facts, the procedures followed, admissibility grounds, reasoning on the merits and a finding on the violation of specific articles of the African Charter followed by (sometimes) detailed recommendations. The Commission's decisions have therefore taken on a format that is closer in resemblance to a court judgment.

<sup>68</sup> Helfer & Slaughter referred to the "quality of legal reasoning" as a factor affecting state compliance and quoted Ost as stating that "the giving-reasons requirement is the prerequisite for the exercise of persuasive rather than coercive authority, the assurance that "the authority of a judgment derives from its intrinsic rationality rather than from an 'argument' of authority" (F Ost 'The original canons of interpretation of the European Court of Human Rights' in *The European Convention for the Protection of Human Rights* at 284 quoted in Helfer & Slaughter (1997) 320). Byrnes, in listing a number of factors that influence states to give effect to a decision of the HRC, also listed "whether the decision is persuasively reasoned" as one such factor (Byrnes (2000) 151-152). Another aspect of delivering a well-reasoned decision that would contribute to the authority of a treaty body's decision and thereby exert a greater compliance pull for state parties is judicial cross-referencing to and reliance on the findings of other treaty bodies. The African Commission, in its more recent decisions, has referred to the treaty body output (decisions as well as general comments) of the UN Human Rights Committee, the Inter-American Commission on Human Rights and the European Court on Human Rights. See for instance communication no 211/98 *Legal Resources Foundation v Zambia*, 14<sup>th</sup> Annual Activity Report and communication no 228/99 *The Law Offices of Gazi Suleiman v Sudan*, 16<sup>th</sup> Annual Activity Report.

<sup>69</sup> It has been argued that a system where dissenting opinions are allowed is more likely to receive cooperation from state parties for they perceive the majority decision to be the result of a fair process where all options were considered and not a process

In measuring the six cases where full compliance was recorded against the factors listed above, it is apparent that in all six cases the format of the Commission's decisions resembled that of a court judgment.<sup>71</sup> The Commission does not allow for separate dissenting opinions, in its practice on deciding individual communications, therefore this factor was not present in any of the six cases. In all six cases the findings of the Commission did reflect the nature of the violation.<sup>72</sup> Except for the findings against Sierra Leone, the other cases clearly recommended the remedial steps to be taken by states to remedy the violations.<sup>73</sup> The clarity of the remedies recommended is closely linked with aspects of the subject matter and nature of the remedies, which will be discussed below.<sup>74</sup> Recommending unclear remedies, which leaves it up to states to determine the steps to be taken,<sup>75</sup> or not formulating any recommendations, has been one of the recurring factors which has played a role in those cases where non-compliance was recorded.<sup>76</sup>

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aimed at humiliating them. Helfer & Slaughter relied on Merrills in explaining that the European Court on Human Rights depends on the support of governments "who must be satisfied that in accepting its obligations ... they are subscribing to a system whose object and effect are the protection of rights, and not national humiliation ... in this context separate opinions are 'especially important' in marshalling government support" (JG Merrills *The Development of International Law by the European Court of Human Rights* (1993) 36 quoted by Helfer & Slaughter (1997) 327-328). Separate opinions are delivered by the Committee members of the UN Human Rights Committee but it is not the practice of the African Commission.

<sup>70</sup> The Commission's practice in this regard has not been consequent. It has sometimes awarded no remedies to the victims of human rights abuses (for a recent example see communication no 225/98 *Huri-Laws v Nigeria*, 14<sup>th</sup> Annual Activity Report). It has also on occasion formulated very vague recommendations stating merely that 'a state party should bring its laws into conformity with the African Charter'. See for instance communication nos 105/93, 128/94, 130/94 and 152/96 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, 12th Annual Activity Report. Vague recommendations not only leave the victims without any recourse but also make it difficult to determine whether a state party actually complied with the Commission's recommendations.

<sup>71</sup> See fn 23 above for full citations of the cases against Cameroon, Nigeria (2 cases), Zambia, Botswana and Sierra Leone where full compliance has been recorded.

<sup>72</sup> See Table A, chapter 2.

<sup>73</sup> See section 3.3.5 below for a summary of the recommendations issued in each of the six cases where full compliance has been recorded.

<sup>74</sup> See section 3.3.5 (b) and (c) below.

<sup>75</sup> For example in joint communication nos 140/94, 141/94 and 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, 13<sup>th</sup> Annual Activity Report, the Commission did not recommend specific steps to be taken by the government. The Commission merely invited the government to "take all necessary steps to comply with its obligations under the Charter" (See Table A, chapter 2). The government did not comply with this decision.

<sup>76</sup> The Commission did not, for example, formulate any recommendations in deciding the following cases: communication 215/98 *Rights International v Nigeria*, 13<sup>th</sup> Annual Activity Report and communication no 225/98 *Huri-Laws v Nigeria* 14<sup>th</sup> Annual Activity Report. Non-compliance was recorded in both cases as the government never took any steps to remedy the violations complained of.

**(d) Publicity**

The publication of the findings of treaty bodies plays a significant role in influencing state compliance.<sup>77</sup> In the absence of coercive measures, the mobilisation of shame is one of the only tools available to a treaty body to pressurise state parties on an international level to comply with its findings. Most state parties attach importance to their reputation in the international community. Those that have ceased to care about their reputation are not likely to be influenced by any of the factors listed in this chapter.

The UN Human Rights Committee in March 1994 decided that “publicity for follow-up activities would not only be in the interest of victims of violations of the Covenant’s provisions, but could also serve to enhance the authority of the Committee’s views and provide an incentive for state parties to implement them”.<sup>78</sup> The African Commission initially interpreted article 59 of the African Charter in an overly strict manner and did not publish any information regarding individual communications.<sup>79</sup> The African Commission now regularly publishes its findings as an annexure to its Annual Activity Reports.<sup>80</sup> Annual Activity Reports are, however, only published after

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<sup>77</sup> Proof that state parties do react to ‘international shaming’ to protect their reputations in the international sphere is given by Schmidt who reported that France and Ecuador “promptly reacted” and “forwarded follow-up replies and provided victims with remedies” upon publication of the 1995 and 1998 Annual Reports of the Human Rights Committee, listing the uncooperative states under the Committee’s follow-up mandate (M Schmidt ‘Follow-up mechanisms before UN human rights treaty bodies and the UN mechanisms beyond’ in Bayefsky (2000) 238). Also see Hathaway (2002) 2008 and Byrnes (2000) 151-152.

<sup>78</sup> Before 1994, the Human Rights Committee considered follow-up information on a confidential basis. The Committee however came to the conclusion that “publicity for follow-up activities would be the most appropriate means for making the procedure more effective” (See Report of the Human Rights Committee, *Official Records of the General Assembly*, 51<sup>st</sup> Session, Supplement No. 40 (A/51/40) paras 435-438).

<sup>79</sup> Article 59 of the African Charter reads as follows: “All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide”. For a detailed discussion of the African Commission’s interpretation and initial application of this article, see the section 3.4.2.1 (c) in chapter 3.

<sup>80</sup> For an overview of how the African Commission interpreted the confidentiality clause in a more progressive manner, also see section 3.4.2.1 (c) in chapter 3. The African Commission however still do not allow public access its files on already decided communications, as this author experienced first hand in trying to gain access at the documentation centre of the Secretariat of the Commission in Banjul, The Gambia. More specifically information relating to those communications where the Commission reported that an amicable settlement was reached between the victim and the state party concerned, which for all practical reasons is a form of state compliance, is strictly off limits for public access. (The author specifically tried to establish the details of the agreement reached in communication 11/88, *Henry Kalenga v Zambia*, since the Commission reported an amicable settlement was

adoption by the AU Assembly, which means that the publication of the Commission's findings takes place only once a year. At the third session of the AU Assembly a decision was adopted to change the time frame of the Assembly's sessions from meeting once a year to meeting every six months.<sup>81</sup> Viljoen raises the question as to whether the "cycle of reports by the Commission should also be changed to coincide with that of the Assembly".<sup>82</sup> This would eliminate one of the many delays in deciding communications timeously and would increase the publicity of the Commission's findings as its work would receive more regular media coverage.<sup>83</sup>

The Annual Activity Reports of the African Commission are not widely disseminated. Even if the decisions of the Commission can be accessed on its official website,<sup>84</sup> the Commission has not made use of the media to publish its findings on decisions in addition to the inclusion of the findings in its Activity Reports. The Commission has also not made use of the media to publicise instances where governments complied with its recommendations, not to mention all the cases of non-compliance.<sup>85</sup> If the Commission were to publish examples of state compliance, it could encourage other states to also implement the Commission's findings. As important as the role of international and domestic pressure on states in influencing compliance is, this role is yet to be fulfilled by the African Commission. Up to now this role has been fulfilled mainly by NGOs.<sup>86</sup>

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reached but the complainant eventually lodged a complaint with the Human Rights Committee and was compensated. This not only raises questions about confidentiality but also as to what the Commission view as state compliance in terms of an amicable settlement).

<sup>81</sup> Decision on the periodicity of the ordinary sessions of the Assembly, AU Doc Assembly/AU/Dec 53 (III).

<sup>82</sup> F Viljoen 'Recent developments in the African regional human rights system' (2004) 4 *African Human Rights Law Journal* 347.

<sup>83</sup> As above.

<sup>84</sup> Available at: <http://www.achpr.org>.

<sup>85</sup> The Commission has through promotional missions to state parties established follow-up with some of its recommendations. The Commission has therefore been aware of some instances where state parties did implement its recommendations, but it has not used this information to praise the state concerned through the media in an effort to encourage other states to follow suit. In the Zambia case (see fn 23 above), for example where full compliance was recorded, the Commission noted in its *Report of the Promotional Visit to the Republic of Zambia*, 9-13 September 2003, that the state complied with the Commission's recommendations (page 10 of the Report). The Commission did not however use this information in a manner to encourage compliance amongst other state parties.

<sup>86</sup> See section 3.3.6 below for a discussion on the role of NGOs.



### **(e) Follow-up policy**

The African Commission has no follow-up policy or mechanisms in place to monitor the status of state compliance with its recommendations.<sup>87</sup> In four of the six cases where full compliance with the Commission's recommendations has been recorded, the Commission did attempt to follow up on the status of state compliance.<sup>88</sup> The lack of a follow-up policy has affected state compliance with the Commission's recommendations in the majority of cases decided by the Commission. A follow-up policy should incorporate most of the factors discussed in this chapter.

### **3.3.4 The role of state parties**

#### **(a) Regional dependence and links between states at the supra-national level**

In a globalised world states do not exist in a vacuum. They increasingly depend on their relationships with other states on an international, regional and sub-regional level. International relations scholars have argued that this interdependence amongst states is strongest on the regional level.<sup>89</sup> According to Hathaway's findings, compliance with regional human rights treaties seems to be affected for the worse rather than the better by the strong allegiance amongst states on a regional level.<sup>90</sup> Hathaway explained it as follows:<sup>91</sup>

Ratification of regional human rights treaties may be more often and more markedly associated with worse human rights ratings than is ratification of universal human rights treaties because regional political and economic interdependence creates greater incentives for countries to express their commitment to community norms even when they are unable or unwilling to meet those commitments.

This seems especially true in the context of the African regional human rights system. Irrespective of the fact that all member states of the African Union have ratified the African Charter, non-compliance with the Charter obligations and the

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<sup>87</sup> "No effective mechanism has been developed by the Commission for monitoring the implementation of its recommendations" (Dankwa (1998) 4).

<sup>88</sup> The follow-up efforts the Commission had undertaken in the cases decided against Botswana, Cameroon, Zambia and Sierra Leone are discussed in fn 43 above.

<sup>89</sup> See Chayes & Chayes (1995) 27 and Hathaway (2002) 2016.

<sup>90</sup> Hathaway (2002) 2016.

<sup>91</sup> As above.

recommendations of the African Commission is very high.<sup>92</sup> It can therefore be argued that state compliance is influenced by the regional interaction between states on human rights issues. In the absence of a strong political umbrella body that promotes the protection of human rights, as a deciding factor in the regional interaction between member states, states will continue to ignore the recommendations of the African Commission due to a lack of pressure from states within the region. If there is no fear of exclusion from this regional web with all its political and economical benefits, due to non-compliance with regional human rights standards, then there is no incentive for state parties to comply with their regional human rights obligations in the first place.

**(b) System of governance and level of stability**

From an analysis of the findings on the status of state compliance with the Commission's recommendations, it is apparent that state compliance is influenced by the system of governance and the level of political stability within a state party.<sup>93</sup> A democratic system of governance is characterised by principles such as a functional multi-party electoral system, an independent judiciary, the rule of law, constitutionally guaranteed rights, an active civil society and a freely functioning NGO community.<sup>94</sup> These are all factors that if present in a state will pressurise a state to bring its international policies in line with its domestic policies.<sup>95</sup> In five of the six cases where full compliance has been recorded, the system of governance in place, may be listed as one of the factors that have contributed to state compliance.<sup>96</sup>

<sup>92</sup> Refer to table 1 in section 5.2.1 above for an overview of the overall lack of state compliance with the Commission's recommendations.

<sup>93</sup> Hathaway, for example, found that "ratification of human rights treaties by fully democratic nations is associated with better human rights practices" (Hathaway (2002) 1941). See fn 23 for full citations of the cases.

<sup>94</sup> Byrnes (2000) 151-152.

<sup>95</sup> In analysing state compliance with the final judgments of the International Court of Justice, Paulson came to a different conclusion, he found that "[a]utocratic states were no more likely to disregard a judgments than democracies" (C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 460).

<sup>96</sup> To explain this point, the system of government in place in each of the cases where full compliance was found is rated here according to the findings of Freedom House. Freedom House has allocated a rating to each of these countries according to which they are listed as free, partially free, or not free. The lower the rating accorded to a state the higher the freedoms in a state. Botswana: Communication no 97/93, where full compliance has been recorded, was adopted in the 14<sup>th</sup> Annual Activity Report, 2000-2001. Botswana has been a parliamentary democracy since independence in 1966. Freedom status: free (2,2). Zambia: Communication no 212/98, where full compliance has been recorded, was adopted in the 12<sup>th</sup> Annual Activity Report, 1998-1999. Zambia was one of the first states in Africa, in the wave of democratisation of

In respect of Nigeria, although full compliance has been recorded in two cases, non-compliance was recorded in 13 of a total of 19 cases decided against Nigeria.<sup>97</sup> This highlights another one of the recurring predictors of non-compliance, namely, the system of governance, which is usually closely related to the political instability in a country. This factor is in turn, usually associated with serious or massive violations of human rights.<sup>98</sup> Ongoing civil wars within state parties have not only affected political stability within its own borders but also in neighbouring countries.<sup>99</sup> In the face of a series of serious and massive human rights violations, the impact of a treaty body such as the African Commission is limited if measured in terms of state

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the 1990's, to adopt a multi-party system in 1992. Freedom status: partially free (2,3). Sierra Leone: Communication no 223/98, where full compliance has been recorded, was adopted in the 14<sup>th</sup> Annual Activity Report, 2000-2001. Freedom status: partially free (3,5). Nigeria: Communication nos 153/96 and 206/97, where full compliance has been recorded, were adopted in the 13<sup>th</sup> Annual Activity Report, 1999-2000. This was at the time of the death of General Abacha and the end of his military dictatorship. Freedom status: partially free (from 1999). Therefore, it is clear that in these five instances where full compliance has been recorded compliance took place at a time when the system of governance in these countries could be described as free or partially free. The same principles do not however apply to explain full compliance by Cameroon. Communication no 39/90, was adopted in the 8<sup>th</sup> Annual Activity Report, 1994-1995. Freedom status: not free (7,5). Cameroon did however adopt a system of multi-party elections in 1991 and a new Constitution in 1996, but due to factors such as widespread corruption in the country it cannot be described as free. The fact that Cameroon fully complied with the Commission's findings in the absence of a democratic system of governance is evident of the fact that it is not just one factor that influences state compliance but rather a combination of factors that could persuade a state to comply.

<sup>97</sup> Most of the 19 communications against Nigeria were lodged during the military dictatorship of General Sani Abacha, from the high rate of non-compliance, the conclusion can be drawn that in the presence of a military dictatorship there will be no or limited state compliance with regional human rights treaty obligations. Further examples to this extent can be found in reference to Zaire (communications no 47/90 and communication nos 25/89, 47/90, 56/91 and 100/93) the Commission's findings was never implemented. In joint communications 147/95, 149/96 against The Gambia, which related to the *coup d'état* of 1994, the Commission observed that "the military coup was therefore a grave violation of the right of Gambian people to freely choose their government" (at par 73).

<sup>98</sup> Examples where the Commission found that the communications revealed the existence of serious or massive violations, as a result of political instability, were those decided against Chad, Zaire and Malawi (See Table A, chapter 2). The Commission did not formulate any recommendations apart from making its finding, as it is was probably presumed that only regime changes would bring an end to the violations.

<sup>99</sup> Non-compliance with the recommendations of the African Commission has been recorded in the cases decided against Angola, Burundi, and Rwanda. A factor that most probably have influenced state compliance in respect of these state parties are the ongoing civil wars that were closely related to the subject matter of the complaints filed with the Commission. Even though the situation has now changed in both Angola and Rwanda, the Commission's recommendations have not been implemented.

compliance.<sup>100</sup> However, the filing of communications with the Commission by NGOs against an autocratic government or during a time of civil war is not necessarily done only to seek specific remedies from the Commission. Interviews with various Nigerian NGOs that filed many communications with the Commission during the dictatorial regime in the 1990's, revealed that the Commission was used as a forum to pressurise the state party internationally and to publicise the human rights violations committed by the government as widely as possible.<sup>101</sup>

### **(c) Change of government**

As mentioned above, non-compliance with findings by the Commission that the facts of a particular case reveal the existence of serious or massive violations was usually due to the system of governance in place or factors related to the political stability in a country. Large scale violations require large scale remedies. Under these circumstances the only factor which might influence state compliance for the better, is the opportunity offered for the improvement of a country's human rights record as a result of a change in government after years of military dictatorship or civil war.<sup>102</sup> In the African system, the change of government that took place in Nigeria, with the

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<sup>100</sup> It is not only the African Commission that is "powerless" in cases of serious or massive human rights violations. Helfer and Slaughter reported that, "both the Commission [European Commission on Human Rights] and the European Court on Human Rights, for example, were relatively powerless in the face of systematic human rights violations in Greece during the military dictatorship in the early 1970's; indeed Greece ultimately withdrew from the Convention" (Helfer & Slaughter (1997) 330).

<sup>101</sup> See the findings detailed in Table A, chapter 2.

<sup>102</sup> Hathaway has summarised it as follows: "Major shocks to the system such as change in government provide limited windows of opportunity for effecting large changes in the system. Indeed when major changes in human rights occur, it is often because of such an event" (Hathaway (2002) 2003). Evidence that regime changes could lead to the implementation of the findings of treaty bodies, even years after the decisions was originally taken by the treaty body, has been recorded in reference to both the Human Rights Committee and the Inter-American Commission on Human Rights. Helfer and Slaughter reported that the Human Rights Committee "must contend with systematic repression of grave abuses anywhere in the world. Even here, however, persistence may pay off. For example after many years of non-action, the Committee received a statement from Uruguay indicating that, after a change of government, it had released from imprisonment or offered amnesty to several individuals whom the Committee had determined were victims of serious human rights abuses" (Helfer & Slaughter (1997) 362-363). In an interview with Dr David Padilla, specialist on the Inter-American human rights system, he highlighted the importance of a change of regime as a "good hook" to get previous decisions of a treaty body implemented. He referred to Ecuador as a case in point where the new Attorney-General of the new regime implemented all the findings of the Inter-American Commission on Human Rights that were never implemented under the previous regime. Interview held with Dr Padilla in April 2002 at the Centre for Human Rights, at the University of Pretoria.

death of General Abacha in 1999, resulted in the end of the military dictatorial regime and the start of a period of democratic governance. Although there are still recommendations awaiting implementation by Nigeria,<sup>103</sup> it is evident that with the change of government the decrees that formed the substance of most communications against Nigeria were repealed and political prisoners were for the most part released. It should also be noted that whereas most of the 44 communications examined in this study were filed against Nigeria, very few cases have been filed after the new government had taken office.<sup>104</sup>

#### **(d) Domestic implementation of treaty body findings**

Factors that influence state compliance also relate to the domestic implementation of treaty provisions and treaty body findings. Gutto listed the “weak incorporation of international agreements in the domestic legal system and/or popular political space” as a factor that affects state compliance with international agreements.<sup>105</sup> In the African system, the African Charter should theoretically have direct force in francophone and lusophone countries in line with the monist traditions applied in those countries. According to the monist theory, treaties duly ratified by a state party form part of national law without necessitating any further incorporation through national legislation.<sup>106</sup> In countries following the dualist approach to international law - in Africa these are mostly the countries with common law traditions - treaty provisions have to be incorporated into domestic law to have any direct effect before domestic courts.<sup>107</sup> However, such stark delineations of monist and dualist traditions are not applied in practice. Among those countries following a dualist approach in Africa, Nigeria is the only country that has adopted domestic legislation to incorporate the African Charter into its domestic law.<sup>108</sup> The impact of domestication of the Charter is evident from two cases against Nigeria, where the fact that the domestic courts could rely directly on the Charter provisions and interim measures issued by

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<sup>103</sup> Partial compliance has been recorded in reference to communication no 155/96 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, 15<sup>th</sup> Annual Activity Report, a great many of the recommendations forwarded in this case are still outstanding.

<sup>104</sup> In an interview with Huri-Laws, a Nigerian-based NGO, its members commented that cases are now taken to domestic courts as the jurisdiction of the courts to decide human rights issues is no longer ousted by military decrees (Interview conducted in November 2002 at the Huri-Laws offices in Lagos, Nigeria).

<sup>105</sup> Gutto (2002) 6.

<sup>106</sup> MN Shaw *International Law* (1986) 98.

<sup>107</sup> JG Starke *Introduction to International Law* (1984) 68.

<sup>108</sup> African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act [Cap. 10 Laws of the Federation of Nigeria, 1990].

the Commission, contributed to the resultant partial compliance with the Commission's recommendations.<sup>109</sup>

Another factor that influences state compliance with the recommendations of the Commission is whether specific "enabling legislation" has been adopted by a state party to provide for the domestic implementation of treaty body findings. Schmidt explained that "enabling laws" are laws "under which decisions of UN human rights treaty bodies and regional human rights instances are given legal status".<sup>110</sup> The Human Rights Committee in its Annual Report regularly lists the absence of specific enabling legislation as a "crucial factor which often stands in the way of monetary compensation to victims of violations of the Covenant, or the granting of other remedies based on the Committee's views".<sup>111</sup> The Committee furthermore "urges state parties to consider the adoption of specific enabling legislation and, pending that, to make *ex gratia* payments by way of compensation".<sup>112</sup>

In general, no such enabling legislation exists in the domestic law of African countries. In communication 231/99, against Burundi, the Commission recommended that Burundi should "take appropriate measures to allow the

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<sup>109</sup> See the follow-up established to communication no 60/91 *Constitutional Rights Project (in respect of Akamu, Adegga and others) v Nigeria*, 8<sup>th</sup> Annual Activity Report and communication no 87/93 *The Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v Nigeria*, 8<sup>th</sup> Annual Activity Report (See Table A, chapter 2).

<sup>110</sup> Schmidt (2000) 241.

<sup>111</sup> See the *Report of the Human Rights Committee*, Official Records of the General Assembly, 51<sup>st</sup> Session, Supplement No. 40 (A/51/40) par 432. The HRC mentioned that the Government of Austria (in its follow-up reply on the views in case no 415/1990) and the Government of Senegal (in reference to case no 386/1989) argued that the absence of enabling legislation meant that they could not implement the Committee's views. Padilla, specialist on the Inter-American human rights system, in addressing NGOs during the 32<sup>nd</sup> ordinary session of the African Commission, mentioned that one of the legal obstacles hindering implementation is the lack of domestic legislation that provide for the implementation of the decisions of treaty bodies. He referred to Law No. 288 (1996) of Columbia that specifically provided for the implementation of the decisions in the Inter-American system. Dr Padilla addressed NGOs on follow-up to the decisions of the African Commission on 16 October 2002 in Banjul, The Gambia (notes on file with author).

<sup>112</sup> *Report of the Human Rights Committee*, Official Records of the General Assembly, 51<sup>st</sup> Session, Supplement No. 40 (A/51/40) par 432. Peru was the first country to enact enabling legislation in 1985 and undertook thereby to cooperate with international and regional human rights treaty bodies and implement their decisions. Schmidt however reported that Peru "rescinded" the enabling legislation under the government of President Alberto Fujimori in 1996 (Schmidt (2000) 241). In 1996 Columbia also adopted enabling legislation to provide for the implementation of the findings of both the UN Human Rights Committee and the Inter-American Commission and Court on Human Rights (See par 433 of the *Report of the Human Rights Committee*, Official Records of the General Assembly, 51<sup>st</sup> Session, Supplement No. 40 (A/51/40)).

reopening of the file and the reconsideration of the case in conformity with the laws of Burundi and the pertinent provision of the African Charter”.<sup>113</sup> However, due to the fact that Burundi’s domestic legislation did not provide for the reopening of criminal cases, the Commission’s recommendations could not be implemented.<sup>114</sup>

### 3.3.5 The role of the nature of the case

The nature of a case plays a significant part in influencing state compliance. This statement should be understood with reference to the following three issues, namely: (1) Does the case reveal violations of the rights of individuals or are the violations of an institutional nature linked to the system of governance of a state party? (2) Is the subject matter of violations, civil and political or socio-economic in nature? (3) What is the nature of the remedies recommended? The role the answers to these questions plays in influencing state compliance will be explained briefly in this section with reference to the cases where states have fully complied with the Commission’s recommendations, as well as those instances where there was non-compliance. As the nature of the violations is usually reflected in the nature of the remedies recommended, this section starts out by briefly summarising the recommendations formulated in the six cases in which full compliance with the Commission’s findings has been recorded:<sup>115</sup>

- Botswana: The Commission urged the state to “take appropriate measures” to recognise the victim as a citizen by descent and to “also compensate him adequately for the violations of his rights occasioned”.
- Cameroon: It was recommended that Cameroon “draw all the necessary legal conclusions to reinstate the victim in his rights”. In effect this meant that the victim had to be reinstated in the judiciary (as magistrate).
- Nigeria (153/96): The Commission appealed to the state “to charge the detainees or to release them”.

<sup>113</sup> Communication no 231/99 *Avocats Sans Frontieres (on behalf of Gaetan Bwampamye) v Burundi*, 14<sup>th</sup> Annual Activity Report, final paragraph.

<sup>114</sup> *l’Association Burundaise pour la Defense des Droits des Prisonniers* (ABDP) an NGO based in Bujumbura, Burundi, reported that it had lobbied for the implementation of the Commission’s recommendations, but in the absence of any domestic legislation to provide for the reopening of criminal cases, its efforts were to no avail. In order to ensure that criminal cases could in future be reopened on the domestic level, following a decision by an international judicial institution or a quasi-supranational institution, ABDP on 3 September 2004 approached the Parliament of Burundi to amend the existing legislation (Interview with ABDP held by Frans Viljoen at the 36<sup>th</sup> ordinary session of the African Commission in Dakar, Senegal).

<sup>115</sup> See fn 23 above for the full case citations. The information on the remedies recommended is taken from Table A, section 2.2.2 of chapter 2.

- Nigeria (206/97): The Commission urged the state “to release the four journalists”.
- Sierra Leone: No specific recommendations were issued, but the subject matter of the complaint required the state to amend its legislation on court martial to allow for appeal to a higher court.
- Zambia: “Zambia must be required to allow the return of William Steven Banda with a view to making application for citizenship by naturalisation. No evidence was led before the Commission for compensation. No award for compensation is called for. The government of Zambia should be required to return the body of John Lyson Chinula who died in exile in Malawi”.

**(a) Nature of the violation**

These six cases dealt with individuals rather than groups of individuals. In the past, the Commission has dealt with the mass expulsion of West Africans in two separate cases against Zambia and Angola.<sup>116</sup> Due to the number of individuals involved, it was not possible for the states to compensate the individuals for the material losses they suffered as a result of the expulsion. Non-compliance was recorded in the case of Angola.<sup>117</sup> Zambia complied partially, since it amended its law on immigration to prevent a similar violation of the Charter in future, even if it did not compensate the victims.<sup>118</sup> The violations in the cases listed above were also of such a nature that they could be addressed through technical or legal actions on the part of the state. In other words, the facts did not reveal serious or massive violations that could be addressed by the Commission. Violations on an expansive scale are mostly linked to the system of governance or factors such as political instability due to an ongoing civil war and would require deep substantial reform in order to achieve compliance.<sup>119</sup> Even in the cases against Nigeria, which were brought during the military dictatorship

<sup>116</sup> Communication no 71/92 *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia*, 10<sup>th</sup> Annual Activity Report and communication no 159/96 *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Recontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Senegal and Association Malienne des Droits de l'Homme v Angola*, 11<sup>th</sup> Annual Activity Report.

<sup>117</sup> Angola did not adopt legislation like Zambia to prevent a similar violation of the Charter in future and as a result it appear from media reports that West African were again expelled in violation of article 12(4) of the African Charter in 2004. See the discussion in fn 26 of chapter 2.

<sup>118</sup> See fns 23 and 24 of chapter 2.

<sup>119</sup> See fn 29 above for a list of communications where the Commission found that the facts revealed serious or massive violations and did not make any recommendations, and as a result of the fact that substantial reform would need to be brought about to comply there has also been non-compliance in these cases.



of General Abacha, the implementation of the recommendations that had been complied with did not affect the system of governance in place as they did not deal with for example the amendment of decrees but rather with the release of a few individuals.<sup>120</sup> Most of the remedies issued against Nigeria that were not implemented, addressed problems that could only be implemented after a regime change - problems that were inherent to the system of governance.<sup>121</sup>

## (b) Subject matter of the violations

A distinction has been drawn based on subject matter between three “generations” of human rights, namely, first generation rights (civil and political rights), second generation rights (economic, social and cultural rights) and third generation rights (collective rights such as the right to development and environmental rights).<sup>122</sup> From an analysis of the violations found in the six cases where states have complied with the Commission’s recommendations, it is apparent that the violations dealt mostly with first generation rights, in other words, civil and political rights, and in particular fair trial rights.<sup>123</sup> Another system for classifying human rights, as first articulated by Shue, is according to the obligations they impose on state parties.<sup>124</sup> According to this system of classification, human rights impose obligations on a state to “respect”, “protect” or “fulfil” a right. When the state is under an obligation to “respect” a right, it is obliged to refrain from taking any action that would result in the violation of a right. Under the obligation to “protect”, a state must ensure that it takes certain actions such as the adoption of legislation for instance to protect an individual from third

<sup>120</sup> See for instance communication 101/93 *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*, 8<sup>th</sup> Annual Activity Report. The Commission recommended that the decree which violated the provisions of the Charter should be annulled. Nigeria did not comply, the decree stayed in force until the military dictatorship came to an end (See the discussion in fn 19 of chapter 2).

<sup>121</sup> For example it was reported in the follow-up to communication 102/93 *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, 12<sup>th</sup> Annual Activity Report, that some of the detainees who were detained for protesting against the annulment of the elections of 12 June 1993 and whom the Commission ordered should be released were only released after the death of General Abacha (See Table A, chapter 2).

<sup>122</sup> For a detailed discussion on the categorisation of human rights see, A Rosas & M Scheinin ‘Categories and beneficiaries of human rights’ in R Hanski & M Suksi *An Introduction to the International Protection of Human Rights – A Textbook* (1997) 49, 54.

<sup>123</sup> It is also apparent that the right to fair trial rights (article 7 of the Charter) was the subject of violation in five of the six cases (Cameroon, Zambia, Nigeria (two cases) and Sierra Leone).

<sup>124</sup> H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980). The tripartite division of government obligations has since been echoed by many authors and also by the UN Committee on Economic, Social and Cultural Rights *The Right to the Highest Attainable Standard of Health*, General Comment 14, UN Doc.E/C.12/2000/4, para 33.

parties. Lastly, the obligation to “fulfil” places a positive obligation on a state. The state has to take certain actions towards the realisation of a specific outcome.

The classification of rights according to the obligations they place on state parties is best illustrated in the *SERAC* case.<sup>125</sup> An example of the obligation to “respect” is the Commission’s recommendation that Nigeria should stop all attacks on Ogoni communities.<sup>126</sup> An example of the obligation to “protect” is the Commission’s recommendation to the state to conduct investigations into the human rights violations identified in the case and to prosecute those responsible.<sup>127</sup> Lastly, an example of the state’s obligation to “fulfil” is embodied in the Commission’s recommendation requesting the government to undertake a comprehensive clean-up of lands and rivers damaged by oil operations.<sup>128</sup>

In terms of compliance, state parties seem to find it easier to “respect” rights,<sup>129</sup> than to “protect”<sup>130</sup> or to “fulfil” rights.<sup>131</sup> From an analysis of the six cases where full compliance was recorded, it is evident that in none of these cases were the state parties under an obligation to “fulfil”. In other words, the subject matter of the cases analysed dealt mostly with obligations to “respect” and “protect” which it seems states find easier to comply with.<sup>132</sup>

### (c) Nature of the remedies

The nature of the remedies made by the Commission is closely linked to the nature of the violations found by the Commission. Therefore, some of the comments made in reference to the nature of the violations also holds true for the remedies issued. In

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<sup>125</sup> Communication no 155/95 *the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, 15<sup>th</sup> Annual Activity Report, final paragraph. Partial compliance was recorded in this case.

<sup>126</sup> As above.

<sup>127</sup> As above.

<sup>128</sup> As above.

<sup>129</sup> Even in cases where there was only partial compliance it is usually where the state was prepared to meet its obligations to “respect” by for example releasing victims from prison. See communication no 148/96 *Constitutional Rights Project v Nigeria*, 13<sup>th</sup> Annual Activity Report, see fn 33 chapter 2 (the state was prepared to release the prisoners to stop the violation of their rights, but not to compensate them).

<sup>130</sup> In the case of Sierra Leone discussed above the state amended its legislation to guarantee fair trial rights in future for cases appearing in front of the Court Martial in Sierra Leone. This is an example of a state fulfilling its obligation to “protect” which is clearly linked to civil and political rights.

<sup>131</sup> The obligation to “fulfil” is linked to socio-economic rights.

<sup>132</sup> In other words, states find it easier to implement obligations arising from a violation of civil and political rights than socio-economic rights.

communication nos 48/90, 50/91, 52/91 and 89/93 (joined) against Sudan, the Commission concluded its decision by stating that “to change so many laws, policies and practices will off course not be a simple matter” while also noting “that the situation has improved significantly”.<sup>133</sup> It follows that recommendations involving the amendment of legislation are usually associated with a more extended domestic procedure involving the legislature of a state. In communication no 211/98 against Zambia, the Commission urged the state to bring “its laws and Constitution into conformity with the African Charter”.<sup>134</sup> This decision was adopted in the 14<sup>th</sup> Annual Activity Report and is one of the cases where partial compliance has been recorded, since a process to amend the Zambia Constitution has commenced in 2003 but is yet to be finalised.<sup>135</sup> Recommendations seeking amendments of the Constitution of a country is clearly a process that would involve more stakeholders than an amendment to other domestic legislation, and as such would take place over a longer period of time.

Padilla has commented that it is apparent from the experiences in the Inter-American regional human rights system that states are sometimes more willing to pay compensation than to implement remedies of a political nature or remedies involving the amendment of domestic legislation.<sup>136</sup> In the Inter-American system, there is however a system in place to determine the amount of compensation to be awarded to a victim.<sup>137</sup> In the African system there is no such system. Commissioner Dankwa has observed the following, in reference to the *Mekongo* case:<sup>138</sup>

The Commission took the view that the complainant deserved to be paid compensation. It did not, however, have the means to assess the quantum of damages which should be offered to Louis Emgba Mekongo.

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<sup>133</sup> Paragraph 83.

<sup>134</sup> Final paragraph of the communication.

<sup>135</sup> See Table A, chapter 2.

<sup>136</sup> In listing factors that could affect state compliance with international agreements, Gutto referred to a “lack of capacity in the political, legal/technical or economic sense on the part of a state, thus leading to impossibility to comply” (Gutto (2002) 5). Padilla also referred to the impossibility of states to comply with the findings of treaty bodies due to a lack of resources. Comments made during an address to NGOs at the 32<sup>nd</sup> ordinary session of the African Commission in Banjul, The Gambia.

<sup>137</sup> With the entry into force of the 1997 version of the Inter-America Court on Human Rights’ Rules of Procedure, provision was made for the first time in article 23 to provide that the representatives of the victims or their next of kin may independently submit their own arguments and evidence during the reparations stage of the Court’s proceedings. The Court therefore holds separate hearings to determine the quantum of damages.

<sup>138</sup> EVO Dankwa ‘The African system for the protection of human rights: The tasks ahead’ (1998), page 4, paper prepared for the National Human Rights Commission of Nigeria, African Human Rights Day Celebration, Nigeria Institute of International Affairs, Victoria Island, Lagos, Nigeria (on file with author).

In the absence of a system to determine the quantum of damages, the Commission referred the victim back to the domestic system, where he had already awaited his appeal to be heard for 12 years, to determine the quantum “under the law of Cameroon”.<sup>139</sup> It comes as no surprise that the state did not comply with the Commission’s recommendation. The state argued that it had experienced difficulties with locating the victim to compensate him.<sup>140</sup> Dankwa criticises the Commission for the lack of a policy to determine compensation. He questions whether the Commission expected the victim to return to it, if he had experienced difficulties securing compensation in the domestic system.<sup>141</sup>

The lack of a policy according to which to determine the quantum of damages in awarding compensation to victims is definitely a factor that has influenced state compliance negatively in the African system. An attempt was made to follow up on six cases where the Commission had recommended the payment of compensation to victims, but without stipulating an amount.<sup>142</sup> In none of these cases has compensation been paid. The Botswana case is listed as an example of full compliance because, as it was explained in the previous chapter, negotiations are in a final stage and compensation will most probably be paid to the victim and his family.<sup>143</sup> However, since the Commission did not stipulate an amount of compensation to be paid, the process was wholly dependent on negotiations between the state party and NGOs acting on behalf of the victim, which delayed the process over a long period of time.<sup>144</sup>

<sup>139</sup> Final paragraph of the communication no 59/91 *Embga Mekongo Louis v Cameroon*, 8<sup>th</sup> Annual Activity Report.

<sup>140</sup> Comments made by the state party in representing its state report at the 31<sup>st</sup> ordinary session of the Commission, in Pretoria, South Africa.

<sup>141</sup> “Come and do what before the Commission for a second time?”, is not an unreasonable question for Louis Embga Mekongo to ask” (Dankwa (1998) 4).

<sup>142</sup> (1) Communication nos 54/91, 61/91, 98/93, 164/97-196/97, 210/98 *Malawi African Association v Mauritania, Amnesty International v Mauritania, Ms Sarr Diop, Union Interfricaine des Droits de l’Homme and RADDHO v Mauritania, Veuves et Avants-droit v Mauritania, Association Mauritanienne des Droits de l’Homme v Mauritania*, 13<sup>th</sup> Annual Activity Report. (2) Communication no 97/93 *John K Modise v Botswana*, 14<sup>th</sup> Annual Activity Report. (3) Communication no 218/98 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*, 14<sup>th</sup> Annual Activity Report. (4) Communication no 155/96 *The Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v Nigeria*, 15<sup>th</sup> Annual Activity Report. (5) Communication nos 222/98 and 229/98 *The Law Offices of Ghazi Suleiman v Sudan*, 16<sup>th</sup> Annual Activity Report. (6) Communication no 236/2000 *Curtis Francis Doebbler v Sudan*, 16<sup>th</sup> Annual Activity Report.

<sup>143</sup> See Table A, chapter 2.

<sup>144</sup> Interights, a London-based NGO negotiated with the government on behalf of the victim (See Table A, chapter 2).

### 3.3.6 The role of victims and NGOs

Victims themselves have played an insignificant role in ensuring follow-up to findings involving them.<sup>145</sup> This is probably understandable given that most cases filed with the Commission took several years to finalise.<sup>146</sup> By the time the Commission made its findings known the victims could no longer be traced.<sup>147</sup>

Mostly, however, the NGOs that have submitted communications on behalf of victims played a more significant role in follow-up.<sup>148</sup> The absence of any follow-up policy resulted in a situation where NGOs that filed communications with the Commission also had to take on the role of follow-up. NGOs have been instrumental in applying pressure on and lobbying states at the domestic and international level, so as to influence state compliance.<sup>149</sup> State compliance was secured in the Botswana case

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<sup>145</sup> In the limitations to this study it was noted that follow up could not be established with any of the victims of human rights violations, except where communications were filed by NGOs on behalf of other NGOs. Apart from this fact it could not be established through any other sources that victims have played a significant role in influencing states to comply with the Commission's findings. Victims such as the widows in the communication decided against Mauritania did work closely with NGOs, such as the Institute for Human Rights and Development in Africa (IHRDA), that have filed the communications on their behalf in supporting their efforts to ensure state compliance (joint communication nos 54/91, 61/91, 98/93, 164/97-196/97, 210/98 *Malawi African Association v Mauritania*, *Amnesty International v Mauritania*, *Ms Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO v Mauritania*, *Collectif des Veuves et Avants-droit v Mauritania*, *Association Mauritanienne des Droits de l'Homme v Mauritania*, 13<sup>th</sup> Annual Activity Report). (The author was present as meetings held in Bajul, The Gambia, in November 2002, between some of the victims in this case and IHRDA and other Mauritanian NGOs to strategise on ways to lobby the government to implement the Commission's recommendations. This decision has not been implemented.)

<sup>146</sup> From a survey of the 44 communications investigated in chapter 2 (Table A) it is evident that communications never took less than two years and on average much longer even as long as eight years in the case of *Modise* (full citation fn 23 above) to be finalised.

<sup>147</sup> See for instance the follow-up established in communication 59/91 *Embga Mekongo Louis v Cameroon*, 8<sup>th</sup> Annual Activity Report. In this case the government reported that it could not locate the victim to compensate him (comments made during the examination of Cameroon's state report at the 31<sup>st</sup> ordinary session of the Commission).

<sup>148</sup> Most of the communications filed in the African system have been filed by NGOs on behalf of victims (See Table A, chapter 2).

<sup>149</sup> In the communication against Zambia (case of *Banda and Chinula*), filed by Amnesty International, it was reported that due to the political nature of the case there was a lot of international pressure on the government to comply. In the *Modise* case against Botswana, a London-based NGO called Interights undertook comprehensive follow-up efforts to secure implementation of the Commission's findings. (See Table A, chapter 2 for a detailed discussion of the follow-up steps taken by Interights to secure state compliance). In the case against Sierra Leone, it was one of those instances where the Commission did make an attempt at follow-up through a promotional mission to the state. Implementation of the Commission's recommendations was not however the result of only the Commission's efforts, but

mainly as a result of the follow-up efforts of the NGO Interights.<sup>150</sup> In the *Zamani Lakwot* case,<sup>151</sup> where partial compliance was recorded, the role fulfilled by NGOs in pressurising the state to comply through a widespread advocacy campaign was noted as a deciding factor in commuting the sentences of the victims from “death by hanging” to life imprisonment.<sup>152</sup> It can therefore be concluded that international pressure and internal pressure play an important role in influencing state compliance.<sup>153</sup> It has so far been up to NGOs to apply pressure on states to comply. This study will recommend a follow-up policy for the African system that will retain this role for NGOs, but will also extend the role of pressurising states through media reports and advocacy campaigns to the African Commission.<sup>154</sup>

### 3.4 Conclusion

From an analysis of the factors that influence state compliance with the recommendations of the African Commission it is evident that a combination of factors rather than a specific factor plays a role in cases where states comply. It is further clear that not all the factors identified above can be incorporated by this study into recommendations to improve state compliance.<sup>155</sup> Some of the factors are legal in nature some could be blamed on the ineffective functioning of the Commission, and may be addressed comparatively easily. Other factors are of a political nature, as they relate to the system of governance in place in a country or an ongoing civil war in a state. These deeply embedded problems cannot be addressed by legal means, but would require substantial political reform. It could be argued that the

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according to Thomas MacLean, member of the NGO Forum of Conscience that filed the communication, implementation could also be attributed to “the mobilisation of civil society within Sierra Leone” (Interview held with Thomas Maclean during the ‘Workshop on Human Rights Litigation in Africa’ held in Pretoria from 29 to 1 May 2002). (See fn 23 above for full case citations).

<sup>150</sup> See fn above and discussion in Table A, chapter 2.

<sup>151</sup> Communication no 87/93 *The Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v Nigeria*, 8<sup>th</sup> Annual Activity Report.

<sup>152</sup> Constitutional Rights Project (CPR) attributed the partial compliance secured in this case to the communication of the Commission as well as the wide spread advocacy campaign run by CPR. According to CPR, there was a lot of pressure on the government to comply with the Commission’s findings (Interviews held with Anges Olowu, CPR member at the CPR offices in Lagos, Nigeria on 28 October 2002 and Kolawole Olaniyan (previously a member of CPR) during the 33<sup>rd</sup> ordinary session of the Commission).

<sup>153</sup> Paulson recorded a similar finding in reference to state compliance with the final judgments of the ICJ, he held as follows: “International pressure to comply played a prominent role in many states’ decisions to implement the judgments, as did internal political pressure” (Paulson (2004) 459).

<sup>154</sup> See discussion in section 3.3.3 (d) above on the role that the African Commission should play in the publication of its findings.

<sup>155</sup> See chapter 7.

strengthening of the AU will address at least some of these factors, but these are issues which are within the powers of members states and cannot be addressed in the study through legal solutions.

Not addressing the political issues might lead some to pose the question whether the factors that influence compliance which can be legally addressed will make any difference to the level of state compliance with the African Commission's recommendations. Firstly, in answer, the point must be made that the AU only replaced the OAU in 2002. Most of the cases to which follow-up was established in the previous chapter were adopted under the auspices of the OAU. Since the AU seems to address some of the OAU's weaknesses (at least in theory), it is hoped that some of the political factors that impacted negatively on compliance will be addressed in future.<sup>156</sup> Secondly, the African Commission and NGOs should be encouraged to lobby the AU to pressurise state parties where political factors such as those identified above prevent compliance. Therefore, increased interaction between the role players should be encouraged. But even if this is not the case, there are still a number of factors that hold persuasive power even with autocratic governments and which could result in compliance. These are briefly summarised here.

The factors that negatively affect the institutional legitimacy of the African Commission and, as a result, also affect the persuasive force or authority of its findings, relate to its composition and manner in which it executes its mandate. These are issues that could be addressed within the Commission and through NGO lobbying. Some of these issues, such as regional representation, have indeed improved.<sup>157</sup> The Commission should adopt a resolution on the legal status of its findings, as it already views its findings as binding as is clear from its jurisprudence. The adoption of a resolution will give legal certainty to state parties.<sup>158</sup> Improving the quality of the Commission's findings is a matter of clarifying the Commission's practice in finalising individual communications, by ensuring that the Commission consistently accompanies its finding with detailed recommendations.<sup>159</sup> Another factor that was found to have played a significant role in influencing state compliance is pressurising state parties both on an international level and domestic level. In this regard, NGOs should continue playing the role they have played thus far. The

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<sup>156</sup> See section 3.3.1 above.

<sup>157</sup> See section 3.3.3 (a) above.

<sup>158</sup> See section 3.3.3. (b) above.

<sup>159</sup> See section 3.3.3 (c) above.

Commission should take on a definite role in publicising its findings and the steps states have taken to implement it. Finally, from an overview of all the factors that do not fall within the ambit of state parties, it is clear that these are all factors that could form part of a comprehensive follow-up policy in the African system. In the following chapter, the possibility of incorporating a follow-up policy into the existing mandate of the African Commission is explored in more detail, while making reference to the factors identified here.