

CHAPTER 4

FOLLOW-UP THROUGH THE AFRICAN COMMISSION'S PROMOTIONAL AND PROTECTIVE MANDATE

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4.1 Introduction

The African Charter on Human and Peoples' Rights (African Charter or Charter) was adopted in 1981 by the Assembly of Heads of State and Government (AHSG) of the Organisation of African Unity (OAU).¹ As the African Charter was adopted at a stage when state sovereignty was high on the agenda of all OAU member states, it resulted in the adoption of a Charter that did not envisage a strong human rights enforcement mechanism.² The African Charter established the African Commission on Human and Peoples' Rights (African Commission or Commission) as the body mandated to implement the human rights norms guaranteed in the Charter, but the Commission lacked enforcement powers.³ Under the Charter, the Commission is established to fulfil both a promotional and protective mandate.⁴ The Commission has developed various practices over the years to strengthen its promotional and protective functions.⁵

The Commission has not, however, adopted any practices to strengthen its powers of implementation. It has no follow-up mechanisms or policy in place to monitor state compliance with its findings on individual communications.⁶ The African Commission, in reflecting on its activities, has in the past indicated that the lack of state compliance with its recommendations was "one of the major factors of the

¹ O.A.U. Doc.CAB/LEG/67/3 rev.5.

² The African Charter is ratified by all member states of the African Union (this was true even in the time of its predecessor the Organisation of African Unity). Hansungule highlights the lack of teeth in the treaty as one of the reasons for ratification across the board (See e.g. M Hansungule 'The African Charter on Human and Peoples' Rights: A critical review' (2000) 8 *African Yearbook of International Law* 267).

³ The African Commission is established under article 30 of the African Charter. The African Charter was adopted on 11 October 1986 and in 1987 the African Commission was established in accordance with the Charter.

⁴ See e.g. article 45 and article 55 of the Charter.

⁵ For instance, the Commission developed practices around the issuing of interim measures and the appointment of special rapporteurs, both functions which were not explicitly provided for in the Charter. These practices are discussed in more detail in sections 4.4.1.3 and 4.4.2.2 below.

⁶ Eno commented that "[u]nlike other regional and global human rights bodies, the Commission has not developed any follow-up mechanism to ensure implementation of its recommendations ... This has been very frustrating especially for the victims who have to pursue the execution of the decisions on their own. Because there is no pressure from the Commission, states have tended to turn a blind eye to the recommendations and a deaf ear to the victims pleas for compliance" (R Eno 'The place of the African Commission in the new African dispensation' (2002) 11 *African Security Review* 67). See also 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

erosion of the Commission's credibility".⁷ Therefore, even though the Commission is not oblivious to the fact that there are no follow-up mechanisms or systems in place to monitor state compliance with its recommendations, it has yet to adopt a coherent strategy in this regard. This study has established that there is an overall lack of state compliance with the recommendations issued by the Commission under its individual communications procedure.⁸ Based on this finding, an attempt was made to identify the factors that influence state compliance under the African system.⁹ It was found that some of the factors that influence state compliance are directly related to the treaty body, in this case the African Commission.¹⁰ Against this background, this chapter analyses the promotional and protective mandate of the African Commission. In order to strengthen the enforcement powers of the Commission, the *lacunae* left by the lack of a follow-up policy have to be addressed while taking into account the factors that influence state compliance.

author) and R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 21.

⁷ The first time the Commission noted that state parties did not comply with its recommendations was at its 22nd ordinary session held in November 1997 in Banjul, The Gambia, where it was seized by its Secretariat of the issue of non-compliance. The Secretariat highlighted the absence of compliance, save for one communication no 39/90 against Cameroon, in a document entitled *Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach*, DOC/OS/50b(XXIV). Even though the attached *Draft Resolution on the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights* was never adopted the background document is referred to in this study as it represents the only official documentation by the Secretariat of the Commission on the status of state compliance with the Commission's recommendations. For a discussion on these two documents, see F Ouguerouz *The African Charter on Human and Peoples' Rights – A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 657. In the 11th Annual Activity Report, covering the November 1997 Session, the Commission reflected further on the issue of non-compliance to its recommendations and noted that not only did it affect its credibility but that it could also probably be to blame for the reduction in the number of communications submitted to it. See section VIII Protective Activities, 11th Annual Activity Report of the African Commission adopted by Decision AHG/DEC.126 (XXXIV) of the OAU AHSG, June 1998. At a later occasion, in September 2003, during a retreat organised by the OHCHR in Addis-Ababa for purposes of evaluating the functioning of the African Commission, problems of non-compliance by state parties to the recommendations of the Commission was highlighted once more. The retreat also identified the lack of a follow-up system to ensure that decisions and recommendations of the Commission are complied with as one of the challenges facing the African Commission (*Report of the Retreat of Members of the African Commission on Human and Peoples' Rights (ACHPR) facilitated by the Office of the High Commissioner for Human Rights*, Addis-Ababa, Ethiopia, 24-26 September 2003, page 4. Available at <http://www.nhri.net/Africa.htm>. Accessed: 13 November 2003).

⁸ See chapter 2.

⁹ See chapter 3.

¹⁰ See section 3.3.3 of chapter 3.

In this chapter, the aim is to establish how the Commission, in fulfilling its existing mandate, could incorporate a fully-fledged follow-up procedure. The Commission has in the past made some attempts at follow-up, but there has been no consistency in these efforts and as such it has not become an established practice of the Commission. The Commission's past attempts at follow-up are also analysed here in light of the potential role it could play as part of an established practice and policy on follow-up.

Within the African regional human rights system the Commission has established relationships with Non-Governmental Organisations (NGOs), National Human Rights Institutions (NHRIs) and various organs of the African Union. The potential role that these actors could fulfil as part of a comprehensive follow-up mechanism is also explored briefly. Reference is further made to those aspects of the Commission's practice and the interaction between the Commission and these role players that have been identified as influencing state compliance.¹¹

4.2 African Charter and Rules of Procedure

The drafting of the African Charter on Human and Peoples' Rights (African Charter) was launched in 1979 with Decision 115 (XVI) of the Assembly of Heads of State and Government (AHSG) at its sixteenth ordinary session held in Monrovia, Liberia.¹² The African Charter, in the format in which it was subsequently adopted in 1981, covers not only most of the rights included in other international human rights instruments but went further than other instruments by for the first time listing civil and political rights as being on par with economic, social and cultural rights.¹³ Other distinguishing features of the African Charter include references to African traditional values,¹⁴ specific duties for individuals¹⁵ and the fact that the Charter - unlike most other international human rights instruments - does not provide for derogation from any clauses in times of emergency. These features aside, the African Charter has

¹¹ Factors that influence state compliance have been identified in reference to not only the treaty body but also the African Union, state parties and NGOs. See chapter 3.

¹² See Preamble to the African Charter. See UO Umozurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 908, for details of the drafting history.

¹³ See the Preamble which states as follows: "Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

¹⁴ See the Preamble and articles such as 17 and 18 of the African Charter.

often been described as the weakest regional human rights treaty¹⁶ due to factors such as the existence of claw-back clauses,¹⁷ and more so due to the lack of any real enforcement powers.¹⁸

The Commission has adopted Rules of Procedure to give effect to the procedural provisions of the African Charter, and also to clarify and sometimes even to go further than the provisions of the African Charter.¹⁹ However, neither the African Charter nor the former or revised Rules of Procedure provide for follow-up procedures to monitor the status of state compliance with the Commission's recommendations.

Therefore, the first step towards the establishment of a follow-up mechanism should be to address this procedural *lacuna*. There are three ways to go about creating such a new mechanism within the framework of the African human rights system: an

¹⁵ Chapter II, articles 27-29.

¹⁶ See in this regard: M Mutua 'The African human rights system in a comparative perspective' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 11; CE Welch *Protecting Human Rights in Africa – Roles and Strategies for Non-Governmental Organisations* (1995) 148 and GJ Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681.

¹⁷ Examples of claw-back clauses can be found in articles such as 8, 9 and 10 of the African Charter where rights are guaranteed on the one hand but restricted on the other hand by expressions such as "subject to law and order", "within the law" and "provided that he abides by the law". For more on claw-back clauses see Welch (1995) 148; M Hansungule (2000) 279; F Viljoen 'Overview of the African regional human rights system' in C Heyns *Human Rights Law in Africa 1998* (2001) 133 and Ougergouz (2003) 95, 96, 429-437. The African Commission has however interpreted these claw-back clauses in such a way as to not restrict the rights guaranteed in the Charter. See for instance the Commission's observations in communication no 101/93 *Civil Liberties Organisation (in respect of the Nigerian Bar Association v Nigeria*, 8th Annual Activity Report. The Commission concluded that Nigeria could not adopt domestic legislation that violates the rights guaranteed in the Constitution or international human rights instruments even though the article of the Charter in question included a claw-back clause. In a later decision in communication no 212/98, *Amnesty International v Zambia*, 12th Annual Activity Report, the Commission held as follows: "The deportation order also stated that the deportees were considered a 'danger to peace and good order to Zambia'. The Commission is of the view that the 'claw-back' clauses must no interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter" (at par 42).

¹⁸ See GJ Naldi & K Magliveras 'The proposed African Court on Human and Peoples' Rights: Evaluation and comparison' (1996) 8 *African Journal of International and Comparative Law* 944 and Murray (2000) 22.

¹⁹ The Commission developed Rules of Procedure under article 42(2) of the African Charter. The African Charter for instance did not make direct provision for the issuing of provisional measures while the African Commission provided for such measures specifically in rule 111 of its Rules of Procedure. The African Commission first adopted Rules of Procedure on 13 February 1988. The Commission adopted revised Rules of Procedure on 6 October 1995.

amendment of the African Charter, the adoption of a Protocol to the Charter or the amendment of the Rules of Procedure.

The first and the most unlikely avenue to pursue, due to the difficulties associated with such a process, would be to amend the text of the African Charter by the insertion of an additional clause. Article 68 of the African Charter provides that the Charter can only be amended upon the written request by a state party to the Secretary General of the OAU.²⁰ Article 68 further provides as follows:²¹

The Assembly of Heads of State and Government may only consider the draft amendment after all the States Parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States Parties. It shall come into force for each state which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

Following the article 68 procedures may therefore not have the desired effect. Not only will a state party have to be lobbied to sponsor the amendment, but the process would be in the hands of state parties and the danger exists that they would water down any draft follow-up mechanism. Furthermore, from the last sentence of article 68, it seems that the amendment would not come into force for all states at once, after its approval by a majority of states parties, but it would only be of force in those states that accept the amendment in accordance with their constitutional procedure. There is thus a possibility that those states that have frequently not complied with the recommendations of the Commission could have the opportunity to continue doing so even if a follow-up mechanism is included by amendment in the African Charter. Such an interpretation would be in line with article 40(4) of the Vienna Convention on the Law of Treaties, which stipulates as follows:²²

The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

²⁰ This role is now fulfilled by the Chairperson of the African Union.

²¹ Article 68 of the African Charter.

²² Article 30(4)(b): “When the parties to the later treaty do not include all the parties to the earlier one ... as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations”.

The establishment of a follow-up mechanism through an amendment to the African Charter therefore does not seem to be the best avenue to pursue due to the reasons mentioned above. Another option would be to draft a protocol to the African Charter.²³ The drafting of protocols to either strengthen the African Charter or to elaborate on rights only briefly stated in the Charter is not foreign to the African human rights system. In the past, two protocols to the Charter were drafted to strengthen women's rights on the continent and to establish an African Court on Human and Peoples' Rights.²⁴ However, the drafting and eventual ratification of an additional protocol to the Charter could also prove problematic if the lessons learned from the women's and Court protocol's are anything to go by.²⁵ On average, it takes about nine to ten years to implement a Protocol.²⁶ This could prove problematic where the aim is to create a mechanism to ensure that states comply with the recommendations of the African Commission by granting victims of human rights abuses the relief they came to seek from the Commission in the first place. Apart from the fact that the drafting of an additional protocol could prove to be a lengthy

²³ Article 66 of the African Charter provides for the adoption of special protocols to supplement the provisions of the Charter.

²⁴ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, OAU Doc CAB/LEG/66.6, was drafted due to the insufficient protection that article 18(3) of the African Charter lend to women. For further reading on the Women's Protocol see MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court) came into force on 25 January 2004 to strengthen the regional human rights system. A detailed discussion on the African human rights court will follow in chapter 6.

²⁵ The Assembly of Heads of States and Government of the OAU at its 31st ordinary session in June 1995 already mandated the African Commission to draft a Protocol on the Rights of Women in Africa. Resolution AH6/Res240(XXXI). The first draft only appeared two years later in 1997 and then it took another six years before the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was finally adopted on 11 July 2003 at the Second Ordinary Summit of the AU. Assembly/AU/Dec.19(II). The Protocol will enter into force a month after the deposit of the fifteenth instrument of ratification. As of 23 June 2004 only one country, the Comoros, has ratified the Protocol whilst 29 countries have signed it. (For a list on the status of ratification visits <http://www.africa-union.org/home/Welcome.htm>) It may therefore be years before fifteen ratifications are deposited and the Protocol can enter into force. The drafting, ratification and entry into force of the Protocol on the African Court also took a long time to realise, roughly nine years in total. The OAU Assembly of Heads of State and Government in June 1994 first adopted a resolution, calling for the establishment of an African Court on Human Rights. The drafting process took another four years before the Protocol was adopted by the AHSG in June 1998. OAU/LEG/MIN/AFCHPR/PROT(I) Rev 2. Fifteen ratifications were required for the entry into force of the Protocol and it took five years to gather the requisite number of ratifications. The Comoros was the fifteenth country to deposit their instrument of ratification on 26 December 2003. See http://www.achpr.org/english/news/press_court_en.html. Date accessed: 23 June 2004.

process, it has also proved to be a process through which original drafts aimed at strengthening the system were weakened with every redraft due to pressure from state parties that have to approve the final draft.²⁷

In light of these obstacles, the best method for establishing a follow-up mechanism would be through innovative additions to the Rules of Procedure of the African Commission. In terms of article 42(2) of the African Charter and rule 121 of the Rules of Procedure, the African Commission may amend its Rules without obtaining any prior authorisation from the AHSG, for example. It can therefore sidestep the influence of state parties that would clearly be present if the Charter provisions were either amended or if it was strengthened through an additional protocol. The Commission has in the past provided for measures in its Rules of Procedure that were not pertinently mentioned in the African Charter but that were necessary to enable the Commission to fulfil its mandate to the fullest.²⁸ In creating a follow-up mechanism through its Rules of Procedure, the African Commission would in effect

²⁶ As above.

²⁷ Compare for instance the provisions in the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000, with the version of the Protocol that was eventually adopted by the AHSG on 11 July 2003. The Draft Protocol of September 2000 still had to be presented to member states of the OAU. The conclusion can therefore be drawn that some of the changes to the provisions of the final text that was adopted in July 2003 and which provide less protection to women were amended as a direct result of submissions from member states. The following amendments can be highlighted in this regard: 1) In terms of article 6(d) of the Draft Protocol member states undertook to grant asylum to "those women and girls who are at risk of, have been, or are being subjected to harmful practices and all other forms of intolerance". The corresponding article in the final Protocol, article 5(d) merely obliges member states to protect women in such circumstances and no longer acknowledge it as a ground for asylum. 2) In the Draft Protocol polygamy was prohibited in article 7(c) whilst in the final Protocol monogamy is encouraged but there is no prohibition on polygamy [article 6(c)]. The drafting process of the Protocol to establish the Court seem to have followed a similar route with the Nouakchott draft of April 1997 being a weaker version of its predecessor the Cape Town Protocol adopted in September 1995. Two amendments should be mentioned here to illustrate how the Protocol was weakened with each redraft: 1) The first draft Protocol required merely 11 ratifications to enter into force while the Nouakchott Protocol raised the number of ratifications required to 15. 2) In terms of the first draft individuals had direct access to the Court once their country ratified the Protocol. This section was amended to require state parties that ratify the Protocol to make a separate declaration to accept the competence of the Court to receive complaints directly from individuals. This requirement was retained in article 34(6) of the final Protocol as adopted by the AHSG in 1998 (See F Viljoen (2001) 199).

²⁸ See for instance rule 111 that provides for the issuing of provisional measures to avoid irreparable damage to victims even though there is no such provision in the African Charter. Or rule 119(4) that enables the Commission to act on the evidence before it in deciding on the merits of an individual communication should a state party fail to adhere to the specified time limits. This provision in the Commission's rules

move closer to fulfilling its protective mandate in terms of articles 55 to 59 of the African Charter.²⁹

In terms of articles 60 and 61 of the African Charter, the African Commission may draw inspiration and take into consideration provisions from international law on human and peoples' rights. In amending its Rules of Procedure, to provide for follow-up with its recommendations, the African Commission may therefore draw inspiration from the Inter-American Commission on Human Rights and the United Nations Human Rights Committee. Both these human rights bodies amended their Rules of Procedure to provide for follow-up procedures.³⁰

In summary, it has been shown that neither the African Charter nor the Rules of Procedure of the African Commission provides for a follow-up mechanism to the recommendations of the Commission. The fact that this *lacuna* must be addressed and what the content of such a mechanism should be are not at issue here. The aim is rather to indicate that there are three avenues to establish a follow-up mechanism. For the reasons set out above, the most efficient way to go about addressing this enforcement gap would be for the Commission to amend its Rules of Procedure. In the course of discussions that will follow, the use of existing mechanisms within the African human rights system to achieve follow-up will be explored. In the end, it will still be necessary to include existing and new avenues for follow-up among the norms laid down for the functioning of the Commission.

²⁹ was clearly inserted to assist the Commission in fulfilling its mandate in considering individual communications in terms of articles 55 to 59 of the African Charter. Articles 55 to 59 of the African Charter deals with the consideration of "other" communications, the procedure regularly followed by the Commission in considering individual communications.

³⁰ In 1990 the Human Rights Committee (HRC) decided to adopt measures aimed at the improvement of state compliance with its views, formulated in terms of the Optional Protocol to the International Covenant on Civil and Political Rights. A/45/40, Vol. II, HRC Annual Report, 1990, Annex XI. The HRC amended its Rules of Procedure to provide for a follow-up mechanism. See rules 95 and 97 of the Committee's Rules of Procedure. Almost ten years after the HRC's adoption of a follow-up procedure the Inter-American Commission on Human Rights followed suit and in December 2000 at its 109th Special Session, the Commission adopted new Rules of Procedure that took effect on 1 May 2001. These new Rules provided amongst other measures for a follow-up procedure to its friendly settlement agreements and recommendations. See rule 46 of the Inter-American Commission's new Rules of Procedure.

4.3 Composition and organisation of the African Commission and the Secretariat of the Commission

The African Commission is mandated to promote and protect human and peoples' rights in Africa.³¹ The African Commission's headquarters is based in Banjul, The Gambia, where the Secretariat of the Commission is located to support the Commission in the effective discharge of its functions.³² It has been argued in this study that the composition and organisation of the African Commission and its Secretariat are amongst the factors that influence state compliance with the Commission's recommendations.³³ The institutional legitimacy of a treaty body stems from the integrity of the body which in turn influences the persuasive authority that a treaty body's findings have with state parties.³⁴

The African Commission consists of eleven members elected through secret ballot by the Assembly of the African Union (previously by the AHSG of the OAU).³⁵ Each state party to the African Charter can nominate a maximum of two candidates, but the Commission may not include more than one national from the same state.³⁶ Members are elected for a six-year period after which they are eligible for re-election.³⁷ The only criteria stipulated in the African Charter to guide state parties in nominating candidates to the African Commission state that members should be "chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights" and further that particular consideration would be given to persons

³¹ Article 30 of the Charter.

³² Viljoen lists three reasons for establishing the headquarters of the African Commission in Banjul: "the drafting history of the Charter, an attempt to secure that political manipulation by the OAU in Addis Ababa is minimised, and the fact that The Gambia was one of the few states in Africa with an uninterrupted record of democratic rule since independence" (Viljoen (2001) 150). According to Ankumah the election of the seat of the Commission in Banjul, The Gambia rather than in Addis-Ababa, Ethiopia, where the OAU headquarters is situated was probably an attempt at insuring the Commission's independence from political interference (EA Ankumah *The African Commission on Human and Peoples' Rights – Practice and Procedures* (1996) 18).

³³ See section 3.3.3 (a) of chapter 3.

³⁴ As above.

³⁵ Articles 30 and 33 of the African Charter. The African Union (AU) replaced the OAU in June 2002.

³⁶ Articles 32 and 34 of the African Charter. See also chapter III of the Rules of Procedure.

³⁷ See F Viljoen (2001) 149, for a tabling of the terms Commissioners served in the first ten years of the Commission's existence. He indicates that "it is the rule, rather than the exception, for Commissioners to be re-elected after their first term".

having legal experience.³⁸ Nevertheless, member states have frequently not adhered to these criteria in nominating candidates, especially as far as the possession of human rights knowledge is concerned.³⁹ The absence of any criteria on gender and geographical representation from the African Charter initially led to a situation where the Commission was only composed of males and certain regions of Africa were severely underrepresented.⁴⁰ This situation has changed and today the Chairperson of the Commission is a woman and all regions of the continent are equally represented, but criteria to ensure that the situation remains as such have still to be formally incorporated in the African Charter.⁴¹

Another factor, often cited as inhibiting the proper functioning of the Commission, is the appointment of members that hold governmental positions in their respective

³⁸ Article 31 of the African Charter.

³⁹ From 24 to 26 September 2003 a retreat was facilitated for the African Commission by the Office of the High Commissioner for Human Rights to improve the methods of work and procedures of the Commission and to strengthen its Secretariat. The nomination of candidates without human rights knowledge and expertise was identified as one of the challenges that hinder the independent functioning of the Commission. See *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights (ACHPR) facilitated by the Office of the High Commissioner for Human Rights*, Addis-Ababa, Ethiopia, 24-26 September 2003, page 5. Available at <http://www.nhri.net/Africa.htm>. Accessed: 13 November 2003.

⁴⁰ See the Final Communiqué of the 2nd ordinary session of the African Commission held in February 1988 in Dakar, Senegal, where the Commission was composed of males only. Available at: http://www.achpr.org/english/doc_target/documentation.html?../communiques/communique02_en.html. Date accessed: 17 May 2004. See also F Viljoen (2001) 150, Table B for an overview of the geographical representation of members during the first ten years of the Commission's existence. Several calls were made over the years to transform the composition of the Commission, the following are but a few examples: 1) During the Kigali AU Ministerial Conference on Human Rights a Declaration was adopted that called amongst other issues on the "AU Policy Organs to review the operation and composition of the African Commission on Peoples' Rights with a view to strengthening its independence and operational integrity and ensuring appropriate gender representation". See Item 24 of *The Kigali Declaration*, MIN/CONF/HRA/Decl.1(1); adopted at the first AU Ministerial Conference on Human Rights in Africa on 8 May 2003. 2) The 2003 Retreat report also recommended that the AU should adhere to the principles of gender and geographical representation in electing Commissioners. See *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights (ACHPR) facilitated by the Office of the High Commissioner for Human Rights*, page 6. See also Hansungule (2000) 295 and NS Rembe *The System of Protection of Human Rights under the African Charter on Human and Peoples' Rights: Problems and Prospects* (1991) 23.

⁴¹ During the 34th ordinary session of the African Commission, held in November 2003, Salamata Sawadogo, from Burkina Faso, was the first woman to be elected as chairperson of the African Commission. Nevertheless, even before her election Janaiba Johm, from the Gambia, served as vice chairperson and as of the 34th ordinary session five of the eleven members of the Commission are women. Geographically the current composition of the Commission attempts to give equal representation to all four regions with three members each from West, North and Southern Africa and two members from East Africa.

states.⁴² The appointment of Commissioners with a close political affiliation to their governments places in question Commissioners' ability to serve the Commission in "their personal capacity" as required by the Charter.⁴³ This erodes the independence of the Commission, a factor that is essential for the competence and credibility of a human rights body if it is to have any persuasive powers with state parties, especially where state compliance with the Commission's recommendations is at stake.⁴⁴ Tomuschat summarised the importance of the independence of a human rights body to effect state compliance as follows:⁴⁵

Any State party will find it hard to reject such findings in so far as they are based on orderly proceedings during which the defendant party had ample opportunity to present its submissions. The views of the Human Rights Committee gain their authority from their inner qualities of impartiality, objectiveness and soberness.

If state compliance with the African Commission's recommendations is to be ensured, changes to the nomination and appointment of Commissioners should be brought to the attention of the Political Affairs Department of the African Union. This is the department that oversees issues of good governance, democracy and human rights and it should bring the importance of the independence of the African Commission to the attention of state parties.⁴⁶

⁴² Rule 109 of the Rules of Procedure stipulate that a member may not take part in the consideration of a communication by the Commission if he or she has any personal interest in the case or were involved in any decision relating to the communication. Nevertheless, the Commission's independence, as far as its composition is concerned, has been questioned by various authors especially where Commissioners have very close relationships with their governments. See for instance C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 164 and Hansungule (2000) 296-297. Unfortunately this situation has not yet changed for the Commission as of the 34th ordinary session is still composed of members who serve as diplomats for their countries and members who serve or served in the Ministry of Justice of their respective countries. A mere glance at the address list for Commissioners, available at www.achpr.org, confirms their ties with member states.

⁴³ Article 31(2) of the African Charter.

⁴⁴ According to Ankumah: "The term independence and impartiality simply means that a member of an enforcement or a supervisory body should be free from improper influences and bias" (Ankumah (1996) 18). The independence of the Commissioners in fulfilling their mandate has been an ongoing concern since the inception of the Commission. Murray states that "it is not just the appearance of the lack of independence, with the inclusion of ambassadors amongst its members and senior government figures, but also evidence of an actual lack of impartiality". R Murray 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems' (2001) 1 *African Human Rights Law Journal* 7.

⁴⁵ C Tomuschat 'Evolving procedural rules: The United Nations Human Rights Committee's first two years of dealing with individual communication' (1980) 1 *Human Rights Law Journal* 255.

⁴⁶ This is of importance not only to the future effectiveness of the Commission but also in the nomination of candidates to the African Court on Human and Peoples' Rights.

Finally, concerns have also been voiced about the number of Commissioners appointed in contrast to the number of African countries in which they have to oversee the promotion and protection of human rights.⁴⁷ Any attempt to address such concerns will have to start with an evaluation of the budget of the African Commission. In terms of article 44 of the African Charter, the emoluments and allowances of the members of the Commission forms part of the regular budget of the AU (previously the OAU). The OAU, however, never met its financial obligations towards the African Commission. The OAU always allocated a very small budget to the African Commission and thus mention is frequently made of donor funds that enabled Commissioners to fulfil their mandates especially in regard to promotional visits and the work of special rapporteurs.⁴⁸ The appointment of additional members to the Commission will therefore have to be done in close collaboration with the Commission (Secretariat) of the African Union and the Executive Council (previously, the OAU Council of Ministers).

The effective functioning of the African Commission is not only in the hands of the Commissioners, but is dependent in large measures on the effective running of its Secretariat based in Banjul, The Gambia.⁴⁹ As with the financing of the Commissioners, article 41 of the African Charter stipulates that the OAU (now AU) should bear the costs of the staff and services of the Secretariat. Here, again, a severe lack of human, material and financial resources has been reported from the inception of the Secretariat.⁵⁰ Ankumah reports that the first permanent Secretary

⁴⁷ See UO Umzurike *The African Charter on Human and Peoples' Rights* (1997) 85. Umzurike suggested an increase in the number of Commissioners to effectively perform their duties as early as 1997. While in 2003 this recommendation was once again put forward at the retreat held in Addis-Ababa calling on the "AU to urgently look into the need to increase the number of Commissioners to between 15 and 18 members while adhering to the principles of geographical and gender representation". *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 6.

⁴⁸ See section 4.7 below for a detailed discussion around the budget supplied to the African Commission by the OAU.

⁴⁹ None of the Commissioners, not even the chairperson, are permanently appointed to the Commission. Although Commissioners fulfil promotional and protective functions during the inter-sessional period the Commissioners only gather formally twice a year, usually in May and October of each year, for a period of about ten days. Welch has commented that "problems with the Secretariat reveal a fundamental truth about human rights at the global or regional level. Effectiveness has several components: statutory, resource, personality" (Welch (1995) 160).

⁵⁰ See the report compiled by the Danish Centre for Human Rights outlining the financial difficulties the African Commission faced from its inception whilst also indicating which organisations have funded the Commission in the past. Danish Centre for Human Rights *Evaluation: The African Commission on Human and*

was only appointed in 1989 and it was not until 1992 that a legal officer was employed by the OAU.⁵¹ Even though five permanent legal officers are currently employed at the Secretariat, there is still not nearly enough professionals to handle the ever increasing number of communications received by the Commission.⁵² As with the number of Commissioners the number of legal officers cannot be increased without a serious financial commitment on behalf of the AU.⁵³ The funding of the five officers currently employed in Banjul already seems problematic, as was noted in September 2003 at the retreat organised by the OHCHR:⁵⁴

The level of expertise and number of legal staff in the African Commission's Secretariat is inadequate to meet the expected level of efficiency and professionalism. Most of the existing staff work under difficult conditions. For example, of the five legal officers presently at the Secretariat, only two are paid from the regular budget of the AU. The others are employed on short-term contracts funded by extra-budgetary grants from donors with inferior terms of employment.

Peoples' Rights (1998). Available at: <http://www.humanrights.dk/publications/all/eandr6/>. Accessed: 12 January 2004.

⁵¹ Ankumah (1996) 32. It should also be mentioned that the problems facing the Secretariat have not been marked by understaffing alone but its functioning has also been jeopardised by the appointment of staff without the necessary qualifications or experience. In this regard see, *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 5.

⁵² It was noted at the retreat held in September 2003 in conjunction with the OHCHR that "responding to the increase in communications received by the African Commission under its protective mandate is constrained by a number of administrative and procedural factors, including shortage of qualified legal staff". *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 4.

⁵³ Such a commitment seems difficult in light of the fact that the retreat report noted that "the relationship between the African Commission and its secretariat, between the African Commission and the AU Commission, and between the Secretariat of the African Commission and the AU Commission are not clearly defined. This affects coordination, transparency and accountability as well as the efficiency of the African Commission and its Secretariat". *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 5. Without a clearly defined relationship between these role players communication lines will be blurred and this increases the risk of the allocation of inadequate funding and support. At the first AU Ministerial Conference on human rights, held in Kigali in May 2003 a Declaration was adopted that amongst other factors called upon "the AU policy organs to provide the African Commission with suitable Headquarters, an appropriate structure and adequate human and financial resources for its proper functioning, including the establishment of a Fund to be financed through voluntary contributions from Member States, international and regional institutions". The establishment of such a voluntary fund will go a long way towards securing additional funding that would lighten the burden on the AU which struggles to ensure regular financial contributions from its member states. See item 23 of the Kigali Declaration, MIN/CONF/HRA/Decl.1(1).

⁵⁴ *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 5.

In returning to the issue at hand, the establishment of a follow-up mechanism to the recommendations of the African Commission, it is clear that the challenges that have a negative impact on the effective functioning of the Secretariat should be addressed. At the minimum, a follow-up mechanism would require additional human resources such as the full time appointment of a legal officer to oversee implementation. It would also involve more administrative costs such as follow-up letters, telephone calls, faxes and the establishment of a database on compliance. Apart from these additional expenses, funding would also have to be raised for expanding the media unit at the Secretariat. If international and regional pressure is to be mounted on states to comply with the recommendations of the Commission by addressing human rights violations, the media has an important role to play. There is currently only one media officer employed by the Commission that has to communicate its message from a country that is not centrally located in Africa, making it difficult to gain access to the press in other parts of the continent. Analysing theories of international law around state compliance will have no impact on the African human rights system if practical problems faced by its organs are not addressed as a matter of priority. It is clear that most of the financial and other resource problems faced by both the Commissioners and Secretariat can be traced back to the African Union. The relationship between the African Union and the African Commission will be explored in more detail later in this chapter, in an attempt to determine how future cooperation between these bodies could be strengthened to avoid the same pitfalls of the OAU.⁵⁵

4.4 Mandate of the African Commission

The mandate of the African Commission is set out in articles 45, 46 and 55 of the African Charter. In reality the Commission has a two-folded mandate to promote and protect human and people's rights and although it also has an interpretative function in terms of article 45(3) the Commission has yet to utilise its powers in this regard.⁵⁶ The promotional and protective mandate of the Commission is not only drafted in broad terms but is also interrelated.⁵⁷ The mandate of the African Commission is

⁵⁵ Section 4.7 below.

⁵⁶ Article 45(3) of the African Charter reads as follows: "The functions of the Commission shall be (3) Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognised by the OAU".

⁵⁷ According to Benedek the promotional mandate of the African Commission is broader than both that of the European Commission on Human Rights (this Commission has now been replaced by a single European Court of Human Rights) and the Inter-American Commission on Human Rights (See W Benedek 'The African Charter and

analysed here to establish how a follow-up mechanism could be incorporated in the Commission's existing mandate, while also highlighting previous efforts of the Commission to follow up on the implementation of its recommendations.

4.4.1 Promotional mandate

The promotional mandate of the African Commission is stipulated as follows in the African Charter:⁵⁸

- (a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to governments;
- (b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;
- (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

In 1990, at the African Commission's eighth ordinary session, the state parties to the African Charter were divided for the first time amongst the members of the African Commission to assist them in fulfilling their promotional mandate.⁵⁹ Countries are allocated to Commissioners based on nationality, language and the regions where they reside.⁶⁰ Commissioners should perform the bulk of their promotional activities during the inter-sessional period. Commissioners are to report back on these activities during the ordinary sessions held around May and October of each year.⁶¹

the Commission on Human and Peoples' Rights: How to make it more effective' (1993) 1 *Netherlands Quarterly of Human Rights* 33). See also Österdahl who is in support of the theory that the promotional and protective functions of the Commission are interrelated (I Österdahl *Implementing Human Rights in Africa – The African Commission on Human and Peoples' Rights and Individual Communications* (2002) 16).

⁵⁸ Article 45(1) of the African Charter. Murray has argued that "article 45 represents a hierarchy of importance in terms of the tasks of the Commission, with promotion being the most significant" (Murray (2000) 14).

⁵⁹ Umozurike has observed that "the size of the continent and the number of countries allocated to a Commissioner measured against the human and material resources are not enough" (Umozurike (1997) 72). See also Ankumah (1996) 21.

⁶⁰ See *Geographical Distribution of Countries Among Commissioners for Promotional Activities*, DOC/OS/36e(XXIII).

⁶¹ The participation of Commissioners in promotional activities during the inter-sessional period varies a lot as is clear from a reading of the Annual Activity Reports. See for instance Section C (b): Promotional Activities of members of the Commission, in the 16th Annual Activity Report available at

The promotional mandate of the Commission is not only broad but also overlaps with its protective mandate. For example, state reporting in terms of article 62 of the African Charter has elements of both promotional and a protective character in as far as it is used not only to establish how states implement the provisions of the Charter but also how they comply with recommendations made by the Commission. The promotional mandate of the Commission depends heavily on the co-operation of state parties.⁶² State parties are not only expected to submit state reports on how they implement the African Charter domestically, but promotional visits to countries can only take place upon official invitation from a state party. Where state parties express the political will to co-operate with the African Commission in as far as promotional activities are concerned such opportunities should also be used to approach them on human rights issues relating to the Commission's protective mandate.

Therefore, this section in particular aims to highlight promotional activities of the African Commission that could also be utilised successfully in fulfilling its protective mandate by ensuring state compliance with the recommendations of the African Commission. The following promotional activities will be explored in more detail: state reporting, promotional visits to state parties, and the adoption of resolutions.

4.4.1.1 State reporting

The state reporting mechanism forms primarily part of the Commission's promotional mandate. In this section the possibility of making use of this established practice of the Commission to also fulfil a protective function in following up on state compliance with the Commission's recommendations is investigated. The Commission has indeed in the past attempted to make use of the state reporting mechanism to establish the status of state compliance in certain communications. These efforts are analysed here. First, an analysis of the current functioning of the reporting mechanism is given. It is only if the problems affecting the effective functioning of the system is addressed that the reporting procedure can be extended to include measures to follow up on state compliance.

http://www.achpr.org/english/_doc_target/documentation.html?../activity_reports/activity16_en.pdf . Date accessed: 27 June 2004.

⁶² Article 25 of the African Charter: "State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood".

(a) General provisions on state reporting

State parties to the African Charter are obliged to submit state reports “on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed” by the Charter.⁶³ State reporting, as a mechanism to review state implementation of the provisions of human rights treaties is not unique to the African system, as it forms part and parcel of the UN human rights treaty system where the duty to report is spelt out much clearer than in the African Charter.⁶⁴ The African Charter neither specifies a body to review state reports nor does it state the proposed content or format these reports are to take on. The African Commission, however, strived to address these *lacunae* by requesting the AHSG at its third session for permission to receive and review state reports in terms of article 62 of the Charter.⁶⁵ This led to the development of state reporting procedures set out in the Rules of Procedure and guidelines issued by the African Commission.⁶⁶ Guidelines, relating to the form and content of reports, were first issued at the Commission’s fifth ordinary session.⁶⁷ These guidelines were however criticised for being too long and at its 23rd ordinary session the Commission adopted revised guidelines, summarising issues that states have to take into account in compiling reports, in 11 points.⁶⁸ Nevertheless, Benedek has argued that even these 11 principles causes confusion amongst governments on how to report which can be seen from the diversity of approaches to state reporting.⁶⁹

It is true that various problems can be reported in relation to the state reporting procedure under the African Charter. Although some of these problems will be discussed in more detail, it should also be noted that the African Commission has developed the article 62 procedure into a mechanism that serves not only its promotional but also its protective mandate. It is this aspect that will be explored in

⁶³ Article 62 of the African Charter.

⁶⁴ See article 40 of the International Covenant on Civil and Political Rights and article 44 of the UN Convention on the Rights of the Child.

⁶⁵ Recommendation on Periodic Reports, First Annual Activity Report, Annex IX. See further e.g. Umozurike (1997) 73-74, Murray (2000) 16 and GW Mugwanya ‘Examination of state reports by the African Commission: A critical appraisal’ (2001) 2 *African Human Rights Law Journal* 268.

⁶⁶ See Chapter XV – Promotional Activities, rules 81 to 86 of the Rules of Procedure.

⁶⁷ Annex XII, Second Annual Activity Report, (1989-1990) ACHPR/RPT/2nd.

⁶⁸ The revised guidelines [OAU DOC/05/27 (XXIII)] also referred to as “simplified guidelines” are reprinted in C Heyns *Human Rights Law in Africa 1998* (2001) 125. Murray reported that the revised guidelines were a summary of the outcomes of seminars held on the topic in previous years (Murray (2000) 16).

⁶⁹ Benedek (1993) 32.

further detail in this section. More specifically, the focus will be on how the African Commission has used state reporting, a seemingly promotional aspect of their mandate, to fulfil its protective mandate by following up on the implementation of communications decided against state parties.

A state party is obliged to submit an initial state report two years after ratification of the African Charter. Thereafter, periodic reports must be submitted on a bi-annual basis.⁷⁰ As of May 2003, nineteen countries have never submitted their initial reports, whilst 25 member states had submitted state reports without delay and only 9 states parties had submitted all their reports on regular intervals.⁷¹ Provision is not made for the imposition of any sanctions on member states to the African Charter that fail to submit any or all their reports. Rule 84 of the Rules of Procedure merely provides for a procedure whereby the Commission can send reminders to state parties that do not submit their state reports or additional materials and should a state party still choose to ignore the Commission's reminders this behaviour can be highlighted in its Annual Activity Report to the AHSG.⁷² The Commission established a practice whereby a list is published and distributed during the ordinary sessions, and later annexed to the Annual Activity Report, indicating which countries have or have not complied with their state reporting obligations. According to Umozurike it "is hoped that the publication of the list of the states that have complied will encourage those that have not".⁷³

The failure of state parties to submit state reports or to do so within the time frame specified in the Charter is merely one of the problems hindering the effective functioning of the state reporting system. In order to understand the practicalities of the state reporting system, the problems that the system faces are highlighted here.

⁷⁰ Article 62 of the African Charter. The content of initial and periodic reports differs for instance an initial report must include "a brief history of the state, its form of government, the legal system and the relationship between the arms of government. The initial report should also include the basic documents – constitution, the criminal code and procedure and landmark decisions on human rights". Whereas these issues should not be repeated in periodic reports. *Guidelines to Periodic Reporting under the African Charter* paras 1 and 2, reprinted in Heyns (2001) 125. For more on the content of initial and periodic reports see e.g. C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 637–638.

⁷¹ DOC/OS(XXXIII)/310a. Since the *note verbale* ACHPR/PR/A046 of 30 November 1995, several state reports can be combined into one report. This step was taken in an effort to address the backlog that most state parties faced regarding the submission of state reports.

⁷² Rembe (1991) 41.

⁷³ Umozurike (1997) 73-74.

It is only once these factors are made clear that the link between state reporting, a promotional activity of the Commission, and following up on the implementation of recommendations against state parties that violated the provisions of the Charter can be fully realised.

(b) Problems with state reporting

A brief overview is given here of some of the most pertinent reasons for state parties' lack of compliance with their reporting obligations. The functioning of the reporting mechanism needs to be understood not only in theory, as was indicated above, but also in practice by highlighting the problems the mechanism faces if it is eventually to be used as part of a follow-up mechanism to individual communications. The problems experienced with state reporting are discussed as they occur during the three main phases of reporting, namely the preparation of the report, the consideration of the report and finally with regard to drawing conclusions from the reports.

Firstly, some problems occur during the preparation of state reports. Although the responsibility for the preparation of state reports lies with state parties, they are to be guided in this process by the guidelines prepared by the African Commission. As mentioned earlier, even the revised guidelines still fall short in this regard and this leads to state reports that vary in length and quality from state to state.⁷⁴ Another factor that hinders state parties in reporting effectively is a lack of coordination between the various state departments that have to contribute to the report.⁷⁵ This results in a report that does not reflect the implementation of the Charter provisions in all sectors. It has also been noted, with reference to the state department overall responsible for reporting, that "the institutions that have the responsibility for preparing and submitting state reports differ from country to country which makes it difficult for the African Commission to follow-up with non-reporting states".⁷⁶ An additional problem faced by the state departments responsible for the compilation of the report is the fact that they often also have to file state reports under other

⁷⁴ Murray reported that the Commission due to its quality, thoroughness and the supporting documents that accompanied it, holds the state report of Zimbabwe as a model report (Murray (2000) 16). See also Anyangwe (1998) 640.

⁷⁵ Mugwanya (2001) 278.

⁷⁶ *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 2.

international human rights instruments.⁷⁷ Such duplication in reporting obligations inevitably contributes to the non-compliance of state parties with their reporting obligations.⁷⁸ Finally, the lack of compliance on the part of state parties can also be attributed to the sheer lack of political will to submit regular state reports in a system where no coercive measures exist should states fail to comply.⁷⁹

Secondly, problems are also experienced with the examination of state reports, a process that takes place during the public sessions of the African Commission. In theory, when the Commission receives a report, it appoints one of its members as a rapporteur to study the report and to prepare a list of preliminary questions to be asked to the government representative of the reporting state. In practice, however, various factors affect the effectiveness of this process. Firstly, sometimes when a Commissioner, appointed as a rapporteur of a specific report, is not present, the examination is delayed. The process is also delayed (often for years) where state representatives, even though invited by the Secretariat, do not appear.⁸⁰ In the past, complaints have also been raised that states send low-level delegations to appear before the Commission, but this situation has changed for the better and state parties are now even represented by their ministers of justice.⁸¹ The examination of reports

⁷⁷ State parties to the African Charter not only often face additional reporting obligations in terms of UN human rights treaties to which they are party but also need to submit state reports under other regional mechanisms. Article 43 of the African Charter on the Rights and Welfare of the Child, for instance, obliges state parties to submit reports every two years and although it relates to children specifically there is room for unnecessary duplication.

⁷⁸ Mugwanya (2001) 278.

⁷⁹ K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 268 and Mugwanya (2001) 278.

⁸⁰ The Republic of Seychelles submitted its initial report in September 1994 and was due to present its report at the 17th ordinary session of the Commission. The state party however failed to send any government representatives and the consideration of the report was referred to the following session. Seychelles failed to send any representatives, despite repeated appeals from the Commission, for a number of sessions. Finally, at the 25th ordinary session held in May 1999, the Commission issued a *Resolution concerning the Republic of Seychelles' refusal to present its Initial Report*. (Available at http://www.achpr.org/english/resolution/resolution44_en.html. Date accessed: 28 June 2004). In this Resolution the Commission "firmly condemned this unspeakable behaviour" and called upon the OAU AHSG to consider appropriate measures to be taken against the Republic of Seychelles. This behaviour by a state party also resulted in the decision by the Commission, at its 23rd ordinary session, to consider state reports of those states that failed to send representatives in *absentia*.

⁸¹ At the 31st ordinary session held in Pretoria, South Africa, the Minister of Justice of Mauritania was amongst the government representatives presenting Mauritania's initial state report. Similarly at the 34th ordinary session held in Banjul, The Gambia, in November 2003 the Minister for Human Rights in Senegal represented the state report of Senegal. See also Anyangwe (1998) 640.

have also been delayed by budgetary constraints which resulted in a shortening of the period allocated for ordinary sessions of the Commission which in turn resulted in the postponement of the consideration of state reports.⁸²

During the consideration of state reports, the government representatives are granted an opportunity to summarise the report where after the rapporteur opens the floor for questioning followed by the other Commissioners. Due to a lack of resources, reports have often not been made available in all the working languages of the African Union and as a result not all Commissioners could participate fully in the examination process.⁸³ This situation has since improved and reports are now more regularly made available in the working languages of the AU. Another factor that constraints the effective examination of reports relates to the questions posed by the Commissioners. According to Anyangwe, there “appears to be no trend in the questioning, questioning appears to be disjointed rather than organised and systematic and Commissioners tend to confine themselves to asking general and routine questions”.⁸⁴ Not only the Commissioners are to blame for lack of substance in their questioning, since NGO’s are supposed to play an important role in highlighting human rights issues in the particular country through the submission of shadow (alternative) reports. Unfortunately, very few such reports are prepared to guide Commissioners in the consideration of state reports. Once the questions have been posed, a short break is usually given and then the government representatives are expected to orally answer most of the Commissioners’ concerns.⁸⁵ There seems to be no correlation between the time given for questioning and the time allocated to representatives to answer these questions with the latter often being much shorter

⁸² The 32nd session of the African Commission held in October 2002 in Banjul, The Gambia, was shortened to a mere seven days due to budgetary constraints that could not be met by the host country. As a result the consideration of the state report of the Democratic Republic of Congo (DRC) was postponed until the following session. At the following session held in Niger, Niamey, the examination of the report had to be postponed again for even though there was full attendance of both civil society and government representatives at the previous session no one could afford to attend this session. The report was finally considered in November 2003 at the 34th ordinary session held again in Banjul, The Gambia.

⁸³ Quashigah (2002) 280. This problem was also noted as one of the challenges facing the Commission in the retreat report, *Report of the Retreat of Members of the African Commission on Human and Peoples’ Rights facilitated by the Office of the High Commissioner for Human Rights 2*.

⁸⁴ Anyangwe (1998) 638-639. Murray echoes a similar sentiment and states that “Commissioners often do not probe for an answer if none is provided” (Murray (2001)11).

⁸⁵ Government representatives usually give an oral agreement to the Commission that it will submit, in writing, those answers that they could not provide during the session. Whether this undertaking is actually realised is not certain.

than the time allocated to formulate questions.⁸⁶ It is clear from this procedure that very limited time is dedicated during Sessions to the consideration of state reports.⁸⁷ Not only is limited time given for the presentation and answering session, but the time allocated for the preparation of these answers are usually no more than a lunch break.⁸⁸

The third problem area arises from the need for conclusions adopted after the examination of state reports. Notwithstanding rule 86 of the Rules of Procedure, this then seems to be the end of the process of state reporting as far as the Commission's practice is concerned.⁸⁹ Although the African Commission started issuing concluding observations upon having examined a state party's report, from its 29th Session onwards, these observations are not included in the Annual Activity Reports of the Commission.⁹⁰ Even if such observations are communicated to state parties their impact cannot be great if they are not published to enable civil society regionally and internationally to monitor their implementation. The "combination of all these difficulties" has led Murray to conclude that "the Commission does not really monitor the ongoing situation in states through this mechanism".⁹¹ The state reporting mechanism is nevertheless not still-born. It has improved over the years and state parties do take note of it, if the high powered delegations it sends nowadays to represent its reports are anything to go by. In the next section, another avenue of possible development within the existing state reporting mechanism is explored in more detail.

⁸⁶ In illustration of this problem take for example the time allocation during the 35th ordinary session with the consideration of the State Report of Sudan. The Commissioners spent close to two hours and fifteen minutes posing questions to the representatives from Sudan. After a short break the representatives were given a chance to respond to the questions but were merely allocated 70 minutes to do so. Due to time constraints such as these, the state party can easily avoid answering contentious questions. (Notes on file with author)

⁸⁷ Anyangwe (1998) 638-639 and Murray (2001) 11.

⁸⁸ At the 34th ordinary session of the African Commission the Senegalese delegation were not so fortunate. The Commission did not allow any break for preparation after it finished posing questions to the government. A new chairperson, although a seasoned member of the Commission, was appointed at this Session and this change in procedure might be attributed to this factor.

⁸⁹ Rule 86 deals with the adjournment and transmission of the reports and states that "The Commission shall, through the Secretary, communicate to States parties to the Charter for comments, its general observations made following the consideration of the reports". In subsection 2 it further states that these observations accompanied by the state report may be transmitted to the AHSG.

⁹⁰ On the lack of any follow-up to state reports see generally Murray (2000) 16 and Mugwanya (2001) 278.

⁹¹ Murray (2001) 11.

(c) Following up on individual communications through state reporting

The non-coercive nature of the state reporting mechanism, although criticised earlier, could also be utilised as an opportunity to persuade state parties not only to implement the provisions of the African Charter domestically but also to remedy specific human rights violations committed by them.⁹² Although no provision is made for such an additional role in either the Rules of Procedure or the Guidelines on State Reporting, the African Commission has been innovative in the past and has seized the state reporting procedure as an opportunity to monitor the implementation of recommendations arising from individual communications made to state parties.⁹³ The Commission has gone about this in two ways. On the one hand, it made use of the questioning of state delegates during the public examination of state reports. On the other hand, it included state reporting as part of the recommendations formulated upon finding a state party in violation of the Charter. These practices are analysed here in more detail, and the formal recognition of these procedures is proposed.

The African Commission has on two occasions, in deciding individual communications and finding a state party in violation of the African Charter, requested from a state party

[t]o report back to the African Commission when it submits its next periodic report in terms of article 62 of the African Charter on measures taken to comply with the recommendations and directions of the African Commission in this decision.⁹⁴

It may be deduced that the African Commission, in formulating such recommendations, not only expects state parties to implement its recommendations but also attempts to follow up on the decisions it took in individual communications to ensure state compliance. Viewed against the fact that no follow-up mechanism is

⁹² Anyangwe on the other hand has argued that “[t]he state reporting procedure is not a mechanism for examining and remedying specific violations of human rights by a state. Its utility lies in the fact that it enables the Commission to monitor a state’s implementation of the Charter” (Anyangwe (1998) 637). The Commission’s own practice has however proved the opposite as will be indicated in this section. Notwithstanding the non-coercive nature of state reporting Rembe wrote that “this process [state reporting] and the accompanying debates among state parties and non-governmental organisations act as a restraint and put pressure on the would-be violators, and thus institutionalise a system of monitoring the application of the Convention” (Rembe (1991) 4).

⁹³ See Österdahl (2002) 26.

⁹⁴ The first case was decided in 2001, communication no 211/98 *Legal Resources Foundation v Zambia*, published in the 14th Annual Activity Report. The second case was decided more recently in May 2003, communication no 241/2001 *Purohit and Moore v The Gambia*, 16th Annual Activity Report.

provided for in either the Charter or the Rules of Procedure, such an approach by the Commission must be welcomed. However, none of the two states have subsequently reported, so no indication can be given about the practical effectiveness of this procedure.

Apart from these two cases where the Commission specifically stated that it would follow up on the implementation of its recommendations through state reporting, the Commission has also pursued a similar approach in the consideration of state reports of other countries that did not flow from the individual complaints procedure.⁹⁵ Commissioners have asked government representatives, as part of the questions posed during the examination of state reports, to indicate the status of implementation of the recommendations forwarded to a state as part of the individual communications procedure.⁹⁶ It seems that Commissioners are not only interested in the overall status of implementation but go further and ask specific questions relating to the particulars of a communication around issues such as compensation or the release of victims.⁹⁷

As laudable as the Commission's efforts have been to establish follow-up through its state reporting procedure, the instances quoted above are more the exception than the rule. There are no provisions in law or otherwise that will ensure that these procedures will always be followed. It is therefore recommended that the African Commission should ensure that provision is made in either its Rules of Procedure or in the Guidelines on State Reporting to require state parties preparing their periodic reports to report on the measures it took to implement the recommendations of the

⁹⁵ During the 31st ordinary session of the African Commission, held in May 2001 in Pretoria, South Africa, both the governments of Mauritania and Cameroon presented their initial state reports. The African Commission has previously held both of these countries to be in violation of the African Charter in terms of the individual complaints procedure and recommended to both countries how to rectify their respective situations. At the 31st Session the Commissioners in examining the state reports before them posed questions to the government representatives of both state parties inquiring as to the implementation of the decisions against them. The Commission inquired as to the status of implementation of joint communication nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 against Mauritania and communication nos 39/90 and 59/91 against Cameroon. (Personal notes taken during the 31st ordinary session of the African Commission).

⁹⁶ As above.

⁹⁷ For instance during the 31st ordinary session Commissioner Pityana posed a very specific question to the government of Cameroon inquiring as to whether the interim measures ordered by the Commission in a case involving the jailing of the leader of an opposing political party were ever implemented. Noting that to the best of his knowledge this was not the case. (Personal notes taken during the 31st ordinary session).

Commission.⁹⁸ NGO's, submitting shadow reports to the Commission, should ensure that they report on the status of state compliance to the recommendations of the African Commission in order to guide Commissioners in formulating follow-up questions.⁹⁹ The state reporting mechanism certainly has the potential to play an important role as part of a comprehensive follow-up system to ensure state compliance. Follow-up efforts should however not be restricted to state reporting due to the huge backlog in reporting on the part of states and the fact that it is a procedure that only takes place every two years. The reporting mechanism faces a number of difficulties, as indicated earlier. These should be addressed if the full potential of this mechanism is to be realised. The next section briefly highlights some recommendations that could pave the way towards an effective reporting mechanism that not only serves a promotional but also a protective role.

(d) Recommendations for improving implementation through state reporting

In September 2003 the African Commission, together with other stakeholders, such as the Office of the High Commissioner for Human Rights, formulated the following recommendations to address some of the challenges faced by the state reporting mechanism:¹⁰⁰

- The Commission should issue user-friendly guidelines and model reports.
- Not just NGOs but also National Human Rights Institutions should be encouraged to submit shadow reports.

⁹⁸ Other state parties should follow the example of Burkina Faso in this regard. Burkina Faso presented its periodic report at the 35th ordinary session, covering the reporting period from 1998-2002. The periodic report made specific reference to "Compliance with the decision of the ACHPR concerning communication no 204/97, *MBDHP v Burkina Faso*". The government of Burkina Faso gave a detailed account on the status of the implementation of the Commission's recommendations and gave the assurance that in those matters that were still pending they would "deploy all efforts to find the appropriate solutions". See 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, pages 25-26. (According to this author's records this is the first state party to have formally reported on its compliance record with the recommendations of the Commission)

⁹⁹ During the 35th ordinary session of the Commission, held in June 2004, the periodic report of Sudan was up for consideration. A lawyer who initiated a number of cases against Sudan distributed an information sheet at the Session which systematically highlighted Sudan's lack of state compliance with the decisions of the African Commission. From the subsequent questions posed to the representatives of Sudan, by Commissioner Johm, around the implementation of communication no 236/00 which dealt with the banning of lashing of minors, it follows that shadow reports on state compliance can influence the state reporting procedure in a constructive manner.

¹⁰⁰ *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights 2.*

- The Commission should be encouraged to prepare reports and draw conclusions on the human rights situation in countries that fail to submit periodic reports.
- A follow-up mechanism should be established to follow up on the recommendations issued on states reports.

Although these recommendations are welcomed and should be pursued, they will clearly not address all the problems currently affecting the effective functioning of the state reporting mechanism in terms of article 62 of the African Charter. Some additional recommendations are made here as they relate to difficulties with the system indicated above.

With regard to the preparation of state reports, it is recommended that each state party should not only designate a state department to oversee the process, but further ensure that the contact details of the department are communicated to the Secretariat of the African Commission. This suggestion should be developed further as to also provide for the training of government officials to compile state reports in a coordinated manner.¹⁰¹ To address state parties' lack of political will to prepare any reports for consideration by the African Commission, Quashigah suggested "a more radical system of sanctions and monitoring involving the Executive Council of the AU and the Pan-African Parliament" as opposed to the non-coercive system currently in place.¹⁰² These suggestions all aim to address problems on the part of state parties in fulfilling their reporting obligations.

To improve the examination of state reports, the African Union needs to increase its budgetary allocation towards the African Commission and its Secretariat, thus providing for additional funding for the timeous translation of state reports into all the working languages of the AU and to increase the number of days of each ordinary session of the Commission. If session days are increased by even a limited number it will allow the Commission to allocate more time to the proper examination of state reports.

The African Commission, for its part, needs to issue guidelines on possible questions to be asked by Commissioners in publicly examining state reports so as to ensure that questions are organised, systematic and useful in assessing a state party's

¹⁰¹ Benedek supported a similar approach (Benedek (1993) 32).

compliance with the African Charter. Such guidelines should also require Commissioners to inquire after the implementation of decisions taken against a state party in deciding individual communications. Furthermore, the Commission must develop a procedure whereby questions left unanswered by the state representatives are submitted to the Secretariat and are consequently published.¹⁰³ Such a development should be directly linked to a procedure whereby the Commission not only formulates concluding observations on its findings, but also publishes it.¹⁰⁴

Once the problems with the state reporting system are sorted out, state reporting will not only function more effectively as a mechanism to fulfil the Commission's promotional mandate, but it can also be used more efficiently as a follow-up mechanism to monitor state compliance with its recommendations on individual communications. As with state reporting, the lines between the promotional and protective mandate of the Commission are not clear-cut when it comes to promotional and protective missions to state parties. An overview of these functions is given in the next section. Specific reference is made to the role these country missions play in following up on the implementation of the Commission's findings.

4.4.1.2 Promotional missions and missions for protective activities

It has previously been noted that state parties to the African Charter are divided amongst the eleven Commissioners, according to the proximity from the country where they usually reside and for linguistic reasons, to enable them to fulfil their promotional mandate, in terms of article 45 of the Charter.¹⁰⁵ As part of its promotional mandate the African Commission has undertaken promotional visits to the countries assigned to them during the period between ordinary sessions. The main objective of promotional missions to state parties is to promote awareness about the African Charter.¹⁰⁶ Promotional missions, however, also have a distinct

¹⁰² Quashigah (2002) 268.

¹⁰³ See Mugwanya (2001) 281. The author suggested that the "Commission should also create a follow-up mechanism to deal with unanswered queries or unsatisfactorily answered questions by state representatives during the examination of state reports".

¹⁰⁴ There is also no system in place to ensure that all the questions posed are answered. A system should be put in place whereby legal officers keep record of all the questions as well as answers forwarded during and after the consideration of a state report.

¹⁰⁵ See discussion under section 4.3 above.

¹⁰⁶ *Memorandum on Missions for Protective Activities under the African Charter on Human and Peoples' Rights*, DOC.OSI/XXII), 22nd ordinary session, 2-11 November 1997. The Memorandum was prepared and submitted jointly by *Recontre Africaine Pour de Defense des Droits de l'Homme* (RADDHO), Civil Liberties Organisation

protective feature in that they are usually seized by the Commission as an opportunity to monitor implementation of the Commission's findings made upon consideration of an individual communication against a state party.¹⁰⁷ This aspect of promotional missions is explored here in more detail.

No specific mentioning is made of promotional missions in either the African Charter or the Commission's Rules of Procedure.¹⁰⁸ The Commission has, however, reported that it decided at its 26th ordinary session to "embark on constructive dialogue with state parties to the Charter through promotional missions".¹⁰⁹ From the reports of the promotional visits undertaken to Burkina Faso and Zambia, it appears that a part of this "constructive dialogue" is aimed specifically at establishing state compliance to the decisions taken against these governments as a result of the individual communications procedure.¹¹⁰ Promotional missions are therefore another avenue already pursued by the Commission in an effort to establish follow-up to its decisions.¹¹¹

(CLO), and the International Centre for the Legal Protection of Human Rights (Interights).

¹⁰⁷ Dankwa explains it as follows: "Despite the distinction drawn between the promotional and protective functions of the Commission, as is evidenced by articles 30 and 45 of the Charter, matters falling under the latter may be, and have been, taken up during promotional visits" (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) 344-345).

¹⁰⁸ Although promotional missions would be covered by rule 87 of the Rules of Procedure this rule has wide application and does not give any particulars on how such a mission should be conducted. Rule 87(2): "The Commission shall carry out other promotional activities in member states and elsewhere on a continuing basis".

¹⁰⁹ See the Introduction to the *Report of the African Commission's Promotional Mission to Burkina Faso, 22 September to 2 October 2001*, DOC/OS(XXXIII)/324b/I.

¹¹⁰ The report of the promotional visit to Burkina Faso stated that one of the objectives of the mission was to "remind the government of the need to honour its obligations under the African Charter by adopting special measures aimed at ... Giving effect in the shortest possible time to the decision taken by the Commission at its 29th ordinary session in Tripoli, Liya, regarding the communication for human rights violations lodged by MBDHP and its chairman, Mr Halidou Ouedraogo, against the government, a decision that the government acknowledged". *Report of the African Commission's Promotional Mission to Burkina Faso, 22 September to 2 October 2001*, DOC/OS(XXXIII)/324b/I. Following up on the implementation of decisions taken against Zambia, in regard to communication no 212/98 *Amnesty International v Zambia* and communication no 211/98 *Legal Resources Foundation v Zambia*, were also listed as part of the objectives of the promotional mission to Zambia. *Report of the promotional visit to Zambia, 9-13 September 2002*, page 7.

¹¹¹ Commissioner Dankwa reported that during his promotional visit to Botswana he "took up with the relevant authorities a communication by JK Modise on the alleged deprivation of his citizenship" (Dankwa (2002) 345).

Nevertheless, certain problems exist that affect not only the effectiveness of promotional visits in general, but also the potential role that it could play as part of a comprehensive follow-up mechanism. For instance, promotional visits are few and far apart. The main reason for this is the limited budget available to the Commission and its Secretariat.¹¹² Although the Commission and its stakeholders recommended in September 2003 that “members of the African Commission should undertake at least one promotional mission every two years to each country under their responsibility”, this will not be possible without securing additional funding.¹¹³ Another problem that relates to the number of promotional visits undertaken by the Commission stems from the fact that missions have to be authorised by member states before they can take place.¹¹⁴ Apart from these difficulties it is also unclear as to what role promotional visits have played in bringing about state compliance. From the examples discussed here, it would seem that promotional missions have played a role in influencing state compliance. Full compliance with the Commission’s recommendations has been recorded in reference to communication 212/98 against Zambia,¹¹⁵ and partial compliance in two other communications against Zambia and one against Burkina Faso.¹¹⁶

¹¹² Promotional visits are undertaken by the Commissioner assigned to a specific country accompanied by one or more members from the Secretariat, usually a legal officer of the Secretariat.

¹¹³ *Report of the Retreat of Members of the African Commission on Human and Peoples’ Rights facilitated by the Office of the High Commissioner for Human Rights*, page 4.

¹¹⁴ In May 2003, during the Meeting of Experts of the First AU Ministerial Conference on Human Rights in Africa, it was however reported by the Commission that “member states authorised missions of promotion of the ACHPR more easily than before”. *Report of the Meeting of Experts of the First AU Ministerial Conference on Human Rights in Africa: Report of the African Commission on Human and Peoples’ Rights on the situation of human rights in Africa*, item 23.

¹¹⁵ Full compliance has been recorded in communication no 212/98 *Amnesty International v Zambia*, 12th Annual Activity Report (See Tables A and B, chapter 2). The mission report of the Commission stated that the delegation was informed that the President had revoked the deportation order issued against Banda and Chinula. The government further reported that Banda, since he lived in Zambia should have straightened out his citizenship since the President made known that the deportation order was revoked. As for Chinula, who died in exile the government reported that it had authorised the repatriation of his remains and he is to be reburied in Zambia (*Report of the promotional visit to Zambia*, 9-13 September 2002, page 7).

¹¹⁶ Partial compliance was recorded in communication no 71/92 *Recontre Africaine pour la Defense des Droits de l’Homme*, 10th Annual Activity Report and communication no 211/98 *Legal Resource Foundation v Zambia*, 14th Annual Activity Report (See Tables A and B in chapter 2). In terms of communication no 211/98 *Legal Resources Foundation v Zambia*, the Minister of Justice informed the delegation during the promotional visit to Zambia, that the country was in the process of undertaking constitutional revision and that the decision of the African Commission had been brought under the attention of the Cabinet and the Minister further ensured them that it would be inscribed into the order of the day. *Report of the promotional visit to Zambia*, 9-13 September 2002, page 7. Partial compliance has been recorded in

On the other hand, the Commission also undertakes missions to state parties prompted by protective reasons.¹¹⁷ Usually these missions take place as a result of a prevailing situation of human rights violations in a country brought to the attention of the Commission by various communications pending before it.¹¹⁸ It seems that these missions take place in terms of article 46 of the African Charter, which provides that “the Commission may resort to any appropriate method of investigation”.¹¹⁹ From an analysis of the reports of two protective missions, undertaken to Sudan and Nigeria, it seems that the objectives of protective missions are three-fold. Firstly, the Commission aims to gather information on communications pending before the Commission.¹²⁰ Secondly, it attempts to settle communications pending against the country amicably.¹²¹ And, thirdly, it sees these missions as an opportunity to follow-up on the implementation of those decisions already taken against the host country.¹²² It is this third aspect that is of importance to this study.

communication 204/97 *MBDHP v Burkina Faso* 14th Annual Activity Report (See Tables A and B, chapter 2).

¹¹⁷ The Commission has undertaken protective missions to states such as Togo, Senegal, Sudan, Mauritania and Nigeria. These missions are also referred to as on-site investigations. See 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.

¹¹⁸ See the *Memorandum on Missions for Protective Activities under the African Charter on Human and Peoples’ Rights*.

¹¹⁹ Missions are usually constituted of members of the Commission accompanied by members of the Secretariat.

¹²⁰ During the protective mission to Sudan communication nos 48/90 and 50/91 were raised with a team of officials led by the Director of Public Prosecutions. These communications were not settled at the time and the inquiry was purely to establish facts from the government on the allegations raised in the communications. See section V, page 19 of the *Report of the African Commission on Human and Peoples’ Rights Mission to The Sudan, 1-7 December 1996, DOC/OS/35a(XXII)* released only later at the 23rd ordinary session of the Commission held in April 1998 in Banjul, The Gambia.

¹²¹ In the mission report to Nigeria it is reported that “[i]t had been agreed at the beginning of the mission that the cases against Nigeria before the Commission would be taken up with the appropriate authorities. The hope was that all of them would be settled amicably”. See page 17 of *Mission report to Nigeria*, March 1997, DOC/OS/(XXV)/99, adopted at the Commission’s 25th ordinary session in 1999. The report noted that a note, Ref. ACHPR/PA/A064 dated 26 February 1997, was sent ahead of the mission to the government of Nigeria reminding the government “that during the Mission’s visit it will like to discuss on certain communications”. The mission, on its last day in the country, met with a Dr. AH Yadudu and instead of settling the communication amicably the mission was told, “[t]he Commission ought to complement rather than run counter to the judiciaries of member states” (See Annex B to the Mission report).

¹²² In the note, see above, sent to the government of Nigeria ahead of the planned protective mission the Commission reminded the government that it would also “like to be informed about Nigeria’s efforts to implement the Commission’s decisions on certain communications; and would like to be informed if persons listed in the

From the foregoing discussion, it may be deduced that both promotional and protective missions are utilised by the members of the Commission as an opportunity to monitor state compliance to its findings on individual communications. A fundamental problem with both promotional and protective missions is that the African Charter and Rules of Procedure are silent on how these missions should be conducted.¹²³ This results in a situation where there is no conformity in the way these missions are undertaken, and that there are no guarantee that follow-up efforts will always form part of any given mission. It is therefore recommended that as part of a comprehensive follow-up mechanism to ensure state compliance to the Commission's recommendations guidelines should be put in place, either as a separate document or as part of the Rules of Procedure. Such a step is likely to ensure that promotional and protective missions do not take place without making follow-up a priority.

Another factor that will have to be addressed in regard to both promotional and protective missions is a time limit for the publication of a mission report.¹²⁴ Most reports get published years after the mission had taken place. This defeats the impact and actual goal of the missions. In the case of following up on the implementation of recommendations against a state party, a delay in publication could have devastating effects for the victims.¹²⁵ If these factors are taken into account and regular, well-structured missions that always include follow-up procedures as part of the mission objectives are undertaken, for both promotional and protective reasons, state compliance within the African regional human rights system will in all likelihood be improved significantly.

communications were still in custody of the state" (See Annex B of the Mission report).

¹²³ *Memorandum on Missions for Protective Activities under the African Charter on Human and Peoples' Rights*, page 3.

¹²⁴ See Murray (1999) 467.

¹²⁵ On average it seems to take two years from the date a mission takes place to the date the African Commission adopts a mission report. Reports only become public documents after adoption by the Commission. Both the Sudan and Nigerian reports, referred to above, took approximately two years to become public documents. Within such a time frame it follows logically that the situation within the country, which

4.4.1.3 Special rapporteurs

The appointment of special rapporteurs, to assist the African Commission in the fulfilment of its promotional mandate, is another development within the African regional human rights system. The Charter basis of this procedure seems to be article 45(1)(a) and article 46 of the African Charter.¹²⁶ A special rapporteur could also be called a thematic rapporteur as the mandate of such a person focuses on a specific human rights field. Five special rapporteurs have been appointed within the African regional human rights system:

- The first, appointed in 1994, is the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions.¹²⁷
- The second, appointed in 1996, is the Special Rapporteur on Prisons and Conditions of Detention in Africa.¹²⁸
- The third, appointed in 1999, is the Special Rapporteur on the Conditions of Women in Africa.¹²⁹
- The fourth, appointed in 2004, is the Special Rapporteur on Human Rights Defenders in Africa.¹³⁰
- The fifth, appointed in 2004, is the Special Rapporteur on Refugees and Internally Displaced Persons in Africa.¹³¹
- The sixth, appointed in 2004, is the Special Rapporteur on the Freedom of Expression in Africa.¹³²

The appointment of special rapporteurs did not initially take place at the initiative of the African Commission, but rather took place as a result of extensive lobbying by international NGOs such as Amnesty International and Penal Reform International.

prompted a protective mission, could have changed fundamentally over a two-year period.

¹²⁶ Article 45(1)(a) mandates the Commission to undertake studies on the human rights situation in Africa, while article 46 enables the Commission to “resort to any appropriate method of investigation”. Harrington clarified the position around the appointment of special rapporteurs as follows: “where the Charter has proved too vague, simply unworkable, or inadequate, the Commission has moved beyond the text. The African Commission’s practice of appointing special rapporteurs is therefore an innovation, and should be seen in the context of the Commission’s innovations generally” (J Harrington ‘Special rapporteurs of the African Commission on Human and Peoples’ Rights’ (2001) 2 *African Human Rights Law Journal* 248).

¹²⁷ Annex VII, 8th Annual Activity Report.

¹²⁸ Annex VII, 10th Annual Activity Report.

¹²⁹ 11th Annual Activity Report.

¹³⁰ Final Communiqué of the 35th ordinary session of the African Commission, par 18.

¹³¹ Final Communiqué of the 35th ordinary session of the African Commission, par 18.

¹³² Final Communiqué of the 36th ordinary session of the African Commission, par 43.

Amnesty International first called upon the Commission, in 1990, during the 8th ordinary session, to appoint a special rapporteur on extrajudicial executions. It took nearly four years of lobbying before the Commission finally decided upon the appointment of a Commissioner as Special Rapporteur on Extrajudicial Executions at its 15th ordinary session in 1994.¹³³ The appointment of this rapporteur is often described, as a “disappointment” since it took place with no written mandate, no administrative or budgetary support in place.¹³⁴ As a result the Special Rapporteur on Extrajudicial Executions fulfilled none of the functions envisioned by Amnesty International.¹³⁵ Penal Reform International (PRI) in following on the example set by Amnesty International, lobbied the Commission for the appointment of a Special Rapporteur on Prisons.¹³⁶ The appointment of the Special Rapporteur on Prisons, although not an independent expert as requested by PRI, was a more successful venture because PRI ensured that the rapporteur had a budget, resources, a mandate and other forms of support available.¹³⁷ Nevertheless, the African Commission did not seem to take note of the human and material support that had to be in place to enable a special rapporteur to fulfil his or her mandate. This is apparent from the appointment of a third thematic rapporteur on women who also received no mandate, budget or administrative support at the outset.¹³⁸

From the above it is apparent that there are certain factors that had hindered the effective functioning of special rapporteurs. These include the lack of a clear

¹³³ Amnesty International ‘African Commission on Human and Peoples’ Rights – The Role of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions’ available at <http://web.amnesty.org/library/print/ENGIOR630051997> . Date accessed: 27 November 2003.

¹³⁴ Harrington (2001) 261. See also S Gutto ‘The reform and renewal of the African regional human and people’s rights system’ (2001) 1 *African Human Rights Law Journal* 180-181.

¹³⁵ Harrington reported that when the first Special Rapporteur on Extrajudicial Executions resigned in 2001 at the 29th ordinary session not one written report was produced by him (Harrington (2001) 257). See page 5 of Amnesty International ‘African Commission on Human and Peoples’ Rights – The role of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions’ available at <http://web.amnesty.org/library/print/ENGIOR630051997> . Date accessed: 27 November 2003. Amnesty International indicated that in order to fulfil its mandate, which they based on article 4 of the African Charter, the rapporteur should be able to “act urgently if necessary, all year round; take up individual cases; carry out on-site visits, produce specific recommendations tailored to those countries; examine the phenomenon of extrajudicial, summary or arbitrary executions, recommend general safeguards and changes in law and practice needed to combat extrajudicial executions; act as a catalyst to encourage the development of new regional standards; and encourage the integration of human rights concerns falling within his/her mandate into other areas of the work of regional institutions and bodies”.

¹³⁶ As at December 2004 this position is vacant.

¹³⁷ Harrington (2001) 261-262.

mandate, a lack of administrative support from the Secretariat of the Commission and NGOs who specialise in a specific field and a lack of financial resources to allow rapporteurs to fulfil their mandate. Another aspect, mentioned by authors evaluating the functioning of special rapporteurs in the African system, relates to the individuals appointed as special rapporteurs.¹³⁹ The success of the Special Rapporteur on Prisons and the failures of the other two rapporteurs have, apart from resource issues, also been attributed to a “lack of will” or a lack of “expertise and commitment” on the part of the individuals appointment to fulfil these mandates.¹⁴⁰ This has led to calls for the appointment of independent experts as special rapporteurs rather than Commissioners who only fulfil their functions on a part-time basis and who might lack the experience required in a certain thematic field of human rights.¹⁴¹ The appointment of independent African experts even featured as part of the recommendations recently formulated by the African Commission in the evaluation of its functioning.¹⁴²

If an effort is made in the appointment of new thematic rapporteurs, to address the problems that have hampered the effective functioning of this mechanism in the past, special rapporteurs could fulfil an important role within the African regional human rights system, analogous to their counterparts within the United Nations treaty body system.¹⁴³ The appointment of a Special Rapporteur on Follow-up is strongly recommended if the African Commission is to fulfil its protective mandate upon having found a state party in violation of the African Charter in terms of the individual complaints procedure.¹⁴⁴ Special Rapporteurs on Follow-up already form part of the

¹³⁸ Harrington (2001) 265-266.

¹³⁹ Harrington (2001) 267 and Gutto (2001) 180-181.

¹⁴⁰ As above.

¹⁴¹ Penal Reform International lobbied the Commission for the appointment of an independent expert as Special Rapporteur on Prisons. See Harrington (2001) 265-266 and Gutto (2001) 181.

¹⁴² In reference to special rapporteurs it was recommended that “[t]he African Commission should take urgent steps to conclude the ongoing review process of the Special Rapporteur mechanism, including consideration of the use of Independent African Experts” (*Report of the Retreat of Members of the African Commission on Human and Peoples’ Rights facilitated by the Office of the High Commissioner for Human Rights*, page 7).

¹⁴³ Within the UN system the following rapporteurs fulfil duties similar to those in the African system: UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; and the UN Special Rapporteur on Violence against Women, its Causes and Consequences.

¹⁴⁴ Murray supports the appointment of a Special Rapporteur on Follow-up arguing that “without such a mechanism, the Commission often believes its job is finished once the decision is published, the communication does not get the necessary publicity, and it is not clear whether the victims received the remedy they deserved” (Murray (2001) 10).

follow-up mechanisms provided for by the United Nations Human Rights Committee, the Committee Against Torture and the Committee on the Elimination of Discrimination Against Women.

A brief overview is given here of the mandates fulfilled by Special Rapporteurs on Follow-Up within these bodies, in order to establish what would be expected of a rapporteur within the African human rights system.

In 1990, the UN Human Rights Committee (HRC) was the first human rights treaty body to establish a follow-up mechanism in an effort to fill the *lacuna* left by the Optional Protocol procedure whereby the Committee was seldom informed as to the actions taken by state parties to implement its recommendation in views adopted under the Optional Protocol.¹⁴⁵ Rule 95 of the HRC's Rules of Procedure provides for the appointment of a Special Rapporteur on Follow-up "for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's views".¹⁴⁶ The Special Rapporteur is given a broad mandate in terms of rule 95 stating that the Rapporteur "may make such contacts and take such action as appropriate for the due performance of the follow-up mandate".¹⁴⁷

Over the years, the Committee's mandate has translated into the following actions under taken by Special Rapporteurs on Follow-Up: Firstly, each state party upon being found in violation of the ICCPR is given 90 days in which to report on measures taken to comply with the Committee's views.¹⁴⁸ If no information is

¹⁴⁵ According to Schmidt the HRC derived its authority to establish a follow-up mechanism from the doctrine of implied powers "pursuant to which any international instance must enjoy certain implied powers" (M Schmidt 'The follow-up activities by the UN human rights treaty bodies and the OHCHR' paper delivered during the meeting on the Impact of the Work of UN Human Rights Treaty Bodies on National Courts and Tribunals, September 2003, Turku, Finland. Available at: www.abo.fi/instut/imr/ILA_papers.htm. Date accessed: 20 April 2004). For an overview of follow-up procedures within the Human Rights Committee see also http://www.bayefsky.com/complain/45_followup.htm. Date accessed: 12 April 2004.

¹⁴⁶ The Special Rapporteur's mandate is for a two-year period with the option to renew the contract.

¹⁴⁷ The Special Rapporteur is also, in terms of rule 95, expected to regularly report to the Committee on the activities it undertook to establish follow-up and the Committee must then include this information in its annual report. Rule 97 should be read in conjunction with rule 95 for it determines that "information furnished by the parties within the framework of follow-up to the Committee's views is not subject to confidentiality, unless the Committee decides otherwise". Similar provisions apply to decisions taken by the Committee relating to follow-up activities.

¹⁴⁸ Schmidt however reports that 90 days in general has proved to be too restrictive a time frame and in practice the deadline is therefore not strictly enforced (Schmidt (2003) 3).

provided within a reasonable time after the expiry of the deadline, the Special Rapporteur sends a reminder to the state party through the Secretariat.¹⁴⁹ Second, where state parties do not respond to the Rapporteur's requests, direct follow-up "consultations" with the representatives of the relevant state parties may be organised.¹⁵⁰ Third, if there is still no implementation of the Committee's Views the Rapporteur could organise a follow-up mission to the state party concerned.¹⁵¹ Fourth, where follow-up information is presented by a state party, the Special Rapporteur will convey it to the HRC as part of its regular follow-up progress report to the Committee. This information is also included as a separate chapter to the Human Rights Committee's Annual Report to the UN General Assembly.¹⁵²

At the beginning of 2002, the Committee Against Torture also adopted a follow-up procedure to work towards the implementation of its views given in terms of article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁵³ Follow-up procedures are specifically provided for in rule 114 of the Committee's Rules of Procedure. From an analysis of this rule, it is clear that the follow-up procedures of CAT are closely modelled on the example set by the HRC in 1990. Rule 114 also provides for the appointment of a Special Rapporteur on Follow-Up to "make such contacts and take such action as appropriate for the due performance of the follow-up mandate". The Special Rapporteur is therefore also expected to meet with the representatives of state parties that were found to violate CAT, in order to establish information as to the remedies provided by them to the victims. Furthermore, rule 114 codified the practice developed by Special Rapporteurs on Follow-Up to the Views of the HRC and specifically states that a Rapporteur on Follow-Up may "with the approval of the Committee, engage in

¹⁴⁹ Schmidt (2003) 3.

¹⁵⁰ These consultations are usually organised between the permanent representatives of state parties based in Geneva or New York. Schmidt further reports that "since the inception of the procedure, such direct consultations have been held with representatives of 23 states parties to the Optional Protocol – in some cases, these consultations have yielded pertinent follow-up information, in others not" (Schmidt (2003) 3).

¹⁵¹ This does not however seem like a viable option since only one such mission has taken place, to Jamaica in 1995, and although others were planned they never materialised mainly due to budgetary constraints (See Schmidt (2003) 3).

¹⁵² Schmidt reported on the discontinuation of the practice of "shaming non-compliant state parties into compliance" through the inclusion of a "black-list" as part of the follow-up chapter. He does not however mention the reasons for doing so (Schmidt (2003) 3).

¹⁵³ CAT came into force on 26 June 1987.

necessary visits to the State party concerned”.¹⁵⁴ The findings of the Special Rapporteur on Follow-Up are to be included in the Annual Report of the Committee in terms of rule 115. In practice, the follow-up procedure of the Committee Against Torture has yet to be fully realised. Therefore, only the theory of its procedure can be relayed here. The Special Rapporteur still needs to convert its broad mandate into practical steps.¹⁵⁵

Another body that is theoretically expected to follow-up on its views and recommendations is the Committee on the Elimination of Discrimination Against Women (CEDAW).¹⁵⁶ Although once again the follow-up procedure is built on the experiences of the HRC, a definite effort was made to strengthen the call for implementation of views and recommendations by not merely including the follow-up procedure in the Rules of Procedure but explicitly providing for follow-up in the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁵⁷ In terms of rule 73 of the Rules of Procedure, the Committee is to designate a rapporteur or working group to follow-up on the views adopted under article 7 of the Optional Protocol. The rapporteur or working group “may make such contacts and take such action as may be appropriate for the due performance of their assigned functions and shall make such recommendations for further action by the Committee as may be necessary”.¹⁵⁸ In addition, the rapporteur or working group is expected to report regularly to the Committee and the Committee is to include information on follow-up activities in its Annual Report.¹⁵⁹ The practical aspects of the rapporteur or working group’s follow-up activities is still to be determined, but will most probably also reflect the example set by the HRC.

¹⁵⁴ Rule 94 of the Rules of Procedure of the HRC did not specifically provide for visits to state parties to establish follow-up, rather it was a practice developed within the broad mandate given to the Special Rapporteur on Follow-Up.

¹⁵⁵ Schmidt (2003) 4.

¹⁵⁶ Specific follow-up practices have not been developed for no cases have to date been decided by this Committee.

¹⁵⁷ Article 7(4) and (5) of the Optional Protocol specifically provide for the following follow-up measures: (4) The state party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee. (5) The Committee may invite the state party to submit further information about any measures the state party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the state party’s subsequent reports under article 18 of the Convention.

¹⁵⁸ Rule 73(5).

¹⁵⁹ Rule 73(6) and (7).

In summary, the conclusion is that, should a Special Rapporteur on Follow-Up be designated by the African Commission as part of a comprehensive follow-up mechanism, this could easily be done through an addition to the Rules of Procedure. It is also clear from the above discussion that the mandate of the Special Rapporteur is best left wide open to be determined through practical experiences. However, a Rapporteur should be an independent expert that strives to establish implementation of the Commission's recommendations by firstly keeping record of state compliance and non-compliance to the Commission's findings. Secondly, a Rapporteur should be expected to engage in constructive dialogue with state party representatives based in Banjul, Dakar or elsewhere (maybe even during the Sessions of the Commission when many representatives are present) if no information is forthcoming as to the remedies provided for victims of human rights abuses.¹⁶⁰ Finally, the Rapporteur should also be able to undertake visits to state parties where the implementation of recommendations are unduly delayed or prove particularly difficult to implement. The mandate of a Special Rapporteur on Follow-Up can however only be fulfilled with the support of the Secretariat of the African Commission. A legal officer will have to be appointed within the Secretariat to provide fulltime support to the efforts of the Special Rapporteur on Follow-Up. The African Union will have to ensure that its budget provides for the necessary human and financial resources required for the appointment of a Special Rapporteur on Follow-Up to ensure that it is not merely a mechanism in theory but also in practice.

4.4.1.4 Resolutions

The African Commission also adopts resolutions as part of its promotional mandate.¹⁶¹ Resolutions adopted by the Commission are published in its Annual Activity Reports and subsequently adopted by the AHSG.¹⁶² Although these

¹⁶⁰ More state representatives are based in Dakar, Senegal than in Banjul in The Gambia.

¹⁶¹ No direct reference is however made to the adoption of resolutions in either the African Charter or the Rules of Procedure. Although most of the resolutions adopted relate to the Commission's promotional mandate some resolutions also address protective aspects of the Commission's mandate. Viljoen (2001) 197.

¹⁶² The government of Nigeria once protested against a resolution adopted by the African Commission in relation to the human rights situation prevalent in the country on 22 March 1995. The government alleged that the Commission acted in violation of the confidentiality requirements of articles 58 and 59 of the African Charter by publishing the resolution. The Commission responded by stating that there is no bar on resolutions of the Commission being disseminated however the Commission sees fit". Account of Internal Legislation of Nigeria and the Dispositions of the Charter of

resolutions are not legally binding, they are important tools in the interpretation and clarification of the provisions of the African Charter.¹⁶³ A *Draft Resolution on the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights* was introduced at the 24th ordinary session of the African Commission.¹⁶⁴ Unfortunately this resolution remained in draft format and was never formally adopted by the Commission.¹⁶⁵ The importance of such a resolution rests in the fact that it could have assisted in interpreting the obligations of state parties to implement the Commission's recommendations whilst simultaneously clarifying the role of the Commission and its Secretariat in establishing a follow-up mechanism.

In the past the Commission has adopted, without much deliberation and without consulting independent information, many of the resolutions formulated by the NGO Forum preceding the Sessions of the Commission. The adoption of resolutions submitted by the NGO Forum led to a situation, which according to Ankumah undermined the credibility of the Commission in certain instances.¹⁶⁶ The NGO Forum still precedes the Sessions of the Commission today and is used as a platform to form coalitions and draft resolutions for adoption by the African Commission.¹⁶⁷ Although the Commission is now more wary of merely adopting everything forwarded from the NGO Forum, it will still do so where draft resolutions are properly introduced before them. A first step in speeding up the process of establishing a comprehensive follow-up mechanism might be to pass a resolution to this effect through the Commission.

¹⁶³ African Human and Peoples' Rights, Second Extraordinary Session, Kampala, 18-19 December 1995, DOC.II/ES/ACHPR/4.

According to Ankumah "[t]he purpose of the resolutions is to clarify the vague and ambiguous provisions of the Charter in an effort to give the treaty its maximum effect. However, regrettably some of the resolutions are no clearer than the provisions which they seek to clarify" (Ankumah (1996) 26).

¹⁶⁴ Held in Banjul, The Gambia, from 22 to 31 October 1998. Reprinted in R Murray & M Evans *Documents of the African Commission on Human and Peoples' Rights* (2001) 760.

¹⁶⁵ See Ouguergouz (2003) 657.

¹⁶⁶ Ankumah noted one incident where the Commission at the 16th ordinary session adopted a draft resolution on Algeria submitted by the NGO workshop preceding the session. At the 17th session, the credibility of the Commission came into question when it had to withdraw the resolution on Algeria due to the fact that it did not consult independent information on the facts before adopting the resolution at the previous session and as a result a representative from the government of Algeria brought it to their attention that the facts were untrue. Ankumah (1996) 188.

¹⁶⁷ The NGO Forums were initially organised by the International Commission of Jurists (ICJ) but since the mid-nineties the African Centre for Democracy and Human Rights Studies, based in Banjul, The Gambia, took over this responsibility. Visit the African Centre's website at www.acdhrs.org.

This brings to an end the overview of promotional activities within the mandate of the African Commission that either has been or could be used by the Commission to follow up on the implementation of recommendations formulated by it upon deciding individual communications. In the following section, the protective mandate of the African Commission is discussed with respect to the factors that influence state compliance. Efforts that the Commission has made in the past to follow up on its decisions are also highlighted.

4.4.2 Protective mandate

Article 45(2) of the African Charter calls upon the African Commission to “ensure the protection of human and peoples’ rights under conditions laid down by the present Charter”. In terms of its protective mandate, the Commission can consider communications alleging violations of the African Charter from state parties (inter-state communications) or from individuals (other communications).¹⁶⁸ The inter-state complaints procedure is not discussed here given that, as in other regional human rights systems, this procedure is rarely invoked in front of the African Commission.¹⁶⁹ The Commission has developed an established practice in considering individual complaints. This practice is analysed here as well as the as the issuing of interim measures, a procedure adopted by the Commission in fulfilling its protective mandate.

4.4.2.1 Individual communications

(a) Procedures

The text of the African Charter does not deal in detail with the consideration of “other communications”.¹⁷⁰ Article 58 refers only to “special cases which reveal the

¹⁶⁸ Inter-state communications are lodged and considered in terms of articles 47 to 54 of the African Charter and other communications are dealt with in terms of articles 55 to 59.

¹⁶⁹ Most of the communications lodged before the Commission in terms of the inter-state procedure never made it past the admissibility test for usually one of the parties mentioned in the communication was not a state party to the African Charter. See for instance communication no 3/88, *Centre for the Independence of Judges and Lawyers v Yugoslavia* or communication no 12/88, *Mohamed El-Nekheily v OAU*. As of December 2004 only one inter-state communication was pending before the African Commission, communication no 227/99 *Democratic Republic of Congo v Burundi, Rwanda and Uganda*. For more information on the procedures applicable to inter-state communications see rules 88 to 101 of the Rules of Procedure.

¹⁷⁰ See article 55 of the Charter and the heading that precedes it.

existence of a series of serious or massive violations of human and peoples' rights" in which instance the Assembly of Heads of State and Government may request the Commission to undertake an in-depth study and make a factual report accompanied by its findings and recommendations.¹⁷¹ The Commission has however interpreted its mandate in a progressive manner. It developed its Rules of Procedure to receive communications from its third ordinary session onwards from individuals, groups of individuals and non-governmental organisations, on behalf of individuals, alleging violations of the Charter.¹⁷² Individual communications that have been submitted to the Commission dealt with a wide range of violations of the Charter and have not been restricted to the definition of "serious and massive" violations as specified in article 58.¹⁷³

The individual complaint process officially starts when communications, submitted in terms of article 55 of the African Charter, are included in a list by the Secretariat and this list is then transmitted to the Commission. The Commission decides to consider a communication if a simple majority of its members agree thereto.¹⁷⁴ The Commission refers to this process as 'seizure' of a communication.¹⁷⁵ The seizure of a communication is an event that takes place separate from the consideration of a communication to determine its admissibility before the Commission. In practice, this means that the Commission seizes a communication during a particular ordinary session. It is only six months later, at the next ordinary session, that the Commission will actually determine the admissibility of a communication.

The Commission determines admissibility in accordance with the criteria set out in article 56 of the African Charter, read together with rules 113 to 118 of the Rules of

¹⁷¹ It has been 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).

¹⁷² The Commission made specific provision for the consideration of individual communications in its Rules of Procedure. Rules 102 to 120 stipulates the procedures to be followed from the moment the Commission is seized with a complaint until the publication of the Commission's findings in its Annual Activity Reports.

¹⁷³ Refer to Table A in section 2.2.2 of chapter 2. From the 44 communications listed in Table A it is clear that the Commission has dealt with a wide range of issues.

¹⁷⁴ Article 55(2) of the African Charter.

¹⁷⁵ Each communication is allocated a number followed by the year in which it was submitted to the Commission.

Procedure.¹⁷⁶ Although rule 113 stipulates that a decision on admissibility should be taken “as early as possible”, a decision can only be taken after a state party has been given an opportunity to submit additional information relating to the issue of admissibility in terms of rule 117.¹⁷⁷ Rule 117, however, also states that should a state party fail to submit a written response on admissibility within three months from notification, the Commission can proceed to decide the case on admissibility on the facts provided by the author of the communication. It is clear that rule 117 was drafted with the intent to limit the time it takes to consider the admissibility of a communication, but in practice it is difficult to state that the Commission always adheres to these principles. It seems from the “procedure” part of the report of each communication that state parties are sometimes granted extended periods of time to make submissions to the Commission, thereby delaying the relief sought by the author of the communication over a period of years.¹⁷⁸ It must be taken into account that once a decision is taken on the admissibility of a communication, it is still only after a following six months have passed, at the next Session of the Commission, that a decision will be made on the merits of the communication.¹⁷⁹

It should therefore come as no surprise that it has taken up to eight years in some instances (or until a regime change took place in a state party) before a communication was finalised by the Commission.¹⁸⁰ Such a delay in time, between

¹⁷⁶ Amongst the criteria listed in article 56 the most contentious has proven to be subsection (5) which requires that a communication may only be submitted after the exhaustion of local remedies unless none were available or the procedure was unduly prolonged.

¹⁷⁷ Additional information may also be requested from the author of the communication in terms of rule 117.

¹⁷⁸ The decision on admissibility in the joint communications against Mauritania is illustrative of the severe delays that could occur despite the provisions in rule 117. Communication no 54/91 *Malawi African Association v Mauritania* was seized by the Commission on 14 November 1991 at which date the government was called upon to “make its observations known”. The Commission only decided on the admissibility of the communication after it was joined with other communications at the 23rd ordinary session held in April 1998. Thereafter a decision on the merits of the joint communications was only taken in May 2000, almost ten years after the Commission was first seized with communication no 54/91. See the procedural explanation given in joint communication nos 54/91, 61/91, 98/93m 164.97, 196/97 and 210/98 against Mauritania published in the 13th Annual Activity Report.

¹⁷⁹ In terms of rule 119 once a communication has been declared admissible both the author of the communication and the state party concerned must be informed in writing. The state party then has three months in which to respond to the allegations made in the communication. Should the state party not furnish any further information the Commission can consider the communication on the evidence before it. The state party may also be requested in terms of rule 119 to furnish the Commission with additional information within “a time limit fixed by the Commission”.

¹⁸⁰ During the rule of General Sani Abacha various communications were received by the Commission against Nigeria. One of these, communication no 102/93

the seizure of a communication and the final decision of the Commission, obviously impacts adversely on the victim or victims of human rights abuses who launched the communication with the Commission in the hope of some form of relief.¹⁸¹ This procedural delay in finalising communications therefore results in a situation where the eventual implementation of the relief sought at the time the communication was instituted is also problematic where recommendations are only forwarded years later.¹⁸² In the absence of a follow-up mechanism to speed up the process of state compliance to recommendations, it might still be another couple of years, if ever, before the victims of human rights abuses receive any relief.

The African Commission has acknowledged the existence of a problem in relation to the time it takes to finalise communications and has made the following suggestions:¹⁸³

- “The African Commission should adhere to the time frame for communications as stipulated by the Charter;
- The African Commission should consider a communication even where the state fails to respond to correspondences relating to the communication;

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 24th 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). See also CA Odinkalu ‘The role of case and complaints procedures in the reform of the African regional human rights system’ (2001) 1 *African Human Rights Law Journal* 243.

¹⁸¹ Odinkalu suggested that “one obvious way of avoiding such delays or ameliorating its adverse consequences on victims would be for the Commission to make use of its powers of provisional measures more frequently” (Odinkalu (2001) 243). Provisional measures are discussed in more detail in section 4.4.2.2.

¹⁸² Recommending the release from prison of a victim or recommending that a state party compensate the author of a communication years after the complaint was lodged and the victim either already served several years in prison or can no longer be found to compensate him or her are only some examples. The government of Cameroon for instance alleged that they could not compensate Embga Mekongo Louis, who was awarded compensation by the Commission in 1995 (after lodging the complaint already in 1991) due to difficulties experienced in locating Mr Mekongo. This response was delivered by the government of Cameroon in response to questions posed by Commissioners during the examination of Cameroon’s initial report in May 2002 during the 31st ordinary session of the Commission. (Personal notes taken during the 31st ordinary session of the Commission).

¹⁸³ *Report of the Retreat of Members of the African Commission on Human and Peoples’ Rights facilitated by the Office of the High Commissioner for Human Rights*, pages 4-5.

- In order to speed up the consideration of communications the African Commission should combine the process of seizure and admissibility while dealing with communications”.

The first two recommendations made here are merely repeating the provisions already set out in the Rules of Procedure and are therefore not addressing the factors that in practice lead to repeated delays in the consideration of a communication. Instead of striving to take a decision on admissibility “as soon as possible”, specific time frames should be stipulated not only for admissibility but also for the implementation of the findings of the Commission. The merging of the seizure and admissibility procedures is, however, a practical suggestion that would shorten the overall process with six months on average.

(b) Remedies

Upon having considered the merits of an individual communication, the African Commission makes a finding. When it holds a state party in violation of the African Charter, it usually also formulates recommendations to remedy the situation. These recommendations are in fact remedies couched as “invitations”, “requests” or “appeals” made to a state party in line with the quasi-judicial nature of the Commission.¹⁸⁴

There is no direct reference in the African Charter authorising the Commission to issue recommendations upon finding a state party in violation of the provisions of the Charter.¹⁸⁵ The Commission has developed its mandate in a progressive manner by relying on the “implied powers doctrine” to adopt recommendations upon having found a state party in violation of the Charter.¹⁸⁶ When the Nigerian government questioned the Commission’s competence to issue recommendations, in reference to

¹⁸⁴ The Commission never uses the word “order” in referring a state party to some specific action that should be taken to remedy the situation. Rather the Commission uses terms like “urges”, “recommends” or “appeal”.

¹⁸⁵ Österdahl argued that since the Commission is mandated in terms of its promotional mandate to make recommendations to government’s it should also have the capacity to make recommendations in the context of its protective mandate. She further mentioned that as “the Commission is the sole level of control in the enforcement system under the charter in the absence of a Court this could be an argument in favour of the Commission’s competence to prescribe reparations to be paid by the state. If the Commission does not prescribe sanctions no one else will” (Österdahl (2002) 153-154).

¹⁸⁶ GJ Naldi ‘Reparations in the practice of the African Commission on Human and Peoples’ Rights’ (2001) 14 *Leiden Journal of International Law* 169.

the Commission's findings in communication 101/93, the Commission stated the following:¹⁸⁷

As has been made clear above, Nigeria is bound by the African Charter. The Commission is likewise bound by the Charter, to consider communications fully, carefully, and in good faith. 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. Naturally the Commission could not make such judgments with regard to states outside its jurisdiction. But in ratifying the African Charter without reservation, Nigeria voluntarily submitted itself to the Commission's authority in this regard.

The Commission's practice to issue remedies is now well established and has not been questioned again by any state party. This section therefore analyses the Commission's practice to formulate remedies. The formulation and content of the remedies issued by the Commission are central to the question on compliance. A well-structured and practical remedy will not only assist state parties in the actual implementation of the remedy, but will also enable the victims of human rights abuses to lobby governments to implement the Commission's recommendations.

This section therefore starts out by firstly summarising the various categories of remedies formulated by the Commission in the past. An overview of the remedies published by the Commission, up until the 16th Annual Activity Report, indicates that broadly five types of remedies may be identified. The classification of these remedies are based on an analysis of the Commission's work since its inception and is therefore a summary of recurring themes rather than a classification according to international definitions on remedial measures.¹⁸⁸

In the first place, the mere finding of a respondent state in violation of the Charter is according to Naldi's interpretation of Shelton's views "a sufficient and appropriate

¹⁸⁷ *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. See also F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 28 *Journal of African Law* 11.

¹⁸⁸ Naldi summarises remedies in international law as follows: "Remedies may include provision for reparation that in turn may take the forms of restitution, rehabilitation and the payment of compensation" (Naldi (2001) 681). Although, not the focus of this discussion, these definitions will be taken in to account in classifying the types of remedies usually ordered by the Commission.

remedy” on its own.¹⁸⁹ Naldi refers to this basic finding of the African Commission as “declaratory relief” for it could “possibly lead to a change in law or practice”.¹⁹⁰ Every individual communication where the Commission makes a finding to the effect that it holds the responding state party in violation of the Charter could therefore be labelled as a finding of “declaratory relief”.¹⁹¹ However, in practice the Commission has gone further than merely stating which articles of the African Charter a state party violated, as will be indicated in discussing the other five types of remedies usually formulated by the Commission. This development within the Commission’s jurisprudence is welcomed, as a finding of mere violations of the Charter without indicating to the state party exactly what steps to take to rectify the situation leaves the victims of human rights violations at the mercy of the government accused of violating the Charter in the first place. A case in point is the strong appeal made by Huri-Laws, a Nigerian based NGO, in addressing the African Commission at its 31st ordinary session in May 2002.¹⁹²

We 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)(d) of the 1999 Constitution of Nigeria ... Huri-Laws and the Civil Liberties Organisation, 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.

¹⁸⁹ D Shelton *Remedies in International Human Rights Law* (1999) 199 quoted in Naldi (2001) 685.

¹⁹⁰ As above.

¹⁹¹ Over the years there has been quite a number of individual communications where the Commission’s findings amounted to no more than holding the state party in violation of the Charter provisions. As indicated from this list of cases it was not only a phenomenon in the early days of the Commission’s findings but was recorded still as the only finding as recently as the 14th Annual Activity Report. This attributes to the fact that the Commission’s findings are inconsistent and there is a real need to standardise its practise in this regard to ensure legal certainty for the victims of human rights abuses. The following cases were decided without making any additional recommendations: 8th Annual Activity Report, 1994-1995, communication nos 64/92, 68/92 and 78/92 *Krishna Achuthan (on behalf of Aleke Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*; 9th Annual Activity Report, 1995-1996, communication no 129/94 *Civil Liberties Organisation v Nigeria*; 12th Annual Activity Report, 1998-1999, communication no 212/98 *Amnesty International (on behalf of Banda and Chinula) v Zambia*; 13th Annual Activity Report, 1999-2000, communication no 215/98 *Rights International v Nigeria*; 14th Annual Activity Report, 2000-2001, communication no 223/98 *Forum of Conscience v Sierra Leone* and in the same Report communication no 225/98 *Huri-Laws v Nigeria*.

¹⁹² Personal notes taken during the 31st ordinary session of the African Commission, held in Pretoria, South Africa, May 2002.

The African Commission has yet to respond to the appeals of Huri-Laws and forward actual recommendations to the government of Nigeria who although found guilty of violating the provisions of the Charter has not been instructed to remedy the violations.¹⁹³

A second category of remedies formulated by the Commission also did not indicate specific remedies apart from referring such cases to the AHSG. This was done in cases, which, in accordance with article 58 of the Charter, revealed evidence of the existence of a series of serious or massive violations of human and peoples' rights.¹⁹⁴ From a perusal of the jurisprudence of the Commission it is clear that the Commission stopped making such findings in 1995. In an interview with Commissioner Dankwa, he commented that the reason for this was simply that "the AHSG never conducted these in-depth studies and therefore the Commission stopped referring cases of serious and massive violations to them".¹⁹⁵

A third category of remedies ordered by the Commission relates to the payment of compensation to the victims of the human rights abuses by the responding state party.¹⁹⁶ The Commission has forwarded such a remedy only in a few instances and

¹⁹³ One of the unfortunate repercussions of the Commission's practice, to award no remedies in some instances and merely stating that the respondent government did violate the Charter, is the fact that such behaviour discourages NGO's from seizing the regional human rights system again. In an interview with Frances Ogwo (senior legal officer at Huri-Laws), on 28 October 2002 at the Huri-Laws offices in Lagos, Nigeria, it became apparent that the NGO decided to focus on national advocacy rather than to utilise the long, (in their case) disappointing mechanism of the African Commission.

¹⁹⁴ The following communications were referred to the AHSG: 7th Annual Activity Report, 1993-1994, communication nos 64/92, 68/92 and 78/92 against Malawi *Krishna Achuthan (on behalf of Aleke Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*; 7th Annual Activity Report, communication no 47/90 *Lawyers Committee for Human Rights v Zaire*; 9th Annual Activity Report, 1995-1996, communication 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*; 9th Annual Activity Report, 1995-1996, communication no 74/92 *Commission Nationale des Droits de l'Homme et des Libertas v Chad*.

¹⁹⁵ Comments made by Commissioner Dankwa during an interview held at the University of Pretoria, South Africa, 14 May 2002.

¹⁹⁶ *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, annexed to the final report of the Special Rapporteur, Mr M Cherif Bassiouni, 2000/41, ECOSOC O.R. Supp.No. 3 at par 23 determine that compensation should be payable for "economically assessable damage resulting from physical or mental harm, including pain, suffering and emotional distress, lost opportunities, including education material damages and loss of earnings, including loss of earning potential, harm to reputation or dignity, and costs required for legal or expert assistance, medical services, and psychological and social services".

where it did so it never specified an amount to be paid by the state party.¹⁹⁷ As a matter of fact, the Commission has not only never specified an amount but also specifically left the determination of an amount to the responding state party.¹⁹⁸ This has been described by Shelton as “anomalous among international human rights tribunals”.¹⁹⁹ As a consequence of such findings by the Commission, the complainant has to arrive at a negotiated amount for compensation without the help

¹⁹⁷ In the following instances the Commission called upon state parties to pay compensation: (1) 8th Annual Activity Report, 1994-1995, communication no 59/91 *Emgba Mekongo Louis v Cameroon*; (2) 11th Annual Activity Report, 1997-1998, 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*; (3) 13th Annual Activity Report, 1999-2000, communication nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 *Malawi, African Association, Amnesty International, Ms. Sarr Diop, Union Inter africaine des Droits de l'Homme, RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme v Mauritania*; (4) 14th Annual Activity Report, 2000-2001, communication no 97/93 *John K Modise v Botswana*; (5) 14th Annual Activity Report, 2000-2001, communication no 204/97 *Mouvement Burkinabe des Droits de l'Homme et des Peuples (MBDHP) v Burkina Faso*; (6) 14th Annual Activity Report, 2000-2001, communication no 218/98 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*; (7) 15th Annual Activity Report, 2001-2002, communication no 155/96 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*; (8) 16th Annual Activity Report, 2002-2003, communication nos 222/98 and 229/99 *Law Office and Ghazi Suleiman v Sudan*; (9) 16th Annual Activity Report, 2002-2003, communication no 236/2000 *Curtis Francis Doebbler v Sudan*.

¹⁹⁸ For instance in communication no 59/91 *Emgba Mekongo Louis v Cameroon*, 8th Annual Activity Report, the Commission made the following recommendation: “The 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 Cameroon”. In criticising the Commission’s lack of means to assess the quantum of damages to be awarded to a victim, Dankwa made the following comments in relation to the *Mekongo* case: “In the circumstances, it [the victim] found itself driven back to the very courts whose tardiness had partially necessitated the communication. The Cameroonian courts were to assess the quantum of compensation. No one at the Commission knows what was done after the reference to the municipal courts. Pressed for comment on such a situation, the Commission is likely to state that it expected the complainant to initiate action in Cameroon for the award and assessment of the compensation. He should come back to the Commission if he encountered any more difficulties ‘Come and do what before the Commission for a second time?’, is not an unreasonable question for Louis Embga Mekongo to ask. Indeed, it is unanswerable” (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)). (See also the discussion in section 3.3.5 (c) in chapter 3). The Commission, on another occasion, stipulated in communication no 159/96 against Angola as follows: “The Commission, 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”.

¹⁹⁹ D Shelton (1999) 177 quoted by GJ Naldi (2001) 689.

of the Commission with the very same government that violated his or her rights.²⁰⁰ Another potential drawback, of not specifying the amount of compensation or not reaching such an agreement through negotiations between the Commission and the responding state, is the fact that compensation determined under the national law of a country could amount to much less than usually agreed upon in other international tribunals.²⁰¹ Consequently, not stipulating the amount of compensation to be paid also has a direct, negative effect on state compliance with the Commission's recommendations.²⁰²

The fourth category of remedies formulated by the Commission could be labelled as restitution.²⁰³ According to the *Basic Principles and Guidelines on the Right to a*

²⁰⁰ Murray has summarised the situation as follows: "However, although it appears to hold states continually liable for the violations unless action is taken by the government, what remedies are required is put at the discretion of the state. As a result, it would appear that the complainant has to arrive at a negotiated solution on his or her own. It would have been preferable for the Commission to offer its offices in this regard". 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* 125.

²⁰¹ Rodger Chongwe was awarded compensation by the Human Rights Committee to be paid by the government of Zambia for gunshot wounds he suffered in 1997. *Rodger Chongwe v Zambia* communication no 821/1998 U.N.Doc.CCPR/C/70/D/1998 (2000) The HRC however stipulated that the remedy should conform to Zambian laws and did not specify an amount. Dr Chongwe, who initially claimed \$2.5 million, tried to hold the government of Zambia to this amount. The Legal Affairs Minister and Attorney General of Zambia, George Kunda, responded to Dr Chongwe's claim by stating "In fact by Zambian standards, the \$2,5 million translates into K12,5 billion which should not be a bill for being grazed with a bullet. By Zambian law he would be lucky to get K10 million in such a case". "Government dismisses US\$2,5m Chongwe claims", *Zamnet*, 5 May 2003. Available at <http://www.zamnet.zm/newsys/news/viewnews.cgi?category=30&id=1052116915>. Date accessed: 10 March 2004.

²⁰² In all the communications cited in fn 197 above, apart from those published in the 16th Annual Activity Report (excluded only because it is so recent) and the communication against Botswana where the government has in theory agreed to pay compensation, compensation has rarely been paid to any of the other victims. Although this is a devastating record of state compliance as far as the payment of compensation is concerned, compensation has ironically been paid in some instances where the remedies issued by the Commission did not necessarily call for the payment of compensation. In these cases NGOs secured compensation for the victims of human rights violations in subsequent negotiations with state parties found guilty of violating the African Charter. The Zambian government for instance compensated some of the West Africans that were expelled from the country following the findings of the African Commission in communication no 71/92. Information gathered from an interview held with Chidi Odinkalu, senior legal officer for Interights, a London based NGO that was instrumental in lodging and implementing this communication. Interview was held in November 2003 during the 34th ordinary session of the African Commission, in Banjul, The Gambia.

²⁰³ Although restitution is usually understood as the reconstructing of the situation that existed prior to the occurrence of the wrongful act, this is not always possible as is the case where an individual suffered personal pain. Some forms of restitution, however, is possible as will be indicated in relation to restoring an individual's liberty

Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, restitution includes

[r]estoration of liberty, legal rights, social status, family life and citizenship, return to one's place of residence, and restoration of employment and return of property.²⁰⁴

The Commission formulated these types of remedies in clear and concise terms leaving no doubt for the responding state party as to what action is expected of them in remedying the situation. In general, these remedies would include recommendations to free complainants,²⁰⁵ permitting a retrial of the accused²⁰⁶ or appealing to governments to charge or release detainees.²⁰⁷ Other remedies aimed at achieving some form of restitution included urging government's to recognise a complainant's citizenship through descent,²⁰⁸ facilitating the safe return of a complainant if he so wished²⁰⁹, as well as recommending the return of property²¹⁰ and reinstating the rights due to the unduly dismissed or forcibly retired workers.²¹¹ The African Commission should continue to issue remedies such as these. Such

for instance by releasing him or her from prison. See in general Redress *Reparation – A Sourcebook for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law* (2003).

²⁰⁴ Annexed to the final report of the Special Rapporteur, Mr M Cherif Bassiouni, 2000/41, ECOSOC O.R. Supp.No. 3, 190.

²⁰⁵ In communication no 60/91, *Constitutional Rights Project (in respect of Akuma, Adeaga and others) v Nigeria*, the Commission "recommended that the government of Nigeria should free the complainants". The same recommendation was made to Nigeria in separate communication nos 87/93, 102/93 and 148/96.

²⁰⁶ In communication no 151/96 against Nigeria the Commission appealed to the government of Nigeria "to permit the accused a civil retrial with full access to lawyers of their choice, and to improve their conditions of detention".

²⁰⁷ Such an appeal was made to the government of Nigeria in communication no 153/96.

²⁰⁸ Communication no 97/93 *John K Modise v Botswana*. See also communication nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 *Malawi, African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme, RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme v Mauritania*. The Commission recommended to the government of Mauritania 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".
²⁰⁹ Communication no 232/99 *John D Ouko v Kenya*.

²¹⁰ Joint communication nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 *Malawi, African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme, RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme v Mauritania*. The Commission recommended the "restitution of the belongings looted from them (those who were expelled) 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".

²¹¹ In communication no 39/90 against Cameroon the Commission recommended that "the government of Cameroon draw all the necessary legal conclusions to reinstate the victim in his rights". In a similar manner the Commission ordered the government of Mauritania, in the case cited above, to "reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all the legal consequences appertaining thereto".

remedies provide clear guidance to state parties, making follow-up efforts easier. Restitutional remedies are also to the point and do not leave potential complainants guessing about what kind of remedies if any to expect from the Commission.

A fifth category of remedies formulated by the Commission could be classified as “satisfaction and guarantees of non-repetition”.²¹² This category has been defined as follows: “Satisfaction and guarantees of non-repetition refer to the range of measures that may contribute to the broader and longer-term restorative aims of reparation”.²¹³ The African Commission has over the years recommended various measures in an effort to ensure that similar complaints are not repeatedly brought against the same state parties. The Commission for instance formulated various recommendations relating to the repeal or amendment of legislation that violated provisions of the African Charter. In particular, the following remedies were often ordered in the past:²¹⁴

- recommending that the state party should annul a repressive Decree;²¹⁵
- requesting a state party to bring its laws in line with the Charter;²¹⁶
- urging a state party to repeal oppressive legislation and replace it with legislation that is compatible with the Charter or to achieve the same by amending the legislation.²¹⁷

²¹² Redress (2003) 19-20.

²¹³ Redress (2003) 19.

²¹⁴ In communication no 71/92 *Recontre Africaine pur la Defense des Droits de l'Homme v Zambia* the Commission did not forward any specific remedies to the government of Zambia. However, according to Maria Mapani, Principal State Counsel for Zambia, measures have been put in place since the expulsion of West Africans from Zambia 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. Interview held with Maria Mapani, on 8 May 2002 in Pretoria, South Africa, during the 31st ordinary session of the African Commission.

²¹⁵ 8th Annual Activity Report, communication no 101/93 *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*.

²¹⁶ 12th Annual Activity Report, communication nos 105/93, 128/94, 130/94, 152/96 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*; 13th Annual Activity Report, communication nos 143/95, 150/96 *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*; 13th Annual Activity Report, communication nos 147/95 and 149/96 *Sir Dawda K Jawara v The Gambia*; 14th Annual Activity Report, communication no 224/98 *Media Rights Agenda v Nigeria*; 14th Annual Activity Report, communication no 231/99 *Avocats Sans Frontieres (on behalf of Gaetan Bwampamye) v Burundi*; 16th Annual Activity Report, communication nos 222/98 and 229/99 *Law Office of Ghazi Suleiman v Sudan*.

²¹⁷ 16th Annual Activity Report, communication no 241/2001 *Purohit and Moore v The Gambia*; 16th Annual Activity Report, communication no 228/99 *The Law Office of Ghazi Suleiman v Sudan*; 16th Annual Activity Report, communication no 236/2000 *Curtis Francis Doebbler v Sudan*.

The Commission has also formulated remedies to serve as guarantees of satisfaction to victims of human rights abuses.²¹⁸ Such remedies were typically aimed at the cessation of continuing violations,²¹⁹ the investigation of human rights abuses through the establishment of independent tribunals²²⁰ and the prosecution of the persons responsible for the violations.²²¹

In concluding the discussion on remedies, it should also be mentioned that apart from the categories of remedies discussed above the Commission has also often formulated remedies that were not at all clear in their scope or application.²²² Remedies that urge governments merely to “take steps to repair the prejudice suffered” do not guarantee any specific relief for the victims of human rights abuses and leave them at the mercy of the government’s interpretation of the Commission’s findings.²²³

Detailed remedies such as those found in the *SERAC* case or in the communications against Mauritania incorporate more than one of the categories of remedies discussed above and require specific action from the corresponding state party.²²⁴ In an effort to create legal certainty for both the victims seizing the individual

²¹⁸ According to the NGO, Redress, satisfaction “may consist of an acknowledgement of the breach, an expression of regret, a formal apology, a declaratory judgment or another appropriate modality” (Redress (2003) 20).

²¹⁹ 13th Annual Activity Report, communication nos 48/90, 50/91, 52/91 and 89/93 *Amnesty International, Comite Loosli Bachelard, Lawyers for Human Rights and Association of Members of the Episcopal Conference of East Africa v Sudan*; 15th Annual Activity Report, 2001-2002, communication no 155/96 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC case)*.

²²⁰ *SERAC case*. See also 13th Annual Activity Report, 1999-2000, communication nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 *Malawi, African Association, Amnesty International, Ms. Sarr Diop, Union Interfricaine des Droits de l’Homme, RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l’Homme v Mauritania*.

²²¹ As above.

²²² 10th Annual Activity Report, communication no 39/90 *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon*; 13th Annual Activity Report, communication nos 140/94, 141/94, 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*; 13th Annual Activity Report, communication no 205/97 *Kazeem Aminu v Nigeria*.

²²³ 10th Annual Activity Report, communication no 103/93 *Alhassan Abubakar v Ghana*.

²²⁴ 15th Annual Activity Report, 2001-2002, communication no 155/96 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC case)*; 13th Annual Activity Report, 1999-2000, communication nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 *Malawi, African Association, Amnesty International, Ms. Sarr Diop, Union Interfricaine des Droits de l’Homme, RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l’Homme v Mauritania*.

communications procedure as well as the responding state parties specific remedies, corresponding with the categories discussed earlier, should be incorporated into either the Rules of Procedure or the African Charter.²²⁵

An overview of the Commission's practice in formulating remedies indicates a definite development from merely finding a state party in violation of the African Charter to issuing detailed remedies. A number of factors could be cited for this development, but foremost amongst those would be the fact that the Secretariat of the Commission now has more legal officers to work on individual communications and more importantly there is also the increasing role played by NGOs in formulating detailed remedies.²²⁶ The importance of comprehensive, structured and practical remedies in effecting state compliance with the findings of the Commission cannot be overemphasised. In the following section, the focus falls on issues of confidentiality surrounding the work of the African Commission.

(c) Confidentiality

Article 59 of the African Charter is usually relied upon to explain the African Commission's policy around confidentiality.²²⁷ This article has initially been interpreted by the Commission to mean "that it cannot mention the cases, nor the countries complained against, nor the stage reached by individual cases".²²⁸ Various reasons have been identified by authors to explain the Commission's initial stance on confidentiality. These are but a few:

²²⁵ Rembe expressed a similar view when he stated that "[t]o petition a tribunal without knowing the relief that can be ordered by the tribunal is most absurd. In this respect, appropriate steps need to be taken to amend the African Charter and incorporate specific remedies" (Rembe (1991) 45). In the Inter-American system for example, the system is not silent as to which remedies could be ordered but provision is made for specific remedies in article 63(1) of the American Convention on Human Rights. Article 63(1) states the following: "If this Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

²²⁶ The African Commission has previously in cases such as those against Mauritania, Nigeria (*SERAC* case) and one of the most recent communication nos 241/2001 against The Gambia adopted, almost verbatim, the remedies drafted by the NGOs that submitted the complaints.

²²⁷ Article 59 reads as follows: (1) All measures within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and government shall otherwise decide. (2) The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

- The Commission will make more progress if it maintains confidentiality rather than if it conducts investigations publicly.²²⁹
- States that have cooperated with the Commission and have implemented their recommendations would be disappointed and embarrassed should their dismal human rights record be subsequently published.²³⁰
- State parties viewed the promise of confidentiality as encouragement to ratify the African Charter without compromising national sovereignty.²³¹
- The African Commission has interpreted “measures taken”, as stipulated in article 59, broadly to relate to all aspects of individual communications.²³²

Fortunately, the African Commission has steadily embraced a more progressive approach to publicity and has moved away from the strict approach to confidentiality advocated above.²³³ The first improvement took place with the publishing of the sixth Annual Activity Report in 1993, which for the first time mentioned the state parties against which complaints were lodged.²³⁴ From the Seventh Annual Activity Report in 1994, real progress was however made through the citing of cases together with a short summary of the facts and the Commission’s findings.²³⁵ The publishing of individual communications as a separate annexure to the Commission’s Annual Activity Reports have become an established practice of the Commission. And with the simultaneous development that took place in the jurisprudence of the Commission, complaints are now several pages long setting out the facts of a case, the procedures followed, legal reasoning, findings and recommendations of the Commission.²³⁶

228 Benedek (1993) 29.

229 Umozurike (1997) 80.

230 Umozurike (1997) 80.

231 Murray (2001)170.

232 Ankumah (1996) 38.

233 The African Commission issues a number of documents to publicise its activities such as Final Communiqués at the end of each ordinary session, press releases and Annual Activity Reports. Annual Activity Reports only become public documents after its adoption by the AHSG. Umozurike highlighted the fact that such a requirement resulted in the inevitable delay of publication since the AHSG meets only once a year (Umozurike (1997) 81). The AHSG has nevertheless always adopted the Commission’s Annual Activity Reports.

234 See the 6th Annual Activity Report.

235 See the 7th Annual Activity Report.

236 Compare for instance communication no 59/91, *Embga Mekongo Louis v Cameroon*, published in the 8th Annual Activity Report, a decision of a mere two paragraphs long with the detailed findings of the Commission in the *SERAC* case against Nigeria published in the 15th Annual Activity Report.

In the absence of any enforcement or follow-up mechanism within the African regional human rights system, the importance of publicity cannot be overemphasised.²³⁷ Publicity has been cited as an essential source in the protection of human rights,²³⁸ in effecting state compliance with the decisions of the African Commission²³⁹ and in deterring future violations of the African Charter.²⁴⁰ Since the sixteenth ordinary session of the African Commission, the names of state parties that did not submit their initial or periodic reports in terms of article 62 are published in a separate document and annexed to the Annual Activity Report. It is hoped that such a step would “shame” state parties into submitting their reports in accordance with their obligations under the African Charter while also showcasing those state parties that did report regularly. It seems that state parties never objected in terms of article 59 to the establishment of such a practice. Therefore, in building on this established practice, the Commission should undertake, as part of a comprehensive follow-up mechanism, to publish the state compliance and non-compliance record of state parties. The detailed reasoning and findings of the African Commission in deciding individual communications already form part of the Annual Activity Report and should merely be supplemented by an additional annexure focusing on the implementation of the Commission’s findings in these cases.²⁴¹

In overcoming problems around confidentiality, the Commission should also make more effective use of the press officer, located within the Secretariat, through the

²³⁷ Umozurike has recommended that “[t]he Commission should draw inspiration from other Commissions and keep the Assembly and the public adequately informed about its activities. Having no separate enforcement machinery, human rights organisations see in publicity a potent weapon against abuses of human rights” (Umozurike (1997) 80-81).

²³⁸ Benedek summarised it as follows: “As can be seen from other international procedures, it is publicity which provides protection to the victim in individual cases. As long as there are no successful cases to be shown to the public all efforts to popularise the existence of a regional procedure in Africa will have only limited results” (Benedek (1993) 29). See also VO Nmhielle *The African Human Rights System – Its Laws, Practices and Institutions* (2001) 239.

²³⁹ Murray highlights the importance of publicity to coerce states into complying with the Commission’s decisions irrespective of their legal value (Murray (2000) 170).

²⁴⁰ Nmhielle quoted a member of the African Commission, Dankwa, as stating that “[t]he effect of publicity in the field of human rights protection cannot be quantified. Publicity brings about a resultant shame, which serves as a deterrence to future violations” (EVO Dankwa ‘Commentary on the Rules of Procedure of the African Commission on Human and Peoples’ Rights’ (1990) *Proceedings of the Second Annual Conference of the African Society of International and Comparative Law* 30 quoted in Nmhielle (2001) 239).

²⁴¹ A similar practice already exists in the Inter-American human rights system. In 2001 the Rules of Procedure of the Inter-American Commission on Human Rights were amended to provide for follow-up procedures in article 46. As a result, since 2001 the

application of rule 108 of the Rules of Procedure. This Rule enables the Commission to issue press releases through its Secretariat on activities that took place during its private Sessions. In 1998 the Secretariat made a similar suggestion, and although it is yet to be realised, reasoned that such an approach would “get rid of the straitjacket of confidentiality which as aforementioned does not allow any progress since the state can at any time turn a blind eye”.²⁴² Whilst calling for more effective press coverage from the Secretariat, the same is also true for NGOs lobbying state parties to implement the recommendations of the African Commission. Once the Commission has made its findings known to the victims of human rights violations, NGOs should pressurise state parties to implement these findings by optimally utilising the media both internationally and nationally.

It can therefore be concluded that the publication of the details of those state parties that violated the African Charter together with details around their implementation of the Commission’s findings should be central to any follow-up mechanism adopted by the African Commission. In the next section, the focus is on the Commission’s practice in issuing interim measures. Ensuring state compliance with interim measures is essential for the protection of human and peoples’ rights in the African system.

4.4.2.2 Interim measures

The African Charter does not directly provide for the issuing of interim measures, although it has been suggested that such authority could be derived from article 46.²⁴³ The African Commission, however, provides specifically for the issuing of provisional measures in its Rules of Procedure.²⁴⁴ In terms of rule 111, the Commission can issue provisional measures to “avoid irreparable damage being

Annual Report of the Commission includes a list indicating state compliance to their findings. This aspect is dealt with in more detail in chapter 5.

²⁴² *Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach* DOC/OS/50b(XXIV).

²⁴³ Article 46: “The Commission may resort to any appropriate method of investigation”. (See e.g. Ankumah (1996) 72).

²⁴⁴ Rule 111 replaced old rule 109 of the Rules of Procedure in 1995. Murray described the new rule as “extended” in scope to the previous rule (Murray (1997) 427). Naldi expressed a similar sentiment in writing that “an analysis of the wording of comparable human rights instruments suggests that the Commission may actually have a wider margin of discretion, at least on paper” (GJ Naldi ‘Interim measures of protection in the African system for the protection of human and peoples’ rights’ (2002) 2 *African Human Rights Law Journal* 5).

caused to the victim of the alleged violation”.²⁴⁵ Interim measures can however only be issued if a communication has been submitted to the Commission. Interim measures are therefore not available *per se*. The Commission can issue interim measures either by its own decision in terms of rule 111(1) or on request of the complainants.²⁴⁶ A decision to issue such measures does not affect the outcome of the case on its merits and can be issued whether the Commission is in session at the time or not.²⁴⁷

The issuing of interim measures could therefore be viewed as an urgent response of the African Commission to avoid irreparable damage caused to victims before a communication could be decided on its merits. Deciding a communication on its merits has proved to be a lengthy process in the practice of the Commission.²⁴⁸ The African Commission has nevertheless commented recently that its existing procedure of handling communications does not allow it to address “urgent human rights matters”.²⁴⁹ Such a remark could possibly stem from the fact that state parties have not always complied with the interim measures issued by the African Commission. One of the most publicised cases in this regard was that of *Ken Saro-Wiwa*.²⁵⁰ Upon being seized by this communication, the African Commission, invoked interim measures no less than three times, but to no avail, as the government of Nigeria went ahead and executed *Ken Saro-Wiwa*.²⁵¹

²⁴⁵ In communication nos 140/94, 141/94 and 145/95, 13th Annual Activity Report, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* the Commission invoked old rule 109 upon being seized by these communications and “called upon the government of Nigeria to ensure that the health of the victims was not in danger”. And in communication no 83/92, 7th Annual Activity Report, *Jean Y. Degli v Togo* the Commission issued interim measures “towards ensuring the security of Corporal Nikabou Bikagni to avoid any irreparable prejudice inflicted on the victim of the alleged violations”.

²⁴⁶ In communication no 87/93, 8th Annual Activity Report, *Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v Nigeria* it is reported that the complainants requested Commissioner Umozurike to issue interim measures.

²⁴⁷ See rule 111(1) and (3).

²⁴⁸ For instance the communication submitted in October 1994 on behalf of Ken Saro-Wiwa Jnr. was only finalised by the African Commission four years later in October 1998. Communication nos 137/94, 139/94, 154/96 and 161/97 *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, 12th Annual Activity Report.

²⁴⁹ *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights*, page 4.

²⁵⁰ Communication nos 137/94, 139/94, 154/96 and 161/97 *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, 12th Annual Activity Report.

²⁵¹ See the ‘Procedure before the Commission’ where it is reported that the Commission requested the Nigerian government “not to cause irreparable prejudice” to Mr Saro-Wiwa on three occasions namely 9 November 1994, 13 February 1995 and again on 1 November 1995. On 1 November 1995 it is reported that “upon hearing that a

Even though the reasons for state parties' non-compliance with interim measures are not clear, two possible motives for their inaction are explored here. Firstly, problems with communication between the Secretariat of the Commission based in Banjul and state parties could possibly be to blame. This is not merely saying that communication is technically difficult in Africa, but as the Commission has indicated recently, it is difficult to identify the correct government representative to which urgent messages should be communicated, if no focal points have previously been identified within government structures.²⁵² Such focal points should be identified as a matter of policy so as to form the government link that the Commission can refer to in all matters.

Secondly, and of more importance to the implementation of interim measures, is the uncertainty that surrounds the legal status of interim measures.²⁵³ From the jurisprudence of the African Commission, it seems that the Commission expects implementation of interim measures, and therefore it could be deduced that it views them as binding and not merely as advisory measures.²⁵⁴ In the *Saro-Wiwa* case, the Commission strongly criticised the government of Nigeria for executing *Ken Saro-Wiwa* and eight of his supporters by ignoring the interim measures invoked in terms of Rule 111, which called on a stay of execution.²⁵⁵ The Commission held that "in ignoring its obligations to institute provisional measures, Nigeria has violated article 1" and that calling it a violation of the Charter was "an understatement".²⁵⁶ Naldi, in commenting on the legal status the Commission attaches to interim measures, lends his own justification to the Commission's interpretation and reasons as follows.²⁵⁷

Although the Commission has not proved a deeply reasoned justification for its determination, its conclusion, commensurate with the teleological method of

death sentence had been passed on Mr Saro-Wiwa and eight of his co-defendants, the Secretariat faxed a *note verbale* to the government of Nigeria, invoking the revised Rule of Procedure 111 asking that the executions should be delayed until the Commission had taken its mission and spoken with the competent authorities. This *note verbale* was also faxed to the Secretary General of the OAU, the Nigerian High Commission in Banjul, and the Special Advisor (Legal) to the Head of State of Nigeria". (See also Table A, chapter 2).

²⁵² *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights*, page 3.

²⁵³ Ankumah, although indicating that interim measures are perhaps "the most effective way by which the African Commission can protect human rights", did not hold interim measures to be binding on state parties (Ankumah (1996) 180).

²⁵⁴ See the comments of the Commission in paragraphs 114 –116 of Communication nos 137/94, 139/94, 154/96 and 161/97 *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, 12th Annual Activity Report.

²⁵⁵ As above.

²⁵⁶ As above.

interpretation appropriate to human rights treaties, must be considered correct, if only on the utilitarian ground of seeking to ensure maximum protection for people at risk.

The legal status the African Commission assigns to interim measures also seems to be in line with developments in international law. The International Court of Justice (ICJ) held in 2001, for the first time, that its orders indicating provisional measures are legally binding.²⁵⁸ The ICJ in determining the legal status of interim measures ordered in terms of article 41 of the ICJ Statute relied on article 31(1) of the Vienna Convention on the Law of Treaties,²⁵⁹ holding as follows:²⁶⁰

It follows from the object and purpose of the Statute, as well as from the terms of article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under article 41 might not be binding would be contrary to the object and purpose of that article.

Finally, it should also be mentioned that despite the arguments outlined above, not all interim measures ordered by the African Commission were ignored in the past.²⁶¹ In one instance, interim measures ordered against Nigeria calling on a stay of

²⁵⁷ Naldi (2002) 8.

²⁵⁸ *Germany v United States of America (LaGrand case)* Case no104, International Court of Justice, 2001. Available at: http://www.icj-cij.org/icjwww/idocket/...usjudgment/igus_ijudgment_20010625.htm. The Court held by thirteen votes to two that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the ICJ, the United States breached its obligations in terms of the Order indicating provisional measures issued by the ICJ on 3 March 1999.

²⁵⁹ Article 31(1) of the Vienna Convention on the Law of Treaties determines that “a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty’s object and purpose”. At paragraph 99.

²⁶⁰ At paragraph 102.

²⁶¹ The African Commission in criticising the government of Nigeria for executing Ken Saro-Wiwa and ignoring the interim measures ordered by them commented that “executions had been stayed in Nigeria in the past on the invocation by the Commission of its rule on provisional measures (rule 109 now rule 111) and the Commission had hoped that a similar situation will obtain in the case of Ken Saro-Wiwa and others” (See par 103 of the *Saro-Wiwa* case). The Commission was most probably referring to provisional measures ordered in communication no 60/91 *Constitutional Rights Project v Nigeria*, communication no 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and 6 others) v Nigeria* and communication nos 140/94, 141/94, 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights v Nigeria*. In all three these cases the Commission invoked interim measures to prevent irreparable harm being caused to the complainants identified in these cases and in all three instances it seems that the government, albeit for a number of reasons, did not proceed with harming or executing the victims.

execution, were even used by a local NGO as the basis on which to institute proceedings in the High Court of Lagos.²⁶² The Court issued an injunction against the execution of the complainants whilst the case was still under consideration by the Commission.²⁶³

Although interim measures do not relate to the merits of a communication, but are purely intended to protect potential victims from irreparable harm, the compliance or non-compliance of state parties with these measures could hold comparative truths about state compliance in general. The problems identified with implementing interim measures, around issues such as improper communication channels and the absence of focal points within governments should also be addressed if compliance to the recommendations of the African Commission is to be achieved. Secondly, although the compliance record with interim measures seems dismal and could therefore bode nothing good for overall compliance, the fact that the Commission has taken a strong stance against state parties that ignored its efforts, should be welcomed. If the Commission is prepared to take up the issue of non implementation of interim measures with state parties, it should also be able to expand this approach to state compliance with its recommendations.

4.5 Cooperation between Non-Governmental Organisations and the African Commission

Provision is made for cooperation between the African Commission and African and international non-governmental organisations (NGOs) in both the African Charter and the Rules of Procedure.²⁶⁴ At the second ordinary session of the Commission, a decision was taken to grant observer status to NGOs who meet certain criteria

²⁶² *The Registered Trustees of the Constitutional Rights Project v The President of the Federal Republic of Nigeria and Two Others*, Unreported Judgment of the High Court of Lagos State, 5 May 1993. Suit no M/102/93.

²⁶³ Ankumah commented how the Court correctly chose not to follow the arguments of the state and consider the validity of the decree under which the complainants were sentenced but rather took into account the fact that a case was pending before the African Commission and thus reached a decision (Ankumah (1996) 73). The death sentences were later commuted into prison terms. (See Table A, chapter 2).

²⁶⁴ See articles 45(1)(a), (c) and 45(3) on the relationship between the Commission and NGOs. Article 45(1)(c) specifically lists that as part of the mandate of the Commission it has to “cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights”. In terms of the Rules of Procedure, rule 75 stipulates that NGOs with observer status can participate in the public sessions of the Commission whilst rule 76 provides for consultations to take place between the African Commission and NGOs at the request of either party.

determined by the Commission.²⁶⁵ Some of the privileges enjoyed by NGOs with observer status include the receipt of information and agendas on upcoming sessions of the Commission at least four weeks in advance, receipt of all public documents such as final communiqués and participating in the public sessions of the Commission.²⁶⁶ For their part, NGOs with observer status are expected to submit reports on their activities every two years from the date they have been granted observer status.²⁶⁷ Most of the NGOs were however in arrears with their submissions of activity reports despite being threatened in 1998 with the revocation of observer status should they not submit overdue reports.²⁶⁸ The discussion so far has merely set the background against which the relationship between NGOs and the Commission should be viewed. The actual focus of this section falls on the activities of the Commission in which NGOs not only regularly participate but without which the Commission could not fully fulfil its promotional and protective mandate.

Prior to each ordinary session of the Commission, NGOs gather in a forum to discuss the activities of the Commission and to strategise around their participation in these activities.²⁶⁹ The most important product of these NGO forums is the formulation of resolutions on pressing human rights issues for submission to the African

²⁶⁵ The AHSG of the OAU, at its 34th ordinary session, requested the African Commission to review its criteria for granting observer status to NGOs. The need for revised criteria was motivated by the following arguments: a) the fact that very few NGOs committed themselves to the African Commission for their track record for submitting activity reports as decided in Tunis was dismal; b) the Commission was not adequately informed as to what NGOs were doing in the field of human rights; and c) the fact that some NGOs apparently misused donor funds. See AHG/Dec.126 (XXXIV) para 3. This led to the adoption of a “Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations working in the field of human rights with the African Commission on Human and Peoples’ Rights” at the 25th ordinary session of the Commission held in Bujumbura, Burundi in 1999. Annexed to this Resolution were the new criteria for granting and maintaining of observer status. AHG/215.(XXXV) Annex IV, pages 16-18.

²⁶⁶ As of December 2004, 319 NGOs enjoyed observer status with the Commission. See Final Communiqué of the 36th ordinary session of the African Commission, par 33.

²⁶⁷ This decision was taken at the 11th ordinary session of the Commission held in Tunis, Tunisia.

²⁶⁸ In 1998, at the 24th ordinary session of the Commission, a resolution was adopted that called sternly on all NGOs to submit their overdue Activity Reports before the 27th ordinary session or face revocation of their observer status. The Commission fortunately did not hold any NGOs to this resolution and at the 32nd ordinary session it merely repeated its call to most of the 274 NGOs who were in the rear with their submissions. See “Status of Submission of NGOs Activity Reports to the Commission”, DOC/OS(XXXII)/289c.

²⁶⁹ Initially these workshops were organised by the International Commission of Jurists (ICJ) but since the late nineties the African Centre for Democracy and Human Rights, an NGO based in Banjul, The Gambia, took over from the ICJ.

Commission during the ordinary session that follows immediately after the forum.²⁷⁰ During the ordinary sessions of the Commission, NGOs with observer status may participate in the public sessions by delivering statements usually under agenda items dealing the “cooperation and relationship between the Commission and NGOs” and “the human rights situation in Africa”.²⁷¹ NGOs with observer status can also submit shadow reports to Commissioners to inform their consideration of state reports in terms of article 62 of the African Charter.²⁷² NGOs have further assisted the African Commission with human and financial resources to enable the Commission to co-host seminars or to strengthen its legal capacity through the intake of interns.²⁷³

Irrespective of the above, the most important and active role played by NGOs have been in the submission of individual complaints to the Commission. A broad and progressive interpretation of the term “other communications” under article 55 of the African Charter led to a situation where communications could be filed by individuals or NGOs on behalf of victims.²⁷⁴

The involvement of NGOs in the individual complaints procedure does not however end with the Commission finding a state party in violation of the Charter. On the contrary, in the absence of a follow-up mechanism to ensure state compliance with

²⁷⁰ The Commission does not blankly adopt all the resolutions formulated by the NGO forum but through lobbying Commissioners on an individual basis many resolutions have been adopted in the past. Kisanga described the contributions of NGOs as a result of such forums as “valuable to the Commission” (RH Kisanga ‘Fundamental rights and freedoms in Africa: The work of the African Commission on Human and Peoples’ Rights’ in M Nyota *Fundamental Rights and Freedoms in Tanzania* (1998) 28-29).

²⁷¹ These are very brief statements lasting five minutes at most but fortunately the Secretariat of the Commission must ensure that copies of each statement is distributed afterwards. It should be noted that state parties enjoy a ‘right of reply’ to these statements and those with a more dismal human rights record usually do not let any NGO statement pass without rebuttal.

²⁷² The submission of a shadow report not only offers NGOs an opportunity to question a state party’s compliance with the provisions of the African Charter but should also be seen as an opportunity for following up on the implementation of the recommendations of the Commission if a decision was taken in terms of the individual complaints procedure against a state party.

²⁷³ Danish Centre for Human Rights (1998).

²⁷⁴ Under the individual complaints system of both the UN Human Rights Committee and the European Court of Human Rights only the victims of human rights abuses can lodge a complaint against a state party. See article 1 of the Optional Protocol to the ICCPR and article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This may well explain according to Murray why NGO involvement within the African human rights system is viewed as greater than in other international or regional human rights systems (Murray (2000) 88). See further Ankumah (1996) 186.

the findings of the Commission, it is up to the NGOs that have lodged a complaint to take the decision of the Commission to the responding state party and negotiate relief for the victims of human rights abuses. Without the involvement of the Commission, its Secretariat or of other political organs of the AU in such negotiations, it is obvious that NGOs which initially lodged the complaint against a state party are in weak position in the face of government machinery that it has to approach for implementation of the Commission's recommendations. NGOs have nevertheless proceeded to lobby state parties to implement the recommendations of the Commission by making use of various opportunities offered by the promotional and protective mandate of the African Commission.

NGOs with observer status have made use of opportunities to publicly address the ordinary session of the Commission to appeal to both the Commissioners and the respective state parties to follow-up and implement decisions of the Commission.²⁷⁵ Another avenue pursued by NGOs during the ordinary sessions of the Commission is to arrange meetings with government representatives during the sessions following the outcome of the Commission's findings.²⁷⁶ NGOs have further made use of the state reporting procedure in terms of article 62 of the African Charter to remind Commissioners to inquire about the status of implementation of recommendations made against a state party. This is done either through the submission of separate shadow reports highlighting the lack of state compliance or by lobbying Commissioners on an individual basis before the public consideration of state

²⁷⁵ For instance the Institute for Human Rights and Development, an NGO based in Banjul, The Gambia, seized the opportunity at the 31st Session held in Pretoria, South Africa, to call upon the Commission to follow-up on the status of implementation of the recommendations forwarded to Mauritania in communication no 54/91. The Institute called upon the Commissioner assigned to Mauritania to meet with NGOs and the government's representatives in an effort to analyse problems of implementation and to put forward workable solutions. Unfortunately, the government of Mauritania has strongly objected to the calls for implementation from NGOs and this is a case in point where the efforts of NGOs alone cannot make a difference.

²⁷⁶ Interights, a London-based NGO, followed this strategy in approaching the government representatives of Botswana following the Commission's decision in the Modise case, communication no 97/93. Interights set up a meeting with the representatives of the government following immediately after a public announcement by the government of Botswana during the 31st ordinary session wherein they expressed a willingness to implement the Commission's recommendations. This initial meeting led to follow-up meetings between Interights and the Attorney General of Botswana, in Botswana in 2003. The government of Botswana awarded Mr Modise and his children citizenship by descent and in principal it was also agreed that compensation will be paid to Mr Modise, the details of which is still being negotiated. Information obtained from an interview held with Chidi Odinkalu and Ibrahima Kane, both legal counsel representing Interights, in Banjul, The Gambia, during the 34th ordinary session of the Commission in November 2003. (See Table A, Chapter 2 and section 3.3.6 of chapter 3).

reports.²⁷⁷ On the domestic level, NGOs usually first approach the local media to publicise the Commission's findings and to make it clear as to what is expected from the government to rectify the situation.²⁷⁸ Where the Commission has undertaken promotional or protective missions to a state party, NGOs have made use of the opportunity to lobby the Commissioners to engage with the government on the steps taken to implement the Commission's recommendations.²⁷⁹

With more NGOs obtaining observer status at every session of the Commission, the relationship between the African Commission and NGOs is shaped through the active participation of an ever-increasing number of African and international NGOs. By far most of the communications lodged with the Commission have been filed by NGOs. The submission of complaints is not restricted to only those NGOs with observer status.²⁸⁰ In the absence of a comprehensive follow-up mechanism to ensure that victims of human rights abuses receive the relief sought, it is up to NGOs to lobby state parties to implement recommendations of the Commission. A number

²⁷⁷ In the consideration of the initial report of Cameroon, during the 31st ordinary session held in May 2001, it was apparent from the questions posed to the state representatives that the Commissioners made an effort to follow-up on the implementation of the recommendations they issued against Cameroon in communication nos 59/91 and 39/90. However, where state representatives cannot answer the questions in full during the public session they are requested to do so in writing but these replies are never made public and thus defeats the purpose in as far as follow-up is concerned.

²⁷⁸ From an interview held with Ndidi Bowei, senior legal counsel for Social and Economic Rights Action Centre (SERAC) a NGO based in Lagos, Nigeria, the organising of a press conference was first amongst their efforts to work towards the implementation of the detailed recommendations made by the Commission in the mainly socio-economic rights communication no 155/96 against Nigeria (Interview held during the 32nd ordinary session of the Commission in November 2002 in Banjul, The Gambia).

²⁷⁹ This strategy, like most of the above, can still be in vain without a coordinated effort from the Commission and the AU. A case in point was illustrated by the government of Burkina Faso's refusal to implement the Commission's recommendations set out in communication no 204/97, *Mouvement Burkinabe des Droits de l'Homme et des Peuples (MBDHP) v Burkina Faso*. The government did not implement the Commission's recommendations despite various attempts by MBDHP, an NGO based in Burkina Faso, to bring about state compliance. MBDHP not only organised press conferences to publicise the findings of the Commission but also made an effort to bring the lack of compliance to the attention of the then Chairman of the Commission, Isaac Nguema, during his mission to the country from 22 September to 3 October 2001. Information obtained during an interview with Christof Compaore, member of MBDHP, held in Pretoria, South Africa, during the 31st Ordinary Session of the African Commission. The periodic report of the government of Burkina Faso has since been examined during the 35th ordinary session of the Commission and it was reported that the findings of the Commission were being attended to albeit a very lengthy process (See Periodic Report of Burkina Faso to the African Commission on Human and Peoples' Rights, October 1998-2002, page 25).

²⁸⁰ See Table A in chapter 2, from the table it is clear that most communications have been filed by NGOs.

of follow-up procedures regularly pursued by NGOs were highlighted above. Despite the success rate of these efforts being undetermined, it is clear that it should not be up to NGOs, often victims themselves, to take sole responsibility for state compliance above and beyond being the main actors in lodging individual complaints. The relationship between NGOs and the Commission will be strengthened once a follow-up mechanism is established within the African Commission, for NGOs will no longer have to struggle to overcome the weaknesses in a system renowned for its lack of “teeth”.

4.6 Cooperation between National Human Rights Institutions and the African Commission

Affiliate status was first awarded to National Human Rights Institutions (NHRIs) at the 24th ordinary session of the African Commission held in Banjul, The Gambia, in 1998.²⁸¹ The granting of affiliate status to NHRIs gives effect to article 26 of the African Charter and reinforces the fact that NHRIs should play an essential role in the implementation of the African Charter at a national level.²⁸² There are currently 17 NHRIs that enjoy affiliate status with the African Commission.²⁸³ National Institutions must formally apply to the African Commission for affiliate status and must comply with the stipulated criteria.²⁸⁴

Similar to NGOs with observer status, NHRIs that enjoy affiliated status, have certain duties and enjoy certain privileges.²⁸⁵ The relationship between the African Commission and NHRIs is however not nearly as formalised or strong as is the

²⁸¹ At the 24th Session a *Resolution on the granting of observer status to NHRIs in Africa* was adopted.

²⁸² Article 26 of the African Charter reads as follows: “States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter”.

²⁸³ As at December 2004, see the Final Communiqué of the 36th ordinary session of the African Commission, par 32.

²⁸⁴ Resolution adopted at the 24th ordinary session (see fn 281 above). The Resolution stipulates that NHRIs must adhere to the following criteria: 1) The National Institution should be duly established by law, constitution or by decree; 2) It must be a National Institution of a state party to the African Charter; 3) The National Institution must conform to the Principles relating to the Status of National Institutions, also known as the Paris Principles, adopted by the General Assembly of the United Nations under Resolution 48/144 of the 20th of December 1993.

²⁸⁵ NHRIs with affiliated status have a duty to submit Activity Reports to the Secretariat of the African Commission on a bi-annual basis. As of October 2002 however, only

relationship between the African Commission and NGOs.²⁸⁶ Until now NHRI have only participated briefly, through the delivery of public addresses, in the sessions of the Commission, and have not participated actively in any of the other promotional or protective functions of the African Commission. This lack of cooperation between the African Commission and NHRIs led the Commission, together with other stakeholders, to formulate the following recommendations that could pave the way towards closer cooperation.²⁸⁷

- “The African Commission should provide NHRIs with enhanced affiliate status and develop a clear working relationship, *especially in the area of follow-up to the decisions, observations and recommendations of the Commission*. The UN human rights system has developed similar relationships and roles with the NHRIs.
- A focal point for the NHRIs should be established in the Secretariat of the African Commission.
- The work of the NHRIs, together with those of the national civil society structures, ought to form the basis for fact-finding missions and serve as a source for shadow reports”.

It is the possibility of involving NHRIs in follow-up to the decisions of the African Commission, as mentioned above, that is explored here in more detail. Firstly, such an endeavour would further the overall mandate of NHRIs in Africa, which is “to become key instruments for the domestic application and monitoring of the observance of national, regional and international human rights norms and standards”.²⁸⁸ Secondly, NHRIs in Africa have come together and established a Secretariat of NHRIs to amongst other objectives “organise events to share good practices, experiences, expertise and information around human rights issues”.²⁸⁹

²⁸⁶ three of the then ten NHRIs with affiliated status, have submitted a first Activity Report. See *Status of Submission of NHRI Activity Reports* DOC/OS(XXXII)288b.

Already at the OAU First Ministerial Conference on Human Rights in Africa’s Grand Bay Declaration it was recognised that there was a lack of effective cooperation between the African Commission and NHRIs and this was reiterated in the Retreat report in 2003. *Report of the Retreat of Members of the African Commission on Human and Peoples’ Rights facilitated by the Office of the High Commissioner for Human Rights* page 8.

²⁸⁷ *Report of the Retreat of Members of the African Commission on Human and Peoples’ Rights facilitated by the Office of the High Commissioner for Human Rights* page 9. (Own emphasis added).

²⁸⁸ See the Background paper to the Secretariat of African National Human Rights Institutions (SANHRI). Available at: http://www.sahrc.org.za/afr_sec_background.htm. Date accessed: 18 May 2004.

²⁸⁹ The first permanent Secretariat of African National Human Rights Institutions was elected in March 2001 and the South African Human Rights Commission was

The Secretariat therefore offers an ideal platform for the development of a comprehensive strategy amongst African NHRIs on the implementation of the decisions of the African Commission in their respective countries. Not only will the involvement of NHRIs in follow-up activities strengthen their relationship with the African Commission, but it will also strengthen their relationship with national and international NGOs that often view NHRIs as lacking a genuine commitment to human rights.²⁹⁰

The relationship between the African Commission and the African Union (AU) is crucial to improved implementation of the Commission's finding, and this forms the focus of the final discussion in this chapter.

4.7 Relationship between the African Commission and the Organisation of African States and its successor the African Union

(a) Organisation of African Unity

The Organisation of African Unity (OAU) was established with the adoption of the OAU Charter by the Summit Conference of Independent African States in Addis Ababa on 25 May 1963. The objectives of the OAU focused almost entirely on the unification of African states through liberation from colonialism and by fighting Apartheid in Southern Africa.²⁹¹ Since the focus of the OAU fell more on protecting the independence of state parties than on the protection of human and peoples' rights, the latter did not feature strongly in either the OAU Charter or in its agenda.²⁹² Pressure groups, such as the media, churches, inter-governmental and non-governmental organisations, nevertheless lobbied the OAU, since its inception to

mandated to host the Secretariat for an initial period of three years. See the Background paper to the Secretariat of African National Human Rights Institutions (SANHRI). Available at: http://www.sahrc.org.za/afr_sec_background.htm. Date accessed: 18 May 2004.

²⁹⁰ For a critical review of the legitimacy of NHRIs in Africa see Human Rights Watch *Protectors or Pretenders: Government Human Rights Commissions in Africa* (2001) and International Council on Human Rights Policy *Performance and Legitimacy: National Human Rights Institutions* (2000).

²⁹¹ See article II of the OAU Charter dealing with the purposes of the OAU.

²⁹² The human rights obligations of member states to the OAU Charter are only briefly mentioned in the Preamble to the Charter and then again in article II amongst the purposes of the OAU and amounts to nothing more than an endorsement of the principles of the Universal Declaration of Human Rights.

adopt a human rights agenda and establish a regional human rights mechanism.²⁹³ Almost twenty years after the inception of the OAU the Assembly of Heads of State and Government adopted the African Charter in 1981 in Nairobi, Kenya, which came into force on 21 October 1986.

The OAU was replaced by the African Union (AU), which held its first Assembly of Heads of States in July 2002 following the adoption of the Constitutive Act of the African Union in July 2000.²⁹⁴ Since the inception of the OAU the goal posts have shifted on the continent, it was no longer a priority to liberate states from colonialism or to fight Apartheid. Therefore, it became necessary to revisit the objectives of the OAU and this culminated in the drafting of the AU Constitutive Act that aims to “achieve greater unity and solidarity between the African countries” and to focus on a new liberation struggle formulated around economic empowerment.²⁹⁵ In contrast to the provisions of the OAU Charter, the AU Constitutive Act appears to incorporate the promotion and protection of human rights not only amongst its objectives but also as part of its founding principles that should form the basis of its functioning.²⁹⁶ In the

²⁹³ See Information Sheet No.1 of the African Commission on Human and Peoples’ Rights on the ‘Establishment of the Organisation of African Unity’. Available at: <http://www.achpr.org>. Date accessed: 17 May 2004.

²⁹⁴ It took four summits one of which was extraordinary to establish the AU. In September 1999 an Extraordinary Session of the AHSG of the OAU was held in Sirte where it was decided to establish an African Union. (Sirte Declaration EAHG/DECL.(IV) Rev 1). This was followed by the Lomé Summit of 2000 where the Constitutive Act was adopted by all 53 member states (Morocco is the only African state that withdrew from the OAU in 1981 in protest against the OAU’s official recognition of the right to self-determination of the people of Western Sahara.) In 2001 at the Lusaka Summit an implementation plan for the AU rollout was drafted and finally in 2002 the Durban Summit took place where the AU was officially launched and the 1st Assembly of the Heads of States of the African Union was convened.

²⁹⁵ See the Preamble to the Constitutive Act and article 3 which lists the objectives of the Union. The need to establish a regional body that could address both economical and political problems was not an entirely new concept but rather as Gutto put it “a culmination of long-term efforts by all African countries to link the living-but-not-very-healthy OAU with the existing-on-paper-only AEC” (S Gutto ‘The reform and renewal of the African regional human and people’s rights system’ (2001) 2 *African Human Rights Law Journal* 182). The Treaty Establishing the African Economic Community (Abuja Treaty) entered into force on 12 May 1994 and aimed to achieve regional economic integration. Baimu argued that since the entry into force of the Abuja Treaty it created a system whereby the OAU operated in terms of both the OAU Charter and the Abuja Treaty and this created a situation where the need arisen to amalgamate the two into one body (E Baimu ‘The African Union: Hope for better protection of human rights in Africa?’ (2001) 2 *African Human Rights Law Journal* 303-304).

²⁹⁶ See the Preamble to the Constitutive Act, article 3(e) and (h) dealing with objectives and article 4(m) on the principles in accordance with which the Union should function. See also the comments of Dr Ibrahim Ali Badawi El-Sheikh, former member and chairperson of the Commission, in ‘The African Union and Human Rights:

transformation from the OAU to the AU, the African Commission was retained as regional mechanism for the promotion and protection of human rights.²⁹⁷ Therefore, the relationship that existed between the Commission and the OAU as stipulated in the African Charter is merely continued with the AU. From the above discussion around the promotional and protective mandate of the African Commission, it is clear that the OAU has failed the Commission. The OAU did not fulfil its duties especially around financial and human resources. The question therefore arises whether this situation will improve within the framework of the AU.²⁹⁸ This section sets out to analyse the relationship that existed between the OAU and the African Commission. The focus then shifts to the AU in a bid to determine whether the new structure of the AU will improve its relationship with the Commission. Various possibilities around the AU's role in assisting the African Commission to follow-up on its findings on individual complaints are also explored.

The African Charter sets out the basic guidelines for the relationship between the now defunct OAU and the new AU.²⁹⁹ Apart from the role that the OAU plays in the appointment of Commissioners and in the adoption of the Commission's Annual Activity Report, the responsibility of the OAU to ensure the proper functioning of the African Commission through the provision of human and financial resources was by far the most important aspect shaping the relationship between the Commission and the OAU.³⁰⁰ It was this dependence of the African Commission on the budget provided by the OAU that led many authors to describe the relationship between the two bodies as one of subordination.³⁰¹ The OAU was not only a political body constituted of the member states that often violated the African Charter, but it was also an impoverished body dependent for its budget on the contributions from member states that either could not or would not contribute regularly to the budget of

²⁹⁷ Preliminary Reflections with Special Reference to the African Commission on Human and Peoples' Rights', DOC/OS(XXXIII)/320 distributed during the 33rd ordinary session of the African Commission held in July 2003 in Niamey, Niger.

²⁹⁸ See AU 'Decision on the interim period' AU Doc ASS/AU/Dec1 (I) where it was decided during the July 2002 Summit that the African Commission and the African Committee of Experts on Rights and Welfare of the Child, would continue to operate within the framework of the African Union. Direct reference is made to the African Charter as the basic document to inform the promotion and protection of human and peoples' rights in fulfilling the objectives of the AU. See article 3(h).

²⁹⁹ See the discussions under section 3.3 above.

³⁰⁰ Articles 30, 33, 35, 37, 39, 41, 43, 44, 47-54, 58 and 59 of the Charter deals with the cooperation between the African Commission and the OAU.

³⁰¹ Article 41 of the African Charter states that the OAU "shall bear the costs of the staff and services". Article 44 further stipulates that "provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity".

the OAU.³⁰² As a result of the proper functioning of the African Commission was severely inhibited by the lack of adequate funding.³⁰³ According to Murray this led to a situation where the “impoverished Commission could easily be influenced by the political agendas of OAU members” and even if this was just a perception it still tarnished the Commission’s record on appearing independent.³⁰⁴ A lack of adequate funding from the OAU meant the African Commission had to rely heavily on donor funding and although the additional resources enabled it to better fulfil its mandate, this state of affairs once again raised questions around the independence of the Commission when it came to fulfilling the demands of donors.³⁰⁵

In summary, the relationship between the African Commission and the OAU clearly was not founded on solid human rights foundations but was rather shaped by state parties’ wishes to keep the Commission subordinated to their political will and inevitable budgetary constraints. Without adequate human and financial resources to fulfil its core functions, the Commission obviously could not meet any additional obligations such as following up on the recommendations it forwarded to states upon finding them in violation of the African Charter. Neither the provisions in the African Charter nor the structure of the OAU encouraged the establishment of a follow-up mechanism that would allow the Council of Ministers rather than the AHSG to play a decisive role in achieving state compliance.³⁰⁶ The relationship between the OAU

³⁰¹ See Ankumah (1996) 43, Murray (1997) 413 and Welch (1995) 150.

³⁰² Kisanga (1998) 32.

³⁰³ Murray (1997) 414. The Commission continued to struggle with inadequate resources despite recommendations from the First OAU Ministerial Conference on Human Rights to urgently provide the Commission with adequate human, material and financial resources. Grand Bay Mauritius Declaration and Plan of Action, CONF/HRA/DECL(1), 12-16 April 1999.

³⁰⁴ Murray (1997) 414.

³⁰⁵ See B El-Sheikh (2003) 5 and Danish Centre for Human Rights *Evaluation: The African Commission on Human and Peoples’ Rights* (1998). Available at: <http://www.humanrights.dk/upload/application/cdf466a6/afr.commanus.pdf>. Date accessed: 12 January 2004.

³⁰⁶ The Council of Ministers was formed by the Ministers of Foreign Affairs from the various state parties of the OAU and met twice a year. They met once to discuss the budget and administrative measures of the OAU and a second time to discuss the Annual Summit. The AHSG meeting that took place once a year, usually in July, is best described by Welch as “a few days of bonhomie and resolution-passing”. Welch (1995) 150. The agenda of the AHSG was too full to give any special attention to the needs of the African Commission. The Council of Ministers was in a better position not only to deal adequately with budget considerations but also to play a role in mounting political pressure on member states to comply to the findings of the African Commission. Fulfilling such a role would have been analogous to that of the Committee of Ministers of the Council of Europe who in terms of article 46(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is responsible for supervising the execution of the judgments of the European Court of Human Rights. It should also be noted that already at the first

and the African Commission was therefore far from ideal. The future relationship of both the Commission and African Court on Human and Peoples' Rights is shaped by the AU and its revised organs - this forms the focal point for the next discussion.

(b) African Union

The relationship between the AU and the African Commission is analysed with reference to three factors, namely the budget of the Commission, the human rights foundations of the newly found AU and, thirdly, the opportunities offered for enhanced interaction between the two bodies made possible by the new structures of the AU.

With the transition from the OAU to the AU, nothing changed regarding the budgetary allocation to the African Commission.³⁰⁷ Not only is the resource allocation to the African Commission inadequate to enable it to discharge its mandate, but the AU has also failed to put in place policies to regulate the acquiring and managing of extra-budgetary finances.³⁰⁸ For extra-budgetary finances, the African Commission has always been dependent on donors. Without mechanisms in place to ensure adequate report back as to how the funds were spent, even this source of income could dry up. Badawi aptly described the African Commission as “being primarily an African responsibility”.³⁰⁹ Therefore, member states to the AU have an individual responsibility to contribute to the budget of the AU and the AU in its turn should allocate adequate funds towards the regional mechanism for human rights protection. In terms of article 23 of the Constitutive Act, the AHSG can determine appropriate sanctions to be imposed on member states that default in the payment of their contributions towards the budget of the AU. Should the Assembly strictly adhere to

OAU Ministerial Conference on Human Rights, held in April 1999, the Conference reported that “the African Charter authorises the AHSG to take decisive action on the Activity Reports of the African Commission and expressed the hope that the Assembly would consider delegating the task to the Council of Ministers”. Grand Bay Mauritius Declaration and Plan of Action, CONF/HRA/DECL(1).

³⁰⁷ In September 2003 the budgetary allocation to the Commission from the AU was held to be “grossly inadequate”. *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 5.

³⁰⁸ As above, see specifically page 6 of the Report where detailed recommendations were formulated placing the responsibility of providing adequate resources, whether from budgetary or extra-budgetary sources, firmly on the shoulders of the AU Commission (previously called the General Secretariat of the OAU).

³⁰⁹ El-Sheikh (2003) 5.

this principle, there will be no reason to describe the AU as “impoverished”.³¹⁰ Should the AU fail the African Commission, as its predecessor the OAU did, by not providing adequate resources, not only will the Commission be unable to fulfil its current duties but the taking on of additional essential tasks such as follow-up will be made impossible.

In examining possible reasons for the AU’s neglect of the Commission’s human and financial needs, the question inevitably arises whether it could be linked to the importance the AU ascribes to human rights and specifically to the African Commission. It has already been mentioned above that it appears from the text of the AU Constitutive Act that the promotion and protection of human rights seem to have moved beyond preambular protection to form part of both the objectives and principles underlying the AU.³¹¹ However, mentioning the African human rights system amongst the objectives and principles of the AU is described by Gutto as “appropriate but not sufficient”.³¹² In clarifying this statement, it is necessary to understand the position that the African Commission held within the OAU’s organisational structure in comparison to the position it currently holds within the AU. In reflecting on the functioning of the OAU, it is clear that the African Commission did not feature amongst its principal organs and this could very well explain the lack of commitment on the part of the OAU towards the proper functioning of the Commission.³¹³ In restructuring the OAU to constitute the new AU, the African Commission, although retained as regional human rights mechanism, once again do not form part of the principle organs of the AU.³¹⁴ The AU boasts nine principle

³¹⁰ Some of the sanctions that could be imposed are listed as follows in article 23: “denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from the commitments, there from”.

³¹¹ In the OAU Charter reference was only made to the Universal Declaration of Human Rights and only in the preamble whereas in article II (1)(e) one of the purposes of the OAU is described as promoting international cooperation whilst having due regard to the Universal Declaration. In the AU Constitutive Act, on the other hand, the promotion and protection of human and peoples’ rights is stated as a separate objective and specific mentioning is made of the African Charter. See the Preamble, article 3(e) and (h) and article 4(m).

³¹² Gutto (2001) 184.

³¹³ Article VII of the OAU Charter lists only four institutions as principle organs of the OAU: The Assembly of Heads of State and Government; The Council of Ministers; The General Secretariat; and The Commission of Mediation, Conciliation and Arbitration.

³¹⁴ The African Charter, as indicated above, clearly envisaged a close relationship with the OAU with numerous references to the AHSG in the Charter. However, with the transformation of the OAU into the AU the African Charter has not been amended to accommodate the new structures of the AU. This creates a situation where the AU is not incorporated into the African Charter and vice versa the African Commission is not incorporated into the AU Constitutive Act which ultimately means that the African

organs, five more than the OAU, and upon closer inspection these organs, although adjusted, amount to no more than the direct incorporation of the principle organs of the OAU and the African Economic Community (AEC).³¹⁵

The list of organs of the AU does not appear to be a closed list. Article 5(2) of the Constitutive Act states that the organs of the AU shall also include “other organs that the Assembly may decide to establish”. This provision has indeed been invoked in July 2001 to incorporate the OAU’s Central Organ of the Mechanism for Conflict Prevention, Management and Resolution amongst the organs of the AU under a new title, namely, the Peace and Security Council (Council).³¹⁶ The Peace and Security Council has primarily been established to prevent, manage and resolve conflicts on the African continent.³¹⁷ Reference is made to the protection of human rights and fundamental freedoms amongst the objectives and guiding principles of the Council.³¹⁸ Based on these provisions, the Council could possibly play a role in implementing those cases where the African Commission has found a state party in violation of the African Charter, based on a series of serious or massive violations of the Charter, as a direct result of internal conflict within a state.³¹⁹ Article 58 of the

regional human rights system is in a very insecure position in the new system. Various authors have commented on the fact that the African Commission has not been incorporated into the principle organs of the AU. See for instance: Gutto (2001) 175; Baimu (2001) 299; Eno (2002) 72 and Murray (2001) 16.

³¹⁵ Article 5(1) of the AU Constitutive Act lists the principle organs of the AU as follows: 1) The Assembly of the Union (replacing the AHSG of the OAU); 2) The Executive Council (previously called the Council of Ministers); 3) The Pan-African Parliament; 4) The Court of Justice; 5) The Commission (previously called the General Secretariat of the OAU); 6) The Permanent Representatives Committee; 7) The Specialised Technical Committees; 8) The Economic, Social and Cultural Council; 9) The Financial Institutions.

³¹⁶ The Declaration on the Establishment within the OAU of the Mechanism for Conflict Prevention, Management and Resolution, was first adopted by the AHSG of the OAU at the 29th ordinary session in Cairo, Egypt, 28-30 June 1993. See OAU ‘Decision on the implementation of the Sirte summit decision on the African Union’ 37th ordinary session of the AHSG July 2001, Lusaka, Zambia AHG/Dec1(XXXVII) para 8 on the reincorporation of this mechanism as an organ of the AU subject to certain amendments and a name change. At the July 2002 AU Summit a Protocol was therefore adopted to replace the Mechanism for Conflict Prevention, Management and Resolution with a Peace and Security Council. See AU ‘Decision on the establishment of the Peace and Security Council of the African Union’ AU Doc/Ass/AU/Dec 3 (I), para 4.

³¹⁷ Article 2(1) of the Protocol relating to the Establishment of the Peace and Security Council of the African Union (Protocol).

³¹⁸ Article 3(f) and 4(c) of the Protocol.

³¹⁹ As recorded in Table A in chapter 2 the cases where the Commission found serious or massive violations of the Charter and which were subsequently referred to the AHSG in accordance with article 58 of the Charter were never acted upon. See for example communication no 47/90 *Lawyers Committee for Human Rights v Zaire*, 7th Annual Activity Report and joint communication nos 25/89, 47/90, 56/91,100/93 (joined) *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union*

African Charter provides that the Commission should refer cases revealing serious or massive violations to the AHSG of the OAU. Since the OAU never took any steps in cases referred as such by the Commission, the Commission stopped referring such cases to the AHSG. With the establishment of the Council under the AU, it offers a new opportunity for the Commission to make use of article 58. Decisions of the Commission indicating serious and massive violations will guide the Council in its actions to resolve conflicts, which in turn could result in the Commission's decisions which reveal serious or massive violations being implemented for the first time.³²⁰

In returning to the discussion on the principal organs of the African Union, it could be argued that the African Commission, although not directly incorporated into the AU as part of its principal organs does form part of the general provision for "other organs that the Assembly may decide to establish". Gutto, however, describes these "other organs" of the AU as "subsidiary bodies" and if that is the case, the African Commission and the broader African human rights system will once again not form part of the principal mission of the AU. The problems associated with the relationship with the OAU will merely continue.³²¹

The African Commission is certainly not without blame when it comes to the non-inclusion of the African human rights system amongst the principal organs of the AU. Firstly, there is no evidence that the Commission made a conscious effort to lobby for its direct inclusion into the Constitutive Act of the AU.³²² Secondly, on a more critical note the view has also been expressed that "had the Commission been very active in

Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire, 9th Annual Activity Report.

³²⁰ Article 58(3) also makes provision for the Commission to bring cases of emergency to the attention of the OAU. Under the AU this would enable the Commission to bring such cases to the attention of the Council.

³²¹ Gutto (2001) 183-184.

³²² In the absence of any effort on the part of the African Commission to clarify its role within the new AU the OAU AHSG at its 38th ordinary session held in July 2002 called upon the African Commission "to prepare a report proposing ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the African Union and submit it at next year's AU session". See E Baimu 'Human rights in NEPAD and its implications for the African human rights system' (2002) 2 *African Human Rights Law Journal* 314 fn 66. OAU 'Decision on the Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights' 38th ordinary session of the AHSG of the OAU, 8 July 2002, Durban, South Africa, AHG/Dec 171 (XXXVIII) para 2. The African Commission has yet to respond to this request even though the representative from the South African Government to the Commission, Sam Kotane, has reiterated this call from the AHSG to the Commission at both the 33rd and 34th ordinary sessions of the African Commission in calling upon the Commission during its public session to "do a critical self-appraisal".

the field of human rights to make its impact felt on the continent or to be seen as an important tool for socio-economic and political development, such impact would not have been ignored by the drafters of the Act”.³²³

Amongst the direct and indirect consequences that non-inclusion could have on the relationship between the AU and the African Commission, the continued marginalisation of the African Commission is certainly foremost.³²⁴ Instead of mainstreaming human rights into the core functions of the AU and therefore ensuring that the Commission will receive adequate human and financial resources to fulfil its mandate, the Commission seems no better off in this new dispensation than it did in the submissive relationship it had with the OAU.

Another argument is that the Commission was not included amongst the principal organs of the AU so as to protect the independence of the Commission in the execution of its mandate. Pityana summarised this viewpoint as follows:³²⁵

Another view is that the African Commission can best serve its tasks inherent in the African Charter and the Constitutive Act by remaining an independent body of experts that accounts for its activities and decisions to the AU, but remains independent as regards its decisions and processes. To be established as a specialised body within the AU, so the argument goes, might compromise its independence.

A particular area of concern relates to the fact that the African Court of Justice, an organ of the old AEC, was directly incorporated as a principal organ of the AU, while the African Court on Human and Peoples’ Rights was left out.³²⁶ At the 3rd ordinary session of the AU Assembly, a decision was adopted to “integrate” the ACHPR and the ACJ, a decision clearly motivated by budgetary concerns on the part of state parties.³²⁷ The merging of the two Courts would require a new Protocol to be drafted to set out the modalities of this decision. The practical impact of the merging of the

Personal notes taken during both the 33rd and 34th ordinary sessions of the African Commission.

³²³ Eno (2002) 72.

³²⁴ Gutto (2001) 175-176.

³²⁵ NB Pityana ‘Reflections on the African Court on Human and Peoples’ Rights’ (2004) 4 *African Human Rights Law Journal* 124.

³²⁶ The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights was already adopted and opened for ratification at the 34th ordinary session of the AHSG of the OAU in 1998. The notion of an African Court on Human Rights was therefore a reality before the drafting of the AU Constitutive Act commenced.

³²⁷ *Decision on the seat of the organs of the African Union*, Assembly/AU/Dec.45(III), Assembly/AU/Dec 33-45(III), paras 4-5.

two Courts falls outside the scope of this study, a matter that is of concern to this study relates to questions raised around the enforcement of the decisions of the African Human Rights Court. In terms of article 29 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, the OAU Council of Ministers was allocated the responsibility to oversee the enforcement of the Court's decisions.³²⁸ Amongst the principal organs of the AU the Executive Council has replaced the Council of Ministers. Neither an amendment to the Protocol establishing the Court nor the functions of the Executive Council states explicitly that the Executive Council will indeed take on the responsibility of enforcement.³²⁹ For the African regional human rights system to be effective, it is however not only important that the Court's decisions should be enforced once it has been established, but also that the recommendations of the African Commission should be implemented. Therefore, the focus of the discussion now shifts towards the new organs of the AU that do form part of its principal machinery in an effort to establish how these could be utilised as part of a comprehensive follow-up mechanism not only for judgments of the Court, but also for findings of the Commission.

In exploring the possibilities of establishing a comprehensive follow-up mechanism within the parameters of the relationship that exists or that should exist between the African Commission and the AU, the role of the AU Commission, the Executive Council and the African Peer Review Mechanism (APRM) is analysed here. The establishment of a follow-up mechanism within the Secretariat of the African Commission will not be possible without the human and financial support from the AU Commission.³³⁰ Within the AU Commission there are eight Commissions. One of these, the Political Affairs Commission, is tasked with looking after human rights issues on the continent, amongst other areas, such as good governance and

³²⁸ This provision is similar to article 46(2) of the Rules of Procedure of the European Court of Human Rights in terms of which the Committee of Ministers supervises enforcement of Court decisions.

³²⁹ Article 13 of the AU Constitutive Act sets out the functions of the Executive Council and makes no mention of any human rights or enforcement duties even though the Act was clearly drafted after the Protocol already existed and stipulated the enforcement role for the Council of Ministers.

³³⁰ The AU Commission is the Secretariat of the AU responsible for the day to day functioning of the Union and its organs. The AU Commission replaced the General Secretariat of the OAU. See article 20 of the AU Constitutive Act for the composition of the Commission.

electoral institutions.³³¹ The Political Affairs portfolio is again divided into six branches with the Democracy, Governance, Human Rights and Elections Division carrying the responsibility to strengthen the African Commission and to set up the African Court on Human and Peoples' Rights.³³² Within this structure, it is the Director of the Department of Political Affairs that is responsible for the functioning and the performance of the Secretariat of the African Commission. The African Commission will therefore have to ensure that they build up a solid relationship with the Director for Political Affairs in order to secure the necessary resources to fulfil its mandate, which should include funding for the implementation of its decisions.³³³ On the part of the AU there is a responsibility to ensure, as identified by stakeholders in September 2003, that "professional human rights officers with appropriate expertise should be recruited to work in the Political Affairs Department" to strengthen the human rights capacity of the AU in order to fully grasp the needs of the African Commission.³³⁴

Whereas the AU Commission has a role to play in the financing of follow-up measures, the Executive Council, as another principal organ of the AU, should be utilised as a forum for enforcement through political pressure.³³⁵ As alluded to above, it was foreseen in the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights that the Executive Council would bear the responsibility to enforce the decisions of the Court.³³⁶ The Executive Council's involvement should however not be limited to the decisions of the African Court on Human Rights for it could be argued that it was the lack of involvement of its predecessor, the Council of Ministers of the OAU, that

³³¹ See the AU website available at <http://www.african-union.org>. Within the structure of the OAU the Department of Political Affairs fulfilled a similar role since its inception in 1963.

³³² See AU website.

³³³ Mrs Julia Joiner was appointed as the first AU Commissioner for Political Affairs. Since her appointment it does appear as though she has made a conscious effort to engage with the African Commission through attending ordinary sessions of the Commission and by participating in the September 2003 retreat where the African Commission and various stakeholders set out to identify and address the challenges facing the Commission. *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 2.

³³⁴ *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights* page 8.

³³⁵ "The Executive Council is composed of Ministers of Foreign Affairs or such other Ministers or authorities duly accredited by the governments of Member States". Rule 3 of the Rules of Procedure of the Executive Council as adopted in July 2002 at the first ordinary session of the AU Assembly.

³³⁶ See article 29 of the Protocol.

contributed to a lack of state compliance to the findings of the African Commission in the absence of political pressure.³³⁷ The Executive Council should in other words be mandated to oversee the implementation of the recommendations forwarded to state parties by the African Commission upon finding them in violation of the African Charter in terms of the individual complaints procedure.

The formulation of an enforcement mandate for the Executive Council as part of a comprehensive follow-up mechanism should be possible with the assistance of the Assembly of the AU and through a progressive interpretation of the Rules of Procedure of the Executive Council. The Assembly of the AU now meets twice a year, but for a short duration of time and due to its heavy agenda has started to delegate functions ascribed to it in terms of the African Charter to the Executive Council.³³⁸ In instructing the Executive Council during the second ordinary session of the AU to consider the Annual Activity Report of the African Commission and to submit a report thereon, the foundation was laid upon which a follow-up mechanism could be established.³³⁹ In considering the Activity Report of the Commission, the Executive Council will inevitably have to deal with the findings of the Commission on individual complaints which are annexed to the Report. In terms of its Rules of Procedure the Executive Council could set up an ad-hoc committee or a working group to deal with the Commission's Report and to serve as a follow-up

³³⁷ Badawi commented on the role of the Council of Ministers and the Executive Council, as follows: "The lack of involvement of the Council of Ministers in the process of following the work of the Commission deprives the latter from an important contribution ... Meanwhile, the African Commission does not have a direct relation with the Executive Council. The reports of the Commission are submitted directly to the Assembly. Therefore, it would be important to involve the Executive Council with the reports of the African Commission to ensure proper follow-up on the work of both the African Court and the African Commission, given the complementarities between them, especially in the protective mandate" (El-Sheikh (2003) 6-7).

³³⁸ Initially the AU Assembly, as its predecessor the AHSG of the OAU met only once a year usually in June or July. At the 3rd ordinary session of the AU Assembly a decision was adopted to meet every six months (Decision on the periodicity of the Ordinary Sessions of the Assembly, AU Doc Assembly/AU/Dec 53 (III)). Article 33 of the African Charter determines that the members of the African Commission must be elected by the Assembly of Heads of State and Government. In terms of article 1(f) of the Rules of Procedure of the Executive Council the election of members of the Commission now rests with the Council.

³³⁹ In terms of article 59(2) of the African Charter the Annual Activity Report of the African Commission should be submitted to the Assembly of Heads of State and Government. The fact that the Assembly of the AU delegated the consideration of the Annual Activity Report to the Council should be welcomed for it hopefully did away with the practice whereby the Assembly, due to time constraints, merely adopted every Report of the Commission with a rubber stamp. See Decision of the Assembly of the AU, second ordinary session, 10-12 July 2003, Maputo, Mozambique DOC.Assembly/AU/7(II).

mechanism.³⁴⁰ The Executive Council furthermore has the power to take binding decisions in the form of regulations or directives which are automatically enforceable within thirty days after its publication in the Official Journal of the African Union, or as specified by decision, and can apply sanctions imposed by the Assembly where there is no compliance to these decisions.³⁴¹ Should the Ministers of Foreign Affairs, who constitute the Executive Council, view the issuing of regulations and directives, which are binding, as contrary to “constructive dialogue” on an international plane they could still issue recommendations or opinions to non-compliant state parties. According to the Rules of the Council, recommendations, declarations, resolutions, opinions and the like “are not binding and are intended to guide and harmonise the view points of Member States” but are still categorised in terms of rule 34 as decisions of the Council and as such subjected to sanctions where there is non-compliance in terms of rule 36. In summary, it can therefore be concluded that a framework to enable the Executive Council to engage in follow-up already exists and it is now up to the African Commission to engage the AU in this regard.

(c) NEPAD

Finally, it is also necessary to briefly analyse the relationship between the African Commission and the New Partnership for Africa’s Development (NEPAD), in light of its possible involvement as part of a follow-up mechanism. NEPAD is described as “a vision and strategic framework for Africa’s renewal” and is designed to meet the development objectives of the AU.³⁴² As such, NEPAD is described as a programme

³⁴⁰ Article 1(n) of the Rules of Procedure provide for the setting up of ad-hoc committees or working groups by the Council “as it may deem necessary”.

³⁴¹ Rule 34(a) and (b) deals with the issuing of regulations and directives by the Executive Council and read as follows: a) Regulations: these are binding and applicable in all member states; and national laws shall where appropriate be aligned accordingly; b) Directives: these are addressed to any or all member states, to undertakings or to individuals. They bind Member States to the objectives to be achieved while leaving national authorities with power to determine the form and the means to be used for their implementation”. Rule 35 determines when regulations and directives come into force and rule 36(b) stipulates that sanctions shall apply as imposed by the Assembly where there is non-compliance to decisions.

³⁴² The development of the NEPAD document took place almost simultaneously with the transformation of the OAU into the AU. The NEPAD document started out as the Millennium Africa Recovery Plan (MAP) in 2000, initiated by the Heads of State of South Africa, Nigeria and Algeria. MAP merged with a similar plan, OMEGA, designed by the president of Senegal to form the New African Initiative (NAI) in July 2001. The NAI was adopted by the 37th OAU Assembly of Heads of State and Government in July 2001 and after some refinement to the document it emerged as NEPAD on 23 October 2001. See OAU Declaration on the New African Initiative [MAP and OMEGA] 37th ordinary session of the Assembly of Heads of State and Government of the OAU, July 2001 Lusaka, Zambia, OAU Doc AHG/Decl1(XXXVII).

of the AU and is subsidiary to the AU.³⁴³ Within the NEPAD framework there are various “key priority action areas”, but the mechanism with which the African Commission should engage actively, especially around follow-up, is the African Peer Review Mechanism (APRM).³⁴⁴ A call was made for the establishment of the APRM during the first meeting of the Heads of State and Government Implementation Committee³⁴⁵ (HSGIC) held in Abuja on 23 October 2001.³⁴⁶ In July 2002 the establishment of the APRM was approved by the HSGIC.³⁴⁷ The APRM is intended to be an “African self-monitoring mechanism” open for voluntary accession by AU member states.³⁴⁸ According to the APRM base document the mechanism is mandated to

[e]nsure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.³⁴⁹

Once a country has formally acceded to the peer review process, it must clearly define a time frame for implementing both the Declaration on Democracy, Political, Economic and Corporate Governance, as well as periodic reviews.³⁵⁰ There are four

³⁴³ See “NEPAD in brief” available at <http://www.touchtech.biz/nepad/files/inbrief.html>. Date accessed: 1 June 2004. All NEPAD documents are available at <http://www.nepad.org>. For a discussion on the subsidiary role of NEPAD in relation to the AU see Baimu (2002) 311-312.

³⁴⁴ Apart from operationalising the APRM other “key priority action areas” include: a) “Facilitating and supporting implementation of the short-term regional infrastructure programs covering transport energy, ICT, water and sanitation; b) Facilitating implementation of the food security and agricultural development program in all sub-regions; c) Facilitating the preparation of a coordinated African position on market access, debt relief and ODA reforms”. See “NEPAD in brief” available at <http://www.touchtech.biz/nepad/files/inbrief.html>. Date accessed: 1 June 2004.

³⁴⁵ The HSGIC is one of three bodies that make up the institutional framework of the APRM. It is the HSGIC that must report annually to the AU Assembly of Heads of State and Government. The other two bodies that make up the APRM are the Steering Committee and the Secretariat.

³⁴⁶ See the Communiqué issued at the end of the first meeting of the HSGIC, Abuja, Nigeria, 23 October 2001.

³⁴⁷ See the Communiqué issued at the end of the third meeting of the HSGIC, Rome, Italy, 11 June 2002.

³⁴⁸ See “The African Peer Review Mechanism” the APRM base document was adopted at the HSGIC 6th Summit held on 9 March 2003. AHG/235(XXXVIII) Annex II par 1. Available at <http://www.nepad.org/documents/49.pdf>. Date accessed 1 June 2004.

³⁴⁹ Par 2 of “The African Peer Review Mechanism”. As of 1 June 2004 only 16 of the 53 member states of the AU have voluntarily joined the APRM. These states are Algeria, Burkina Faso, Cameroon, Congo, Ethiopia, Mozambique, Nigeria, Ghana, Kenya, Rwanda, Senegal, Uganda, Gabon, Mauritius, Mali and South Africa. Available at http://www.touchtech.biz/nepad/files/aprm_countries.html. Date accessed: 1 June 2004.

³⁵⁰ Par 13 of “The African Peer Review Mechanism”.

types of reviews and five stages to each review process.³⁵¹ From a reading of the ‘Guidelines for Countries to Prepare for and to Participate in the African Peer Review Mechanism’³⁵² it appears that the state reporting mechanism of the African Commission could overlap to a certain extent with the peer review process.³⁵³ Although the duplication of processes within the limited budget of the AU is a very worrying phenomenon, it comes as no surprise since the African Commission clearly did not participate in the development of the APRM mechanism or the NEPAD document.³⁵⁴ As a result, the participation of the African Commission in the peer review mechanism is limited to the fifth and final stage of the review process and even so its input amounts to no more than a “cosmetic linkage”.³⁵⁵ The fifth and final stage of the review process merely stipulates that the report must be “formally and publicly tabled” in key regional and sub-regional structures such as the African Commission, amongst others, six months after it has been considered by the Heads of State and Government of the participating member states.³⁵⁶ Therefore, apart from perusing the document, the African Commission will have no opportunity to provide feed-back or any additional input into the report.

If the African Commission is to fulfil its mandate as regional human rights mechanism, it will have to engage with and forge relationships with the new regional mechanisms established under the auspices of the AU. The APRM offers an ideal platform to engage with governments, through participating member countries, on issues such as state compliance to the recommendations of the African Commission.³⁵⁷ Furthermore, the “revival” of Africa through NEPAD is dependent on the financial assistance from donor countries. It could be deduced from the peer review mechanism that those countries that either do not participate in the process or

³⁵¹ See par 14 for the types of reviews and paras 18-25 for the five stages in each review process in “The African Peer Review Mechanism”. The APRM base document further stipulates that the duration of the review process should not be longer than six months. See par 26.

³⁵² NEPAD/APRM/Panel2/country/10-2003/DOC7. Available at <http://www.nepad.org/documents/guidelinesforcountryreview161204.pdf>. Date accessed: 1 June 2004.

³⁵³ Baimu not only highlighted this similarity in reporting obligations for member states but also indicated that a proliferation of mechanisms on the regional front could “present problems to African states regarding how to allocate resources and personnel to deal with obligations arising from their involvement in these institutions and mechanisms” (Baimu (2002) 316).

³⁵⁴ Baimu (2002) 314.

³⁵⁵ Baimu (2002) 314 fn 67.

³⁵⁶ Par 25 of “The African Peer Review Mechanism.

³⁵⁷ Requiring a member state to report on the measures taken to implement the decisions of the African Commission, as part of the criteria that must be met in the review process, will go a long way towards encouraging state compliance.

are not willing to correct their short-comings upon completion of the process, will receive less aid funding.³⁵⁸ These stipulations create an opportunity rarely offered, namely coercing states to comply with their international human rights treaty obligations due to the potential severance of their access to aid funding should they not comply with the findings of for instance the African Commission.³⁵⁹

In conclusion, it is apparent that there are several potential roles that the principal and subsidiary organs of the AU could fulfil as part of a comprehensive follow-up mechanism to ensure state compliance with the recommendations of the African Commission. It is however first and foremost be the responsibility of the African Commission to establish relationships with the various bodies highlighted above in order to explore these possibilities, and to ensure that its relationship with the AU goes beyond mere financial dependence, as was the case with the OAU.

4.8 Conclusion

In this chapter various aspects of the Commission's promotional and protective mandate were analysed in an effort to determine which aspects of the Commission's existing functions could be utilised in the establishment of a follow-up mechanism. These findings will be incorporated in the recommendations formulated in the final chapter to this study. This analysis also highlighted aspects of the Commission's

³⁵⁸ Par 24 of the base document of the APRM stipulates the following procedures to be applied to governments that are either willing or not to rectify their identified shortcomings upon completion of the review: "If the government of the country in question shows a demonstrable will to rectify the identified shortcomings, then it will be incumbent upon participating governments to provide what assistance they can, as well as to urge donor governments and agencies also to come to the assistance of the country reviewed. However, if the necessary political will is not forthcoming from the government, the participating states should first do everything practicable to engage it in constructive dialogue, offering in the process technical and other appropriate assistance. If dialogue proves unavailing, the participating Heads of State and Government may wish to put the government on notice of their collective intention to proceed with appropriate measures by a given date. The interval should concentrate the mind of the government and provide a further opportunity for addressing the identified shortcomings under a process of constructive dialogue. All considered, such measures should always be utilized as a last resort".

³⁵⁹ Baimu has welcomed the establishment of the AU, as "the highest level of economic integration" in Africa, as an important tool for the successful enforcement of human rights in Africa through relying on Viljoen and Heyns who argued that enforcement will depend in part on the development of economic integration (Baimu (2001) 310 referring to C Heyns & F Viljoen 'An overview of international protection of human rights in Africa'(1999) 15 *South African Journal of Human Rights* 425,433). If the establishment of the AU was welcomed as a step towards economic integration on the continent for reasons of human rights enforcement then in theory the establishment of the peer review mechanism within NEPAD should be applauded.

composition and functioning that would need to be strengthened if the factors that influence state compliance in relation to treaty bodies, identified in the previous chapter, are taken on board.³⁶⁰ Finally, this chapter also focused on the Commission's existing or potential relationships with NGOs, NHRIs and various organs of the AU. The potential roles that could be fulfilled by these role players in improving state compliance with the Commission's recommendations through a follow-up mechanism, which incorporates the factors that influence state compliance in regard to each of these bodies, were explored. Some of these bodies will have follow-up functions to fulfil in the short term (NGOs and the Executive Council, for example). The potential roles of others should be developed in the long term (Peace and Security Council and the APRM for example).

In conclusion, it has been established in this chapter that there are various possibilities for the establishment of a comprehensive follow-up mechanism making use of the existing functions and role players within the African regional human rights system. The modalities of such a mechanism could be further developed by taking into account the experiences of other regional and global human rights treaty bodies. This is the focus of the next chapter.

³⁶⁰ See section 3.3.3 of chapter 3.

CHAPTER 5

COMPARATIVE OVERVIEW OF FOLLOW-UP MECHANISMS: EXPERIENCES OF THE EUROPEAN COMMITTEE OF MINISTERS, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND THE UN HUMAN RIGHTS COMMITTEE

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5.1 Introduction

There are currently three functioning regional systems for the promotion and protection of human rights in the world. The Inter-American and European systems date back to the time of the adoption of the Universal Declaration on Human Rights and have over the years developed various mechanisms to strengthen their efforts to promote and protect human rights in their regions.¹ Within the United Nations (UN) treaty body system, the Human Rights Committee (HRC) took up its mandate under the International Covenant for Civil and Political Rights (ICCPR) in 1977. The HRC has a global mandate to monitor obligations of state parties under the ICCPR. The African regional human rights system is the youngest of the three regional systems and the African Commission on Human and Peoples' Rights (African Commission), the body mandated with the promotion and protection of the rights guaranteed in the African system, was established in 1987, ten years after the UN HRC. As the most recently established body, the African Commission could and should be inspired by the best practices developed by comparative bodies from the regional or UN systems that predate its own experiences, in order to strengthen its human rights mechanisms.

In this chapter, the focus is on bodies within the abovementioned systems with a status, powers and functions similar to that of the African Commission, namely the (now defunct) European Commission on Human Rights, the Council of Europe's Committee of Ministers (employing its mandate under article 32 of the European Convention), the Inter-American Commission on Human Rights and the UN HRC. All

¹ The Universal Declaration on Human Rights was adopted in 1948 but was actually preceded by the establishment in the same year of the Inter-American system with the adoption of the American Declaration on the Rights and Duties of Man. The European system followed shortly thereafter, with the European Convention on Human Rights entering into force in 1953.

these bodies can (or could) consider individual complaints alleging a violation of the rights guaranteed in their founding treaties (and declaration, in the case of the Inter-American system).² All these bodies have struggled (or still struggle) with state compliance with their findings made in terms of the individual complaints procedures. As a result, they have all adopted some form of follow-up to encourage state compliance. As indicated in chapter 2, there is an overall lack of state compliance with the recommendations adopted by the African Commission in terms of its individual communications procedure. Yet, the Commission has not adopted any formal follow-up procedures to establish the status of state compliance or to encourage greater compliance by state parties. Therefore, the aim of this chapter is to examine the follow-up measures adopted within the European and Inter-American regional human rights systems, as well as by the UN HRC, in order to identify comparable best practices, on which the African Commission may rely in developing its own follow-up measures.

Within the European system, the European Commission on Human Rights and the article 32 mandate of the Committee of Ministers have with the adoption of Protocol 11 in 1998 been replaced by a single European Court of Human Rights. The system as it existed before 1998, is being examined in this study, given that the European system's successes predated the 1998 changes and might therefore hold some best practice examples for the African system. A comparative analysis of the supervision of the execution of the judgments of the European Court of Human Rights and the Inter-American Court on Human Rights, in light of the upcoming African Court on Human Rights, will be the focus of the next chapter.

In each section below a brief overview is given of the individual complaints procedures that exist (or existed), followed by an examination of the follow-up procedures adopted by the various bodies. Finally, to inform future decisions on follow-up within the African regional human rights system, some best practices are deducted from each of these discussions.

² The Committee of Ministers is a political organ of the Council of Europe that was established under the Statute of the Council of Europe. The role it had fulfilled in considering individual complaints under article 32 of the European Convention did not involve primary fact-finding in a case, as this was the function of the European Commission on Human Rights. The Committee of Ministers should be distinguished from the African Commission, Human Rights Committee and the Inter-American Commission, as these are human rights treaty bodies established under their various founding treaties with quasi-judicial mandates.

5.2 Follow-up procedures under the European Convention on Human Rights before 1 November 1998

5.2.1 Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or Convention) entered into force in September 1953. The Convention provides for the protection of civil and political rights and freedoms and initially delegated the implementation of the treaty obligations to three institutions.³ These institutions were the European Commission of Human Rights and the European Court of Human Rights, established in terms of the Convention, as well as the Committee of Ministers, which predated that Convention as the executive organ of the Council of Europe.⁴

As of 1 November 1998, with the entry into force of Protocol 11 to the Convention, the implementation machinery of the European Convention has changed completely. Although the Committee of Ministers still has a role to play in the new system, the part-time Commission and Court is replaced by a single permanent Court. The African regional human rights system is following a different route. Whereas the African Commission was the only institution entrusted with the implementation of the African Charter, the implementation machinery will shortly be supplemented by an African Human Rights Court.⁵ Therefore, even though the European Commission on Human Rights no longer exists, the experience of the European system predating 1 November 1998 is still relevant to the African regional human rights system, and is discussed here briefly. The discussions will therefore not focus on the system in

³ Since the entry into force of the Convention, thirteen Protocols have been adopted. These protocols either provided for additional rights and freedoms or dealt with the organisation of and procedures before the three Convention institutions. Protocol 11 provides for the restructuring of the enforcement mechanisms under the Convention and with its entry into force on 1 November 1998 replaced all provisions amended or added by protocols 3, 5, 8 and 2. Protocol 9 was repealed and 10 lost its purpose whilst 12 and 13 still require the requisite number of ratifications to enter into force (See cover page of the Convention available at <http://www.echr.coe.int/Convention/webConvenEng.pdf>. Date accessed: 28 September 2004).

⁴ The Committee of Ministers comprises the Foreign Affairs Ministers of all the member states of the Council of Europe or their permanent representatives, usually the Ministers' Deputies who perform the day to day duties, in Strasbourg.

⁵ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court on Human and Peoples' Rights), adopted in 1998, entered into force on 25 January 2004 and a process to elect the judges has been set in motion.

general, but will analyse the follow-up procedures that were in place before Protocol 11.

5.2.2 The division of roles and functions of the European Commission, European Court and the Committee of Ministers

It is firstly necessary to briefly outline the roles and functions fulfilled by the three institutions that were entrusted with the enforcement of the treaty provisions of the European Convention on Human Rights.⁶ The pre-1998 Convention provided for inter-state complaints under article 24, as well as individual complaints.⁷ Both inter-state and individual complaints had to be lodged with the European Commission on Human Rights, described by Macdonald as the initial “filter” for complaints lodged under the Convention.⁸ The Commission decided on the admissibility of complaints. Once a complaint was declared admissible, the Commission had a duty to engage both parties in an effort to reach a friendly settlement.⁹ If a friendly settlement was not reached, the Commission undertook further fact-finding and drew up a report indicating whether on the merits of the complaint the respondent state party was in violation of the provisions of the Convention.¹⁰ This report was then transmitted to the Committee of Ministers.¹¹

⁶ References to the European Convention on Human Rights in this section, unless otherwise indicated, should be understood to refer to the Convention before the coming into force of Protocol 11.

⁷ Under article 25 of the European Convention, individuals, groups of individuals or non-governmental organisations on behalf of individuals could file individual complaints. Individual complaints could however only be filed with the European Court on Human Rights subject to the ratification by the respondent state party of Protocol 9 and after acceptance by a screening panel.

⁸ R St J 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) 418.

⁹ Shelton reported that “in quite a few cases governments paid compensation as part of a friendly settlement reached in accordance with article 28(b) of the European Convention” (D Shelton *Remedies in International Human Rights Law* (1999) 152). Even though the role of the European Commission is not delved on in this section, for by far the most decisions were taken by the Committee or Court, it is still important to note that they did play a role in finalising a number of cases in terms of friendly settlements and that state parties complied with their obligations in terms of such settlements.

¹⁰ See Information document issued by the Registrar of the European Court of Human Rights, Historical background, Section A: The European Convention on Human Rights of 1950. Available at: <http://www.echr.coe.int/Eng/EDocs/Historical/Background.htm>. Date accessed: 29 September 2004.

¹¹ In terms of article 31(1) of the Convention.

Once the Commission has forwarded its report to the Committee of Ministers, one of two procedures ensued. If the respondent state party had accepted the compulsory jurisdiction of the European Court of Human Rights, either the Commission or any of the state parties concerned with the dispute, could bring the case before the European Court within three months following the transferral of the Commission's report to the Committee.¹² The European Court could then hear a case on the merits and give a final and binding judgment. The supervision of the execution of the Court's judgments was the responsibility of the Committee of Ministers.¹³ However, if the case was not referred to the European Court, under article 32 of the Convention the Committee of Ministers had to decide whether there has been a violation of the Convention. Any decision that the Committee of Ministers took in terms of article 32 had to be regarded as binding on the state parties.¹⁴ The Committee also had to supervise the implementation of the decisions it took under article 32.¹⁵

From the above, it is clear that the original European Convention on Human Rights provided for two distinct procedures – one, a judicial mechanism whereby the European Court issued binding judgments, and the other a quasi-judicial procedure whereby a political body, the Committee of Ministers, issued binding decisions. However, in both instances the supervision of the implementation of the judgments and decisions was the responsibility of the Committee of Ministers. Of comparative importance to the African regional human rights system is the role played by the Committee of Ministers in ensuring state compliance with the decisions taken by them in terms of article 32. (The role of the Committee in terms of the judgments of the Court will be examined in chapter 7).

Any discussion on the quasi-judicial role of the Committee of Ministers should be preceded by the question why such a system was incorporated into the original text of the European Convention on Human Rights. Most commentators describe the conferring of quasi-judicial powers on a political body such as the Committee of Ministers as the result of a “compromise” reached during the drafting of the

¹² Article 48 of the Convention. Individual complaints could only be filed with the European Court subject to the ratification by the respondent state party of Protocol 9 and after acceptance by a screening panel.

¹³ Article 54 of the Convention. This procedure is only briefly mentioned here but will be examined in detail in chapter 7.

¹⁴ Article 32(4) of the Convention.

¹⁵ Article 32(2) of the Convention.

Convention.¹⁶ During the drafting process, it apparently became clear that not all states were prepared to accept the compulsory jurisdiction of the European Court on Human Rights. Therefore, those cases that could not, or would not, be referred to the Court would not continue once the Commission finished drafting its report.¹⁷ As a result, article 32 was inserted into the Convention to provide for an alternative solution to the Court, whereby binding power was vested in a political body, rather than in the uncertain status of a quasi-judicial body.

5.2.3 Committee of Ministers: Supervising the implementation of article 32 decisions

In terms of the original European Convention, the main tasks of the Committee of Ministers, if the European Commission's report was not referred to the European Court, related to its article 32 decision-making powers. Its duty was to subsequently supervise the implementation of those decisions where a respondent state party was found to be in violation of the Convention. In theory, the article 32 procedure involved that the Committee of Ministers, by a two-thirds majority of its members, first had to decide, after the three month period had lapsed and the Commission's report was not referred to the Court in accordance with article 48, whether there had been a violation of the Convention.¹⁸ If the Committee decided that the responding state party had violated the Convention, it was to prescribe a period during which the state party had to take measures to remedy the situation as stipulated in the Committee's decision.¹⁹ Should it be found that the state party did not take "satisfactory measures" within the time frame prescribed by the Committee, the Committee must decide,²⁰ again by a majority of two-thirds of its members, what effect should be given to its original decision under article 32(1) and should (but was not obliged to)

¹⁶ See Macdonald (1999) 421, DJ Harris, M O'Boyle & C Warbrick *Law of the European Convention on Human Rights* (1995) 692 and P Van Dijk & GJH Van Hoof *Theory and Practice of the European Convention on Human Rights* (1998) 36.

¹⁷ As above.

¹⁸ Article 32(1): "If the question is not referred to the Court in accordance with article 48 of this Convention within a period of three months from the date of the transmission of the report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention". In practice the Committee of Ministers in most cases merely adopted the report of the Commission (See JG Merrills & AH Robertson *Human Rights in Europe – A Study of the European Convention on Human Rights* (2001) 293).

¹⁹ Article 32(2): "In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers".

²⁰ Article 32(3) of the Convention.

publish the Commission's report.²¹ Any decision taken by the Committee of Ministers in terms of article 32 had to be regarded by state parties as binding on them.²²

In practice, the article 32 decision-making powers of the Committee of Ministers attracted much criticism from commentators who frequently highlighted the following problems that arose, mostly due to the fact that a political body was endowed with judicial decision-making powers: (1) Critics highlighted cases where the Committee did not attain a two-thirds majority and as a result took no decision as to whether a state party had violated the Convention.²³ This meant that such case could not continue and the individual complainant was denied justice.²⁴ (2) The individual complainant, after having lodged a complaint with the Commission, had no initially input as to whether his or her case was to be heard by the Committee or Court. Once a case had been referred to either the Committee or Court, the individual could not further participate in the proceedings.²⁵ (3) Van Dijk & Van Hoof indicated that the article 32 procedure "is not public, not adversary and takes place before a non-independent organ. Consequently, it by no means satisfies the requirements of a fair trial which article 6 of the Convention imposes upon the contracting states in respect of their domestic procedures".²⁶ These problems combined with factors such as case backlogs and the duplication of proceedings, which were inherent in the original

²¹ Article 32(3): "If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph 1 above what effect shall be given to its original decision and shall publish the report".

²² Article 32(4): "The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs".

²³ Article 32(1) of the Convention.

²⁴ In such situations, Harris, O'Boyle & Warwick explained, a number of state parties abstained from casting their vote most probably as a result of effective lobbying by the respondent state party. They listed five cases where the Committee did not take any decision as a result of not attaining a two thirds majority: *Huber v Austria* (Res DH (75) 2), *East African Asians v United Kingdom* (Res DH (77) 2), *Dores and Silveira v Portugal* (Res DH (85) 7), *Dobbertin v France* (Res DH (88) 12) and *Warwick v United Kingdom* (Res DH (89) 5) (See Harris, O'Boyle & Warbrick (1995) 695). Also see, Macdonald (1999) 429; B Dickson *Human Rights and the European Convention – The Effects of the Convention on the United Kingdom and Ireland* (1997) 21; Merrills & Robertson (2001) 293-294 and Van Dijk & Van Hoof (1998) 273 and 279. It must also be noted that state parties could participate in the vote of the Committee even in cases where they were the respondent party in what Macdonald described as a process which discredited the system "because independence and impartiality are not guaranteed" (Macdonald (1999) 429).

²⁵ Macdonald (1999) 429; Dickson (1997) 22. However, in as far as the determination of just satisfaction to be awarded to the individual applicant is concerned a practice did developed whereby the applicant would receive a copy of the Commission's report in confidence to substantiate his or her claim to the Commission (See Van Dijk & Van Hoof (1998) 275).

²⁶ Van Dijk & Van Hoof (1998) 284.

system, to create a need for reform of the implementation machinery under the Convention and resulted in the adoption of Protocol 11.²⁷

The above overview of the article 32 decision-making powers of the Committee of Ministers and the associated difficulties was merely done to form the background for the actual focus of this section, namely, the examination of the Committee's supervisory role in respect of the implementation by state parties of its decisions. Firstly, it must be noted that decisions of the Committee of Ministers finding a state party to be in violation of its Convention obligations was "essentially declaratory in character".²⁸ Leuprecht explains it as follows:²⁹

They [the decisions of the Committee] do not have the direct effect of quashing or abrogating a decision, legislation or practice of the state concerned ... the obligation to execute is an obligation to produce a certain result. The state concerned may choose the means through which to achieve that result.

Therefore, in measuring state compliance with the decisions of the Committee of Ministers, it is clear that in terms of article 32(4) the obligation to remedy the violation of the Convention is binding upon the state party, but the means of achieving this end is up to the state concerned.

In practice, nevertheless, state compliance with the decisions of the Committee was mostly "remarkably good".³⁰ Merrills and Robertson reported that "the overall record of the Committee of Ministers in dealing with cases under article 32 shows that entrusting a political body with judicial or quasi-judicial functions worked rather better than might have been expected".³¹ Where the Committee did meet with resistance from state parties to implement its decisions, it regularly amended its practice to achieve state compliance and to prevent similar situations in future. Some of these developments are briefly highlighted here, as some of the adjustments made by the Committee could serve as best practices for other systems struggling with state compliance, such as the African.

²⁷ For information on the backlog of cases before the Commission, Committee and Court see Information document issued by the Registrar of the European Court of Human Rights, Historical background, Section B: Subsequent Developments, par 6. Available at: <http://www.echr.coe.int/Eng/EDocs/Historical/Background.htm>. Date accessed: 29 September 2004. See further, Macdonald (1999) 427 and 433.

²⁸ Leuprecht (1993) 793 and Macdonald (1999) 420.

²⁹ Leuprecht (1993) 793.

³⁰ Leuprecht (1993) 800.

³¹ Merrills & Robertson (2001) 295.

From the overview of the article 32 procedure it is clear that once the Committee of Ministers found a state party in violation of the Convention in terms of article 32(1), it had to prescribe a period under article 32(2) during which the state concerned had to implement the measures stipulated in the Committee's decision. From the wording of article 32(2), just satisfaction should have formed part of the Committee's practice since its inception, but in reality it was only in 1987, with the amendment of its Rules, that the Committee started a practice of awarding just satisfaction.³² Such an award of just satisfaction (or any other measures stipulated under article 32(2)) should have been binding on the state concerned, but instead the Committee adopted Rule 5 which determined that any advice, suggestions or recommendations made to states under article 32(2) were not binding on them.³³

In addition to these factors, the Committee of Ministers also did not as a matter of practice stipulate a time limit for compliance with its article 32(1): decisions, even though such a time limit was specifically provided for in article 32(2).³⁴ State parties nevertheless implemented the decisions of the Committee, thus obviating the need for the Committee to amend its practice.³⁵ However, in 1990 the Committee faced difficulties with several cases decided against Italy, in respect of which the payment of just satisfaction was recommended but not implemented.³⁶ Firstly, the Committee reacted by making use of article 32(2) and by setting a time limit within which Italy had to comply.³⁷ Still the government of Italy did not make any payments. It argued that the awards of just satisfaction were not binding on the government as such

³² Consequently individual applicants before the revised procedure of 1987 could only receive awards of just satisfaction before the Court not the Committee. On this issue see e.g. Harris, O'Boyle & Warbrick (1995) 699; Leuprecht (1993) 795 and Van Dijk & Van Hoof (1998) 271.

³³ Article 32(2) should have been read in conjunction with article 32(4), which in effect means that any measures stipulated under article 32(2) is binding on states in terms of article 32(4). Rule 5 stipulated: "The provisions of paragraph 2 of article 32 enable the Committee of Ministers, in cases where it has decided that there has been a violation, to give advice or make suggestions or recommendations to the state concerned, provided that these are closely related to the violation. Such advice, suggestions or recommendations, whether based on proposals made by the Commission or not, would not be binding on the government to which they are addressed because they would not constitute decisions within the meaning of paragraph 4 of article 32".

³⁴ See Harris, O'Boyle & Warbrick (1995) 699 and Van Dijk & Van Hoof (1998) 280.

³⁵ Leuprecht reported that in 23 cases following the Committee's decision to issue awards of just satisfaction state parties did comply even though as a result of rule 5 these were mere recommendations and not binding decisions (See Leuprecht (1993) 796).

³⁶ Leuprecht (1993) 796; Harris, O'Boyle & Warbrick (1995) 699 and Van Dijk & Van Hoof (1998) 272.

³⁷ As above.

awards were mere recommendations in terms of rule 5.³⁸ The Committee of Ministers responded by deleting rule 5 from its Rules, thereby making it clear that all decisions taken under article 32(2), including awards of just satisfaction, are binding on state parties in terms of article 32(4).³⁹

In summary, in the face of non-compliance by a state party, the Committee of Ministers thus seized its full powers in terms of article 32(2) and developed a procedure whereby it awarded binding orders of just satisfaction, stipulated time frames for the implementation of these orders and developed a practice whereby it invited governments to inform it of the measures taken as a consequence of its decisions.⁴⁰ In other words, the Committee realised from the difficulties it was facing in its decisions against Italy that it required its decisions to be binding, that it had to stipulate a time frame within which to comply therewith and that it had to request follow-up replies from state parties in order to ensure state compliance.

As part of its regular practice, the Committee, used to publish the resolution it adopted under article 32 concluding that no further action is needed in a particular case, with specific reference to the measures taken by the state concerned.⁴¹ Should a state party still not have implemented the decisions of the Committee in a “satisfactory” manner within the time limited stipulated, the Committee under article 32(3) could decide by a two-thirds majority on the effect to be given to its original decision. It could also publish the report of the Commission. The publication of the Commission’s report in such circumstances would amount to a sanction against the state party concerned, as the report would indicate the lack of state compliance with the measures a state had to take to implement its decision.⁴²

³⁸ As above.

³⁹ The government of Italy did comply with the decisions of the Committee after the Committee made the necessary changes to its practices and on 17 September 1992 the Committee closed its consideration of these cases with the adoption of resolutions on each (See Van Dijk & Van Hoof (1998) 272).

⁴⁰ However, the Committee did not stipulate time limits in all its decisions but limited it to awards of just satisfaction. See Leuprecht (1993) 799 and Macdonald (1999) 420.

⁴¹ Usually the Commission’s report was also published as a source of information and not as a sanction as referred to below. A report of the Committee is also referred to as a resolution of the Committee. See Harris, O’Boyle & Warbrick (1995) 694 and Leuprecht (1993) 800.

⁴² Van Dijk & Van Hoof (1998) 280 and Macdonald (1999) 420.

In practice, however, commentators reported that only once, in the *Greek case*,⁴³ did the Committee publish the Commissions' report as a sanction against the defaulting state party.⁴⁴ The *Greek case* dealt with a politically sensitive inter-state complaint, where the European Commission found that a great many of the Convention's articles had been violated under the dictatorial leadership in Greece.⁴⁵ However, before the Committee could adopt its resolution, Greece had already withdrawn from the Council of Europe and denounced the European Convention.⁴⁶ The one occasion during which the Committee did publish its report as a "sanction" against a state party, thus took place under very special circumstances.⁴⁷ Another sanction that was technically available to the Committee of Ministers, although never invoked, related to the power of the Committee to suspend or expel any state in terms of article 8 of the Statute of the Council of Europe, if such state had seriously violated article 3 of the Statute.⁴⁸

The fact that the Committee of Ministers only once had to invoke any of the above sanctions and furthermore that they could address non-compliance by state parties with their decisions simply by relying on their already available powers under article 32, can possibly be explained in reference to the preamble of the European Convention on Human Rights. The preamble to the Convention refer to European countries as countries "which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law".⁴⁹ In other words, the homogeneity among member states of the European Convention which is characterised by the democratic principles highlighted in the preamble to the

⁴³ The *Greek case* involved four joint inter-state complaints against Greece: Case no 3321/67 *Denmark v Greece*, case no 3322/67 *Norway v Greece*, case no 3323/67 *Sweden v Greece* and case no 3344/67 *Netherlands v Greece*.

⁴⁴ Res DH (70) 1 of the Committee of Ministers of the Council of Europe (15 April 1970). See further Leuprecht (1993) 799 and Macdonald (1999) 420.

⁴⁵ Harris, O'Boyle & Warbrick (1995) 697.

⁴⁶ As above.

⁴⁷ The Committee resolved that "it was called upon to deal with the case in conditions which are not precisely those envisaged in the Convention" and concluded "that in the present case there is no basis for further action under paragraph 2 of article 32 of the Convention" (paragraphs 19 and 20 of Res DH (70) 1, available at:<http://www.ena.lu/mce.cfm>).

⁴⁸ Article 3 stipulated that as a pre-condition for membership in the Council of Europe every state must accept the principles and rules of law applicable to the protection of human rights. Macdonald reported that the Committee did consider invoking its powers under article 8 once, in the *Greek case*, but when Greece withdrew from the Council of Europe they could not follow through on their decision. See Macdonald (1999) 421.

⁴⁹ See Preamble to the European Convention on Human Rights available at <http://www.echr.coe.int/Convention/webConvenEng.pdf>. Date accessed: 28 September 2004.

Convention regularly led commentators to conclude that “the success of the European system may be attributed in large part to the fact that there were more “good guys” than “bad guys”.⁵⁰ Even so, certain “best practice” principles can still be identified for the African system, from the supervisory functions fulfilled by the Committee of Ministers under the original European Convention. These are briefly outlined in the next section.

5.2.4 Best practices for the African regional human rights system

The supervisory role fulfilled by the Committee of Ministers under the original European Convention was definitely amongst the factors that contributed to the success of the European system. Although it will not work to simply adopt a similar approach for the African regional human rights system and expect similar results, there are underlying principles that may be identified from the practice of the Committee of Ministers that should be taken into account in developing a follow-up mechanism for the African system. The first important factor to mention here is the fact that it was the Committee of Ministers, a political body of the Council of Europe, which was tasked with supervising the implementation of decisions and not a body established under the Convention. Within the African Union, the AU Executive Council is a political body similar in composition and powers to the Committee of Ministers.⁵¹ In the establishment of a follow-up mechanism within the African system, the AU Executive Council would be in the best position to fulfil a supervisory role, especially since it is already the body assigned to consider the Annual Activity Report of the African Commission with the decisions of the Commission annexed thereto.⁵² Furthermore, provision has already been made for the Executive Council to oversee the execution of the judgments of the African Court on Human and Peoples’ Rights.⁵³ Therefore, by analogy to the Committee of Ministers, that supervised implementation

⁵⁰ LF Zwaak ‘The effects of final decisions of the supervisory organs under the European Convention on Human Rights’ in AF Bayefsky (2000) 272. Merrills & Robertson echoed this sentiment by stating that “the European system was able to function effectively because the governments concerned were willing to co-operate with the Convention organs and genuinely wished to secure the effective exercise of human rights within their territories” (Merrills & Robertson (2001) 296).

⁵¹ See section 4.7 of chapter 4 for a discussion on the relationship between the African Commission and the organs of the AU including the Executive Committee.

⁵² See Decision of the Assembly of the AU, second Ordinary Session, 10-12 July 2003, Maputo, Mozambique DOC.Assembly/AU/7(II). In terms of this decision the Assembly of Heads of State of the AU delegated the consideration of the Annual Activity Report of the African Commission to the Executive Council.

⁵³ Article 29 of the Protocol establishing the African Court.

of both its own decisions under article 32 and the judgments of the Court, there should be nothing hindering the Executive Council from fulfilling a similar role.⁵⁴

From the Committee of Minister's practice in managing Italy's initial resistance to implement its decisions, it is also apparent that decisions that are binding on state parties have a greater compliance pull. In regard to the decisions of the African Commission, it has been argued that the decisions of the Assembly of Heads of State of the AU on the adoption of the African Commission's Annual Activity Reports (with the decisions of the Commission annexed thereto) are binding and as such "confirms the legally binding nature of the findings, or "converts" a quasi-legal finding into a legally binding decision".⁵⁵

Other factors that can be identified as important steps to include in any follow-up mechanism, from the practice of the Committee of Ministers are: (1) Stipulating a time limit within which the state party has to implement the recommendations as outlined in the decision; (2) inviting follow-up replies from the state party concerned; (3) including the steps taken by the state to implement the recommendations of the treaty body together with its findings in a final resolution on the case and to subsequently publish it; and (4) publishing the treaty body's findings where there was non-compliance, while highlighting the lack of state compliance, as a sanction against the defaulting state party.

5.3 The Inter-American Commission on Human Rights: Tracing the establishment of a follow-up mechanism to ensure state compliance with the Commission's recommendations

5.3.1 Introduction to the Inter-American human rights system

In the analysis of best practices for ensuring state compliance in the African regional human rights system, the lessons that can be drawn from the experiences of the Inter-American regional human rights system, as opposed to the European system, might prove to be the most practical. This assumption is based on the parallels that can be

⁵⁴ As above.

⁵⁵ F Viljoen & L Louw 'The status of the findings of the African Commission: from moral persuasion to legal obligation' (2004) 4 *Journal of African Law* 18-19.

drawn between the historical, political and legal similarities that form the background against which these regional systems operate today.⁵⁶

The Inter-American regional human rights system is located within the Organisation of American States (OAS), which was established in 1948 in Bogota, Colombia, with the adoption of the Charter of the Organisation of American States by the Ninth International Conference of American States.⁵⁷ The same Conference also adopted the American Declaration of the Rights and Duties of Man (Declaration), which is described as the “formal beginning” of the Inter-American system for the protection of human rights.⁵⁸ However, the Declaration did not provide for any organs to monitor the rights guaranteed therein. Eleven years later, in 1959, the Fifth Meeting of Consultation of Ministers of Foreign Affairs adopted a resolution establishing the Inter-American Commission on Human Rights (IACHR).⁵⁹ The original Statute of the Inter-American Commission was adopted in 1960 but it was only in 1965 with the amendment of the Statute by the Second Special Inter-American Conference that the Commission received additional powers to examine individual petitions.⁶⁰ The next major development came about in 1967 with the Protocol of Buenos Aires that amended the OAS Charter and incorporated the Inter-American Commission on Human Rights as a principle organ of the OAS.⁶¹ These developments form the basis of what still today constitutes the one leg of the Inter-American human rights system.

⁵⁶ For an overview of the “similarities and differences between the Americas and Africa” see D Padilla ‘An African human rights court: Reflections from the perspective of the Inter-American system’ (2002) 2 *African Human Rights Law Journal* 186-187.

⁵⁷ The Charter of the Organisation of American States has been reprinted by the General Secretariat of the OAS in *Basic Documents pertaining to Human Rights in the Inter-American System* (2001) 193.

⁵⁸ As above at 3. Various authors have documented the historical development of the Inter-American regional human rights system, see for instance: H Van der Walt & V Krsticevic ‘The OAS system for the protection of human rights’ in R Hanski & M Suksi (eds) *An Introduction to the International Protection of Human Rights – A Textbook* (2000) 371; 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; VR Rescia & MD Seitles ‘The development of the Inter-American human rights system: A historical perspective and a modern day critique’ (2000) 16 *New York Law School Journal of Human Rights* 593.

⁵⁹ Declaration at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12 through 18, 1959, Final Act. Document OEA/Ser.C/II.5, pages 10-11.

⁶⁰ See the Final Act of the Second Special Inter-American Conference. OAS Official Records, OEA/Ser.C/I.13, 1965. As reported *Basic Documents pertaining to Human Rights in the Inter-American System* (2001) 7.

⁶¹ As above at 8. Article 106 of the OAS Charter stipulates that the Inter-American Commission on Human Rights shall be responsible for the promotion and protection of human rights and shall serve as a consultative organ to the OAS in this regard.

The second leg of the system was established in 1969, with the adoption of the American Convention on Human Rights (American Convention or Convention) which came into force in 1978.⁶² The American Convention on Human Rights provides mainly for the promotion and protection of civil and political rights, articles 3 to 25, with economic, social and cultural rights briefly mentioned through reference to the OAS Charter in article 26. The Convention provides for two implementation bodies, namely the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.⁶³ At present, only 24 of the 35 member states of the OAS have ratified the American Convention. Only 21 of the states have accepted the contentious jurisdiction of the Inter-American Court.⁶⁴ A dual system therefore exists in the Americas, according to which 25 states are subject to the Inter-American Commission on Human Rights in terms of the American Convention, with the remaining ten states resorting under the Inter-American Commission on Human Rights in terms of the OAS Charter and the American Declaration of the Rights and Duties of Man.⁶⁵ Amongst those 25 states that are party to the American Convention, there is a further distinction to be made between those states that have accepted the jurisdiction of the Inter-American Court of Human Rights and those that have not.

In this section, the focus is not on the Inter-American Court of Human Rights, as the functioning and practices of the Court will be discussed in detail in chapter 7. The focus here falls specifically on the experiences of the Inter-American Commission on Human Rights. More specifically, the aim is to analyse the measures taken over the years to ensure state compliance with the recommendations issued by the Commission under its individual petition procedures. Therefore, the point of departure is a brief discussion on the functioning of the individual petition procedure with specific focus on the formulation of recommendations and the mechanisms to encourage state compliance that existed before 2000. In 2000 specific follow-up

⁶² The OAS has 35 member states and the American Convention on Human Rights entered into force after the 11th instrument of ratification was deposited in 1978. See article 74 of the Convention.

⁶³ Articles 34 to 51 of the Convention deals with the composition, powers and functions of the Inter-American Commission and articles 52 to 60 with the Inter-American Court. A state party to the Convention need to make a separate declaration in terms of article 62 to accept the jurisdiction of the Inter-American Court.

⁶⁴ There used to be 25 ratifications but Trinidad and Tobago denounced the American Convention on 26 May 1998 (See http://www.corteidh.or.cr/general_ing/history.html. Date accessed: 11 October 2004).

measures to the recommendations of the Commission were adopted and the formulation, scope and application of these measures form the main focus of the remainder of this section. Finally, certain best practices are identified for the African regional human rights system.

5.3.2 The Inter-American Commission on Human Rights: The individual petition system

Before any in-depth discussion of a specific function of the Inter-American Commission on Human Rights can be undertaken it is necessary to briefly outline the legal framework within which the Commission operates, especially since it fulfils a dual role as outlined above.⁶⁶ The Inter-American Commission on Human Rights is firstly a principle organ of the OAS, as stipulated in article 53(e) of the OAS Charter. As such, it is the principle organ for the promotion and protection of human rights in all 35 member states of the OAS as provided for in article 106 of the OAS Charter. Article 18 of the Statute of the Inter-American Commission on Human Rights (Statute) outlines the powers and functions of the Commission with respect to all members of the OAS.⁶⁷ The above cited provisions therefore apply to the Commission in respect to all 35 member states of the OAS.

In regard to those states that did not ratify the American Convention on Human Rights, article 20 of the Statute of the Inter-American Commission on Human Rights stipulates the powers of the Commission in addition to those stipulated in article 18. These powers relate specifically to the promotion and protection of the rights guaranteed in the American Declaration of the Rights and Duties of Man. Of importance to this section are articles 20(b) and (c), which empower the Commission to receive individual complaints and to make recommendations upon finding a state (one of the ten that are not party to the Convention) in violation of its obligations. This article must be read together with articles 49 and 50 of the Rules of Procedure of the Inter-American Commission on Human Rights (sometimes called Regulations),

⁶⁵ Padilla described it as “an incomplete, unconsolidated and indeed dual system” (Padilla (2002) 186).

⁶⁶ The Inter-American Commission is composed of seven members, elected in their personal capacity by the General Assembly of the OAS for a period of four years. On the composition, election and terms service of the Commissioners see articles 2 to 7 of the Statute of the Inter-American Commission on Human Rights.

⁶⁷ In terms of this provision the Commission undertakes promotional activities in all member states of the OAS and can request governments to provide them with reports

which deals with the receipt and applicable procedure of petitions concerning states that are not party to the Convention.⁶⁸

Article 19 of the Statute of the Inter-American Commission applies to the 25 states that are party to the American Convention on Human Rights. Article 19 provides the Commission with powers additional to those stipulated in article 18 and should be read in conjunction with the relevant provisions of the Convention. Article 19 specifically refers to the Commission's power to act on individual complaints and other communications pursuant to the provisions of articles 44 to 51 of the Convention and provides that the Commission can appear before the Inter-American Court of Human Rights. Articles 44 to 51 of the Convention outline the competence and procedures of the Inter-American Commission to receive and consider individual complaints. These provisions should be read in conjunction with the corresponding Rules of Procedure of the Inter-American Commission, in particular articles 26 to 47.⁶⁹

Within this extensive legal framework, necessitated by the dual nature of the system, the individual complaints procedure is briefly outlined here. The aim is not to give a comprehensive overview of the petition system, but rather to highlight factors that were included in the procedures to encourage state compliance with the recommendations formulated by the Commission in finding state parties in violation of their obligations under either the Declaration or the Convention.⁷⁰ The discussion further focuses only on the practice of the Commission as it stood before the amendment of its Rules of Procedure, in 2000, to specifically provide for follow-up procedures. The amended Rules will be the focus of the next section. The intention here is to identify what was in place and why it was inadequate and necessitated amendments.

on the measures they have adopted in human rights matters, amongst other general functions.

⁶⁸ As will be seen from the discussions below the procedures followed in considering individual complaints under the Declaration and Convention are exactly the same except for the possibility of a referral to the Court for those states that are party to the Convention and have accepted the jurisdiction of the Court.

⁶⁹ The Rules of Procedure was amended in 2000 with the approval of the Inter-American Commission at its 109th Special Session.

⁷⁰ For a detailed analysis of the individual complaints mechanism, which is outside the scope of this study, see S Davidson *The Inter-American Human Rights System* (1997) 155-204; DJ Harris & S Livingstone (eds) *The Inter-American System of Human Rights* (1998) or MF Cosgrove 'Protecting the protectors: Preventing the decline of the Inter-American system for the protection of human rights' (2000) 32 *Case Western Reserve Journal of International Law* 39.

In terms of article 44 of the Convention, a person, group of persons or non-governmental organisation can file a complaint with the Commission.⁷¹ Once a complaint is filed, the Inter-American Commission determines its admissibility in accordance with the provisions of article 46 of the Convention read together with articles 28 to 37 of the Rules of Procedure. If a complaint is admissible, the Commission continues to verify the facts by requesting additional submissions from the state party concerned and the complainant and can conduct on-site investigations.⁷² In terms of article 41 of the Rules of Procedure, the Inter-American Commission, acting both in terms of the Convention or Declaration, should place itself, during any stage of the proceedings, at the disposal of the parties concerned with a view to reaching a friendly settlement.⁷³ If a friendly settlement is reached, the Commission must adopt a report outlining the facts and the terms of the settlement reached.⁷⁴ This report must be sent to both the state and the complainant and must be published, but only after the Commission confirmed that the complainant consented to the settlement and that the settlement is based on respect for human rights.

If no settlement is reached, the Commission must draw up a report on the merits of the complaint. It is at this stage that there used to be a two step difference in the procedures followed by the Commission in respect of those states party to the Convention and those that were not. Before the adoption of the amended Rules of Procedure of the Inter-American Commission in 2000, only one final report was issued to those states not party to the Convention, if a friendly settlement could not be reached, while two reports were issued to states party to the Convention.⁷⁵ The new Rules of Procedure determine that both a preliminary and final report is issued for non-state parties as well as state parties. The only difference that remains is that

⁷¹ The broad legal standing awarded in the Inter-American system is similar to that of the African Commission in that the individual does not have to be a victim of the violations complained of as is the requirement in the European system.

⁷² Articles 38, 39 and 40 of the Rules of Procedure read together with article 48 of the Convention.

⁷³ For those states that are party to the Convention article 48(1)(f) is also applicable.

⁷⁴ In terms of article 41(5) of the Rules of Procedure. For Convention states article 49 is also applicable.

⁷⁵ For a discussion on the procedures that existed before the Rules were amended 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) 67 and Davidson (1997) 118.

the case cannot be referred to the Inter-American Court of Human Rights in regard to non-state parties.⁷⁶

In terms of the Convention, if a friendly settlement is not reached, the Commission must in terms of article 50 draw up a report setting out the facts, the conclusions drawn. The Commission may attach to the report “such proposals and recommendations as it sees fit”.⁷⁷ The article 50 report is then transmitted to the state concerned.⁷⁸ From the date that the report was transmitted to the state party, the state party has three months to implement the recommendations made by the Commission.⁷⁹ Within this three month period either the state concerned or the Commission can refer the complaint to the Inter-American Court of Human Rights, provided that the state accepted the Court’s jurisdiction.⁸⁰ However, if the state did not settle the matter or if the case was not referred to the Court within three months, the Commission may, by a vote of an absolute majority of its members, draw up a final report in terms of article 51 of the Convention.⁸¹ Attached to this report the Commission must, where appropriate, “make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined”.⁸² Once the prescribed period has expired, the Commission must decide if the state has taken “adequate measures” and the Commission can publish the report if it so decides by an absolute majority.⁸³ The

⁷⁶ Old rule 53(2) determined that the final report issued to non-state parties had to be sent to the “state in question or the petitioner” and “shall include any recommendations the Commission deems advisable and a deadline for their implementation” (article 53(1)). If a state did not comply with the recommendations within the prescribed time the Commission could, in terms of articles 53(3) and (4) of the old Rules, publish the decision either as part of the Annual Report to the OAS General Assembly and/or as a separate document. See Buergenthal (1985) 67; C Cerna ‘Commission organisation and petitions’ in DJ Harris & S Livingstone (eds) *The Inter-American System of Human Rights* (1998) 103. See new articles 49 and 50 of the amended Rules of Procedure which determine that the same Rules of Procedure are applicable to state parties and non-state parties in considering individual petitions, with the exception of article 44 which deals with referrals to the Court and which is only applicable to state parties that accepted the jurisdiction of the Court.

⁷⁷ Article 50(3) stipulates that the Commission may forward recommendations to the state party concerned.

⁷⁸ Article 50(2) stipulates that the state may not publish the report.

⁷⁹ Article 51(1).

⁸⁰ Article 51(1).

⁸¹ Buergenthal reports that the Commission is under no obligation to adopt an article 51 report in all cases (Buergenthal (1985) 66).

⁸² Article 51(2).

⁸³ Article 51(3).

Commission can include its final report on a case in its Annual Report to the General Assembly “and/or it can publish it in any other manner deemed appropriate”.⁸⁴

From the above discussion, it appears that the Inter-American Commission expects its decisions with the accompanied recommendations to be implemented within a stipulated time frame. Indeed, the Inter-American Court of Human Rights has held as follows:⁸⁵

In accordance with the principle of good faith, embodied in the aforesaid article 31(1) of the Vienna Convention, if a state signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to comply with the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organisation of American States, whose function is “*to promote the observance and defence of human rights*” in the hemisphere.

With regard to the procedure applicable to state parties to the Convention, it is clear that should they not implement the Commission’s interim findings as contained in the article 50 report, the Commission will continue to take a final decision, once more accompanied by recommendations combined with a given time frame. This step could already be viewed as a “sanction” taken against the state party concerned for not implementing the recommendations as contained in the interim report. Upon the expiry of the deadline stipulated in the final article 51 report, the Commission can decide whether the state concerned has taken “adequate measures” to implement its recommendations.⁸⁶ Should the Commission find that the state did not take “adequate measures”, it has yet another “sanction” available. It can publish the final report as part of its Annual Report “and/or any other manner deemed appropriate”.⁸⁷ Cerna explains that article 51 reports are not published if the state complied with the Commission’s recommendations “because the act of publishing is considered notice

⁸⁴ In terms of article 45(3) of the Rules of Procedure. See further articles 42-44 of the Rules of Procedure with regard to decisions and reports on the merits and referrals to the Court.

⁸⁵ The Court continued further by stating that [a]rticle 33 of the American Convention states that the Inter-American Commission, is as the Court, competent “*with respect to matters relating to the fulfilment of the commitments made by the state parties*”, which means that by ratifying said Convention, states parties engage themselves to apply the recommendations made by the Commission in its reports”. Inter-American Court of Human Rights *Loayza Tamayo* Case, Judgment of September 17, 1997, Series C, No. 33, paras 78-82 available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_33_ing.pdf. Date accessed: 14 October 2004.

⁸⁶ Article 51(3).

⁸⁷ As above.

of the government's failure to comply".⁸⁸ Buergethal raises another aspect of sanctioning a state through publication, by arguing that the inclusion of a final decision in the Annual Report to the General Assembly of the OAS

[g]ets the case on the agenda of the General Assembly where the state's failure to comply with the Commission's recommendations may be discussed and acted upon...since an OAS Assembly debate may give rise to adverse publicity, governments take seriously the threat of the publication of a critical report by the Commission as well as any condemnatory resolution the Assembly might adopt with regard to a case.⁸⁹

Lastly, the formulation of detailed and practical recommendations by the Inter-American Commission is another aspect of its established practice that could potentially encourage greater state compliance.⁹⁰ The Commission has in the past recommended both monetary and non-monetary remedies.⁹¹

Notwithstanding the measures that form part of the Inter-American Commission's legislative framework or established practice, which are aimed at encouraging state compliance, various commentators have highlighted the general lack of state compliance with the Commission's recommendations.⁹² From the discussions above

⁸⁸ Cerna refers to Advisory Opinion No. 13 of the Inter-American Court of Human Rights where the Court "took the view that the power to publish the report under article 51(3) arises only where the Commission's recommendations 'have not been accepted'". Adv.Opin. No. 13, Series A, para 54 (Cerna (1998) 104).

⁸⁹ Buergethal however mentioned that the General Assembly had yet to debate state compliance or taken any actions in that regard (Buergethal (1985) 66). Grossman pointed out that the uncertainty surrounding compliance with the Commission's reports was "compounded by the attitude of the political organs of the OAS, as stated above, which so far do not debate – let alone take action on-cases of failure to comply with reports and decisions of the Commission and the Court in individual cases" (C Grossman 'Strengthening the Inter-American human rights system: the current debate' (1998) 92 *American Society of International Law* 190-191).

⁹⁰ Refer to section 3.3.3 (c) in chapter 3 on the importance of detailed remedies as a factor influencing state compliance.

⁹¹ Shelton recorded the following types of remedies as examples of recommendations made by the Commission in the past: (1) the payment of monetary compensation to the victim or if the victim is deceased or has disappeared recommending that payment be made to the victim's family; (2) reform of a military court system; (3) investigation, prosecution and punishment of violators; (4) adoption or modification of legislation; and (5) guarantees for the safety of witnesses (Shelton (1999) 169).

⁹² Grossman wrote that, "compliance with the Commission's reports is, for lack of a better word, uncertain" (Grossman (1998) 190). Other commentators have reported that for the most part states did not comply with the recommendations of the Inter-American Commission. See for instance Van der Walt & Krsticevic (2000) 373 and D Cassel 'Inter-American human rights law: Soft and hard' in D Shelton (ed) *Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System* (2000) 394. The President of the Inter-American Commission in 2001 observed that the Commission's review of follow-up on implementation of the Commission's recommendations showed no instances of full compliance, and emphasized that member states "must do everything possible to comply in good faith

it is clear that many cases will never reach the Inter-American Court. The Commission takes the final decision in all cases filed in terms of the Declaration. In cases involving state parties to the Convention, the Commission can decide whether to finalise a case or to refer it to the Court. Also, such referrals only apply to those states that have accepted the Court's jurisdiction. Therefore most victims of human rights violations in the Inter-American system have only the Commission to rely upon for relief. This situation led to the amendment of the Rules of Procedure of the Inter-American Commission in 2000 to provide specifically for follow-up measures aimed at ensuring state compliance with the Commission's recommendations.⁹³ These follow-up measures are briefly discussed in the following section with the aim to identify best practices for Africa.

5.3.3 Strengthening the Inter-American human rights system: Establishing follow-up with the recommendations of the Inter-American Commission on Human Rights

From 1998 onwards, strategising around a need to reform and strengthen the Inter-American human rights system took place regularly at the level of the OAS General Assembly. All relevant stake holders made inputs.⁹⁴ High on the agenda was the consideration of the allocation of additional resources to both the Commission and Court "in order to improve human rights mechanisms and promote observance of the recommendations of the Commission and compliance with the judgments of the

with the Commission's recommendation" (Address by Juan E. Mendez, President of the Inter-American Commission on Human Rights, upon presenting the IACHR Annual Report for 2001 to the Juridical and Political Affairs Committee of the Permanent Council of the OAS. Available at: <http://www.internationaljusticeproject.org/pdfs/Mendez-writing.pdf>. Date accessed: 11 November 2004).

⁹³ In 1998 already Shelton concluded that "the Commission's remedial role needs to be developed, and enhanced by the creation of follow-up mechanisms to ensure that its recommendations are implemented" (D Shelton 'Remedies in the Inter-American system' (1998) 92 *American Society of International Law* 206).

⁹⁴ In Resolution 1701 (XXX-O/00) of the General Assembly reference is made to consultations that took place since April 1998 on an annual basis on the reform of the Inter-American system for the protection and promotion of human rights. The following stakeholders have been consulted in the reform process: OAS General Assembly, Committee on Juridical and Political Affairs, the Heads of State and Government, Ministers of Foreign Affairs of the OAS, Inter-American Institute of Human Rights, Inter-American Commission on Human Rights, Inter-American Court of Human Rights and representatives of NGOs engaged in the protection of human rights. AG/RES.1701 (XXX-O/00), OEA/Ser.P. Available at: http://www.oas.org/juridico/english/agres_1701_xxxo00.htm. Date accessed: 15 October 2004.

Court”.⁹⁵ Not only was the emphasis increasingly on the need for adequate resources to fulfil these functions, but also to adopt “concrete measures” on follow-up to the Commission’s recommendations.⁹⁶ In this section the aim is to give a concise overview of the measures adopted by the Inter-American Commission in an effort to ensure greater state compliance with its recommendations as part of an overall strategy to reform and strengthen the Inter-American human rights system.

At the 109th Special Session of the Inter-American Commission, held in December 2000, the Commission approved new Rules of Procedure, which took effect on 1 May 2001.⁹⁷ Article 46 of the new Rules of Procedure makes specific provision for the adoption of follow-up measures by the Commission in order to verify compliance with friendly settlement agreements and with its recommendations.⁹⁸ Article 46 is applicable to the Commission’s findings under both the Declaration and the Convention.⁹⁹ The Commission, in applying its power under article 46 to adopt “appropriate follow-up measures”, has developed the following procedures to verify compliance:

- The Commission requests additional information (follow-up replies) from the parties concerned (both the state and victims) as to the measures that have been taken to implement the conditions of a friendly settlement or the recommendations attached to a report on the merits of a case.
- The Commission may hold public hearings to verify compliance based on the additional information requested.

⁹⁵ See AG/RES.1890 (XXXII-O/02) page 1, par 7. Available at: http://www.oas.org/juridico/english/ga02/agres_1890.htm. Date accessed: 15 October 2004. Also see AG/RES.1925 (XXXIII-O/03) page 1, par 2(d). Available at: http://www.oas.org/juridico/english/ga03/agres_1925.htm. Date accessed: 15 October 2004. The OAS established a Specific Fund for Strengthening the Inter-American System for the Protection and Promotion of Human Rights and the General Assembly instructed the Permanent Council to encourage member states to contribute to the Fund. See AG/RES.1925 (XXXIII-O/03) page 2, par 4(b).

⁹⁶ See AG/RES.1890 (XXXII-O/02) page 3, par 1(b). Also AG/RES.1925 (XXXIII-O/03) page 1, par 2(b).

⁹⁷ The new Rules of Procedure has been reprinted by the General Secretariat of the OAS in *Basic Documents pertaining to Human Rights in the Inter-American System* (2001) 127.

⁹⁸ Article 46, Follow-Up: (1) Once the Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations. (2) The Commission shall report on progress in complying with those agreements as it deems appropriate.

⁹⁹ From a reading of article 50 of the new Rules of Procedure it is clear that the article 46 follow-up measures are also applicable to petitions concerning states that are not parties to the American Convention.

- From 2001, the Commission includes a section on the “status of compliance with the recommendations of the IACHR” in its Annual Report to the General Assembly of the OAS.¹⁰⁰
- The Commission also includes a copy of the responses of member states on its web page (www.cidh.org).¹⁰¹

The Commission’s decision to include a section on the status of state compliance in its Annual Report, was taken in conformity with article 46(2) and in accordance with the General Assembly’s request to “particularly consider the possibility of including in its annual reports information on compliance by the states with the recommendations, decisions, or judgments issued by the two organs in the period under consideration”.¹⁰² Before the adoption of new Rule 46, there was no system in place for the determination of the status of state compliance. It was probably with this factor in mind that the Commission, in 2001, took a decision to only request information from states concerning compliance with the recommendations issued in reports on individual cases published in its Annual Report for the year 2000 onwards.¹⁰³ According to Padilla, the Commission decided not to follow up on all previous decisions in an effort not to overwhelm the system since no records were previously kept.¹⁰⁴ The established practice now is that the Commission keeps track of the status of state compliance in all subsequent Annual Reports of decisions taken from 2000 onwards.

The Inter-American Commission presents the status of state compliance in its Annual Reports in the form of a table. Initially, in the 2001 Annual Report, the Commission categorised the levels of compliance into four categories, namely ‘full compliance’,

¹⁰⁰ See Section D of the Annual Report of the Inter-American Commission on Human Rights, 2001, OEA/Ser./L/V/II.114doc.5rev. Available at: <http://www.cidh.oas.org/annualrep/2001eng/chap.3b.htm>. Date accessed: 10 August 2004.

¹⁰¹ The Commission reported that it was expressly requested to include a copy of these responses on its web page. See Annual Report 2001, OEA/Ser./L/V/II.114doc.5rev, par 65.

¹⁰² Resolution AGRES. 1828 (XXXI-O/01). The General Assembly continued by stating that it will then study such information. See Resolutive paragraph 5. In the same Resolution the General Assembly also urged member states to take the necessary measures to implement the recommendations of the Inter-American Commission. See Resolutive paragraph 3.

¹⁰³ See the 2001 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser./L/V/II.114doc.5rev. par 65.

¹⁰⁴ Interview with Dr Padilla, former Assistant Executive Secretary to the Inter-American Commission on Human Rights, in October 2002 at the 32nd Ordinary Session of the African Commission on Human and Peoples’ Rights, held in Banjul, The Gambia (notes on file with author).

“partial compliance”, “non-compliance but with information” and “non-compliance and no information”.¹⁰⁵ In 2002, the General Assembly “invited the Inter-American Commission on Human Rights to consider the possibility of continuing to include in its annual reports information on the follow-up of its recommendations by the states, and to review, with a view to their improvement, the criteria and indicators on that subject in the report for this year”.¹⁰⁶ The Inter-American Commission thereupon took on board the comments made by the representatives of member states upon presentation of their 2001 Annual Report and revised the criteria for categorising the status of state compliance in its 2002 Report.¹⁰⁷ Instead of the four categories cited above, the Commission now makes use of three categories, namely “total compliance”, “partial compliance” and “compliance pending”.¹⁰⁸ In the 2002 Annual Report the Commission also explained that the table on the status of state compliance presented the “current status of compliance” and that the Commission evaluated “whether or not compliance with its recommendations is complete and not whether it has been started”.¹⁰⁹ This practice has continued in the 2003 Annual

¹⁰⁵ These categories were understood to mean the following: (1) “full compliance refers to cases which the state has implemented the IACHR’s recommendations in their entirety; (2) partial compliance refers to cases in which the state has either implemented only one or some of the IACHR’s recommendations or else has implemented all of them but not completely; (3) non-compliance, but with information refer to cases in which the state has replied to the request for information regarding implementation of the recommendations, but the IACHR considers that they were not in fact implemented; (4) non-compliance and no information refer to cases in which the state did not reply to the request for information and where, in the opinion of the IACHR, the recommendations were not implemented” (See the 2001 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.114doc.5rev., par 66).

¹⁰⁶ Resolution AG/RES. 1894 (XXXII-O/02), 2002 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.117Doc.1rev.1, par 106.

¹⁰⁷ See also the 2003 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.118Doc.5rev.2, paras 73 and 76. The revised criteria used in the 2002 Annual Report were carried over to the 2003 Annual Report.

¹⁰⁸ 2002 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.117Doc.1rev.1, par 109. The following indicators are used by the Commission to categorise the status of state compliance into the three revised categories: (1) “total compliance refers to those cases in which the state has fully complied with all the recommendations made by the IACHR. Having regard to the principles of effectiveness and fully observed those recommendations where the state has begun and satisfactorily completed the procedures for compliance; (2) partial compliance refers to those cases in which the state has partially observed the recommendations made by the IACHR either by having complied with only one or some of them or through incomplete compliance with all of them; (3) compliance pending refers to those cases in which the IACHR considers that there has been no compliance with the recommendations because no steps have been taken in that direction; because the state has explicitly indicated that it will not comply with the recommendations made; or because the state has not reported to the IACHR and the Commission has no information from other sources that would suggest otherwise”.

¹⁰⁹ 2002 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.117Doc.1rev.1, par 108.

Report and it should soon be possible to evaluate the status of state compliance with the recommendations of the Inter-American Commission in retrospect to the 2001 table, bringing an end to the uncertainty that previously surrounded the status of compliance in the absence of any adopted follow-up mechanisms.

5.3.4 Best practices for the African regional human rights system

In the introductory part to the Inter-American system, reference has already been made to the degree of homogeneity between the states that compose the OAS, on the one hand, and the African Union (AU), on the other hand, as opposed to the states that form the Council of Europe. From the examination of the individual petition system of the Inter-American Commission on Human Rights, yet another parallel can be drawn with its counterpart in the African regional human rights system, the African Commission on Human and Peoples' Rights, in relation to the status of state compliance. In stark contrast to its European counterpart, where it was reported above that compliance was the norm rather than the exception, the experience of the Inter-American Commission and the African Commission indicates an overall lack of state compliance.¹¹⁰

However, there is a marked distinction between the Inter-American Commission and the African Commission, as well as their founding bodies, the OAS and OAU/AU, in their responses to this lack of state compliance. The organs of the OAS and the Inter-American Commission have committed themselves to the strengthening of the Inter-American human rights system, and specifically to ensuring greater compliance by member states with the recommendations of the Commission. Similar determination has not yet emerged in the African regional human rights system. Therefore, a brief summary of the best practises as developed in the Inter-American system is given here to serve as possible guidelines for the African system.¹¹¹

¹¹⁰ See the analysis of the status of state compliance with the recommendations of the African Commission in chapter 3.

¹¹¹ It must be noted however that during the 32nd ordinary session of the African Commission the Institute for Human Rights and Development in Africa (IHRDA), an NGO based in Banjul, The Gambia, made a public appeal to the African Commission to adopt follow-up measures to "enhance the prospects for implementation of recommendations in individual cases". For the most part the measures advocated by IHRDA were modelled on the measures adopted by the Inter-American Commission the previous year and this factor was specifically brought to the attention of the Commission by IHRDA. Unfortunately, the African Commission has not taken any of these measures on board. These comments are based on personal notes taken during the 32nd ordinary session of the African Commission and the address of the

With reference to the OAS, the following factors must be noted: (1) The Inter-American Commission is incorporated into the OAS Charter as one of the principle organs of the OAS.¹¹² (2) Discussions around the reform and strengthening of the Inter-American human rights system have regularly taken place at the level of the General Assembly and other principle organs of the OAS, resulting in the adoption of numerous resolutions calling on member states to take concrete measures to implement the recommendations of the Commission. (3) The OAS General Assembly has resolved to continuously aim to bring about “an effective and adequate increase in the financial resources allocated to the organs of the Inter-American human rights system”.¹¹³ The OAS Assembly has even established a Specific Fund for Strengthening the Inter-American System for the Protection and Promotion of Human Rights.¹¹⁴ (4) The General Assembly has committed itself to the studying of information on the status of state compliance with the recommendations of the Commission as included in the Commission’s Annual Reports.¹¹⁵

For its part, the Inter-American Commission has amended its Rules of Procedure to specifically provide for the adoption of appropriate follow-up measures in order to verify compliance with friendly settlement agreements and recommendations. These measures and the practices that developed around them are examined in quite some detail above.¹¹⁶ Some of the measures that the African Commission could consider, are: (1) amending its Rules of Procedure so as to enable it to adopt follow-up measures; (2) requesting follow-up replies from both the state concerned and the complainants; (3) verifying the follow-up replies by conducting public hearings; (4) publicising the findings on the status of state compliance by including it as an additional section in the Annual Report as well as on the official website of the Commission; and (5) adopting a methodology for categorising state compliance in a manner that will allow concrete conclusions to be drawn by all stakeholders as to the status of state compliance.

IHRDA distributed by the Secretariat of the African Commission. The 32nd ordinary session took place in October 2002 in Banjul, The Gambia.

¹¹² Refer to chapter 4 where the need to include the implementation organs of the African regional human rights system amongst the principle organs of the AU was highlighted.

¹¹³ See AG/RES.1925 (XXXIII-O/03) par 4(a). Available at: http://www.oas.org/juridico/english/ga03/agres_1925.htm. Date accessed: 15 October 2004. See further AG/RES.1890 (XXXII-O/02) page 1, par 7. Available at: http://www.oas.org/juridico/english/ga02/agres_1890.htm. Date accessed: 15 October 2004.

¹¹⁴ AG/RES.1925 (XXXIII-O/03) par 4(b).

¹¹⁵ Resolutive par 5 of Resolution AG/RES.1828 (XXXI-O/01).

¹¹⁶ See section 5.3.3 above.

Moving away from the regional human rights systems, the next section focuses on the United Nations Human Rights Committee. To some extent, the membership of the Optional Protocol overlaps with that of the European, Inter-American and African regional human rights systems, though.

5.4 United Nations Human Rights Committee: The individual complaints mechanism

5.4.1 Introduction

In 1976 the International Covenant on Civil and Political Rights (ICCPR or Covenant) entered into force.¹¹⁷ The ICCPR guarantees the promotion and protection of a wide range of civil and political rights and establishes the Human Rights Committee (Committee or HRC) as the body that monitors compliance of state parties with their obligations under the ICCPR.¹¹⁸ The HRC is mandated to consider state reports, issue general comments and receive and consider individual complaints.¹¹⁹ The individual complaints procedure is a separate optional procedure applicable to state parties that ratified the First Optional Protocol to the ICCPR.¹²⁰ The focus in the previous sections fell on the follow-up procedures that by the regional human rights bodies adopted to encourage state compliance with their findings and recommendations under their individual complaints procedures. In this section, the focus falls on the follow-up mechanisms adopted by the HRC upon finding a state

¹¹⁷ The General Assembly adopted the ICCPR on 16 December 1966, Resolution 2200A (XXI), and it entered into force ten years later after the 35th instrument of ratification was deposited in accordance with article 49 of the Covenant. The text of the ICCPR can be accessed at: <http://www.ohchr.org/english/law/ccpr.htm>. Date accessed: 11 October 2004.

¹¹⁸ The Human Rights Committee is established in terms of article 28 of the Covenant and is composed of 18 independent experts.

¹¹⁹ State reports must be submitted to the Committee for consideration in terms of article 40 of the Covenant. Article 41 empowers the Committee to receive and consider inter-state complaints, but as such complaints have never been filed under the Covenant, they are not discussed here. General comments are issued by the Committee to interpret the content of human rights provisions, usually on a thematic basis, or are issued to clarify its methods of work.

¹²⁰ The First Optional Protocol also entered into force in 1976, in accordance with article 9, with the depositing of the tenth instrument of ratification. As of October 2004, 153 states are party to the ICCPR; 104 of them have thus far ratified the First Optional Protocol; 33 of these states are from Africa. For an overview of the status of ratification, see: <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>. Date accessed: 20 October 2004.

party in violation of the provisions of the Covenant under the individual complaints procedure.

Under the individual complaints procedure, the Committee can receive and consider communications from individuals “who are the victims of a violation” of the rights guaranteed in the Covenant.¹²¹ Once a complaint is filed, the Committee first decides on the admissibility of the communication and then continue to an examination on the merits of a case.¹²² The decisions of the Committee on the merits of a case are referred to as “views”. Where a state party is found to be in violation of the provisions of the Covenant, the Committee’s views also include the steps that a state party must take to remedy the violation.¹²³ From 1979 to August 2003, the HRC has adopted 436 views on communications considered under the Optional Protocol and found violations in 341 these cases.¹²⁴

The Committee has since its 7th session in 1979 recommended a wide variety of “appropriate” steps to be taken by state parties to remedy violations of the Covenant.¹²⁵ The Committee has often recommended that state parties should compensate the victims,¹²⁶ that state parties should amend offending legislation,¹²⁷ that state parties should commute the victim’s sentences,¹²⁸ that state parties should release victims¹²⁹ and that state parties should prevent the reoccurrence of similar violations in future.¹³⁰

However, the HRC initially had no mechanisms in place to monitor state compliance with its views. Although some state parties have implemented the Committee’s

¹²¹ Article 1 of the Optional Protocol.

¹²² The Committee adopted Rules of Procedure in accordance with article 39(2) of the ICCPR.

¹²³ Article 5(4) of the Optional Protocol provides as follows: “The Committee shall forward its views to the state party concerned and to the individual”.

¹²⁴ Report of the Human Rights Committee (2002), Official Records of the General Assembly, Volume 1, 58th Session, Supplement No. 40 (A/58/40), Chapter VI, par 218.

¹²⁵ See par 542 of the Report of the Human Rights Committee (1995), Official Records of the General Assembly, Volume 1, 50th Session, Supplement No. 40 (A/50/40).

¹²⁶ See for instance case no. 16/1977 *Mbenge et al. v Democratic Republic of the Congo*, case no. 505/1992 *Ackla v Togo* and case no. 780/1997 *Laptsevich v Belarus* (where the Committee recommended compensation to be paid for anguish suffered by the family of the deceased).

¹²⁷ See for instance case no. 36/1978 *Aumeeruddy-Cziffra et al. v Mauritius*.

¹²⁸ See for instance case no. 390/1990 *Lubuto v Zambia*.

¹²⁹ See for instance case no. 428/1990 *Bozize v Central African Republic* and case no. 440/1990 *El Megreisi v Libyan Arab Jamahiriya*.

¹³⁰ See for instance case no. 115/1982 *Wight v Madagascar*.

recommendations and subsequently informed it of the measures taken, this was the exception rather than the norm.¹³¹ On the whole, commentators noted wide spread non-compliance with the Committee's views.¹³² Due to the "poor record of compliance",¹³³ combined with the fact that the Committee's decisions are not "*strictu sensu* binding and do not provide an enforceable legal title", the Committee decided to adopt follow-up measures in 1990.¹³⁴ The theory and practice of these follow-up measures are examined in more detail in the following section.

5.4.2 Follow-up to the views issued by the Human Rights Committee

(a) Before 1990

In order to be chronologically true to the development of follow-up procedures under the HRC, the events that led up to 1990 must be stated briefly. Schmidt summarised the developments before 1990 into three phases:¹³⁵ (1) The first discussions around follow-up to the views of the Committee took place in 1982, but due to factors associated with the Cold War no consensus could be reached. (2) In 1989, the UN Secretariat, acting on the instructions of the Committee, developed a working paper on possible approaches to monitoring compliance with its views.¹³⁶ The members of the Committee were divided into two camps - those that questioned the Committee's

¹³¹ Two cases are often cited in this regard case no. 24/1977 *Lovelace v Canada* and case no. 36/1978 *Aumeeruddy-Cziffra v Mauritius*.

¹³² Mutua quoted McGoldrick from his 1991 work as noting that "the ultimate concern of an alleged victim is of course with the observance of the HRC's views in an individual case rather than with the procedural merits of the OP [Optional Protocol] system. It must be frankly admitted that compliance with the HRC's views by state parties has been disappointing" (M Mutua 'Looking past the Human Rights Committee: An argument for de-marginalising enforcement' (1998) 4 *Buffalo Human Rights Law Review* 234-235). Schmidt mentioned that in the absence of a follow-up mechanism individuals "with increasing frequency" complained to the HRC that state parties "had failed to take any measures to implement the Committee's views" (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 21st Century* (2000) 234). See further M Nowak 'The International Covenant on Civil and Political Rights' in R Hanski & M Suksi (eds) *An Introduction to the International Protection of Human Rights – A Textbook* (2000) 97.

¹³³ AF Bayefsky *The UN Human Rights Treaty System: Universality at the Crossroads* (2001) 33. Available at: <http://www.bayefsky.com/report/finalreport.php>. Date accessed: 19 October 2004.

¹³⁴ M Schmidt 'The Follow-up activities by the UN human rights treaty bodies and the OHCHR, paper delivered during the Meeting on the Impact of the Work of UN Human Rights Treaty Bodies on National Courts and Tribunals, ILA, Committee on International Human Rights Law, September 2003. Available at: http://www.abo.fi/institut/imr/ILA_papers.htm. Date accessed: 19 October 2004.

¹³⁵ Schmidt (2000) 234-235.

¹³⁶ The working paper was never published. See Schmidt (2000) 235.

competence to engage in follow-up activities, and those that reasoned that “some follow-up competence was an inherent part of the effective performance of the Committee’s functions”.¹³⁷ (3) A third debate took place amongst members of the Committee, resulting in the adoption of follow-up measures in 1990.¹³⁸

(b) 1990-1993

The first measure adopted by the Committee, during its 39th session in July 1990, was the creation of a Special Rapporteur for the Follow-up on Views.¹³⁹ The mandate of the Special Rapporteur was included as an annexure to the Committee’s 1990 report. In brief it outlined the following functions to be fulfilled by the Rapporteur:¹⁴⁰

- Informing the Committee on actions to be taken in instances where the victims reported that no appropriate remedies were provided by a state party;

¹³⁷ Schmidt (2000) 234.

¹³⁸ The Committee derived its competence to adopt follow-up measures from the doctrine of implied powers, based on the argument that “every international organ must be deemed to have certain implied powers, every procedure of international investigation or settlement must necessarily have the means of determining whether a settlement has been reached and whether it is being observed” (M Schmidt (2000) 234-235). It was further argued that state parties voluntarily joined the Optional Protocol and submitted themselves to the Committee’s power to consider individual communications and it would thus follow that such a process had to be followed to its natural end which would be righting the wrong complained of. For the Committee to know whether implementation indeed took place it had to adopt follow-up measures. Boerefijn noted that “other relevant bodies have confirmed the authority of the HRC to monitor the compliance with its views”. She specifically made mention of the 1993 World Conference on Human Rights and the support expressed in the Vienna Declaration, adopted at the Conference, to the inclusion of follow-up measures aimed at improving the supervisory mechanisms of treaty bodies. Finally, mentioning was also made of the ongoing support received from the UN General Assembly and the Commission on Human Rights (political organs of the UN) to the adoption of follow-up measures (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) page 4. Available at: <http://www2.law.uu.nl/english/sim/publ/conference/boerefijn.pdf>. Date accessed: 23 June 2003).

¹³⁹ Report of the Human Rights Committee (1990), Official Records of the General Assembly, Volume I, Supplement No. 40 (A/45/40) pages 144 -145. Available at: http://www.bayefsky.com/general/a_45_40_vol1.pdf. Date accessed: 19 October 2004.

¹⁴⁰ Report of the Human Rights Committee (1990), Official Records of the General Assembly, Volume 2, Supplement No. 40 (A/45/40), annex XI. Available at: http://www.bayefsky.com/general/a_45_40_vol2.pdf. Date accessed: 19 October 2004.

- Communicating with state parties in reference to the information received from victims alleging non-compliance;
- Communicating with all state parties to ascertain what steps, if any, were taken to implement the views of the Committee and to provide the Committee with such information;
- Compiling information on follow-up activities to be included in the annual report of the Committee;
- Advising the Committee on the setting of deadlines for the receipt of follow-up information from state parties;
- Regularly reviewing the follow-up procedures and to advise the Committee on ways to strengthen the mechanisms.

Since the autumn of 1990, the Special Rapporteur has requested follow-up information from state parties in respect of all views in respect of which states had been found to be in violation of the Covenant.¹⁴¹ In 1993, the HRC reviewed the effectiveness of its follow-up procedures, and was informed by the Special Rapporteur that only approximately 20% of the follow-up replies received could be deemed “satisfactory”.¹⁴² Accordingly, the Committee undertook to strengthen the follow-up procedures which manifested in three important developments in 1994.

(c) 1994

In an effort to strengthen and formalise the powers of the Special Rapporteur, the Committee in 1994 incorporated the Rapporteur’s mandate into its Rules of Procedure through the adoption of Rule 95.¹⁴³ Provision was also made in rule 99 (now rule 97) for the publication of follow-up information by stipulating the following:

¹⁴¹ See par 546 of the Report of the Human Rights Committee (1995), Official Records of the General Assembly, Volume 1, 50th Session, Supplement No. 40 (A/50/40). The Inter-American Commission, as indicated above, in adopting follow-up measures decided to only follow-up on remedies recommended to state parties from 2000 onwards. The Special Rapporteur on follow-up to the views of the HRC adopted a different and more comprehensive practice whereby it follows up on all the views issued by the Committee since its seventh session in 1979. From 1990, until further developments took place in 1994 (see below), the Committee concluded its decisions with a statement that it “would welcome information on any relevant measures taken by the state party in respect of the Committee’s views” (see for instance case no. 291/1988 *Torres v Finland*).

¹⁴² Schmidt (2000) 236.

¹⁴³ Rule 95 reads as follows: (1) “The Committee shall designate a Special Rapporteur for follow-up on views adopted under article 5, paragraph 4, of the Optional Protocol, for the purpose of ascertaining the measures taken by states parties to give effect to the Committee’s views. (2) The Special Rapporteur may make such contacts and

Information furnished by the parties within the framework of follow-up to the Committee's views is not subject to confidentiality, unless the Committee decides otherwise. Decisions of the Committee relating to follow-up activities are equally not subject to confidentiality, unless the Committee decides otherwise.

The Committee had resolved 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".¹⁴⁴ In keeping with this statement, the Committee during its 50th session in March 1994 formally adopted a number of decisions to enhance the publicity of its follow-up efforts. These decisions may be summarised as follows:¹⁴⁵

- The Committee must give every form of publicity to follow-up activities.
- The Committee undertakes to include a separate and highly visible chapter in annual reports on follow-up activities, indicating clearly which states have cooperated and which states failed to cooperate with the Special Rapporteur.
- The Committee undertakes to send reminders to all state parties that have failed to provide follow-up information.
- The Committee undertakes to issue press communiqués once a year, after the summer session of the Committee, highlighting both the positive and negative aspects on follow-up activities.
- The Committee welcomes information on follow-up from NGOs.
- The Special Rapporteur and other members of the Committee must strive to establish contacts with the permanent representatives of state parties to the UN to establish follow-up to the Committee's views.
- The Committee undertakes to draw the attention of state parties, at their biannual meetings, to the failure of certain states to implement the Committee's views and to cooperate with the Special Rapporteur in providing information on the implementation of views.

take such action as appropriate for the due performance of the follow-up mandate. The Special Rapporteur shall make such recommendations for further action by the Committee as may be necessary. (3) The Special Rapporteur shall regularly report to the Committee on follow-up activities. (4) The Committee shall include information on follow-up activities in its annual report".

¹⁴⁴ Report of the Human Rights Committee (1995), Official Records of the General Assembly, Volume 1, 50th Session, Supplement No. 40 (A/50/40), par 555.

¹⁴⁵ Report of the Human Rights Committee (1995), Official Records of the General Assembly, Volume 1, 50th Session, Supplement No. 40 (A/50/40), par 556 (a)-(g).

In accordance with the above, from 1994 onwards the Special Rapporteur strived to set up meetings with the permanent representatives of state parties to the UN, either in Geneva or New York, to discuss, explain and encourage follow-up procedures.¹⁴⁶ An overview of the Special Rapporteur's follow-up consultations has been included in the annual reports of the Committee since 1996.¹⁴⁷ Commentators have, however, indicated that in practice the Committee has performed its tasks pertaining to follow-up with "minimal transparency and effort" in spite of rule 97 of its Rules of Procedure or the above additional decisions around publicity.¹⁴⁸

In a further development during 1994, the Committee adopted a practice whereby it includes a final paragraph with respect to follow-up to its findings of a violation of the Covenant, aimed at reminding all state parties of their obligation to remedy any violations of the Covenant.¹⁴⁹ The standard paragraph usually reads as follows:¹⁵⁰

Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the

¹⁴⁶ As of September 2003 such consultations have taken place with 23 state parties. According to Schmidt these consultations have in some cases "yielded pertinent follow-up information, in others not" but he also emphasised the "educational value" of such consultations as "most state party representatives have little or no information about treaty body procedures, including follow-up activities, they are not likely to react and to report back to their capitals until the costs of non-cooperation are explained to them in more graphic detail" (Schmidt (2003) 3 and Schmidt (2000) 239).

¹⁴⁷ See Report of the Human Rights Committee (1996), Official Records of the General Assembly, Volume I, 51st Session, Supplement No. 40 (A/51/40) paras 438-454.

¹⁴⁸ See Schmidt (2000) 242, Byrnes (2000) 153 and Bayefsky (2001) 33. Bayefsky lists at least ten instances in which the HRC failed to publicise either the procedures it follows in establishing follow-up or its findings thereon.

¹⁴⁹ This paragraph was, first used in 1994 in conclusion to the Committee's views in case no. 386/1989 *Kone v Senegal*, from then onwards it is also regularly included in section F (Remedies called for under the Committee's views) of the annual reports of the Committee.

¹⁵⁰ According to Mutua it can be deduced from the inclusion of this paragraph that the Committee "expects states to 'comply' with its findings" (Mutua (1998) 233). Pocar in reference to the Committee's practice of including this standard paragraph in its views explained the link between article 2(3) of the Covenant and the Protocol as follows: "Article 2(3) of the Covenant provides that, when a violation of an individual right occurs, the state is under a legal obligation to give the victim an effective and enforceable remedy. This provision and the Optional Protocol tend to achieve the same goal, although at different levels, i.e. to provide for an international guarantee in the case of a violation: article 2 sets forth a legal obligation for the state, the Protocol provides for a machinery to establish the existence of a violation" (F Pocar 'Legal Value of the Human Rights Committee's Views' (1991) *Canadian Human Rights Yearbook* 119-120).

Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views.

Consequently, from 1994 onwards the Special Rapporteur has been expecting follow-up replies from state parties within 90 days after the Committee's views had been issued.¹⁵¹

(d) 1995 - 1997

The HRC has also attempted to establish follow up on the implementation of its views through follow-up missions to state parties. In terms of rule 95(2) of the Rules of Procedure, the Special Rapporteur in 1995 conducted a mission to Jamaica in the context of the follow-up procedure in light of the fact that 18 follow-up replies were outstanding from Jamaica.¹⁵² No other follow-up missions have since been undertaken, primarily due to a lack of resources. These resources are lacking, despite the Committee's repeated requests in its annual reports since 1996 to the effect that at least one follow-up mission per year be budgeted for by the Office of the High Commissioner for Human Rights.¹⁵³

In conformity with rules 95(4) and 97 of the Rules of Procedure and bearing in mind the 1994 decision of the Committee to "include a separate and highly visible chapter on follow-up activities" in its annual reports, the Committee included a chapter on follow-up for the first time in its Report for 1995.¹⁵⁴ Schmidt noted that listing non-cooperative state parties has an effect on state compliance. Exemplified by the reaction of France and Ecuador in providing victims with remedies and forwarding their follow-up replies to the Committee.¹⁵⁵

¹⁵¹ Schmidt however indicated that in practice 90 days was too short a period and state parties rarely met the deadline, he suggested a six to twelve month period. (Schmidt (2000) 241).

¹⁵² Report of the Human Rights Committee (1995), Official Records of the General Assembly, Volume 1, 50th Session, Supplement No. 40 (A/50/40), paras 557-562.

¹⁵³ See for example the Committee's repeated request for resources in Report of the Human Rights Committee (2001), Official Records of the General Assembly, Volume I, Supplement No. 40 (A/56/40) par 202.

¹⁵⁴ Report of the Human Rights Committee (1995), Official Records of the General Assembly, Volume 1, 50th Session, Supplement No. 40 (A/50/40), Chapter IX 'Follow-up activities under the Optional Protocol'.

¹⁵⁵ France and Ecuador sent follow-up replies to the Committee following the publication of the 1995 and 1998 Annual Reports. Schmidt (2000) 238.

The Special Rapporteur also prepares, with the assistance of the UN Secretariat, “follow-up progress reports” to give the Committee a detailed overview of the status of state compliance.¹⁵⁶ However, until 1997 these reports were not made public. These reports are still not produced in full in the annual reports, but are only reproduced in summarised form.¹⁵⁷

The above is an overview of the most important follow-up measures adopted by the HRC within specific time frames in an effort to enhance state compliance with the Committee’s views. The HRC has however on an annual basis reconfirmed in its reports to the UN General Assembly that it “will keep the functioning of the follow-up procedure under regular review”.¹⁵⁸ Therefore, although this discussion ends in 1997, it does not suggest that the Committee did not continuously reconsider its procedures in an effort to strengthen it. This task has however been greatly impeded by a lack of adequate resources. In the following section, a brief overview is given of the type of follow-up responses received by the Committee since it adopted follow-up procedures in 1990. Some reference is also made to the budgetary constraints faced by the Committee.

(e) 1990-2003: Overview of follow-up replies and the future of the follow-up procedure

In its annual reports, the HRC initially stated that “any attempts to categorise follow-up replies are inherently difficult and imprecise” or are “necessarily imprecise” and more recently it declared that “attempts to categorise follow-up replies by state parties are necessarily subjective and imprecise; as a result, it is not possible to provide a neat statistical breakdown of follow-up replies”.¹⁵⁹ The HRC therefore did not set out to list follow-up replies in terms of compliance or non-compliance, but instead developed a system whereby it recorded statistics as to how many follow-up replies it received in respect of views formulated, how many are still outstanding and

¹⁵⁶ 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 21st Century* (2000) 153-154. Also Schmidt (2000) 236-237.

¹⁵⁷ As above.

¹⁵⁸ As an example see, Report of the Human Rights Committee (1999), Official Records of the General Assembly, Volume 1, Supplement No. 40 (A/55/40) par 616.

¹⁵⁹ Report of the Human Rights Committee (1996), Official Records of the General Assembly, Volume 1, Supplement No. 40 (A/51/40), par 427; Report of the Human Rights Committee (1998), Official Records of the General Assembly, Volume 1, Supplement No. 40 (A/54/40), par 459; and Report of the Human Rights Committee

for how many the deadline for receipt of follow-up information has not yet expired.¹⁶⁰ In addition to the empirical data, the HRC proceeded to categorise the replies received as “satisfactory” in cases where a state party displayed a willingness to implement the Committee’s views or to offer the applicant an appropriate remedy.¹⁶¹ Alternatively, the HRC would classify the replies as not fully satisfactory in that they either did not address the Committee’s recommendations at all or merely dealt with only one aspect of the recommendation.¹⁶² Since the first chapter on follow-up was included in 1995, the Committee has reported that approximately 30% of the replies it received was satisfactory.¹⁶³

The Committee has categorised or explained the remainder of the follow-up replies it received as follows:¹⁶⁴

- Many replies simply indicated that the victim had failed to file a claim for compensation within the statutory deadlines and that, therefore, no compensation could be paid to the victim.
- Some replies explicitly challenged the Committee’s findings on factual or on legal grounds.

(2002), Official Records of the General Assembly, Volume 1, Supplement No. 40 (A/58/40), par 220.

¹⁶⁰ Report of the Human Rights Committee (1995), Official Records of the General Assembly, Volume 1, 50th Session, Supplement No. 40 (A/50/40), par 546. The Secretariat also reported that it regularly received information from authors, in instances where the state parties failed to supply information, indicating either that the Commission’s views had not been implemented or in some rare instances that it has been implemented.

¹⁶¹ Report of the Human Rights Committee (2002), Official Records of the General Assembly, Volume 1, Supplement No. 40 (A/58/40), par 220. Such an approach is in direct contrast to the practice of the Inter-American Commission which evaluates whether or not compliance with its recommendations is complete and not whether it has been started, i.e. not whether the state is willing to comply but whether it has actually done so. See discussion in section 5.3.3 above.

¹⁶² In the 1996 Report (par 427) the Committee elaborated on this distinction and stated: “Follow-up replies that respond in substance to the Committee’s recommendation or represent substantial compliance will be referred to as “satisfactory” hereafter, and replies that do not respond in substance to the Committee’s recommendations, fail to address the Committee’s recommendation to grant compensation to the victim or constitute less than substantial compliance will be referred to as “unsatisfactory”.

¹⁶³ See for instance the HRC’s reports for 1995 (A/50/40), par 547 and for 2002 (A/58/40) par 178, where it repeatedly stated that only approximately 30% of the follow-up replies received were satisfactory. See also section 2.6 of chapter 2 where an analysis of the status of state compliance by African states with the views of the HRC indicated a 29% compliance rate.

¹⁶⁴ After an examination of the Committee’s annual reports for 1995 (A/50/40) paras 546-549, 1996 (A/51/40) paras 426-428, 1998 (A/54/40) paras 459-461, 1999 (A/55/40) paras 599-601, 2000 (A/56/40) paras 177-180 and 2002 (A/58/40) paras 220-223, it became apparent that these categories have applied throughout and no additional categories were identified in later years.

- Other replies indicated that the state party would not, for one reason or another, give effect to the Committee’s recommendations.
- Some replies promised an investigation of the matter considered by the Committee.
- Other replies constituted much belated submissions on the merits of the case.

In its earlier reports, the Committee specifically mentioned state parties that provided “positive examples of follow-up cooperation/replies”, followed by a “black list” of state parties that did not cooperate with the Committee.¹⁶⁵ This practice has since been discontinued.¹⁶⁶

The Committee has consistently indicated in its annual reports that the lack of adequate financial and human resources prevented “the proper and timely conduct of follow-up activities, including follow-up missions and follow-up consultations”.¹⁶⁷ The Office of the High Commissioner for Human Rights (OHCHR) Annual Appeal for 2002 identified support for follow-up to the views adopted under the individual complaints procedures as part of its 2003 programme of support to treaty bodies.¹⁶⁸ It was therefore possible to appoint, for the first time, a Follow-Up Officer in 2003 as a full-time staff member, tasked to assist the HRC and other treaty bodies with their follow-up mandates.¹⁶⁹

5.4.3 Best practices for the African regional human rights system

The Human Rights Committee has more than ten years of experience in following up on the views it issues under the individual complaints procedure. Nevertheless, the HRC frequently reported in its annual reports that only about 30% of the follow-up replies received from state parties had been satisfactory.¹⁷⁰ From the discussions on the regional systems above, it is clear that the European system had an exemplary record on state compliance even before the system changed in 1998, and in the case of the Inter-American system it is maybe too soon to comment on the status of compliance as they only started adopting follow-up measures in 2001. Therefore, the fact that the HRC has adopted follow-up measures since 1990 and still only have a

¹⁶⁵ See for instance paragraphs 455 and 463 of the 1997 Report of the HRC.

¹⁶⁶ Schmidt (2003) 3.

¹⁶⁷ See in this regard par 202 of the 2000 Report of the Human Rights Committee (A/56/40).

¹⁶⁸ Schmidt (2003) 5.

¹⁶⁹ As above.

30% satisfactory compliance rate might raise questions about the efficiency of the measures themselves, and about the role that follow-up measures play at all in ensuring increased state compliance, more broadly speaking.

The latter concern should be laid to rest by the fact that for almost fifty years the formulation of norms took up most of the developments on the human rights front. The focus is only now shifting to the implementation of these norms and follow-up measures necessarily must form part of this process.¹⁷¹ The question is no longer so much *whether* to adopt specific implementing measures, such as follow-up measures, but rather *which measures* would best bring about the desired result of increased state compliance.

In questioning the effectiveness of the follow-up measures adopted by the HRC against the background of the relatively low rate of state compliance, two factors should be highlighted: (1) the lack of a political enforcement body within the UN human rights system; and (2) the Committee's continued lack of adequate resources. The importance of the first factor can be explained with reference to the practice in the European regional human rights system whereby the supervision of the implementation of decisions (before Protocol 11) was allocated to a body endowed with the necessary political clout, namely the Committee of Ministers.¹⁷² Both the ICCPR (under article 45) and the Optional Protocol (under article 6) require the Committee to submit annual reports on its activities through the Economic and Social Council (ECOSOC) to the General Assembly of the United Nations. However, not ECOSOC or the General Assembly has ever taken any steps to improve the implementation of the Committee's findings.¹⁷³ Nowak summarised the need for political supervision of the Committee's views, as follows:¹⁷⁴

¹⁷⁰ See fn 163 above.

¹⁷¹ Heyns and Viljoen explained that "at the beginning of the new millennium, it is clear that the concept of human rights is widely accepted as the 'idea of our time'. The conceptual battle is over, and the focus has shifted to the implementation of human rights". C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483.

¹⁷² See the discussion in section 5.2.3 above.

¹⁷³ Byrnes suggested that for the HRC to follow in the "success of the Council of Europe's arrangement" a possible solution could be for the states parties to the Optional Protocol to elect a small working group on follow-up "which would meet frequently to carry out scrutiny comparable to that carried out by the Committee of Ministers of the Council of Europe" (Byrnes (2000) 155). Boerefijn has criticised this suggestion on two grounds, namely the fact that the state parties have only met in the past to elect candidates and have not played any role in the supervision of the ICCPR and secondly, she argued that the monitoring of compliance should not become

The Committee as the most important treaty monitoring body made a significant contribution to the development of universal human rights standards and their supervision by international experts. Now it is up to the competent political bodies to ensure that governments in fact comply with the decisions and recommendations of the relevant expert bodies.

Apart from the lack of political enforcement, the HRC has also struggled to fully implement the follow-up measures it adopted since 1990 due to a lack of human and financial resources. Therefore, the conclusion that should be drawn from the above is that it is not due to the type of follow-up measures adopted by the HRC that such a relatively low state compliance rate was prevalent throughout the years. Rather low rates of compliance were due to the fact that the Committee could not fully implement the follow-up measures as a result of a lack of political backing and the necessary resources. From this, it flows that there are definitely still aspects of the follow-up measures adopted by the HRC that, with the necessary political backing and resources to fully implement them, can serve as best practices for the African regional human rights system. These are briefly outlined here.

The practice of appointing special rapporteurs, with mandates that relate to specific human rights issues, already exists within the African regional human rights system.¹⁷⁵ The appointment of a special rapporteur with a specific mandate to follow-up on the implementation of the recommendations of the African Commission, similar to the HRC's Special Rapporteur for the Follow-Up on Views, would therefore not be a foreign concept to the African system.¹⁷⁶ The African Commission could also, like the HRC, include an additional paragraph in its Rules of Procedure to formally provide for the mandate of a special rapporteur on follow-up. Specific best practices that developed around the mandate of the HRC's Special Rapporteur on Follow-Up on Views that the African Commission could consider, include the following: (1) The HRC could request follow-up replies on the steps taken to implement the decisions of the HRC within 90 days of communicating its findings to the state party concerned.

politicised but that "the final say in deciding whether or not views have been complied with should remain with the HRC" (Boerefijn (2001) 8).

¹⁷⁴ Nowak (2000) 98. See further M Nowak 'The UN High Commissioner for Human Rights: A link between decisions of expert monitoring bodies and enforcement by political bodies' in AF Bayefsky (ed) *The UN Human Rights Treaty System in the 21st Century* (2000) 253.

¹⁷⁵ See the discussion on special rapporteurs in chapter 4.

¹⁷⁶ In section 4.4.2.3 of chapter 4 specific reference is made to the possibility of appointing a Special Rapporteur on Follow-up in the African regional human rights system.

(2) If there is no response forthcoming from a state party, the HRC can address a reminder to that state. (3) If there is still no response forthcoming after a reminder has been sent the Special Rapporteur should arrange a consultation with the permanent representatives of the state party (in the case of the African Commission this should ideally take place where many state representatives are based, for example in Dakar, in Senegal, or where the AU Commission is based in Addis Ababa, Ethiopia). (4) Finally, the Special Rapporteur should have the necessary financial resources available to undertake follow-up missions to state parties to explain and encourage state compliance.

The Special Rapporteur on Follow-up is also involved in the preparation of a separate chapter for the HRC's annual report that specifically deals with follow-up activities. As already recommended in relation to a similar practice adopted by the Inter-American Commission on Human Rights above, it is once again suggested that the African Commission should include a specific chapter on state compliance in its annual report. In adopting this procedure, the HRC decided to follow up on all the views it issued since its inception, whereas the Inter-American Commission opted for a system whereby it only follows up on the recommendations it issued from 2000¹⁷⁷ onwards.

Since the African Commission has thus far only held state parties in violation of the African Charter in 44 communications, it is suggested that it should be possible for the Commission to follow up on all the recommendations it has issued.¹⁷⁸ Not only should the African Commission include a highly visible chapter on the status of state compliance together with its recommendations as part of its annual report, but it should also take note of the various measures adopted by the HRC, albeit still mostly in theory, to enhance the publicity of its follow-up activities. Lastly, the African Union should take note of the fact that additional resources were made available within the UN human rights system to appoint a permanent staff-member to the Secretariat of the Office of the High Commissioner for Human Rights to assist treaty monitoring bodies with follow-up activities. A follow-up mechanism will only be successful if the

¹⁷⁷ The year in which the Inter-American Commission adopted follow-up measures for the first time.

¹⁷⁸ See sections 2.2.2 and 2.3.2 of chapter 2 for an overview of the 44 communications in which the African Commission has found a state party in violation of the African Charter and in some instances subsequently forwarded recommendations to the state parties. The Commission in adopting follow-up measures should also as a rule follow-up on communications where friendly settlements were reached.

part-time African Commission with limited legal secretarial support has a full time legal officer dedicated to follow-up measures.

5.5 Conclusion

The best practices identified from the different follow-up procedures adopted within the European and Inter-American regional human rights systems, as well as by the UN HRC, form the backdrop against which recommendations for the adoption of follow-up measures in the African regional human rights system is formulated in chapter 7.

In conclusion, a schematic overview is given here of the differences and similarities that exist between the follow-up approaches adopted within three human rights systems discussed above.

Table F: Comparative overview of follow-up measures

Measures adopted	European system (before Protocol 11)	Inter-American system	Human Rights Committee
Legal value of decisions under the individual complaints procedure.	Binding (article 32(4)).	Non-binding.	Non-binding.
Legal framework for the adoption of follow-up measures.	Article 32 of the European Convention.	Article 46 of the new Rules of Procedure that took effect on 1 May 2001.	Rule 95 of the HRC's Rules of Procedure adopted in 1994.
Body responsible for supervising follow-up.	Committee of Ministers.	Inter-American Commission on Human Rights.	Special Rapporteur for the Follow-Up on Views, created in 1990.
Political body responsible for supervising follow-up.	Committee of Ministers.	None, although the General Assembly of the OAS has committed itself to the overall strengthening of the	None.



		regional human rights system.	
Issue detailed remedies or recommendations.	Limited to orders of just satisfaction.	Recommends both monetary and non-monetary remedies.	Recommends both monetary and non-monetary remedies.
Prescribed period within which to implement decisions or to report back on the steps taken to implement recommendations or remedies.	Article 32(2) "...the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers".	The Inter-American Commission prescribe a three month period under article 50 for Convention states to implement its decision and if there is no compliance prescribe "a period" within which to implement its recommendations under article 51 of the Convention. For non-state parties the same time periods apply but are set out in rules 43 and 45 of the Rules of Procedure.	The Special Rapporteur advises the Committee on the setting of deadlines for the receipt of follow-up information and the final paragraph of each view issued by the Committee stipulates that the state has to provide follow-up information within 90 days.
Request follow-up replies from state parties.	Yes, in all cases where violations were found.	Yes, in all cases decided from 2000 onwards, where violations were found or friendly settlements were reached.	Yes, in all cases where violations were found.
Additional follow-up measures.		Hold public hearings to verify compliance based on the follow-up information requested.	If no follow-up replies are forthcoming from a state party the Special Rapporteur will attempt to set up follow-up consultations with the



			<p>permanent representatives of a state party in Geneva or New York. The Special Rapporteur can also undertake follow-up missions to state parties. The appointment of a permanent staff member to deal specifically with all aspects of follow-up replies.</p>
<p>Publish findings on state compliance.</p>	<p>The Committee used to publish the resolution adopted under article 32 concluding that no further action is needed in a particular case, with specific reference to the measures taken by the state concerned.</p>	<p>From 2001, the Inter-American Commission includes a section on the “status of compliance with the recommendations of the IACHR” in its Annual Report to the General Assembly of the OAS. It also publishes follow-up responses of states on its web site.</p>	<p>Rule 97 of the HRC’s Rules of Procedure. In 1994 the HRC also adopted a number of decisions to enhance the publicity of its follow-up efforts. From 1995 the HRC’s Report to the General Assembly of the UN includes a chapter on follow-up.</p>
<p>Categorise status of state compliance.</p>	<p>No.</p>	<p>Yes, in tabular format indicating three categories namely: total compliance, partial compliance and compliance pending. It measures whether compliance is complete and not whether it has been started.</p>	<p>Yes, but the Committee stipulates that “it is not possible to provide a neat statistical breakdown of follow-up replies” and therefore does not publish it in a “black list” format. It does however categorise follow-up replies as</p>



			satisfactory or not. It measures a state's willingness to implement the Committee's views.
Status of state compliance.	It has been described as "remarkably good".	A general "lack" of state compliance has been reported by commentators and since compliance is only measured from the decisions taken in 2000 it is too early to report on the status of compliance from the time when follow-up measures were adopted.	Approximately 30% of the follow-up replies received from state parties were satisfactory.
Sanctions for non-compliance.	Publication of non-compliance by a state party through the publication of the Committee's report under article 32(3) as a sanction. Technically, although never used in practice, the Committee could invoke its powers under article 8 of the Statute of the Council of Europe and suspend or expel a state party.	The publication of the final report on a communication as part of the Commission's Annual Report "and/or any other manner deemed appropriate".	The publication of follow-up replies, in a summarised version, in a separate chapter to the Committee's annual report.



CHAPTER 6

A COMPARATIVE ANALYSIS OF THE ENFORCEMENT OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS, THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE UPCOMING AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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- 6.2 Supervision of the execution of the judgments of the European Court of Human Rights: Lessons to be learnt from more than 40 years of experience
 - 6.2.1 Introduction
 - 6.2.2 The legal obligations arising from judgments of the European Court of Human Rights
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 - (b) Problems experienced with state compliance
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- 6.3 The Inter-American Court of Human Rights: Monitoring compliance with the Court's judgments
 - 6.3.1 The mandate of the Inter-American Court of Human Rights
 - 6.3.2 *Baena-Ricardo et al. v Panama*: The arguments underlying the Inter-American Court's competence to monitor compliance with its judgments
 - (a) Facts in *Baena (workers)* case and *Baena (competence)* case
 - (b) Legal framework for monitoring compliance
 - (c) State obligations to implement the decisions of the Court
 - (d) Scope of the competence of the Court to determine its own competence and order remedial measures
 - (e) Procedure applied by the Court to monitor compliance with its decisions



- (f) Acceptance by states of the Court's practice of monitoring compliance with its own decisions
- (f) Role of the OAS General Assembly in monitoring compliance with the Court's judgments
- 6.3.3 Best practice examples for the African Court based on the experiences of the Inter-American Court's practice of monitoring compliance with its own judgments
- 6.4 Supervising the execution of the judgments of the African Court on Human and Peoples' Rights
 - 6.4.1 Establishment of the African Court on Human and Peoples' Rights
 - 6.4.2 Judgments and enforcement: Factors that affect enforcement
 - (a) Factors that directly impact on state compliance
 - (b) Factors that could indirectly impact on state compliance
 - 6.4.3 The supervisory role of the AU Executive Council and other organs of the AU
- 6.5 Conclusion

6.1 Introduction

On 25 January 2004 the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol) entered into force.¹ With the establishment of an African Court on Human and Peoples' Rights (African Court or ACHPR), the African Commission on Human and Peoples' Rights (African Commission) will no longer be the only body with a protective mandate under the African Charter on Human and Peoples' Rights (African Charter). Although an African Court will strengthen the African regional human rights system, the delivery of judgments that are binding will not in itself guarantee state compliance. The drafters of the Protocol must have anticipated this fact, or were aware of the lack of state compliance with the African Commission's recommendations, for they specifically included provisions to deal with the monitoring of compliance with the Court's judgments.²

Individuals and non-governmental organisations (NGOs), who have been responsible for filing most if not all the cases before the African Commission, will only have direct access to the Court if the respondent state party has deposited a separate optional declaration to that effect.³ In terms of the Protocol, only states and the Commission may refer cases to the Court. Even if all cases could potentially be referred to the Court by the African Commission or state parties this would probably not be the case initially. If the experience of the Inter-American system is any indication, the case load of the Court may never be as heavy as that of the Commission.⁴ Arguably, it is preferable if not all cases, but only those dealing with new questions in law, are referred to the Court, so as to avoid a situation where the process is unnecessarily prolonged only for the Court to reach a judgment similar to the conclusion reached by the Commission. The need to establish mechanisms to follow up the recommendations issued by the African

¹ Comoros deposited the fifteenth instrument of ratification on 26 December 2003.

² Articles 29(2) and 31 of the Protocol.

³ Article 5(3) read together with article 34(6) of the Protocol.

⁴ See article 5(1) of the Protocol. 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. Date accessed: 19 November 2004.

Commission after finding a state party in violation of the African Charter is thus not obviated by the entry into force of the Protocol. The need to ensure greater compliance with the recommendations of the African Commission should thus also not be put on hold in favour of establishing a Court.

In this chapter, the measures included in the Protocol for the monitoring of state compliance are analysed, in light of the fact that those bodies mandated by the Protocol to monitor compliance could also play a role in follow-up with the recommendations of the Commission. Such an approach will be in line with the established practices adopted in the European and Inter-American regional human rights systems. In the European system, before the entry into force of Protocol 11, mechanisms were in place not only to monitor compliance with the European Court's judgments but also compliance with the decisions delivered by the Committee of Ministers (Committee) under article 32 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).⁵ In the Inter-American system the need to monitor compliance not only with the Inter-American Court's decisions but also with the Inter-American Commission's decisions led to the adoption of specific follow-up measures to monitor compliance with the Commission's recommendations in 2001.⁶ In view of the lack of state compliance with the recommendations of the African Commission, as documented in chapter 4, the African system should seize the opportunity offered by the entry into force of the Protocol not only to establish mechanisms to monitor compliance with the Court's judgments, but also with the recommendations of the Commission.

The adoption of a follow-up mechanism for the Commission will be examined in detail in chapter 7. The focus of this chapter is on the measures included in the Protocol for monitoring compliance with the African Court's judgments. As the Protocol does not deal with any details on how these measures will be applied in practice, it will be up to the Court to elaborate thereon in its Rules of Procedure. The same will apply to the organs of the African Union (AU) that will have to adopt rules in that regard. The provisions of the Protocol that deal with this function have been modelled on the existing provisions and practices in the European and Inter-American regional human rights systems. This chapter analyses the procedures adopted in the European and Inter-

⁵ See section 5.2.3 of chapter 5.

⁶ See section 5.3.3 of chapter 5.

American systems in monitoring compliance with their respective Court's judgments. In each case examples are identified that could best guide the African Court and AU in developing their monitoring mandates.

6.2 Supervision of the execution of the judgments of the European Court of Human Rights: Lessons to be learnt from more than 40 years of experience

6.2.1 Introduction

In the previous chapter, the focus fell on the functioning of the European regional human rights system as it existed in terms of the European Convention before the entry into force of Protocol 11 in 1998.⁷ With the entry into force of Protocol 11, the supervisory machinery under the European Convention on Human Rights was restructured to provide for a single European Court of Human Rights.⁸ The European Commission on Human Rights, as well as the quasi-judicial functions of the Committee of Ministers in terms of article 32 of the Convention, ceased to exist under Protocol 11.⁹ However, the Committee of Ministers retained its role as the body responsible for the supervision of

⁷ See the discussion in section 5.2 of chapter 5.

⁸ Due to an ever increasing number of states joining not only the membership of the Council of Europe since 1950 but also becoming state parties to the European Convention on Human Rights the case load of the bodies charged with the implementation of the Convention became overloaded. The resultant backlog in cases before the European Commission on Human Rights and the Court increased even further as more states accepted the right of individual application under article 25 of the Convention and as the functioning of these organs became more widely known amongst the European community. These factors amongst other factors led to the restructuring of the European system to deal with the increased demand and to address issues such as the quasi-judicial role the Committee of Ministers fulfilled in terms of article 32 of the Convention. Chapter 5 dealt in detail with the criticisms launched against the article 32 role played by the Committee. Protocol 11 entered into force in 1998 after all the state parties to the Convention have ratified it. For a detailed analysis of the reasons for changing the system see R St J 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) 427 and DJ Harris, M O'Boyle & C Warbrick *Law of the European Convention on Human Rights* (1995) 706. See further JG Merrills 'The Council of Europe (I): The European Convention on Human Rights' in R Hanski & M Suksi *An Introduction to the International Protection of Human Rights – A Textbook* (2000) 297.

⁹ In creating a single permanent European Court of Human Rights to perform the functions previously fulfilled by the European Commission on Human Rights and the Court, Protocol 11 replaced articles 19 to 56 of the 1950 European Convention.

the execution of the judgments of the European Court of Human Rights.¹⁰ In the previous chapter, the role that the Committee played in the implementation of its own decisions under article 32 was discussed in detail as the African Commission could possibly draw on its experience in strengthening its implementation mechanisms in future.

In this section, the focus is specifically on the mechanisms in place in the European system for the supervision of the execution of the judgments of the European Court after the entry into force of Protocol 11. However, since state compliance with the judgments of the European Court has often been described as “more than satisfactory” or “exemplary”,¹¹ even before the restructuring of the system, reference will where applicable also be made to practices that existed prior to 1998. The legal obligations that arise from a judgment of the European Court finding a state party in violation of the Convention are discussed at the outset. The focus then shifts to the supervisory role of the Committee of Ministers, as laid down in the Convention and developed through its practice. As part of this analysis, some of the difficulties experienced by the Committee in achieving implementation of the Court’s decisions and its responses thereto are also highlighted. The Committee of Ministers has not been alone in playing a supervisory role. The assistance it has received from other bodies within the Council of Europe is therefore briefly outlined. In concluding this section, the factors that have contributed to the overall satisfactory execution of the Court’s judgments are recaptured in a bid to identify the best practices that the African regional human rights system could possibly emulate.

¹⁰ The Committee of Ministers, as a political body of the Council of Europe consisting of the Ministers of Foreign Affairs or their Deputies of member states, always had the role of supervising the execution of the judgments of the European Court of Human Rights under article 54 of the Convention. The Committee retained this role with the entry into force of Protocol 11 and its supervisory mandate is now spelled out in article 46(2) of the European Convention.

¹¹ Macdonald (1999) 430 and Harris, O’Boyle & Warbrick (1995) 702.

6.2.2 The legal obligations arising from judgments of the European Court of Human Rights

Since the entry into force of Protocol 11, the European Court functions on a permanent basis with a number of judges equal to that of the state parties to the Convention.¹² Under article 34 of the Convention, the Court may receive applications “from any person, non-governmental organization or group of individuals” alleging that a state party violated any of the Convention rights.¹³ The consideration of the admissibility of a case and the securing of a friendly settlement, previously the tasks of the European Commission, have been retained under the revised Convention and are now performed by the Court.¹⁴ To enable the Court to fulfil these functions and to deal with increased case loads, the structural functioning of the Court was also addressed by Protocol 11 by providing for the establishment of Committees, Chambers and a Grand Chamber of judges.¹⁵

The judgments of the Court are final and binding on the state parties. In terms of article 46(1) state parties undertake to abide by the final judgments of the Court. State parties are therefore under a legal obligation to comply with all the consequences arising from judgments that hold them in violation of the Convention. The judgments of the Court are however merely declaratory in nature. In other words, the Court can rule that certain state conduct is in violation of the European Convention but the Court has no

¹² Articles 19 and 20 of the European Convention on Human Rights.

¹³ This provision makes the European system the only regional system which grants direct access for individuals to a supranational court. Access for individuals to the courts in the Inter-American and African regional human rights systems is limited to those state parties that made a separate declaration to accept the jurisdiction of the court. Inter-state applications can be brought in terms of article 33 of the Convention.

¹⁴ Articles 28, 29 and 35 deals with admissibility and article 38 with friendly settlements.

¹⁵ Article 27 of the Convention establishes Committees consisting of three judges, Chambers consisting of seven judges and a Grand Chamber consisting of seventeen judges. Once a case is filed with the Court by an individual under article 34 the case is submitted to a Committee if the three judges are unanimous that a case is inadmissible such a decision is final (article 28). If no decision was taken under article 28 a Chamber must decide on admissibility and the merits of a case (articles 29 and 35). Once a case is admissible the Court must in terms of article 38 place itself at the disposal of the parties to reach a friendly settlement. If no settlement is reached the Chamber will consider the case on the merits and a judgment will be issued. In exceptional cases, any party to the case may request the case to be referred to the Grand Chamber within a period of three months from the date of the judgment of the Chamber (article 43). A panel of five judges of the Grand Chamber reviews such requests and if accepted the

competence to “annul, repeal, or modify statutory provisions or individual decisions taken by administrative, judicial or other national authorities”.¹⁶ The Court has repeatedly stated that it has no competence to award specific remedies to redress the violation complained of or to prevent similar violations in future, as it explained in *Marckx v Belgium*.¹⁷

Admittedly, it is inevitable that the Court’s decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from individual measures of implementation, but the decision cannot of itself annul or repeal these provisions: the Court’s judgment is essentially declaratory and leaves to the State the choice of the means to be utilized in its domestic legal system for performance of its obligation under article 53 (now article 46(1)).

It is therefore up to the state parties to decide how to comply with the Court’s judgments. Nevertheless, the fact that they are under a legal obligation to comply and produce a specific result has been highlighted by various commentators,¹⁸ and indeed by the Court itself in *Papamichalopoulos v Greece*.¹⁹

The Court points out that by article 53 (now article 46 (1)) of the Convention the High Contracting Parties undertook to abide by the decision of the Court in any case to which they were parties; furthermore, article 54 (now article 46(2)) provides that the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution. It follows that a judgment in which the Court finds a breach imposes on the respondent state a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.

case is decided by the full Grand Chamber by means of a judgment (article 43 (2) and (3)).

¹⁶ J Polakiewicz ‘The execution of judgments of the European Court of Human Rights’ in R Blackburn & J Polakiewicz (eds) *Fundamental Rights in Europe – The European Convention on Human Rights and its Member States, 1950-2000* (2001) 56.

¹⁷ Judgment of 13 June 1979, Series A, Volume 31, at 25-26, par 58.

¹⁸ See European Commission for Democracy through Law (Venice Commission) *Opinion on the Implementation of the Judgments of the European Court of Human Rights* (December 2002) page 7 par 36. Available at: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)034-e.html](http://www.venice.coe.int/docs/2002/CDL-AD(2002)034-e.html). Date accessed: 15 April 2003. See further, E Jurgens ‘Report on the execution of the judgments of the European Court of Human Rights’ (2000) 21 *Human Rights Law Journal* 278; Polakiewicz (2001) 57.

¹⁹ Judgment of 31 October 1995, Series A no 330-B, par 34.

The European Commission for Democracy through Law (Venice Commission)²⁰ has found that the Court preferred state parties to redress violations of article 6 of the Convention and article 1 of Protocol 1 by taking steps that would bring about a result as close to *restitutio in integrum* as was possible.²¹ However, it is still up to the state parties to choose the manner in which to do this, for the Court held further in *Papamichalopoulos* that “if the nature of the breach allows of *restitutio in integrum*, it is for the respondent state to effect it, the Court having neither the power nor the practical possibility of doing so itself”.²²

Under article 41 of the Convention, the Court can award just satisfaction to the injured party but just “if the internal law of the High Contracting Party concerned allows only partial reparation to be made” and only “if necessary”.²³ An order of just satisfaction usually involves one or more of the following remedies: (1) the reimbursement of costs and expenses; (2) compensation for pecuniary damage; and (3) compensation for non-pecuniary damage.²⁴ From October 1991, the Court has been prescribing a period of three months from the date of the decision within which the applicant must be paid.

²⁰ The Venice Commission’s primary tasks are “to assist and advise individual countries in constitutional matters – to provide “constitutional first-aid” – upon a request by the states, the Council of Europe’s organs or other international organisations”. The research of the Commission is available on its website at: http://www.venice.coe.int/site/main/Constitutional_Assistance_E.asp. Date accessed: 12 November 2004.

²¹ The Venice Commission, in reference to article 1 of Protocol 1, referred to the Court’s judgment in *Belvedere Alberghiera v Italy* (Judgment of 30 May 2000, par 69) where it held, “The Court considers, however, that in the circumstances of the case the issue of the application of article 41 is not ready for decision. In the light of the violation that has been found of article 1 of Protocol No. 1, the most appropriate form of redress in the present case would be by way of restitution of the land by the state, coupled with compensation for the pecuniary damage sustained, such as the loss of enjoyment, and compensation for non-pecuniary damage”. With reference to article 6 violations, the Venice Commission referred to the case of *Piersack v Belgium* (Judgment of 26 October 1984, Series A no. 85, par 11) where the Court held that “the proceedings subsequently brought [had] essentially redressed the violation [of article 6] found by the Court (...) [and] brought about a result as close to *restitutio in integrum* as was possible in the nature of things”. Venice Commission (2002) 8 par 39, fns 25 and 28.

²² Judgment of 31 October 1995, Series A no 330-B, par 34.

²³ Article 41 replaced the old article 50. Article 41 reads as follows: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”.

²⁴ See Effects of Judgments or Cases 1959-1998, section A. *Just Satisfaction*. Available at: <http://www.echr.coe.int/Eng/EDocs/EffectOfJudgments.html>. Date accessed: 6 September 2004.

Since January 1996, the Court provides for interest in the event of failure to comply with this time-limit.²⁵

The supervision of the execution of the judgments of the Court, be it the payment of just satisfaction ordered under article 41 or the implementation of individual measures to remedy a situation or general measures to ensure that similar violations do not reoccur in future, is the function of the Committee of the Council of Europe.²⁶ It must be noted that the Committee, just as the Court, does not have the power to order a state to take a particular action in response to the finding of a violation of the Convention.²⁷ Nevertheless, states have as a rule acted in good faith and endeavoured to execute the Court's decisions.²⁸ The mandate of the Committee as set out in article 46(2) is not detailed. As a result, the Committee has developed its own rules and practices to enable it to fulfil its role effectively. In the following section these rules and practices are analysed in an effort to ultimately determine best practice examples for the African system.

6.2.3 The supervisory role of the Committee of Ministers

(a) Mandate and working methods

The allocation of the supervision of the execution of the judgements of the European Court to the Committee of Ministers has been described as “a sensible division of powers in the Convention system which appropriately leaves it to a political body – with power to suspend or expel a state from the Council of Europe – to ensure that states comply faithfully with the judgments of the Court”.²⁹ In fulfilling this task which is

²⁵ As above.

²⁶ The Committee of Ministers performed this role before the entry into force of Protocol 11 under article 53 of the Convention. The Committee of Ministers retained this role after 1998 which is now set out in article 46(2) of the Convention.

²⁷ The European Court in the case of *Scozzari and Giunta v Italy* (judgment of 13 July 2000) at par 249 indicated that “subject to monitoring by the Committee of Ministers, the respondent state remains free to choose the means by which it will discharge its legal obligation under article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment”.

²⁸ Jurgens (2000) 278.

²⁹ Harris, O'Boyle & Warbrick (1995) 700.

“essentially legal in character”,³⁰ the Committee adopted “Rules for the application of article 54” in 1976, which it replaced after the entry into force of Protocol 11 with the “Rules for the application of article 46(2)” of 2001.³¹ These Rules and the established as well as revised working methods of the Committee in fulfilling its mandate in terms of article 46(2) are outlined here briefly.³²

When a judgment is transferred to the Committee, it is inscribed, “without delay”, on the agenda of the Committee.³³ The Committee’s supervision of the execution of judgments takes place during special human rights meetings, usually at intervals of not more than six months.³⁴ The Committee invites states found to have violated the Convention to inform it of the measures it has taken “in consequence of the judgment” of the Court.³⁵ The Committee cannot indicate to a state which measures to adopt to abide by the Court’s decision - the Committee can only examine “whether any just satisfaction awarded by the Court has been paid, including as the case may be default interest”.³⁶ The Committee can only examine other measures taken by a state if it is so required and then it has to take into account “the discretion of the state concerned to choose the means necessary to comply with the judgment”.³⁷ Within these confines, the Committee can then measure whether:³⁸

³⁰ P Leuprecht ‘The execution of judgments and decisions’ in R St J Macdonald, F Matscher, & H Petzold (eds) *The European System for the Protection of Human Rights* (1993) 797.

³¹ The ‘Rules adopted by the Committee of Ministers for the application of article 46, paragraph 2, of the European Convention’ on 10 January 2001 is available at: <http://www.cm.coe.int/intro/e-rules46.htm>. Date accessed: 15 April 2003.

³² The Committee of Ministers reported that it had to review its working methods to deal with the increase in its workload in order “to ensure the continuing effectiveness of the system of human rights protection set up by the European Convention on Human Rights”. See Reply adopted by the Deputies following the Parliamentary Assembly Recommendation 1477 (2000). Available at: <https://wcm.coe.int/ViewDoc.jsp?id=250399&Lang=en>. Date accessed: 16 November 2004.

³³ Rule 2.

³⁴ Rule 1.

³⁵ Rule 3(a).

³⁶ In terms of Rule 3(b) and pursuant to the Committee’s qualified mandate under article 46(2).

³⁷ Rule 3(b). The Venice Commission in forwarding their opinion on the implementation of the judgments of the European Court explained that “execution within a literal meaning is only relevant when awards are made under article 41 of the Convention”. Venice Commission (2002) 5 par 19.

³⁸ Rule 3(b).

- “individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention” or
- “general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations”.

The Venice Commission, however, explained that the adoption of broader measures (such as individual and general measures) by states, although still within a certain margin of appreciation on their side, is “nowadays to be exercised within the framework of the case-law built up in this respect by both the Court and the Committee of Ministers”.³⁹ They identified the following categories of individual or general measures that a state could be expected to adopt in lieu of precedents set by previous cases, namely: amending legislation; taking appropriate action in respect of state agents; encouraging an appropriate interpretation of domestic legislation or jurisprudence; and reopening domestic proceedings.⁴⁰

It must also be noted that various commentators have highlighted the fact that the obligation to execute judgments of the European Court does not only rest with the state that is party to a particular case.⁴¹ In Resolution 1226 (2000), the Parliamentary Assembly of the Council of Europe explained this as follows:⁴²

The principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties).

In other words, states that are not party to a specific judgment of the Court also have to take into account “the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice”.⁴³

³⁹ Venice Commission (2000) 5 par 20.

⁴⁰ As above.

⁴¹ Polakiewicz (2001) 64; Jurgens (2000) 275; Venice Commission (2000) 7 par 32 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 21st Century* (2000) 269.

⁴² Resolution 1226 (2000) adopted on 28 September 2000, par 3. Reprinted in *Human Rights Law Journal* (2000) 21 at 273.

⁴³ Jurgens (2000) 275. Zwaak referred to two examples from the experiences of the Netherlands where the judgments of the European Court in regard to Belgium (*Marckx*

In deciding whether a state party has taken adequate individual or general measures, or both, to comply with the Court's judgment, the Committee acts on the advice of the Directorate of Human Rights.⁴⁴ The Directorate of Human Rights has been described as the "Advocate of the Convention before the Committee",⁴⁵ and it is up to the Directorate to assist and advise the Committee, a political body, on the legal questions of state compliance.⁴⁶ The Committee keeps a case on its agenda until it is satisfied that the state has taken all the measures necessary to abide by the judgment.⁴⁷ It then adopts a resolution termed a "final resolution" to state that it has completed its functions under article 46(2).⁴⁸ The Committee attaches a summary of the measures a state has taken to implement the Court's decision on the "final resolution".

Apart from the continued examination of cases at the Committee's human rights meetings, the Committee has developed the following practices to ensure the execution of the Court's judgments:⁴⁹

- It has established direct contacts through letters or by meeting in person, at different levels, with national authorities responsible for the implementation of a decision.
- It has established contact at the highest level between the Chairman of the Committee of Ministers and the Minister of Foreign Affairs of the state party concerned.
- It has adopted different types of interim resolutions.

case fn 17 above) and the United Kingdom (*Brogan* case decision of 29 November 1988, Series A, Volume 145-B) had a preventative effect in that the Netherlands changed its practices (with regard to illegitimate children and detention without remand) that could potentially violate the Convention. Zwaak (2000) 269-270.

⁴⁴ Harris, O'Boyle & Warbrick (1995) 702.

⁴⁵ J Harman 'Complementarity of mechanisms within the Council of Europe/Perspectives of the Committee of Ministers' (2000) 21 *Human Rights Law Journal* 296.

⁴⁶ Leuprecht described the role fulfilled by the Directorate in expressing doubt as to whether the measures taken by a state in specific case are adequate as an "uncomfortable task" (Leuprecht (1993) 798). See further Harris, O'Boyle & Warbrick (1995) 702.

⁴⁷ Rule 4 deals with control intervals.

⁴⁸ Rule 8.

⁴⁹ See par 21 of the *Opinion of the CDDH concerning Recommendation 1477 (2000) of the Parliamentary Assembly on the execution of judgments of the European Court of Human Rights* an Appendix to the Reply adopted by the Deputies following the Parliamentary Assembly Recommendation 1477 (2000). Available at: <https://wcm.coe.int/ViewDoc.jsp?id=250399&Lang=en>. Date accessed: 16 November 2004.

In adopting new Rules for the application of article 46(2), the Committee also provided for the following new working methods to “ensure the continuing effectiveness of the system of human rights protection”: (i) “increased use of interim resolutions to inform, to encourage and even in certain cases to exhort; (ii) streamlining procedures and documentation to improve effectiveness; (iii) the introduction of a new rule of transparency; and (iv) the publication of the information regarding the execution of the different cases on the Committee of Minister’s internet site”.⁵⁰

Two of these “new” working methods, namely the increased use of interim resolutions and a move towards increased publicity around the work and findings of the Committee, require further discussion. Interim resolutions are adopted in accordance with rule 7 in the course of the Committee’s supervision of the execution of a judgment. Rule 7 provides that the Committee may adopt interim resolutions “notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make relevant suggestions with respect to execution”. In practice, interim resolutions have usually been adopted in cases where the Committee has experienced difficulties with state compliance either because a state was delaying implementation or because it refused to implement a decision.⁵¹ The difficulties the Committee faces in this regard are explored in more detail in the next section. It is clear that the Committee through making increased use of interim resolutions aims to mobilise

⁵⁰ Reply adopted by the Deputies following the Parliamentary Assembly Recommendation 1477 (2000). Available at: <https://wcm.coe.int/ViewDoc.jsp?id=250399&Lang=en>. Date accessed: 16 November 2004.

⁵¹ From a quick overview of the interim resolutions adopted by the Committee between 2000 and 2004 it is clear that the majority of interim resolutions were adopted in regard to Italy (various cases relating to the length of criminal proceedings) and Turkey (more than 400 cases for which execution is outstanding). Interim resolutions are available at: <https://wcm.coe.int/ViewDoc.jsp?id=35403&Lang=en>. Date accessed: 17 November 2004. See for instance Interim Resolution DH (2000) 105 adopted on 24 July 2000 at the 716th meeting of the Ministers’ Deputies on the *Non-execution of the judgment in the case of Loizidou v Turkey*. In this Resolution, which was already the second to be issued by the Committee, the Committee called in no uncertain terms on Turkey to implement the 1998 judgment of the Court emphasising that the “failure on the part of a High Contracting Party to comply with a judgment of the Court is unprecedented”. This Interim Resolution is reproduced in the *Human Rights Law Journal* (2000) 21 at 272. For interim resolution where the Committee has made suggestions as to how to affect execution see, Interim Resolution DH (99) 437 of 15 July 1999 on the *Excessive length of proceedings before the civil courts in Italy: supplementary measures of a general character*. In another example the Committee, in Interim Resolution DH (2002) 58 on the P.G.II case against Italy, urged Italy to adopt general measures and amend its bankruptcy legislation to avoid similar violations of the Convention as occurred in this 1997 case.

public shame and peer pressure within the Council of Europe to ensure the execution of judgments in instances where states are reluctant to comply.⁵²

Another avenue, which the Committee is pursuing with increased vigour in an effort to mount pressure on state parties, is to make use of publicity. Information provided by the states to the Committee in accordance with article 46 is accessible to the public except where the Committee decides otherwise in order to protect legitimate public or private interests.⁵³ The Committee subsequently also decided to make public its annotated agenda for its human rights meetings, in which information on the state of progress of the execution of cases is contained.⁵⁴ Information on the execution of judgments, both interim and final resolutions, is also available on the website of the Committee. According to the Venice Commission publication of resolutions on its website serves to add “publicity and moral pressure”.⁵⁵ Lastly, the Committee also makes use of press releases after the submission by states of their annual reports on the progress of execution.⁵⁶

On the whole, states paid the just satisfaction ordered under article 41, they affected the individual measures required to bring to an end violations of the Convention and to put an injured party, as far as possible, in the same situation as existed before the violation.⁵⁷ Polakiewicz reported that states even submitted information to the Committee on general measures they have adopted without the Court having ruled on the conformity of their statutory or regulatory provisions with the Convention.⁵⁸ Nonetheless, the Committee has also experienced problems with the implementation of some judgments of the Court. The difficulties the Committee has experienced in the past and its responses thereto are briefly outlined in the following section.

⁵² The Venice Commission highlighted the fact that [t]he main tool at the disposal of the Committee of Ministers is peer pressure”. Venice Commission (2002) 8 par 43.

⁵³ Rule 5.

⁵⁴ This was done in April 2001 only months after the Committee adopted rule 5. This document is available on the Committee’s website at: <https://wcm.coe.int/ViewDoc.jsp?id=35403&Lang=en>. Date accessed: 17 November 2004.

⁵⁵ Venice Commission (2002) 9 par 43.

⁵⁶ As above.

⁵⁷ Venice Commission (2002) 5 par 19.

(b) Problems experienced with state compliance

Notwithstanding the good state compliance record with the European Court's judgments, the ultimate test for the supervisory role of the Committee of Ministers lies with those cases where states either delay implementation of the Court's judgments or where they do not implement the judgments. In this section, the difficulties that the Committee has experienced with non-compliance in the past are briefly outlined, followed by a discussion of the possible reasons for these problems. Finally, the options that are available to the Committee or that have been explored by the Committee and other role players, in dealing with non-compliance, are highlighted.

In summarising the problems that the Committee of Ministers has in the past experienced with regard to state compliance, it is not possible to cite any instances of outright non-compliance or refusal to comply. Rather, it seems that the problems the Committee has and still does experience relate to inordinate delays in executing the judgments of the Court.⁵⁹ This does not imply that delay in the execution of judgments has less devastating consequences than non-compliance. If judgments are not timeously implemented the violation of the rights of the applicant continues as it did before the case was filed. If the state party does not adopt general measures, similar cases, alleging the same violations of the Convention, will be launched with the already overburdened Court.⁶⁰

⁵⁸ Polakiewicz (2001) 64. See Shelton for a list of the effects that the Court's judgments have had in member states (D Shelton *Remedies in International Human Rights Law* (1999) 159).

⁵⁹ Any discussions around the delay in the execution of judgments of the European Court should be viewed against the background of the average time that elapses between a judgment and its execution. The Venice Commission referred to statistics made available by the Department for the Execution of Judgments of the European Court of Human Rights, which recorded the average time for all states as 399,5 days for the years 1985-1991, and 345,85 days for the years 1995-2001 (Venice Commission (2002) 19 fn 7). Various commentators and bodies of the European Council have commented on the problems relating to the delay in implementation of the judgments of the Court. See for instance Macdonald (1999) 424; Harris, O'Boyle & Warbrick (1995) 702; Zwaak (2000) 261; Venice Commission (2002).

⁶⁰ Polakiewicz reported for example that the excessive length of court proceedings in Italy has led to the Court finding more than 1500 violations of article 6 of the Convention since the first judgment was delivered on the matter (Polakiewicz (2001) 74).

The following factors have been highlighted to explain why state parties delay in implementing the Court's judgments or experience difficulty in implementing the Court's judgments:⁶¹

- perceived or real problems relating to the compatibility of a judgment with the domestic legal or constitutional order;⁶²
- political reasons;⁶³
- strongly held cultural or moral ideas;⁶⁴
- time consuming domestic procedures to amend or introduce new legislation or administrative procedures;⁶⁵
- the lack of adequate domestic legislation to allow for the reopening or re-examination of cases;⁶⁶
- budgetary reasons;⁶⁷
- the scale of reforms required.⁶⁸

⁶¹ Most of these factors have also been identified as factors that influence state compliance with the recommendations of the African Commission (see chapter 3).

⁶² Harman (2000) 296. This issue is discussed in more detail below.

⁶³ Harman (2000) 296. Turkey for instance delayed the payment of just satisfaction awarded in 1998 to Titina Loizidou (see fn 51 above) for almost five years arguing that the case related to broader political issues of great sensitivity around the Cyprus problem. On 2 December 2003 Turkey made the payment of 1.12 million Euros to Loizidou. The Turkish press however reported that the President of the Turkish Republic of Northern Cyprus reported that the ruling was politically motivated stating that "the Republic of Turkey was obliged to pay the compensation in order to save the honor of the Court". *Turkish Press Review*, 3 December 2003. Available at: <http://www.hri.org/cgi-bin/brief?news/turkey/trkpr/2003/03-12-03.trkpr.html#05>. Date accessed: 18 December 2004. The relentless efforts of the Committee of Ministers to engage with the Turkish Government therefore did pay off in the end and although there was a delay in complying with the Court's judgment the fact that Turkey did comply with a highly sensitive political judgment should not go unnoticed. See also Resolution 1226 (2000) of the Parliamentary Assembly, par 8.

⁶⁴ Harman (2000) 296. Jurgens listed the various cases concerning homosexuals in Cyprus as an example where public opinion delayed implementation as he explained that "some southern European countries" viewed homosexuality as extremely unfavourable. Cyprus however did pass legislation to decriminalise homosexuality although Jurgens reported that it continued using "various distinctions between homosexual and heterosexual acts" and as a result the cases were still being examined by the Committee (Jurgens (2000) 280).

⁶⁵ Macdonald (1999) 425. Belgium is often cited as an example in this regard in reference to the fact that it took the Government almost eight years to introduce new legislation in response to the Marckx judgment (see fn 17 above). Due to the fact that the state took so long to adopt general measures in the form of new legislation, another case was filed with the Court based on the old legislation and a further violation was found in *Vermiere* (Judgment of 29 November 1991, Series A, Volume 214-C).

⁶⁶ Venice Commission (2002) 6 par 24. This issue is discussed in more detail below.

⁶⁷ Parliamentary Assembly Resolution 1226 (2000) par 8.

Although the cases where implementation of judgments were delayed are few in comparison to the heavy case load of the Court, they do “raise several important questions of principle” not only in light of new states joining the European Convention but also for other regional systems.⁶⁹ In dealing with delays or resistance to compliance, the Committee firstly pursues the avenues highlighted in the section above. It will engage with the Minister for Foreign Affairs of the respondent state through letters written by its Chairman. Should a public communication be necessary to mount more peer pressure, it will issue interim resolutions. The Committee is also increasingly making its work and findings public either through its website or by issuing of press releases.

There is very little the Committee can do in the absence of sanctions, apart from keeping a case on its agenda and pursuing the above avenues to encourage execution. The European Convention does not provide for sanctions against a state in the event of non-execution. The Statute of the Council of Europe does however provide for a sanction to be enforced by the Committee of Ministers in exceptional cases, allowing the Committee to suspend or expel a member state of the Council if it is found to have seriously violated article 3 of the Statute.⁷⁰ The Committee has never made use of its powers under article 8, and it is unlikely to do so in instances where a state has failed to execute the judgments of the Court.⁷¹

Instead of invoking this “ultimate” sanction against member states, the Committee has opted to make use of interim resolutions and to issue recommendations to member

⁶⁸ In a report to the Parliamentary Assembly, on the execution of the Court’s judgments, Rapporteur Jurgens reported that the delays in implementing the judgments of the Court by Turkey and Italy were due to the “scale of reforms required” by these states to complete execution. To execute the Court’s judgments in the Turkish cases where violations of the Convention were found in relation to torture, the government not only had to implement legislative reforms but also regulatory and administrative measures, training courses as well as addressing the imbedded culture of torture in society. For Italy to address the excessive length of judicial proceedings the government would have to undertake large scale legislative, regulatory, administrative and practical reform measures (Jurgens (2000) 279).

⁶⁹ Harris, O’Boyle & Warbrick (1995) 703.

⁷⁰ This power is exercised in terms of article 8 of the Statute. Article 3 stipulates that as a pre-condition for membership in the Council of Europe every state must accept the principles and rules of law applicable to the protection of human rights.

⁷¹ Zwaak (2000) 264 and Harris, O’Boyle & Warbrick (1995) 705.

states on some of the issues listed above as factors that contribute to delays in execution. By way of an example, the Committee issued Recommendation No. R(2000) 2 to encourage state parties to

[e]xamine their national legal systems with a view to ensuring that there exist possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where: (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.⁷²

This recommendation ultimately aims to encourage state parties to examine their domestic legal systems in order to put an end to the violation of the Convention in instances where implementation cannot be achieved through any other means than through the review of a case by a domestic court. Various member states have indeed already adopted measures ranging from the adoption of special legislation to special review proceedings to allow for the reopening of domestic cases following a judgment by the European Court.⁷³

Lastly, it should be mentioned that the Committee and various other role players are busy examining ways of improving and accelerating the execution of the judgments of the Court.⁷⁴ The Steering Committee for Human Rights (CDDH) is currently looking into

⁷² Recommendation No. R(2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies.

⁷³ For a list of states that have adopted either special legislation or review proceedings as well as a list of those cases where domestic proceedings were indeed reopened following a judgment of the Court see Polakiewicz (2001) 67, 68 and Macdonald (1999) 423.

⁷⁴ Refer to the following documents for an overview of the recommendations formulated thus far to strengthen the supervisory powers of the Committee of Ministers and the system as a whole: Parliamentary Assembly Resolution 1226 (2000) adopted on 28 September 2000; Parliamentary Assembly Recommendation 1477 (2000) adopted on 28 September 2000; Report on the execution of judgments of the European Court of Human Rights, Rapporteur E Jurgens, Doc. 8808; Opinion of the CCDH concerning Recommendation 1377 (2000) of the Parliamentary Assembly on the execution of the judgments of the European Court of Human Rights, adopted by the CCDH during its 52nd

how the proposals on strengthening the long-term effectiveness of the European Court of Human Rights and its supervisory machinery could be incorporated in an amending Protocol to the Convention, as part of the ongoing reform of the regional system.⁷⁵

(c) Supervisory support from other bodies within the Council of Europe

Even though the responsibility to execute judgments of the Court is first and foremost that of the respondent state party, the Court, Committee and other bodies of the European Council share some of this responsibility.⁷⁶ The Parliamentary Assembly in Resolution 1226 (2000) resolved that the Court and the Committee are also to blame for delayed implementation of judgments where the Court's judgments "are sometimes not sufficiently clear" or where the Committee "does not exert enough pressure when supervising the execution of judgments".⁷⁷

Although it is the Committee of Ministers that is mandated in terms of the Convention to supervise the execution of judgments, other organs of the European Council have also fulfilled various roles to support the Committee in its mandate. First, there is the Directorate of Human Rights. Its role is to assist and advise the Committee on the adequacy of the measures taken by member states. Second, in order to avoid the filing of cases against states on violations already judged by the Court, Jurgens suggested that the Council of Europe's Human Rights Commissioner could play a role "in that one of his main duties will be to anticipate violations and alert governments to the measures they need to take in order to avoid an intervention of the Court".⁷⁸

meeting; Parliamentary Assembly Resolution 1268 (2002) adopted on 22 January 2002; Parliamentary Assembly Recommendation 1546 (2002) adopted on 22 January 2002; Venice Commission 'Opinion on the implementation of the judgments of the European Court of Human Rights' adopted at its 53rd Plenary Session, December 2002; and Final Report on "Guaranteeing the long-term effectiveness of the European Court of Human Rights" of the CDDH, CDDH (2003) 006 Final.

⁷⁵ See par 6 of 'Areas where the European Convention on Human Rights cannot be implemented – Parliamentary Assembly Recommendation 1606 (2003)' – Reply adopted by the Committee of Ministers on 21 January 2004 at the 869th meeting of the Ministers' Deputies. CM/AS(2004)Rec1606 final 23 January 2004.

⁷⁶ In particular the Parliamentary Assembly should share in this responsibility as they in turn represent the various member states' national legislatures. Jurgens (2000) 276.

⁷⁷ Resolution 1226 (2000) adopted on 28 September 2000, par 6. Reprinted in *Human Rights Law Journal* (2000) 21 at 273.

⁷⁸ Jurgens (2000) 281.

Third, the most important role has thus far been fulfilled by the Parliamentary Assembly of the Council of Europe. The Assembly has pursued various avenues in an effort to support the Committee in its supervisory role and to protect the integrity of the Court. The Assembly has voiced its concerns about the delay in the executing certain judgments and have inquired into the progress of implementation, through the formulation of questions for written or oral reply for the attention of the Chair of the Committee of Ministers.⁷⁹ Using the Parliamentary Assembly as a public platform of debate to raise questions on state compliance in reference to particular states is a good way of mounting peer pressure on non-compliant states. In addition, the Assembly has also issued resolutions and recommendations making a number of proposals for dealing with the problems surrounding the execution of the judgments of the Court.⁸⁰ As indicated above, the Steering Committee for Human Rights and the Venice Commission have also formulated recommendations for strengthening the supervisory role of the Committee as part of the ongoing reform of the system.⁸¹ Amongst the specific measures undertaken by the Assembly was a decision in Resolution 1226 (2000) to debate, once a year, the execution of the judgments of the Court based on a record prepared by its Committee on Legal Affairs and Human Rights.⁸² This record set out the time that has elapsed since a judgment was issued and the urgency attached to the implementation of certain decisions.⁸³ Following the first debate in 2002, the Assembly decided to write to eight governments calling on them to implement the judgments of the Court and to report back within three months.⁸⁴ Although only three delegations replied, the Assembly decided to continue monitoring the progress made by the Committee of Ministers. It therefore instructed its Committee on Legal Affairs and Human Rights to continue updating the record of the execution of judgments.⁸⁵

⁷⁹ See for instance Written Question No. 378 of 10 September 1998 which dealt with the length of time full execution was taking in all cases where judgments were over three years old and where there was still no sign of execution. Or Written Question No. 428 of 5 September 2003 where the Assembly probed the Chair of the Committee as to what were the most urgent and important measures which remained to be adopted by Turkey in order for it to comply with the more than 400 judgments which were not yet executed.

⁸⁰ See fn 74 above.

⁸¹ As above.

⁸² See section C of Resolution 1226 (2000).

⁸³ Par 4 of Resolution 1268 (2002).

⁸⁴ Resolution 1268 (2002).

⁸⁵ Resolution 1268 (2002).

This concludes the overview of the supervisory machinery of the European Convention. In the next section a brief analysis is given of some of the best practices developed within the European human rights system to ensure the execution of the judgments of the Court. This is done in an effort to guide the to-be-established African Court on Human and Peoples' Rights to ensure maximum state compliance with its judgments, especially as the compliance record with the recommendations of the African Commission has been dismal.

6.2.4 Best practices for the African Court: Factors that contributed to the successful compliance record within the European system

Leuprecht explained that the *travaux préparatoires* to the Convention illustrated that “article 54 [now article 46(2)] arose from the concern that, notwithstanding their legally binding nature and the obligation of the states concerned to execute them, judgments might not be complied with”.⁸⁶ In other words, there was a concern at the time of drafting the Convention that the legally binding judgments of the European Court would not be executed without a body specifically assigned to supervise execution. The drafters of the European Convention decided not to allocate this task to a Convention body but rather to the Committee of Ministers as a political body established in terms of the Statute of the Council of Europe. With the entry into force of Protocol 11, the Committee of Ministers retains this role. From the discussions above, it is clear that it was fulfilling this role successfully. Even where there were difficulties with the execution of some judgments it was never an option to allocate this mandate to a different body, but rather to strengthen the existing powers of the Committee.

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol) adopted the same approach as followed in the European Convention by allocating the task of monitoring the execution of the Court's judgments to the Council of Ministers of the Organisation of African Unity (now the Executive Council of African Union).⁸⁷ It can only be assumed that this was done also out of concern that the legally binding judgments of the African Court will not be executed by state parties, especially against the background of poor

⁸⁶ Leuprecht (1993) 797.

⁸⁷ Article 29(2) of the Protocol.

state compliance with the recommendations of the African Commission.⁸⁸ The Executive Council has never played a role in following-up on the implementation of the recommendations of the African Commission and it is therefore a completely new mandate that the Council will be taking on. With no structures, rules or procedures in place to fulfil this mandate, it is recommended that the Executive Council take note of the long-standing practice of the Committee of Ministers to guide and inform it in adopting rules and procedures to monitor the execution of judgments. Some of the best practices of the Committee of Ministers are therefore repeated here for the benefit of the Executive Council.

In developing rules of procedure for monitoring the execution of judgments the Executive Council should strive for maximum transparency and avoid as far as possible, rules embedding confidentiality. The only “real” execution tool that is available to the Committee and the Executive Council is to make use of peer pressure within the close knit regional allegiance that exists amongst state parties. In this regard, the Committee has made increasingly use of publicity and transparency in fulfilling its supervisory role in the following ways: (1) It has made public its annotated agenda which indicates the progress with the execution of judgments in each case. (2) It has used, increasingly, interim resolutions to indicate how far a state has implemented a judgment or to highlight incidents of non-compliance or delayed implementation of judgments. (3) It issued recommendations. (4) It issued press releases. (5) It has made sure that all its findings are available for easy public access via the Internet.

As indicated above, the Committee of Ministers acts on the advice of the Directorate for Human Rights in performing the legal mandate of deciding whether the measures taken by state parties are adequate. It is recommended that the Executive Council should be assisted in this regard by the Democracy, Governance, Human Rights and Elections Division of the Political Affairs Commission of the African Union.⁸⁹ Within the Council of Europe the Parliamentary Assembly is another body that participates in the supervision

⁸⁸ See chapter 2 for a summary of state compliance with the recommendations of the African Commission.

⁸⁹ It is this Division that is responsible, among other tasks, for setting up the African Court. See the discussions in chapter 4 on the relationship between the African Commission and the organs of the African Union. See further, A Lloyd & R Murray ‘Institutions with responsibility for human rights protection under the African Union’ (2004) 48 *Journal of African Law* 173.

of the execution of the judgments of the Court. In particular, the Parliamentary Assembly monitors those cases where states delay to implement the Court's judgments or where there is no compliance. The Assembly not only debates the issue, but also writes to governments which have not executed the judgments of the Court. The Assembly has also posed questions to the Chair of the Committee of Ministers regarding the non-execution or the delay in execution of judgments by particular states, thereby firmly placing the issue in the public domain. In addition to these efforts the Parliamentary Assembly has also adopted various resolutions and recommendations on strengthening and reforming the supervisory role of the Committee of Ministers and other role players. Amongst the organs of the African Union the Pan-African Parliament, representing the national parliaments of all state parties, could potentially also perform a similar role which could pressurise state parties to execute the judgments of the African Court without delay.

Other comparisons will be drawn with the European system throughout the discussions that follow. In the next section the focus falls on the Inter-American Court on Human Rights.

6.3 The Inter-American Court of Human Rights: Monitoring compliance with the Court's judgments

6.3.1 The mandate of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights (Inter-American Court or Court) was established with the entry into force of the American Convention on Human Rights (Convention) on 18 July 1978 when the eleventh instrument of ratification was deposited.⁹⁰ In 1979, the first judges were elected to serve on the Court and its first hearing was held in June 1979.⁹¹ During the same year the Statute of the Court was

⁹⁰ The first talks around the creation of a Court however dated back as far as 1948. For discussions around the creation of a Court in the Inter-American system see VR Rescia & MD Seitles 'The development of the Inter-American human rights system: A historical perspective and a modern-day critique' (2000) 16 *New York Law School Journal of Human Rights* 608.

⁹¹ 'History of the Inter-American Court of Human Rights' available at: http://www.coreidh.or.cr/general_ing/history.html. Date accessed: 11 October 2004.

approved by the General Assembly and in 1980 the Court approved its first Rules of Procedure.⁹² The seat of the Court is in Costa Rica, while the seat of the Inter-American Commission on Human Rights (Inter-American Commission or Commission) is in Washington, D.C., in the United States.⁹³ The Inter-American Court was therefore established nearly twenty years after the establishment of the Inter-American Commission.⁹⁴

The Inter-American Court has advisory and contentious jurisdiction. In terms of the Court's advisory jurisdiction, as spelled out in article 64 of the Convention, any of the member states of the Organisation of American States (OAS) and any of the organs of the OAS may "consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states".⁹⁵ The contentious jurisdiction of the Court is however only applicable to those state parties that in addition to ratifying the American Convention also made a declaration in terms of article 62 that it accepts the jurisdiction of the Court as binding "on all matters relating to the interpretation or application of this Convention".⁹⁶ Furthermore, in accordance with article 61, only state parties and the Commission can submit a case, alleging a violation of the provisions of the Convention, to the Court and only after the procedures before the

⁹² The Court consists of seven judges elected in terms of article 52 of the American Convention on Human Rights.

⁹² The Court has subsequently amended its Rules of Procedure on four occasions with the latest version having entered into force on 25 November 2003. The new Rules of Procedure are available at: http://www.corteidh.or.cr/general_ing/rules.html. Date accessed: 24 November 2004.

⁹³ 'History of the Inter-American Court of Human Rights' available at: http://www.corteidh.or.cr/general_ing/history.html. Date accessed: 11 October 2004.

⁹⁴ See section 5.3 of chapter 5 for a discussion on the Inter-American Commission on Human Rights.

⁹⁵ Article 64 of the Convention. For a discussion on the Court's advisory jurisdiction, which falls outside of the scope of this study, 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*, Heidelberg, 28-30 August 1995, at 72; Rescia & Seitles (2000) 616; and JS Davidson *The Inter-American Human Rights System* (1997) 232.

⁹⁶ Under article 62(1) the declarations are meant to apply to all matters whilst article 62(2) specifies that declarations can also be made "on the condition of reciprocity, for a specified period, or for specific cases". Article 62(3) makes provision for the acceptance of the jurisdiction of the Court also by special agreement in addition to the special declarations referred to in the preceding paragraphs. Currently, 21 state parties of the 24 that are party to the Convention have recognised the contentious jurisdiction of the Court. These are: Costa Rica, Peru, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala, Suriname, Panama, Chile, Nicaragua, Paraguay, Bolivia, El

Commission have been completed. In other words, individuals only have direct access to the Commission but not to the Court.⁹⁷

In deciding cases that fall within the contentious jurisdiction of the Court, judgments are usually delivered in three phases.⁹⁸ Firstly, the Court issues judgments in response to the preliminary objections raised by a state party, which relating to the exhaustion of domestic remedies. Secondly, the Court will proceed and deliver judgments on the merits of a case and lastly, as part of a separate procedure, it can make an order on reparations if a state party was found in violation of the Convention. Article 63(1) gives the Court broad remedial powers.⁹⁹ Shelton summarised the remedial powers available to the Court into the following three categories: (1) ordering measures that “ensure that the victim enjoys future respect for the right or freedom that was violated”, (2) ordering measures that “remedy the consequences of the violation”, and (3) ordering measures to

⁹⁷ Salvador, Haiti, Brazil, Mexico, the Dominican Republic and Barbados. See 2003 Annual Report of the Inter-American Court of Human Rights, OEA/Ser.L/V/III.61, part I, D.

With the entry into force of the 1997 version of the Court’s 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 2001 Rules of Procedure even went further and introduced a series of provisions to grant the alleged victims, their next of kin or their duly accredited representatives direct participation in all stages of the Court’s proceedings once an application has been presented. Article 23 of the latest Rules of Procedure (2003) provide as follows: (1) “When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings. (2) When there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervener who shall be the only person authorized to present pleadings, motions and evidence during proceedings, including public hearings”.

⁹⁸ Rescia and Seitles noted that “not every phase will apply in cases of a friendly settlement, discontinuance or an acceptance of a claim” (Rescia & Seitles (2000) 612). All the Courts judgments as they relate to all these phases can be accessed at: http://www.corteidh.or.cr/seriec_ing/index.html. Date accessed: 19 November 2004. From an analysis of this list it is evident that the Court only delivered four judgments on the merits of a case in the first ten years of its existence. From 1980 until September 2004 the Court has delivered 46 judgments in total on the merits of cases.

⁹⁹ Article 63(1) reads as follows: “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”. This is a much broader power to award remedies than that of the European Court of Human Rights, which in essence as outlined above can only award orders of just satisfaction.

“compensate for the harm”.¹⁰⁰ The judgments of the Court are “final and not subject to appeal”.¹⁰¹ Furthermore, in terms of article 68(1) of the Convention, the state parties “undertake to comply with the judgment of the Court in any case to which they are parties”.

Since the judgments of the Court are final and binding and the state parties have undertaken to comply therewith, the question arises as to which institution is to monitor compliance with the Court’s judgments. Despite the Convention not containing a provision similar to article 46(2) of the European Convention on Human Rights, which confers the supervision of the execution of judgments to the Committee of Ministers,¹⁰² the Court has since the delivery of its first judgment taken it upon itself to monitor compliance with its judgments.¹⁰³

The focus of this section is on the procedures developed by the Court to monitor compliance with its judgments, in order to enable it to report to the OAS General Assembly on cases in which a state has not complied with its judgments and to make relevant recommendations to the General Assembly. The Court’s competence to monitor compliance with its judgments was, however, recently challenged by Panama. This was the first time the Court’s competence to monitor compliance with its own judgments was questioned. The Court responded, in a judgment of 28 November 2003,

¹⁰⁰ D Shelton *Remedies in International Human Rights Law* (1999) 173. The issue of remedies will be discussed in more detail in section (d) below.

¹⁰¹ Article 67 of the Convention. This article also provides that the Court can interpret its own judgments at the request of the any of the parties if such request is made within 90 days from the date of notification of the judgment.

¹⁰² See the discussion in section 6.2.3 above. The Inter-American Court confirmed this in its judgment of 28 November 2003 against Panama stating that “[w]hen the American Convention was drafted, the model adopted by the European Convention was followed as regards competent bodies and institutional mechanisms; however, it is clear that, when regulating monitoring compliance with the judgments of the Inter-American Court, it was not envisaged that the OAS General Assembly or the OAS Permanent Council would carry out a similar function to the Committee of Ministers in the European system”. *Case of Baena-Ricardo et al. v Panama* (Competence), Series C I/A Court H.R., No 104, judgment of 28 November 2003, at par 88.

¹⁰³ Article 65 reads as follows: “To each regular session of the General Assembly of the Organisation of American States the Court shall submit, for the Assembly’s consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations”.

by finding that it is competent to monitor compliance with its judgments.¹⁰⁴ Since very few commentators have commented in detail on the Court's procedures regarding the monitoring of compliance with its judgments, the discussions in the following sections are based mainly on the Court's findings in *Baena*. The discussion starts with a brief explanation of the facts that led to the filing of the *Baena (competence)* case nearly two years after the *Baena (workers)* case. This is followed by a brief summary of the main arguments forwarded by the Court in explaining its competence to monitor compliance. Some of the arguments have been grouped together and do not necessarily follow the line of argument as used by the Court. Where available, additional information from commentators is used to supplement the analysis of the Court.

6.3.2 *Baena-Ricardo et al. v Panama*: The arguments underlying the Inter-American Court's competence to monitor compliance with its judgments

(a) Facts in *Baena (workers)* case and *Baena (competence)* case

In order to understand why Panama questioned the Court's competence to monitor compliance with its judgments, it is first necessary to briefly sketch the background to both cases against Panama. On 16 January 1998, the Inter-American Commission referred a case against Panama to the Court, which would become known as the *Baena-Ricardo et al. case (270 workers v Panama)*.¹⁰⁵ The Court had to decide whether Panama violated a number of Convention articles as a result of

[t]he events that occurred as of December 6, 1990, and especially as of December 14 of said year, when Law No 25 was passed [on the basis of which] 270 government employees who had participated in a demonstration for labour right, and who were accused of complicity for perpetrating a military coup, were arbitrarily dismissed. After [the arbitrary dismissal of said workers], in the procedure pertinent to their complaints and demands, a number of violations of their right to the due process and to judicial protection were committed.¹⁰⁶

¹⁰⁴ *Case of Baena-Ricardo et al. v Panama (Competence)*, Series C I/A Court H.R., No 104, judgment of 28 November 2003.

¹⁰⁵ *Case of Baena-Ricardo et al. v Panama (270 workers v Panama)*, Series C I/A Court H.R., No 72, judgment of 2 February 2001.

¹⁰⁶ Par 1 of the judgment of 2 February 2001.

On 2 February 2001, the Court delivered its judgment finding Panama in violation of articles 1(1), 2, 8(1), 8(2), 16, and 25 of the Convention.¹⁰⁷ The Court's judgment further included detailed orders on reparations and costs issued in terms of article 63(1) of the Convention.¹⁰⁸ Lastly, the Court also declared that it "decided that it shall supervise compliance with the judgment and that it shall close the case only after such compliance".¹⁰⁹

As part of the Court's supervision of compliance by Panama with this judgment, the following steps were taken: (1) The Court received briefs concerning compliance with the judgment from the state, Inter-American Commission, the victims and their legal representatives, and the Ombudsman of Panama.¹¹⁰ (2) Meetings were held at the seat of the Court between the various role players.¹¹¹ (3) On 21 June 2002, the Court issued a first Order on compliance with the judgment, requesting a report from the state indicating the steps it has taken and requesting the victims or their representatives and

¹⁰⁷ Repeated in par 3 of the judgment of 28 November 2003.

¹⁰⁸ The Court issued the following orders as to reparations and costs: The Court: (1) "Decided that the state must pay to the 270 workers mentioned in paragraph 4 of the judgment, the amounts that correspond to unpaid salaries and other labour rights applicable according to its legislation, which payment must, in the case of deceased workers, be made to their beneficiaries. In accordance with the pertinent national procedures, the state shall fix the respective indemnification, in order for the victims and, if applicable, their beneficiaries, to receive it within a maximum term of 12 months from the date of notification of the judgment. (2) Decided that the state must reinstate the 270 workers mentioned in paragraph 4 of the judgment in their positions, and should this not be possible, that it must provide employment alternatives where the conditions, salaries and remunerations that they had at the time that they were dismissed are respected. In the event that, likewise, the latter is not possible, the state shall proceed to pay the indemnity that corresponds to the termination of employment, in conformity with the internal labour law. In like manner, the state shall provide pension or retirement payment as applicable to the beneficiaries of victims who may have passed away. The state shall comply with the obligations established in this operative item within a maximum term of 12 months from the date of notification of the judgment. (3) Decided, for the sake of equitableness, that the state must pay each of the 270 workers mentioned in paragraph 4 of the judgment the amount of US\$3,000 (three thousand US dollars) for moral damages. The state shall comply with the obligations established in this operative item within a maximum term of 90 days from the date of notification of the judgment. (4) Decided, for the sake of equitableness, that the state must pay the group of 270 workers mentioned in paragraph 4 of the judgment the amount of US\$100,000 (one hundred thousand US dollars) as reimbursement for expenses generated by the steps taken by the victims and their representatives, and the amount of US\$20,000 (twenty thousand US dollars) as reimbursement for costs, from internal proceedings and the international proceeding before the Inter-American protection system. These amounts shall be paid through the Inter-American Commission on Human Rights". Repeated in par 3 of the judgment of 28 November 2003.

¹⁰⁹ Repeated in par 3 of the judgment of 28 November 2003.

¹¹⁰ Paras 4-7 of the judgment of 28 November 2003.

the Inter-American Commission to comment thereon.¹¹² (4) On 22 November 2002, the Court issued a second Order on compliance with the judgment requesting another more detailed report from the state.¹¹³ (5) On 6 June 2003, the Court issued a third Order requesting a detailed report on compliance from the state party.¹¹⁴ (6) On 30 July 2003, Panama forwarded a brief to the Court outlining several objections to the competence of the Court to monitor compliance with its judgments.¹¹⁵

Responding to these objections raised by Panama, the Court delivered judgment on 28 November 2003. The main arguments and findings of the Court are highlighted below. The Court not only came to the conclusion that it has the competence to continue monitoring full compliance with the judgment of 2 February 2001 against Panama, but also that it has the authority to do so in relation to all its other judgments.¹¹⁶

(b) Legal framework for monitoring compliance

According to the Inter-American Court, articles 33, 62(1), 62(3), 65 and 29(a) of the American Convention, as well as article 30 of the Statute of the Court and article 31(1) of the 1969 Vienna Convention on the Law of Treaties, form the legal framework on which to base its competence to monitor compliance with its decisions.¹¹⁷ In particular, the

¹¹¹ Paras 8- 11 of the judgment of 28 November 2003.

¹¹² Par 12 of the judgment of 28 November 2003. It must be noted that Panama complied with this Order within the time limit stipulated in the Order (par 13).

¹¹³ Par 21 of the judgment of 28 November 2003. In responding to the second Order of the Court which included provisions in addition to that stated in the original judgment, such as that “the state may not impose any existing or future tax, including income tax, on the compensation paid to the 270 victims or their successors”, Panama stated “that the stage of monitoring compliance with judgment is a ‘post-judgment’ stage that ‘is not included in the norms that regulate the jurisdiction and the procedure of the Court’, and that in the Order of November 22, 2002, the Court interpreted its own judgment of February 2, 2001” (Par 26 of the judgment).

¹¹⁴ Par 37 of the judgment of 28 November 2003.

¹¹⁵ For a summary of the state’s objections see par 54 of the judgment of 28 November 2003. The Commission (par 55), legal representatives of the victims (par 56) and victims (par 57) commented on the state’s arguments.

¹¹⁶ See paras 128 to 138 for the conclusions drawn in this case.

¹¹⁷ Article 33(b) of the Convention lists the Court as one of the organs which shall have competence to measure the fulfillment of the commitments undertaken by the state parties. Article 62(1) and (3) refer to the declarations or special agreements through which the state parties accept the contentious jurisdiction of the Court as binding upon them. Article 65 refer to the power of the Court to submit reports to the General Assembly of the OAS a report specifying those cases in which a state has not complied with the Court’s judgments accompanied by the Court’s recommendations to the General

Court reasoned that in adopting article 65 during the drafting of the Convention, the state parties intended to grant the Court the authority to monitor compliance with its decisions.¹¹⁸ The Court based its argument on the fact that it would not be possible to inform the OAS General Assembly of non-compliance by states if it was not, in the first place, meant to determine the status of compliance by monitoring it.¹¹⁹

(c) State obligations to implement the decisions of the Court

As mentioned above, the judgments of the Court are binding and not subject to appeal and states undertake to comply with the judgments of the Court to which they are parties.¹²⁰ The Inter-America Court in *Baena* highlighted the state's obligations to comply with its judgments as flowing from the principle of *pacta sunt servanda* according to which a "state must comply with its international treaty body obligations in good faith" and it "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".¹²¹ The Court further argued that state parties not only have an obligation to guarantee compliance with treaty provisions but also with their effects (*effet utile*). This obligation applies not only to the substantive norms of human rights treaties but also to the procedural norms such as those embodied in articles 67 and 68(1) which refer to compliance with the Court's judgments.¹²²

Assembly in this regard. Article 29(a) determines that "no provision of this Convention shall be interpreted as permitting any state party, group or person to suppress the enjoyment or exercise of the rights and freedoms recognised in this Convention or to restrict them to a greater extent than is provided for herein". Article 30 of the Statute of the Court is in essence the same as article 65 of the Convention. Article 31(1) of the Vienna Convention states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Section D paras 84 to 104 of the judgment of 28 November 2003 deals with the Court's arguments on the legal grounds for monitoring compliance with its judgments).

¹¹⁸ Par 90 of the judgment of 28 November 2003.

¹¹⁹ As above.

¹²⁰ In terms of articles 67 and 68(1) of the American Convention.

¹²¹ Par 61 of the judgment of 28 November 2003.

¹²² Par 66 of the judgment of 28 November 2003.

(d) Scope of the competence of the Court to determine its own competence and order remedial measures

By alleging that the Inter-American Court did not have the competence to monitor compliance with its own judgments, Panama stated the following:¹²³

It is not possible for the Court, through its constant practice, to extend unilaterally its jurisdictional function to create a monitoring function with regard to its judgments, counter to the provisions of the Convention and its Statute, instead of submitting to the OAS General Assembly its “proposals and recommendations” on “improvements [...] insofar as they concern work of the Court. Neither can the Court create this function under criteria of its *compétence de la compétence* ... The *compétence de la compétence* of an international tribunal refers to the jurisdictional power to decide the matter in dispute, the case before the court, and not to issue subsequent ‘decisions’ that counteract directly the *res judicata* effect of the judgment on merits in the case.

The Inter-American Court, in rejecting the allegations of Panama, made the following counter argument:¹²⁴

The Court, as any body with jurisdictional functions, has the authority inherent in its attributions to determine the scope of its own competence (*compétence de la compétence/ Kompetenz-Kompetenz*) ... An objection or any other action of the state intended to affect the competence of the Court has no consequence, because, in all circumstances, the Court retains the *compétence de la compétence*, as it is master of its own jurisdiction.

The Court made it clear that the monitoring of compliance with its judgments fell within “the authority inherent in its jurisdictional functions”.¹²⁵ To argue otherwise would mean that compliance with its judgments was completely within the discretion of state parties which in turn would weaken the protection of human rights in the Inter-American system. The effectiveness of the protection awarded by the Inter-American Court is wholly dependent on state compliance with the Court’s judgments.¹²⁶

¹²³ Paras 54 (c) and (q) of the judgment of 28 November 2003.

¹²⁴ Par 68 of the judgment of 28 November 2003.

¹²⁵ Paras 128 and 132 of the judgment of 28 November 2003.

¹²⁶ Par 129 of the judgment of 28 November 2003.

It must be noted that Panama did not question the reparations ordered by the Court in the *Baena (workers)* case, but specifically questioned the Court's competence to monitor the implementation of the measures ordered by the Court. As mentioned above, the Court has wide remedial powers under article 63(1) and has applied these powers to award "pecuniary and non-pecuniary damages, granting both monetary and non-monetary remedies".¹²⁷ From the Court's reasoning it is apparent that it views its judgments as not merely declaratory in nature, as is the case with the judgments of the European Court.¹²⁸ The Inter-American Court finds a state in violation of the Convention, it continues and "orders the adoption of a series of measures of reparation to make the consequences of the violation cease, guarantee the violated rights, and repair the pecuniary and non-pecuniary damage produced by the violations".¹²⁹

It is therefore apparent that the Court has wide remedial powers and that it has been innovative in applying these powers. No state has thus far questioned the scope of the reparations ordered by the Court.¹³⁰ This does not mean that the Court's judgments were always complied with within the deadlines set by the Court.¹³¹ Article 68(2) of the

¹²⁷ Shelton (1999) 173.

¹²⁸ See the discussions in section 6.2.2 above.

¹²⁹ Par 83 of the judgment of 28 November 2003.

¹³⁰ An example of where the Court applied article 63(1) "innovatively" is the case of *Aloeboetoe et al. v Suriname* (Judgment of 10 September 1993 (reparations) Series C, I/A Court H.R., No. 15). In this case most of the victims that died at the hands of government soldiers left wives and children behind. In ordering reparations, "which were such as to place the dependants of the deceased to a large degree in the *status quo ante*", the Court did not only award monetary damages to the victim's dependents but also ordered the government to re-open and staff the local school and medical dispensary for the benefit of the victim's children. In addition the Court also ordered the creation of a foundation to manage the compensation awarded to the beneficiaries to their best interests. 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 *The African Society of International and Comparative Law – Tenth Annual Conference* 67-68.

¹³¹ State parties are usually expected to comply with the reparations ordered within six months from the date of the delivery of the judgment. The Government of Honduras for example is often referred to because it delayed payment of the compensation ordered in [*Velásquez-Rodríguez v Honduras* (compensatory damages) No. 7 and *Godínez-Cruz v Honduras* (compensatory damages) No. 8, judgments of 21 July 1989, Series C, I/A Court H.R.] and when it did eventually make the payments it refused to pay the interest ordered by the Court and the additional amount that came about as a result of the devaluation of its currency whilst it was delaying payment. Honduras, after a further delay, did however make the full payments. See the discussions in JM Pasqualucci 'Victim reparations in the Inter-American Human Rights System: A critical assessment of current practice and procedure' (1997) 18 *Michigan Journal of International Law* 56 and D Cassel 'Inter-American human rights law, soft and hard' in D Shelton (ed) *Commitment*

Convention is intended to give some guidance to state parties as to the execution of compensatory awards in the domestic legal system.¹³² Naldi and Magliveras have however described this provision as “unsatisfactory to the extent that national procedural law may restrict significantly or even prohibit the execution of such judgments against the state”.¹³³

(e) Procedure applied by the Court to monitor compliance with its decisions

It has already been mentioned above that the American Convention does not contain a provision similar to that of article 46(2) of the European Convention or article 29(2) of the Protocol establishing an African Court.¹³⁴ In other words, the American Convention does not provide for the supervision of the Court’s decisions by the Permanent Council of the OAS and although article 65 provides for a role for the General Assembly this is not the same as is provided for in the European system or in the proposed African system.¹³⁵ Therefore, the Inter-American Court, ever since it issued its first judgment, took it upon itself to fulfil this supervisory role in order to enable it to specify to the General Assembly under article 65, the cases in which a state has not complied with its judgments.¹³⁶

The procedures to be followed by the Court in monitoring compliance with its decisions are not spelled out in the American Convention, the Statute of the Court or in its Rules of Procedure.¹³⁷ The Court develop its own procedures, which it has applied consistently in following up on all the judgments issued by it and these are briefly summarised here.¹³⁸

and Compliance – The Role of Non-Binding Norms in the International Legal System (2000) 416.

¹³² Article 68(2): “That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state”.

¹³³ GJ Naldi & K Magliveras ‘The proposed African Court of Human and Peoples’ Rights: Evaluation and comparison’ (1996) 8 *African Journal of International and Comparative Law* 963.

¹³⁴ Article 46(2) of the European Convention reads as follows: “The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution”. Article 29(2) of the Protocol establishing an African Human Rights Court reads as follows: “The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly”.

¹³⁵ The role of the General Assembly is discussed in more detail in section (g) below.

¹³⁶ Par 114 of the judgment of 28 November 2003.

¹³⁷ Par 105 of the judgment of 28 November 2003.

¹³⁸ The Court has applied these procedures consistently since it delivered its first judgment on reparations in 1989. Par 107 of the judgment of 28 November 2003.

It are these procedures that form part of the Court's established practice that Panama questioned in referring to the Court's the question of its own competence to monitor compliance with its judgments.¹³⁹

The Inter-American Court follows what it calls a "written procedure" in monitoring compliance.¹⁴⁰ This consists of the Court requesting reports on compliance from the respondent state. These reports are made available to the Inter-American Commission and the victims or their legal representatives for comments.¹⁴¹ The Court has further adopted the "constant practice of issuing orders or sending communications" to the respondent state for one or more of the following reasons:¹⁴²

- "to express its concern in relation to aspects of the judgment pending compliance;
- to urge the state to comply with the Court's decisions;
- to request detailed information on the measures taken to comply with specific measures of reparation;
- to provide instructions for compliance;
- to clarify aspects relating to execution and implementation of the reparations about which there is a dispute between the parties".

The Court has justified its written procedure on the basis of the following built-in guarantees: (1) The process is in line with adversarial principles since all the parties to the case can "provide the Court with all the information they deem relevant concerning compliance with the Court's decisions". (2) The Court does not proceed to issue an

¹³⁹ Panama in its submission to the Court made the following statement: "The invitation that the Court sends to the state parties by regular correspondence is different from the insistence with which it has requested the Panamanian State to submit information, by means of Orders that are presented as the result of the monitoring function that is not established in either the American Convention or the Statute of the Court. It regretted learning *ex post facto* about the procedure applied by the Court, which led it to issue Order of November 22, 2002, and June 6, 2003" (Par 54(i) of the judgment of 28 November 2003).

¹⁴⁰ Par 105 of the judgment of 28 November 2003. Before discussing any of the follow-up steps taken by the Court it must be mentioned that the Court's first practice in monitoring compliance is the inclusion in its judgments of a final sentence that declares its intention to monitor compliance with the judgment. The final paragraph in the *Baena* judgment of 2 February 2001 for instance stated that the Court "decided that it shall supervise compliance with the judgment and that it shall close the case only after such compliance".

¹⁴¹ Par 105 of the judgment of 28 November 2003.

¹⁴² As above.

order or communication or take any other actions in monitoring compliance without first having examined the reports and comments presented by all parties.¹⁴³ However, in *Baena* the Court also made it clear that even though a public hearing on compliance with its judgments has never taken place in the past, it does not exclude the possibility for such hearings to take place in future should the Court consider its essential.¹⁴⁴

In addition to the above, the Court has also held meetings, at the seat of the Court, on compliance with its judgments. Separate meetings are held with the representatives of the state party followed by meetings with the victims or their legal representatives.¹⁴⁵ The procedures followed by the Court in relation to its Annual Reports to the General Assembly and its recommendations to the General Assembly are discussed in detail in the following section. Lastly, it must also be mentioned that the Court does not stop monitoring compliance with its decisions until there has been full compliance at which stage the Court then issues a final order declaring that the case can be filed.¹⁴⁶

(f) Acceptance by states of the Court’s practice of monitoring compliance with its own decisions

Not only has the Court developed a “constant practice” in monitoring compliance with its judgments, but state parties for their part have accepted and participated in these procedures through the submission of reports on compliance as requested by the Court and ultimately through full compliance with the Court’s judgments. In this regard the Court held in *Baena* that its

¹⁴³ Par 106 of the judgment of 28 November 2003.

¹⁴⁴ Par 106 of the judgment of 28 November 2003. The possibility of holding public hearings on compliance seems all the more likely since the follow-up procedures adopted by the Inter-American Commission specifically provide for public hearings as part of follow-up to their recommendations. See the discussions in section 5.3 of chapter 5.

¹⁴⁵ In monitoring compliance with the *Baena (workers)* case the Court first held a meeting attended by the President and Vice President of the Court, two officials of the Secretariat of the Court and representatives of Panama. This was followed by meetings with victims and the Center for Justice and International Law which represented some of the victims. See paras 8-11 of the judgment of 28 November 2003.

¹⁴⁶ For instance in the Court’s Annual Report for 2003, under the heading “Full compliance with the judgments of the Court”, the Court reported as follows: “In ‘The Last Temptation of Christ’ case (*Olmedo Bustos et al. v Chile*) the Court issued an Order in which it decided to order that the case be filed because the state of Chile had complied fully with the reparations ordered by the Court in this case (Appendix XXXVII)”. 2003 Annual Report of the Inter-American Court of Human Rights, OEA/Ser.LV/III.61, section E par 1.

[a]uthority to monitor compliance with its judgments and the procedure adopted to this end, are also grounded in the constant and standard practice of the Court and in the resulting *opinio juris communis* of the states parties to the Convention, with regard to whom the Court has issued various orders on compliance with judgment. The *opinio juris communis* means the expression of the universal juridical conscience through the observance, by most of the members of the international community, of a determined practice because it is obligatory. This *opinio juris communis* has been revealed because states have shown a general and repeated attitude of accepting the monitoring function of the Court.¹⁴⁷

Although it eventually questioned the Court's competence to monitor compliance, Panama presented various briefs on compliance with the *Baena* judgment.¹⁴⁸ It also presented a report on compliance, within the time limit stipulated by the Court, in response to the Court's first order of 21 June 2001.¹⁴⁹ It was only two years after the delivery of the judgment and after Panama had already participated in the monitoring process of the Court that it first questioned the Court's competence.¹⁵⁰ This behaviour on the part of the state led the Court to conclude that "there is no doubt that the state's conduct reveals that it recognised the Court's competence to monitor compliance with its decisions".¹⁵¹

(g) Role of the OAS General Assembly in monitoring compliance with the Court's judgments

The only provision in the American Convention that refers to state compliance with the Court's judgments, apart from the undertaking given by states in article 68(1) to comply therewith, is article 65. Article 65 provides as follows:

To each regular session of the General Assembly of the Organisation of American States the Court shall submit, for the Assembly's consideration, a report on its work during the

¹⁴⁷ Par 102 of the judgment of 28 November 2003.

¹⁴⁸ Par 117 of the judgment of 28 November 2003. Panama presented 14 briefs on compliance with the Court's judgment before it started questioning the Court's competence (par 121).

¹⁴⁹ Par 118 of the judgment of 28 November 2003.

¹⁵⁰ Par 121 of the judgment of 28 November 2003. The Court reported that Panama even in the briefs in which it questioned the Court's competence still reported on the measures it had already taken to implement the Court's decision. Panama also requested meetings at the seat of the Court with members of the Court which did take place (Paras 122 and 123).

previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

According to Buergenthal, this provision “enables the Court to inform the OAS General Assembly of situations involving non-compliance with its decisions, and it permits the Assembly to discuss the matter and to adopt whatever political measures it deems appropriate”.¹⁵²

In questioning the Court’s competence to monitor compliance, one of Panama’s main arguments was that the monitoring of compliance with a judgment “is a post-judgment stage that does not fall within the judicial sphere of the Court, but strictly within the political sphere, which, in this case “is exclusive to the General Assembly of the Organisation of American States”.¹⁵³ In response to this contention, the Court emphasised the fact that it had from the beginning not only informed the General Assembly about the procedures followed to monitor compliance, but also about the status of compliance in each case decided by the Court.¹⁵⁴ It therefore reasoned that if the competence to monitor compliance was exclusive to a political body, then the General Assembly, as the main political body of the OAS, would sometime in the course of almost 14 years have ruled in that regard.¹⁵⁵

From the established practice with regard to the supervision of the execution of the judgments of the Inter-American Court it is clear that it is the Court which monitors compliance. The Court then reports, in its Annual Reports, to the General Assembly on the status of state compliance, specifically non-compliance, with the Court’s judgments. At the same time, it is the Court that in terms of article 65 makes recommendations to the General Assembly regarding those cases where states have not complied with the Court’s decisions. It is then up to the General Assembly to adopt recommendations or

¹⁵¹ Par 127 of the judgment of 28 November 2003.
¹⁵² Buergenthal (1985) 71.
¹⁵³ Par 54(a) of the judgment of 28 November 2003.
¹⁵⁴ Par 110 of the judgment of 28 November 2003.
¹⁵⁵ As above.

resolutions to exert political pressure on state parties to comply with the Court's judgments.¹⁵⁶

In the Court's Annual Reports a separate section is devoted to "Monitoring compliance with judgments and of implementation of provisional measures".¹⁵⁷ In this section the Court starts out by explaining the steps it follows in monitoring compliance. The Court identifies three categories of compliance, namely, "full compliance with the judgments of the Court", "partial compliance with the judgments of the Court and application of article 65 of the American Convention" and "lack of compliance with the obligation to report to the Court".¹⁵⁸ It is in regard to the last two categories that the Court also makes recommendations to the General Assembly, asking it to either require state parties to comply fully with its judgments or to require a state party to inform the Court as to the measures adopted to comply with its judgment.

The inclusion of such a detailed section on compliance in its Annual Report complies with the stipulations of article 65, guides the General Assembly to exert political pressure and in itself serves to mount peer pressure on non-compliant states. The Court's decisions, Annual Reports and orders on compliance are also available on its website.¹⁵⁹

6.3.3 Best practice examples for the African Court based on the experiences of the Inter-American Court's practice of monitoring compliance with its own judgments

In the Inter-American regional human rights system the Inter-American Court was established nearly twenty years after the Inter-American Commission.¹⁶⁰ Similarly, within the African regional human rights system a process is now under-way to establish an African Human Rights Court nearly seventeen years after the establishment of the

¹⁵⁶ For examples of some of the instances in which the General Assembly has adopted recommendations or resolutions in response to the recommendations formulated by the Court in its Annual Reports see paras 111-113 of the judgment of 28 November 2003.

¹⁵⁷ See for instance the 2003 Annual Report of the Inter-American Court of Human Rights, OEA/Ser.L/V/III.61, section E par 1.

¹⁵⁸ As above.

¹⁵⁹ The Inter-American Court's website is available at: <http://www.corteidh.or.cr>.

¹⁶⁰ The Inter-American Commission was established in 1960, see the discussion in section 5.3 of chapter 5. The Inter-American Court was established in 1979, see the discussion in section 6.3.1 above.

African Commission.¹⁶¹ The political and socio-economic realities of the Inter-American system also have much more in common with the African system than with the European system.¹⁶² It is against this background that Viljoen concluded that “[s]imilar tensions as in the Inter-American system may be expected, [as in the African system] and should be anticipated and planned for”.¹⁶³ An integral part of planning ahead in the African system should focus on the execution of the judgments of the future Court, especially if viewed against the lack of state compliance with the recommendations of the African Commission.¹⁶⁴ In this regard the Inter-American system could definitely influence the decisions to be made within the African system. Although state compliance with the Inter-American Commission’s recommendations has also been poor, states have regularly complied with the Court’s orders “requiring essentially the same actions they eschewed when recommended by the Commission”.¹⁶⁵

Even though the supervision of the execution of the judgments of the African Court will be the duty of a political body and in the Inter-American system this role is fulfilled by the Court itself, there are still some best practice examples that may be drawn from the experience of the Inter-American Court that will also hold true for the African Court.¹⁶⁶ Some of the monitoring procedures as developed by the Inter-American Court, over more than a decade of monitoring compliance with its own judgments, are briefly summarised here as it could guide the African Court in the development of its Rules of Procedure. More comparisons between the actual provisions of the American Convention and that of the Protocol will be drawn in the next section, where the discussion will focus specifically on the African Court.

¹⁶¹ The African Commission was established in 1987 after the entry into force of the African Charter on Human and Peoples’ Rights whilst the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights only entered into force in January 2004.

¹⁶² See the discussions in section 5.3 of chapter 5.

¹⁶³ F Viljoen ‘The relevance of the Inter-American Human Rights System for Africa’ (1999) 11 *African Journal of International and Comparative Law* 669.

¹⁶⁴ See the tables in chapter 2 for an overview of the overall lack of state compliance with the African Commission’s recommendations.

¹⁶⁵ Cassel (2000) 416.

¹⁶⁶ In terms of article 29(2) of the Protocol the Council of Ministers of the OAU (now the Executive Council of the AU) is mandated to supervise the execution of the Court’s judgments. This provision is based on the established practice in the European system where the execution of the European Court’s judgments is supervised by the Committee of Ministers in terms of article 46(2) of the European Convention.

However, even if the Protocol assigns the supervision of the execution of the African Court's judgments to the Executive Council, there is nothing prohibiting the Court itself to monitor compliance with its judgments analogous to the role fulfilled by the Inter-American Court.¹⁶⁷ The African Court will not only be in the best position to decide whether a state party has actually fulfilled the legal requirements to fully comply with its judgments but it will also greatly lighten the burden on the Executive Council which until now has never played any significant role in the African human rights system.¹⁶⁸ Such a move will not only have its roots in the Inter-American system but also in the European for as the Inter-American Court indicated in its *Beana (competence)* case, the possibility of the European Court monitoring compliance with its judgments in addition to the role fulfilled by the Committee of Ministers is currently being considered.¹⁶⁹ Another argument in favour of the African Court developing its own monitoring capacity is the fact

¹⁶⁷ Indeed, article 31 of the Protocol establishing an African Human Rights Court is similar to article 65 of the American Convention in that it provides for the African Court to submit Annual Reports to the Assembly of Heads of State and Government of the AU and to specifically indicate "cases in which a state has not complied with the Court's decisions". Article 65 forms the basis on which the Inter-American Court has argued that in order for it to report to the General Assembly of the AU on non-compliance with its judgments it has to monitor compliance in the first place. Murray seems to support such a view stating that article 31 of the Protocol could "perhaps" be interpreted as "giving the impression that the Court will retain some role in its enforcement itself" (R Murray 'A comparison between the African and European Courts of Human Rights' (2002) 2 *African Human Rights Law Journal* 217 fn 129).

¹⁶⁸ During the second Ordinary Session of the African Union the Assembly of the Union adopted a decision instructing the Executive Council to consider the Annual Activity Reports of the African Commission submitted to the Assembly under article 59(2) of the African Charter (see Decision of the Assembly of the AU, second Ordinary Session, 10-12 July 2003, Maputo, Mozambique DOC.Assembly/AU/7(II)). This led to the first documented debate on the adoption of the 17th Annual Activity Report of the Commission. Whereas the Annual Reports of the Commission were previously merely rubber stamped without debate by the Assembly of Heads of State and Government of the OAU, the 17th Report was surrounded by controversy as it included a report on a visit undertaken by the Commission to Zimbabwe. Although the debate resulted in the Commission's report not being adopted for the first time, until the Government of Zimbabwe was given an opportunity to analyse the mission report, it should still be seen as a positive development that the Executive Council is taking note of the Commission's work.

¹⁶⁹ See par 86 fn 55 of the judgment of 28 November 2003, where the Inter-American Court reported that "[W]ithin the framework of the European Convention on Human Rights, the provisions transcribed above, granting competence to the Committee of Ministers of the Council of Europe to monitor compliance with the judgments of the European Court, is currently being reconsidered, in the sense of authorizing this Court to intervene in that respect, and the way is being opened to the idea that the European Court should also play an active role in monitoring compliance with its judgments".

that the Court is more than likely going to deal with very few cases initially.¹⁷⁰ In the Inter-American system individuals do not have direct access to the Inter-American Court and as a result the Court only dealt with one contentious case in its first six years of existence, and over the past twenty years it has only decided 46 cases on the merits.¹⁷¹ The point to be made here is that the African Court, like the Inter-American Court, is not likely to be flooded with cases and will be able to monitor compliance with its judgments without any negative effect on its productivity.¹⁷²

In brief, the procedures which the African Court could consider as adopted by the Inter-American Court in monitoring compliance with its judgments can be summarised in the following steps:¹⁷³

- The African Court could include a standard paragraph in all judgments stating that a case file will not be closed until there has been full compliance and clearly stating the Court's intention to monitor compliance.
- The Court must attach deadlines to each order made in the judgment.¹⁷⁴
- The Court could request reports, within specific given time frames, from the state parties on the steps taken to comply with a judgment.
- Similar to the Inter-American Court, the African Court should request comments on the reports received from state parties from the Commission, the victims or their legal representatives.
- The African Court may further issue orders to state parties to fulfil any of the following functions: requesting information on compliance, urging a state party to

¹⁷⁰ Individuals will only have direct access to the African Court if the corresponding state party has made a declaration to that effect under article 34(6) of the Protocol.

¹⁷¹ A list of all the Court's judgments on the merits can be accessed at: http://www.corteidh.or.cr/seriec_ing/index.html. Date accessed: 19 November 2004. The case load of the European Court, where individuals have direct access, stands in stark contrast to that of the Inter-American Court. In 2001 the European Court reported that the number of applications registered with the Court stood on 13, 858 for that year alone. See 'The European Court of Human Rights – Historical background, organization and procedure' available at: <http://www.echr.cor.int/Eng/EDocs/HistoricalBackground.htm>. Date accessed: 29 September 2004.

¹⁷² Article 30 of the Protocol could further imply a role for the Court itself in monitoring execution of its judgments. Article 30 refers to the execution of judgments within "the time stipulated by the Court". It would therefore seem that the Court would be setting time frames for compliance.

¹⁷³ This is a summary of the discussion in subsection (e) above.

comply or instructing a state party on how to implement specific aspects of the judgment.

- The African Court could schedule meetings at the request of any of the parties to a case.
- Lastly, the African Court could build on the example of the Inter-American Court by monitoring compliance until there has been full compliance.

Lastly, it must also be mentioned that there are no sanctions available in the Inter-American system should a state party not comply with the judgments of the Court.¹⁷⁵ The only real avenue to pursue is to appeal to the OAS General Assembly through the article 65 procedure and recommend to it to adopt resolutions or recommendations to urge specific state parties to comply. It seems that the Inter-American Court has also tried to ensure that its work and findings are accessible to the public in an effort to mount public shame and political pressure on non-compliant state parties. In its Annual Reports, the Court categorises the levels of state compliance. Where state parties have not complied or have not provided the Court with information on the steps taken to implement its decisions, this is clearly indicated and accompanied by recommendations for the attention of the General Assembly. These measures are all aimed at mounting political pressure on non-compliant state parties, the only real enforcement mechanism available to the Court.

¹⁷⁴ Article 30 of the Protocol should be developed further in the Court's Rules of Procedure, to provide for example that time frames for compliance are always stipulated (See fn 172 above).

¹⁷⁵ In the European system, although never invoked, the Committee of Ministers could suspend or expel a state party under article 8 of the Statute of the Council of Europe if found in violation of article 3 of the Statute. See the discussion in section 6.2.3 (a) above.

6.4 Supervising the execution of the judgments of the African Court on Human and Peoples' Rights

6.4.1 Establishment of the African Court on Human and Peoples' Rights

As the youngest of the three regional human rights systems the African system, as established in terms of the African Charter on Human and Peoples' Rights (African Charter), is also the last to establish a human rights court. This is the case even though the setting up of an African Court was recommended as far back as 1961 as part of the declaration that came to be known as "The Law of Lagos", which was produced at a conference organised by the International Commission of Jurists.¹⁷⁶ Almost twenty years later, during the drafting of the African Charter, a group of experts again considered the possibility of establishing an African Court but decided against it "since it felt that the time was not opportune and member states were not likely to accept the idea at the time".¹⁷⁷ The African Charter came into force in 1986 and the African Commission on Human and Peoples' Rights (African Commission) was established in 1987, as the only body charged with the implementation of the Charter.

It was only in the 1990's, after many African states adopted new Constitutions and moved closer to embracing democratic principles of good governance and human rights that the issue of an African Court was raised again.¹⁷⁸ In 1994, during the 30th Ordinary Session of the Assembly of Heads of State and Government (Assembly) of the Organisation of African States (OAU), a resolution was adopted,¹⁷⁹ which amongst other issues requested the OAU Secretary-General

[t]o convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of

¹⁷⁶ *Report on the progress made towards the establishment of an African Court on Human and Peoples' Rights*, OAU Ministerial Conference on Human Rights, 1999 Grand Bay, Mauritius, MIN/CONF/HRA/4(I), par 8.

¹⁷⁷ *Report on the progress made towards the establishment of an African Court on Human and Peoples' Rights*, par 8.

¹⁷⁸ South Africa, Namibia, Burkina Faso, Chad, Comoros, Malawi and Mozambique are but a few examples of states that adopted new Constitutions during the 1990's.

¹⁷⁹ AGH/Res.230 (XXX).

the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights.¹⁸⁰

Pursuant to this resolution a drafting process commenced. Four years later, this process resulted in the adoption, by the OAU Assembly of Heads of State and Government at its 34th Ordinary Session in June 1998, 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).¹⁸¹

After the adoption of the Protocol in June 1998, it was opened for signature and thirty OAU member states signed it.¹⁸² In terms of article 34 of the Protocol, fifteen ratifications were required for it to enter into force. The fifteenth instrument of ratification was deposited five years later, when the Comoros ratified the Protocol on 26 December 2003. A month later, on 25 January 2004, and nearly a decade after the first draft Protocol was considered in Cape Town, the Protocol entered into force.¹⁸³

While the process to establish an African Court within the regional human rights system was ongoing, the OAU made way for the establishment of the African Union (AU) when

¹⁸⁰ *Report on the progress made towards the establishment of an African Court on Human and Peoples' Rights*, par 10. See also the Preamble to the Protocol.

¹⁸¹ In the Preamble to the Protocol the drafting process is briefly noted as having consisted of three meetings of government legal experts, the last of which was enlarged to include diplomats. The first meeting took place in Cape Town, South Africa in 1995, the second draft Protocol was the result of a meeting in April 1997 in Nouakchott, Mauritania, and the third meeting was held in Addis Ababa, Ethiopia, in December 1997. Harrington, however, highlighted the fact that non-governmental organisations also played an active role in the drafting process and although it is not mentioned anywhere, by the OAU General Secretariat, the draft Protocol submitted to the first meeting of government experts was the product of a meeting of non-governmental experts that preceded it (J Harrington 'The African Court 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) 308). For detailed accounts of the drafting process see 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 VO Nmehielle *The African Human Rights System – Its Laws, Practice and Institutions* (2001) 255.

¹⁸² *Report on the progress made towards the establishment of an African Court on Human and Peoples' Rights*, par 37.

¹⁸³ As at December 2004, 43 states have signed the Protocol and 19 states have ratified it. The 19 states are: Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Gabon, Gambia, Libya, Lesotho, Mali, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo and Uganda. For an update on the status of ratification of this Protocol visit the AU website at: <http://www.africa-union.org/home/Welcome.htm>. Date accessed: 29 November 2004.

the Constitutive Act of the African Union was adopted in July 2000.¹⁸⁴ As already discussed in chapter 3, the Constitutive Act did not include the African Commission or the upcoming African Court amongst its principal organs.¹⁸⁵ The African Court of Justice (ACJ) was however included amongst the principal organs of the AU even though it was not yet established at the time.¹⁸⁶ The Protocol of the Court of Justice of the African Union (ACJ Protocol) was adopted by the AU Assembly during its second session in July 2003.¹⁸⁷ The ACJ Protocol also requires fifteen ratifications to enter into force.¹⁸⁸ Of significance for the establishment of the African Court on Human and Peoples' Rights (ACtHPR) was the decision, taken by the 3rd Assembly of Heads of State and Government of the African Union in July 2004, to integrate the ACtHPR and the ACJ. The "modalities" of this decision are to be worked out before the next session in January 2005.¹⁸⁹ It is therefore not yet clear what this decision would amount to in practice, whether the two Courts will merely share a building, library and resources or whether the ACtHPR would be a Chamber of the ACJ and whether this would require amendments to their founding instruments or a new Protocol all together.¹⁹⁰ With regard to the

¹⁸⁴ For a detailed discussion of the OAU and AU in relation to the African human rights system see chapter 4. The AU held its first Ordinary Session in July 2002.

¹⁸⁵ Article 5 of the Constitutive Act lists the organs of the AU.

¹⁸⁶ Article 18 of the Constitutive Act determines that the statute, composition and functions of the ACJ would be determined by a protocol.

¹⁸⁷ In terms of article 18 of the ACJ Protocol state parties to the Protocol, organs of the AU, the AU Commission or third parties "under conditions to be determined by the Assembly and with the consent of the state party concerned" may submit cases to the Court. Article 19 sets out the jurisdiction of the ACJ and although it is mainly intended to interpret and apply the Constitutive Act of the AU, Union treaties and all matters related to the AU and its organs it can also hear disputes on "any question of international law". The latter could also include questions of international human rights law. The ACJ is equivalent to the European Court of Justice (ECJ). For a discussion on the overlapping roles between the European Court of Human Rights and the ECJ and their African counterparts see Murray (2002) 207.

¹⁸⁸ As at December 2004, 32 states have signed the Protocol whilst only five states have ratified the ACJ Protocol. For an update on the status of ratification of this Protocol visit the AU website at: <http://www.africa-union.org/home/Welcome.htm>. Date accessed: 29 November 2004.

¹⁸⁹ *Decision on the seat of the organs of the African Union*, Assembly/AU/Dec.45(III), Assembly/AU/Dec 33-45(III), paras 4-5. The overriding motivation of member states in adopting this decision was surely motivated by budget concerns. In chapter 4 it was highlighted that the OAU struggled to fund the African Commission since its inception and this situation has not changed under the AU. By 31 December 2004, the ACtHPR had not been established. The AU Assembly is to meet from 21-31 January 2005 in Abuja, Nigeria. On the agenda are both the election of judges to the ACtHPR and the merging of the ACtHPR and ACJ.

¹⁹⁰ In March 2004 a Coalition for an Effective African Court on Human and Peoples' Rights was formed. This Coalition made a submission to the African Union in October 2004 entitled "Legal and Institutional Issues Arising from the Decision by the Assembly of

Protocol establishing the ACtHPR, it must be noted that the text has not yet been amended to change the references from the OAU and its organs to that of the AU. A detailed discussion of the impact of the AU's decision to merge the two Courts falls outside the scope of this study. It is however briefly mentioned here, as it will surely impact on the future functioning of the ACtHPR. It is accepted for the purpose of this study that the issuing of judgments and the subsequent enforcement thereof, which is the focus of this section, will still apply regardless of the merging of the two institutions.¹⁹¹

One of the main reasons for the establishment of the ACtHPR is to strengthen the regional human rights system under the African Charter, which has often been criticised as a weak system lacking judicial "teeth".¹⁹² In chapter 4 some of the weaknesses that have plagued the proper functioning of the African Commission have been identified

191 Heads of State and Government of the African Union to Integrate the African Court on Human and Peoples' Rights and the Court of Justice of the African Union". This submission deals in detail with some of the legal and practical questions raised by the AU's decision to merge the Courts. The submission can be accessed at: <http://www.africancourtcoalition.org>. Date accessed: 29 November 2004.

191 It is also the view of this author that a delay brought about by this decision in the establishing of the African Court is not necessarily to the detriment of the system. As will become apparent from the discussions that follow the Protocol establishing the ACtHPR is very vague on a number of issues which will have to be clarified by the drawing up of Rules of Procedure. The appointment of the first judges to the Court should therefore not be done in haste as these judges will ultimately determine how conservative or progressive the Court's practice will be. As many authors have highlighted there is currently great confusion amongst member states as to the distinction between the ACHPR and the ACJ and this could affect, amongst other factors, the caliber of judges nominated by state parties to serve on the ACtHPR leading to a situation where human rights experts are not nominated (See Murray (2002) 206 and NB Pityana 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 123). Furthermore, if the experience in other regional human rights systems is anything to go by it will be years before the Court will actually hear cases on a regular basis especially since the relationship between the Commission and Court is not clear at all. As the assistant director of the Project on International Courts and Tribunals put it "African heads of state would be better off discussing in Addis Ababa where the court will be located and, even more critically, how it will be financed, rather than rushing to nominate judges of a forum that is still largely on the drawing board. Africa needs a strong human rights court that commands respect by African states and governments. Fifty years after Europe and 25 years after the Americas, it is about to attain that. To do it right, it can take a few more months" (CPR Romano 'Africa won't have a second chance', *International Herald Tribune*, 27 January 2004).

192 See for instance: Ankumah (1996) 193; Nmehielle (2001) 249; M Mutua 'The African human rights system – A critical evaluation' (2000) 22. Available at: <http://hdr.undp.org/publications/papers.cfm>. Date accessed: 29 November 2004 and M Mutua 'Looking past the Human Rights Committee: An argument for de-marginalising enforcement' (1998) 4 *Buffalo Human Rights Law Review* 253.

while in chapter 2 the lack of state compliance with the Commission’s recommendations upon having found a state party in violation of the African Charter was highlighted. Whether a Court rendering binding judgments will change the lack of state compliance in the African system is highly questionable if there are no measures in place to monitor compliance and to exert pressure on state parties to execute the Court’s judgments. The establishment of the long awaited human rights Court in Africa could be brought into disrepute if state parties do not cooperate with the judgments of the Court. Such a situation could however be avoided if care is taken to ensure that rules and procedures to ensure the execution of the Court’s judgments are in place from the start. The African Court should be guided by the practices of the European and Inter-American Courts as discussed above. In this section, the provisions in the Protocol establishing the ACtHPR that are aimed at ensuring the timely execution of the Court’s judgments are briefly analysed in reference to the experience of the other regional human rights Courts.

6.4.2 Judgments and enforcement: Factors that affect enforcement

The ACtHPR shall consist of eleven judges elected for a period of six years with the option to be re-elected once.¹⁹³ The onus is on the Assembly to ensure that amongst the judges elected there is adequate gender representation and that as a whole the bench is representative of the “main regions in Africa and of their principal legal traditions”.¹⁹⁴ The Court has very wide advisory and contentious jurisdiction.¹⁹⁵ The

¹⁹³ Articles 11 and 15 of the Protocol. Some of the judges elected initially will serve terms of two or four years instead of six years, so as to ensure continuity.

¹⁹⁴ Article 14 of the Protocol.

¹⁹⁵ The contentious jurisdiction of the Court can be found in articles 3 and 7 of the Protocol. It seems that the jurisdiction of the Court is much wider than that of the other regional Courts discussed above, whose jurisdiction is limited to the application of their founding treaties. Article 3 determines that the “jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the states concerned” and article 7 similarly stipulates that “the Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned”. The advisory jurisdiction of the Court is also not limited to the African Charter with article 4 of the Protocol providing that “at the request of a member state of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission”. Whether the Court under its wide jurisdiction will take it upon itself to interpret human rights treaties to which African states are party but which are overseen by treaty bodies within the UN system for instance will remain to be seen. For an in depth discussion on the jurisdiction of the

focus of this section is however only on the judgments rendered by the Court under its contentious jurisdiction. The discussion focuses first on the elements that will directly impact on the execution of the Court's judgments and that have specifically been provided for in the Protocol. Thereafter, three factors that could indirectly affect state compliance, are outlined briefly.

(a) Factors that directly impact on state compliance

In this section the provisions in the Protocol that have the potential, if used vigorously, to ensure the execution of the judgments of the Court, are briefly analysed. The judgments of the Court are to be rendered within 90 days of having completed its deliberations.¹⁹⁶ Judgments are decided by the majority of the Court, but the Protocol makes provision for the delivery of separate or dissenting opinions if a judgment was not adopted unanimously.¹⁹⁷ The judgments of the Court are final and not subject to appeal, although the Court may in terms of its Rules of Procedure review its decisions in the light of new evidence and the Court can also interpret its own decisions.¹⁹⁸

The confidentiality with which much of the Commission's functions has been associated, especially in relation to its findings and recommendations on individual communications, has been highlighted in this study as a factor that greatly inhibited compliance by not attracting any political or international pressure.¹⁹⁹ It seems that the Protocol aims to avoid the same pitfalls by specifically providing that the Court's judgment will be read in open Court and that it shall be transmitted to the parties to the case, member states of

¹⁹⁶ Court see e.g. RW Eno 'The jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223.

Article 28 of the Protocol. During the second government experts meeting held in Nouakchott, Mauritania, in April 1997 it was decided to stipulate a time limit of 90 days within which the Court must deliver judgment upon having completed its deliberations. *Report of the Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights*, 11-14 April 1997, OAU/LEG/EXP/AFCHPR/RPT (2), Annex II CM/2020(LXVI) par 43. Harrington, in describing article 28 as "one of most significant articles of the Protocol", explained that "this provision is clearly designed to address the situation that has arisen with the Commission, where lengthy, unexplained periods occur between the Commission's final hearings in a case and the release of a decision, which can run into years" (Harrington (2002) 325).

¹⁹⁷ Article 28(2) read together with sub-article (7).

¹⁹⁸ Article 28(2) to (4) of the Protocol.

¹⁹⁹ See chapter 4.

the OAU (now AU) and the Commission.²⁰⁰ The wide dissemination of the judgments of the Court will ensure that member states are aware of the work done by the Court and will hopefully pressurise the state party found to have violated the African Charter, a fact that would have been brought to the attention of its peers, to execute the Court's judgments.

Another provision of the Protocol that could potentially places pressure on state parties to execute the Court's judgments timeously is the undertaking, given in accordance with article 30, by each state party upon ratifying the Protocol. Article 30 stipulates that "state parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time limit stipulated by the Court and to guarantee its execution". The Protocol leaves it to the Court to stipulate what it would deem a reasonable time limit for a state party to execute its judgments. It would be recommended that the Court stipulates a time limit in its Rules of Procedure rather than developing a time limit through its practices, as this may vary or develop over a long period and as such could result in long delays before victims receive the relief ordered by the Court.²⁰¹

Before examining the roles to be fulfilled by the bodies responsible for supervising the execution of the Court's judgments, two issues need to be clarified, namely, what would be monitored and how would a state party implement the Court's decisions domestically. In addressing the first issue, it would follow that it is the implementation of the remedial measures ordered by the Court under article 27(1) that would be monitored.²⁰² The remedial powers of the African Court are not limited like that of the European Court but are wide in scope, similar to that of the Inter-American Court.²⁰³ The application of

²⁰⁰ Articles 28(5) and 29(1) of the Protocol.

²⁰¹ The European Court developed a practice over a number of years whereby from 1991 it stipulates a period of three months from the date of the judgment within which the victim must be paid and from 1996 the Court provides for interest to be paid by the state party in the event of failure to comply with this time limit. See section 6.2.2 above. In the Inter-American system state parties are expected to pay the reparations ordered by the Court within a period of six months from the date of the delivery of the judgment. See the discussion in section 6.3.2 (d) above.

²⁰² Article 27(1) provides that "if the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

²⁰³ The European Court can only issue declaratory judgments and order the state to pay just satisfaction in terms of article 41 of the European Convention, if applicable. See the

article 27(1) could entail that those responsible for monitoring execution with the Court's judgments would have to ensure that state parties, within the time limit stipulated by the Court, takes the following steps: Firstly, the state must bring an end to the violation found. Secondly, it must ensure the payment of "fair compensation or reparation" ordered. Thirdly, it must also take steps or adopt measures to prevent similar violations to those found or to end continues violations, which if not taken could result in similar cases being filed with the Court. Only time will tell whether eventually the Court's decisions will also impact on other member states of the AU. In the European system a practice has developed whereby state parties amend their practices if the Court held similar practices against another state to be in violation of the European Convention.²⁰⁴

Directly related to the above is the question as to how state parties would give effect to the remedies ordered by the Court in their domestic legal systems. In the first place, state parties to the African Charter are under an obligation in terms of article 1 to recognise the rights, freedoms and duties enshrined in the Charter and to "adopt legislative or other measures to give effect to them".²⁰⁵ State parties are therefore under an obligation to domesticate the provisions of the African Charter. Especially for those Anglophone states following a dualist approach, this translates into the adoption of domestic legislation.²⁰⁶ Since only Nigeria has thus far adopted domestic legislation to this effect and since there has been an overall lack of state compliance thus far with the Commission's recommendations, it is recommended that the practices developed in the

discussion in section 6.2.2 above. The Inter-American Court on the other hand, has wide remedial powers under article 63(1) of the American Convention and has applied these powers innovatively in the best interest of the victims and their dependents. See the discussion in section 6.3.2 (d) above. Viljoen highlighted the importance of the fact that the Protocol does not stipulate that "the compensation has to be made to the injured party". It would therefore be hoped that the African Court will be guided by the example set by the Inter-American Court and be innovative in the formulation of its compensatory orders (Viljoen (1999) 670).

²⁰⁴ For a discussion of the extended legally binding effects of the judgments of the European Court see section 6.2.2 above.

²⁰⁵ Only Nigeria has thus far adopted legislation to give effect to the Charter provisions domestically (African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act [Cap. 10 Laws of the Federation of Nigeria, 1990]). It could be mentioned that in South Africa the African Charter on Human and Peoples' Rights Bill is currently listed on the Department of Justice and Constitutional Development's "Extended list of Bills to be submitted to Parliament when they are ready for introduction with the view to the finalisation thereof when circumstances permit". The latter could be translated into understanding that there are other legislative priorities currently engaging the Department and the African Charter Bill is very far down the list.

²⁰⁶ See the discussions in chapter 3.

Inter-American and European systems guide the Court. The Protocol does not include a provision similar to that of article 68(2) of the American Convention, which determines that “that part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state”.²⁰⁷ Although commentators have either expressed reservations about this kind of provision or have regretted the fact that it was not included in the Protocol, it is the principle that there should be a mechanism for domestic enforcement of the Court’s judgments that is currently missing from the Protocol.²⁰⁸ In the European system “neither the Convention itself nor the respective national acts through which it has been incorporated or transformed into domestic law confer any immediate legal effect on the judgments of the Strasbourg Court”.²⁰⁹ However, since the obligations arising from a finding of a violation of the Convention are binding on the respondent state party, the states who are party to the Convention have adopted various legislative or other procedures to give effect to the European Court’s judgments in their domestic legal systems.²¹⁰

The Protocol further also identifies the role players responsible for the supervision of the execution of the Court’s judgments. As there is currently no follow-up mechanisms in place in the African system, this is an important development that should also be made applicable to the recommendations of the African Commission. This issue is addressed in the final section of this chapter.

²⁰⁷ See the discussion in section 6.3.2(d) above.

²⁰⁸ Naldi and Magliveras have described this provision as “unsatisfactory to the extent that national procedural law may restrict significantly or even prohibit the execution of such judgments against the state” (Naldi & Magliveras (1996) 963). Nmehielle have agreed with their conclusion (Nmehielle (2001) 303). Padilla however viewed it as unfortunate that “there is no similar provision in either the African Charter or the Protocol on the African Court” stating that “states should be encouraged to comply in terms of their own law” (Padilla (2002) 193).

²⁰⁹ Polakiewicz (2001) 66.

²¹⁰ Polakiewicz cited the following examples of legislation or procedures adopted by state parties to give legal effect to the judgments of the European Court: (1) Legislation that allows for the reopening or re-examination of a case; (2) Legislation whereby the Constitutional Court is charged to enforce the judgments of the European Court (Malta); (3) Adopting special review proceedings allowing for the reopening of criminal proceedings following a judgment of the European Court (Polakiewicz (2001) 67-68).

(b) Factors that could indirectly impact on state compliance

The first aspect that could indirectly impact on state compliance relates to the question of *locus standi* as provided for in article 5 of the Protocol.²¹¹ From a reading of article 5(3) it is clear that state parties intended to limit the ability of NGOs and individuals to access the Court directly.²¹² Thus far of the 19 states that have ratified the Protocol, only one state party, Burkina Faso, has deposited the additional declaration under article 34(6). In the other regional systems discussed above individuals, after the entry into force of Protocol 11, have direct access to the European Court of Human Rights,²¹³ while under the Inter-American system individuals do not have direct access to the Court under any circumstances.²¹⁴ From the experiences of these two Courts it is apparent that the high case load of the European Court is, amongst other reasons, the result of the fact that victims have standing before the Court.

On the other hand, the Inter-American Court received no contentious cases within the first six years of its existence due to the fact that the filing of cases was wholly dependent on the cooperation of the Commission.²¹⁵ With these facts in mind it would seem likely that the bulk of human rights violations will still be considered by the African Commission under the individual communications procedure. Therefore, efforts to strengthen the African Commission in the wake of establishing an African Court should not be neglected. In particular, efforts should be increased to establish follow-up

²¹¹ Under article 5(1) the Commission, a state party which has lodged a complaint to the Commission; the state party against which such a complaint was lodged, a state party whose citizen is a victim of human rights violations or African Intergovernmental Organisations are entitled to submit cases to the Court. Inter-state complaints whether before a Commission or Court in the regional human rights systems are very few and if the history of such complaints before the African Commission is anything to go by it can be concluded that it is highly unlikely that any such cases will be filed with the ACtHPR. Article 5(3) on the other hand 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.

²¹² Article 5(3) read together with article 34(6) seem to have been modeled on article 46 of the European Convention before the entry into force of Protocol 11.

²¹³ Access is however restricted to applications from individuals or NGOs claiming to be the victims of a violation of the European Convention (article 34 of the European Convention).

²¹⁴ Individuals can however appear before the Court in terms of its Rules of Procedure during the consideration of the case or during the determination of reparations but they cannot file a case with the Court (Article 23 of the 2003 Rules of Procedure of the Inter-American Court).

mechanisms to ensure state compliance with the recommendations of Commission.²¹⁶ If this is not done, not only will violations of the African Charter continue but the victims of human rights abuses will still go without any reparations even after the establishment of an African Court.

A second factor that is closely linked to the issue of standing is the relationship between the African Commission and the African Court.²¹⁷ Since direct access of individuals and NGOs is restricted, much will depend on the willingness of the Commission, which may refer matters for the Court's decision under article 5(a). The African system cannot afford to follow in the footsteps of the Inter-American system, where during its first six years of existence the Commission did not refer any contentious cases to the Court.²¹⁸

Establishing a good working relationship between the African Commission and the African Court is essential for a number of reasons. Foremost is the referral of contentious cases to the Court. In particular, it is recommended that in determining the criteria for referring cases to the Court, provision should be made to enable the Commission to refer cases of non-compliance to the Court.²¹⁹ In other words, in order to

²¹⁵ See the discussion in section 6.3.3 above.

²¹⁶ In the European regional human rights system before the entry into force of Protocol 11 there was a follow-up system in place to monitor compliance not only with the judgments of the Court but also with the decisions delivered by the Committee of Ministers under article 32 of the European Convention on Human Rights. As of 2001 the need to monitor state compliance not only with the judgments of the Inter-American Court (which has been done by the Court itself since it delivered its first judgment) but also with the recommendations of the Inter-American Commission led to the adoption of follow-up mechanisms to monitor compliance with the Commission's recommendations. See the discussions in chapter 5.

²¹⁷ Article 2 of the Protocol is entitled "Relationship between the Court and the Commission" but all it states is that the Court shall "complement the protective mandate of the African Commission". The details of this relationship will have to be set out in the respective Rules of Procedure of the institutions. Article 33 of the Protocol strengthens this notion for it states that "the Court shall consult the Commission as appropriate" in drawing up its own Rules.

²¹⁸ Buergenthal (1985) 71. Padilla summarised the types of cases which were typically referred by the Commission to the Court as follows: (1) Cases alleging grave human rights violations; (2) Cases which have a good chance of winning (especially due to the costs involved when litigating on the international level); and (3) Cases which have the "potential for establishing jurisprudence that will widely affect the respect for human rights in the countries of the region" (D Padilla 'An African Human Rights Court: Reflections from the perspective of the Inter-American system' (2000) 2 *African Human Rights Law Journal* 190-191).

²¹⁹ Els Sheikh and Harrington have identified the referral of cases where there has been non-compliance with the Commission's recommendations as "a way of pressing for enforcement" (IAB Els Sheikh 'The future relationship between the African Court and the

end the continued violation of the African Charter and to grant the victims the remedies they sought to access in the first place by approaching the Commission, the Commission should be able to refer cases to the Court where a state party has refused to comply with its recommendations. This is an issue that can easily be addressed, without political interference, in the Rules of Procedure of both institutions when outlining the relationship between them.

The third factor to be mentioned here relates to the Court's power, under article 33 of the Protocol, to draw up its own Rules of Procedure in consultation with the Commission. As pointed out above, this will be the task of those judges first elected to the Court and will be the first opportunity to outline important issues such as the relationship between the Commission and the Court.²²⁰ Even though the Court can amend its own Rules without interference from state parties, it is still preferable that care be taken in drafting the first set of Rules, which experience has shown once adopted is not often amended.²²¹ The independent experts' meeting that was convened in December 1998 by the International Commission of Jurists in collaboration with the OAU recommended that "the process of drafting the rules of procedure should take into account the experiences of the European and Inter-American human rights systems".²²² In line with this recommendation, it is in particular necessary that the African Commission and the Court, in drawing up new Rules of Procedure, should be guided by the rules and practices of other regional human rights bodies in monitoring compliance with their decisions.²²³ As will become clear from the discussions in the next section, even measures specifically included in the Protocol to monitor the execution of judgments are vague and will have to be developed in the Court's Rules of Procedure.

African Commission' (2002) 2 *African Human Rights Law Journal* 256 and Harrington (2002) 330).

²²⁰ See section 6.4.1 above.

²²¹ The African Commission's Rules of Procedure has only once been amended (1995) since its adoption in 1988.

²²² *Report of the Experts Meeting on the African Court on Human and Peoples' Rights*, Ouagadougou, Burkina Faso, 7-9 December 1998, DOC/OS(XXVI)/126, par C(iii).

²²³ Refer to the discussion in sections 6.2 and 6.3 above as well as chapter 5.

6.4.3 The supervisory role of the AU Executive Council and other organs of the AU

The Council of Ministers,²²⁴ must also be notified of judgments of the Court, in addition to the notifications to states and the Commission.²²⁵ It is the Council who must monitor the execution of the judgments of the Court on behalf of the Assembly of Heads of State and Government (Assembly).²²⁶ From the preceding discussions, it is clear that the role of the Executive Council is modelled on the supervisory role fulfilled by the Committee of Ministers of the Council of Europe, a role it has fulfilled before the entry into force of Protocol 11, and thereafter.²²⁷ In order to fulfil this role the Committee of Ministers has adopted rules to set out the steps it follows in monitoring compliance with the Court's judgments.²²⁸ It is recommended that the Executive Council should also adopt rules to clarify its procedures in monitoring compliance, especially since it has no previous record of fulfilling such a role in respect of the African regional human rights system. It is further recommended that the Council should not only retain this monitoring role in relation to the Court's judgments but that it should also be able to fulfil the same function in relation to the Commission's recommendations.²²⁹ As already indicated above, the Committee of Ministers before the entry into force of Protocol 11 not only monitored implementation of the Court's judgments but also of its own decisions delivered in terms of article 32.²³⁰ Elsheikh recommended that such a

[s]uggestion could possibly be met through a resolution by the Assembly requesting the Secretary-General of the Union to communicate copies of the reports of the Commission to the Council of Ministers [Executive Council] to enable the Council to make any appropriate recommendations to the Assembly when the latter discusses such reports.²³¹

²²⁴ Now the Executive Council of the AU.

²²⁵ Articles 29(1) and (2) of the Protocol.

²²⁶ Article 29(2) of the Protocol. Although as pointed out above the Protocol has not been amended to accommodate the new organs of the African Union it is assumed that since the Council of Ministers as the political body of the OAU has been replaced by the Executive Council that the latter will take up this task. As such the discussions in this section take place in reference to the new organs of the AU.

²²⁷ Before the entry into force of Protocol 11, article 54 of the European Convention regulated the supervisory role of the Committee of Ministers. From 1998, the Committee's supervisory role is set out under article 46(2) of the European Convention. See section 6.2.2 above.

²²⁸ As above.

²²⁹ Elsheikh (2002) 259.

²³⁰ See section 5.2.3 of chapter 5.

²³¹ Elsheikh made this recommendation in reference to article 31 of the Protocol and therefore refers to the submission of the Annual Reports of the Commission to the

Leaving the monitoring of the execution of judgments to a political body has proven very successful in the European system. However, the Executive Council should receive support in fulfilling this task from other organs within the AU as the Committee of Ministers has from other bodies within the Council of Europe. In particular, as has been suggested earlier in this chapter, the Executive Council as a political body should be assisted by the Democracy, Governance, Human Rights and Elections Division of the Political Affairs Commission of the African Union, in deciding whether the measures taken by state parties are adequate.²³²

The Protocol has also borrowed from the American Convention in setting mechanisms in place for the monitoring of compliance with the Court's judgments. Article 31 of the Protocol is modelled on article 65 of the American Convention in stipulating that the Court must submit a report on its work to each regular session of the Assembly. In the report it must "specify, in particular, the cases in which a state has not complied with the Court's judgment".²³³ Based on the corresponding article in the American Convention, the Inter-American Court developed its own procedures for monitoring compliance with its decisions. The Court reasoned that it cannot inform the General Assembly of the OAS of cases in which there has not been compliance if it was not in the first place competent to monitor compliance itself.²³⁴ By analogy, it is recommended that the African Court adopt a similar approach and specifically provide for procedures to monitor compliance with its recommendations in its Rules of Procedure and to take into account the established practices of the Inter-American Court in this regard.²³⁵

Executive Council (Elsheikh (2002) 259). Attached to the Annual Report are the findings and recommendations of the Commission in concluding communications filed under its individual complaints procedure. The result of submitting the Commission's Annual Reports for consideration to the Council would therefore be that it is in a position to recommend to the Assembly to call on states found to have violated the Charter by the Commission to comply with the Commission's findings and implement the Commission's recommendations.

²³² It is this Division within the AU that is tasked with amongst other issues to set up the African Court. In the European system the Committee of Ministers acts on the advice of the Directorate for Human Rights in deciding whether the measures taken by a state party is adequate and in compliance with the Court's judgments. See section 6.2.4 above.

²³³ See section 6.3.2(b) above.

²³⁴ Refer to the Inter-American Court's reasoning in its *Baena (competence)* case; see section 6.3.2(b) above.

²³⁵ See the conclusions drawn in section 6.3.3 above.

Article 31 of the Protocol, although similar to article 65 of the American Convention, did not go as far as article 65 in that it does not stipulate that the Court in specifying cases where there have been non-compliance can also “make any pertinent recommendations” to the Assembly. In applying this provision, the Inter-American Court has regularly formulated recommendations for consideration by the General Assembly of the OAS, requesting the Assembly to either ask states to fully comply with particular judgments or to request them to inform the Court as to measures taken to implement its decisions.²³⁶ The non-inclusion of this provision in the Protocol should however not make a difference to the Assembly’s actions, because the inclusion of article 31 in the first place raises the presumption that the Assembly is requesting information on non-compliance from the Court to enable it to adopt political measures to exert pressure on non-compliant states. This would presumably lead the Assembly to adopt resolutions or recommendations to urge state parties to implement the Court’s judgments in cases to which they are party. This has been the practice of the General Assembly of the OAS.²³⁷ It could further also be assumed that the AU Executive Council in monitoring compliance with the judgments of the ACtHPR would recommend to the Assembly the adoption of resolutions calling on a specific state to comply.

Based on article 65, the Inter-American Court has included a separate section in its Annual Reports to the OAS General Assembly, which categorises state compliance as full or partial compliance. The Court also lists state parties which has not informed it of any steps taken.²³⁸ Should it adopt a similar approach, the publication of such findings, will increase political and international pressure on states to comply with the ACtHPR.²³⁹

The Protocol has incorporated aspects regulating the monitoring of state compliance of both the European system and the Inter-American system. Therefore, instead of delegating the monitoring of state compliance only to the Executive Council, akin to the European practice, it also incorporated a monitoring role for the Court itself and for the Assembly similar to the Inter-American system, but with an additional role for the

²³⁶ See for instance 2003 Annual Report of the Inter-American Court of Human Rights, OEA/Ser.L/V/III.61, at E.

²³⁷ See section 6.3.2(g) above.

²³⁸ See section 6.3.3 above.

²³⁹ Mutua described the article 31 procedure as “a ‘shaming’ tactic that marks the violator” (Mutua (2000) 30).

Executive Council.²⁴⁰ If all these role players actively participate in the monitoring of compliance, there should theoretically be no reason for non-compliance with the Court's judgments.

Finally, the question remains as to whether there exists any sanctions if a state party does not execute the judgments of the Court. As Nmehielle reasoned, it is "actually up to the OAU Assembly (now AU Assembly) to protect the integrity of the system after the Court has fulfilled its role, by adopting whatever political measures that is necessary to secure compliance with the Court's judgment".²⁴¹ The European system is a case in point. The supervisory role fulfilled by the Committee of Ministers in the European system has been described as a "sensible division of powers", leaving the formulation of judgments to the European Court and its execution to a political body empowered to suspend or expel members from the Council of Europe.²⁴² In terms of article 8 of the Statute of the Council of Europe, the Committee can suspend or expel a member state of the Council if it is found to have seriously violated article 3 of the Statute.²⁴³ This is however reserved for exceptional cases only and as such has never been invoked by the Committee. The OAU Charter did not make provision for any sanctions against member states. In contrast, the AU Constitutive Act does albeit only under exceptional circumstances.²⁴⁴ Article 23(2) of the Constitutive Act provides as follows:

Any member state that fails to comply with the decisions and policies of the Union may be subjected to sanctions, such as the denial of transport and communication links with other member states, and other measures of a political and economic nature to be determined by the Assembly.

²⁴⁰ In the European system the Parliamentary Assembly, which is composed of members of national Parliaments of member states of the Council of Europe, also plays an active role in monitoring compliance. The Parliamentary Assembly has fulfilled this role by posing questions on compliance to the Chair of the Committee of Ministers to be answered during a public debate in the Assembly. The Assembly has also adopted resolutions calling on state parties, by name, to execute the Court's judgments. A similar approach should be adopted by the Pan African Parliament of the AU. See the discussion in section 6.2.3(b) above.

²⁴¹ Nmehielle (2001) 304.

²⁴² Harris, O'Boyle & Warbrick(1995) 700. See section 6.2.3 above.

²⁴³ Article 3 relates to states' acceptance of the principles of the rule of law and human rights. See section 6.2.3 above.

²⁴⁴ See the discussion on the relationship between the African Commission and organs of the AU in chapter 4.

This provision must be read in conjunction with rule 36 of the Rules of Procedure of the Executive Council, which determines that it is the Council who shall “apply the sanctions imposed by the Assembly in respect of (b) non-compliance with decisions and policies”.²⁴⁵ It may thus be deduced that should the Assembly adopt a decision regarding the non-compliance of a state party with the judgments of the African Court and this decision is not complied with, theoretically the Assembly could adopt sanctions which the Council must apply against such a state. However, it is very ambitious to interpret the Constitutive Act as a sanctioning tool for non-compliance with the Court’s judgments. In reality, the only measures available to those seeking to ensure state compliance with the judgments of supranational courts are political and international pressure and to ensure that the integrity of the court is such that states feel compelled to comply.

6.5 Conclusion

As the last of the regional human rights systems to establish a human rights court, the African system is in the privileged position to learn from the mistakes made and challenges faced by other regional Courts. Already in the drafting of the Protocol establishing the Court, the drafters in providing for a system to monitor compliance with the judgments of the Court, borrowed from the best practice examples of both the European system and the Inter-American system. As a result, the Protocol provides a theoretical legal framework for monitoring compliance that is more comprehensive than other regional human rights systems. However, the Protocol only sets in place a framework. It will be up to the Court, the Executive Council and other organs of the AU to ensure through the adoption of detailed rules and procedures that in practice the system functions optimally. It is also in this regard that the experiences of the other regional human rights systems may be of assistance, as has been indicated above.

²⁴⁵ As above.



CHAPTER 7 CONCLUSION AND RECOMMENDATIONS

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7.1 Introduction

The African Commission on Human and Peoples' Rights (African Commission or Commission), the monitoring body of the African Charter on Human and Peoples' Rights (African Charter), has developed a well established practice in deciding individual communications submitted under the African Charter. The Commission has been progressive in developing its practice to consider individual communications. It has interpreted its mandate to consider individual communications in such a manner that its jurisprudence reads more like a series of well reasoned judgments than decisions of a quasi-judicial body. It not only makes a finding on the facts alleging violations of the

Charter but has also developed a practice of making recommendations to state parties found to have violated the Charter provisions. From the Commission's jurisprudence and practice it is further clear that the Commission expects state parties to implement its findings, which include the remedies made states. However, the effectiveness of these findings and the strength and credibility of the African regional human rights system depend on the implementation of the Commission's findings by the states concerned.

The African Commission has no follow-up policy or follow-up mechanisms to monitor state compliance with its recommendations or to ensure that states implement its recommendations. The Commission has in the past made some efforts to follow up on the steps states have taken to implement its findings, but these efforts have not been consistent and have therefore not developed into an established practice on the part of the Commission. Not only has the Commission never monitored the status of state compliance with its recommendations, but no comprehensive studies have ever been undertaken by scholars on the African regional human rights system to determine state compliance with the Commission's recommendations.

It is against this background that this study sets out to provide a first coordinated attempt at ascertaining the status of state compliance with the recommendations of the African Commission. The main findings on the implementation efforts of state parties and the questions it raised about factors that influence state compliance with the recommendations of the African Commission are briefly summarised here. This study concludes with the formulation of a comprehensive and effective policy on and mechanism for follow-up to the Commission's recommendations, taking into account the factors that influence state compliance and focusing on those causes of non-compliance that can be addressed through legal or non-political means. The formulation of a comprehensive follow-up mechanism is based on the analysis of the Commission's existing mandate in this study, bearing in mind specifically the Commission's previous attempts at follow-up and the possibilities that exist for incorporating such a mechanism into its mandate. The practices of other regional and global human rights bodies have informed the formulation of a follow-up mechanism for the African system, as these systems have adopted follow-up mechanisms to monitor and improve the implementation of their findings.

The implementation machinery of the African Charter will be strengthened with the establishment of the African Court on Human and Peoples' Rights (ACTHPR). It is however believed that most of the factors that have influenced state compliance with the recommendations of the African Commission will also play a role in the execution of the judgments of the Court.¹ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol) specifically provide for the supervision of the execution of the Court's judgments. The Protocol's provisions in this regard are not detailed and the Court will have to develop a definite practice on monitoring compliance with its judgments in its Rules of Procedure. The comprehensive follow-up mechanism recommended in this study will, with the necessary changes, therefore also apply to the monitoring of state compliance with the Court's judgments. The experience of other regional human rights courts in monitoring compliance with their judgments has been analysed in this study and informs the recommendations formulated in this chapter.

7.2 Survey of state compliance

In the absence of research about state compliance with the recommendations of the African Commission, this study started out by collecting information about the steps states have taken to implement the Commission's findings in all the communications where it found a state in violation of the Charter. An effort was made to ascertain the status of compliance with the Commission's findings in communications published from its 7th Annual Activity Report to its 16th Annual Activity Report. In this period, the Commission found state parties in violation of the African Charter in 44 communications involving 17 state parties. Information on compliance was gathered through conducting interviews with relevant role players, through information gathered by the Commission in cases where they made an attempt at follow-up and through secondary sources such as scholarly works referencing implementation efforts or by relying on media reports to verify implementation efforts.

¹ It is interesting to note that the factors that underlie the problems experienced in the European regional human rights system, regarding state compliance with the judgments of the European Court of Human Rights, are similar to those factors found to have influenced state compliance with the recommendations of the African Commission

This study found that there has been full state compliance in 14%, partial compliance in 20% and non-compliance in 66% of the 44 cases where the Commission found state parties in violation of the African Charter. From a comparative analysis of state compliance by African states with the views of the United Nations Human Rights Committee, a similar trend was noted. Full state compliance was recorded in 29%, partial compliance in 19% and non-compliance in 52% of the 31 individual complaints analysed involving 13 African state parties to the ICCPR. Upon closer analysis, it was also found that of the five African states that have been a party to communications in both the regional and global UN systems, similar compliance behaviour could be recorded. This finding refutes arguments that the global system might hold more persuasive force than regional human rights systems in influencing states to comply with treaty body findings.

It can therefore be concluded that state compliance with the recommendations of the African Commission is poor. States have not complied with the Commission's findings or the views of the Human Rights Committee in more than half of the cases to which they were party. Based on these findings, an attempt was made to determine the factors that influence state compliance with the Commission's recommendations.

7.3 Factors influencing state compliance

The six cases where full compliance with the African Commission's recommendations has been recorded, as well as the recurring factors in the majority of cases where non-compliance was recorded, formed the background against which to identify factors that influence compliance.² Factors that influence state compliance were identified in relation to the Organisation of African Unity,³ the legal framework, the African Commission, state

(Compare the findings in chapter 3 with the factors listed in section 6.2.3 (b) of chapter 6).

² 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).

³ Although the OAU has been replaced by the African Union (AU) the OAU was the regional political body during the period when most of the communications analysed in this study were decided by the Commission. Therefore, most of the factors identified in relation to the regional political body relate to the OAU.

parties, the nature of the case and the role of victims and Non-Governmental Organisations (NGOs).

From an analysis of the factors that have influenced state compliance in the 44 communications that form the basis of this study, it is evident that it is a combination of diverse factors that play a role in securing compliance or that lead to non-compliance in a particular case. Factors that were present in the six cases where full compliance has been recorded are the following: (1) The Commission's decisions in these cases were well reasoned and took on a format that closely resembles a court judgment. (2) The Commission's findings on these communications were clear and in five of the six cases were accompanied by specified recommendations on steps the states had to take. (3) In four of the six cases, the Commission had made some attempt to follow up on the implementation of its findings. (4) The cases dealt with the violation of the rights of individuals and not with multiple or massive violations of the Charter. (5) The subject matter of the violations was restricted to civil and political rights, in particular fair trial procedures, and therefore obligated states to either "respect" or "protect" the rights at issue and did not place any obligations on states to "fulfil", as would have been more likely in respect of socio-economic rights. (6) The nature of the remedies formulated in these cases was such that it could be addressed by the states through specific actions; the remedies did not require extensive or dramatic institutional reform on the part of the states. (7) International and internal pressure played a significant role in influencing states to comply. NGOs were instrumental in this regard. (8) In five of the six cases it was found that the system of governance in place may be listed as a factor that contributed to state compliance. (9) NGOs also played a role in influencing state compliance through various follow-up efforts in the absence of any coordinated effort by the Commission.

Recurring factors in the cases where non-compliance have been recorded are the following: (1) In those cases where the Commission found that the facts reveal the existence of series or massive violations of human rights, the cases were referred to the Assembly of Heads of State and Government (AHSG) of the OAU. The AHSG however never played its role as stipulated in article 59 of the African Charter. These cases were consequently not taken any further. (2) Where the system of governance in place was found to be non-democratic, it reflected as a recurring theme amongst the cases of non-

compliance. (3) Political instability as a result of ongoing civil wars influenced state compliance.

From an analysis of these findings it is argued that factors such as the weaknesses of the OAU occasioning a lack of publicity and political pressure, and factors relating to problems with the institutional legitimacy of the African Commission, have an overall negative impact on state compliance. These factors explain the general low rate of state compliance. Other factors, such as the role of NGOs, the nature and extent of the violation and the form of government in the relevant state, explain compliance or non-compliance in a particular case.

It is not within the scope of this study to formulate recommendations to improve state compliance with the recommendations of the African Commission that would address the factors listed above that are political in nature. Furthermore, it is also apparent that many of the factors identified could be addressed by strengthening the functioning and legitimacy of the regional political body and the African Commission. Where applicable, this study made recommendations to this effect. The AU has replaced the OAU and has put new mechanisms in place, at least normatively, that address some of the weaknesses of the OAU, identified in this study as contributing factors to non-compliance. However, the contribution of this study lies in the formulation of legal and practical recommendations to improve state compliance with the African Commission's findings. Although the recommendations formulated here will clearly not address all the factors influencing state compliance, they do incorporate many of the legal and practical factors in suggesting a comprehensive follow-up policy and mechanism. For reasons stated above, as well as the fact that the complexities surrounding the presence (or absence) of the political will to comply with the findings of supra-national bodies fall within the domain of political science and international relations, recommendations are not addressed to states.

7.4 A recommended follow-up policy: Developing a blue print on a model follow-up mechanism

This study found that state compliance with the Commission's recommendations is poor. The African Commission has no follow-up policy or practice to either monitor state compliance or ensure state compliance with its findings. In the United Nations, European and Inter-American human rights systems, follow-up mechanisms have been adopted by treaty bodies when faced with similar problems of poor state compliance. In drawing on the experience from these systems, the development of a blue print on a comprehensive follow-up mechanism is recommended, in order to fill the *lacunae* in the African system and to improve state compliance with the recommendations of the African Commission. As the African system currently has no follow-up policy in place, it would be unrealistic to expect the adoption of a comprehensive model on follow-up from the outset. Therefore, although multiple elements of a comprehensive mechanism are listed below, it is recommended that the African system should incrementally develop a follow-up mechanism. The elements that would constitute a basic follow-up mechanism are therefore distilled from the comprehensive model and listed in the final section to this chapter in a schematic format. A comprehensive model on follow up is developed, taking into account the Commission's existing mandate and practices under the African Charter, while incorporating those avenues previously pursued by the Commission to follow-up on the implementation of its findings. A blue print on a comprehensive follow-up mechanism is developed in relation to the roles that would have to be fulfilled by the African Commission, the Secretariat of the African Commission and specific organs of the African Union.

(a) African Commission

The first step in adopting a follow-up mechanism is for the African Commission to make provision for such a mechanism in its Rules of Procedure.⁴ This can be done through an amendment to the existing Rules of Procedure.⁵ As far as possible, the Commission

⁴ The UN Human Rights Committee and the Inter-American Commission on Human Rights amended their Rules of Procedure to provide for follow-up to their findings (See sections 5.3.4 and 5.4.3 of chapter 5).

⁵ In accordance with article 42(2) of the African Charter and rule 121 of the Commission's Rules of Procedure.

should outline all the follow-up procedures it adopts in order to ensure that state parties are clear about the steps the Commission intends to follow and what would be expected of them.

It is recommended that a Special Rapporteur on Follow-Up should be appointed.⁶ The appointment and mandate of the Special Rapporteur should be spelled out in the Commission's Rules of Procedure. Ideally, the Special Rapporteur on Follow-Up should be an independent expert and should not be elected from amongst the members of the Commission as the practice in the appointment of Rapporteurs has been in the past.⁷ In the appointment of a Special Rapporteur on Follow-Up, the Commission should avoid the pitfalls that have prevented the effective functioning of the Rapporteur mechanism in the past. In particular, the Commission should ensure that:

- the Rapporteur has a clear mandate; and
- the Rapporteur receives adequate administrative support from the Secretariat. This need will be addressed by the appointment of a full-time legal officer on follow-up.

The mandate of the Special Rapporteur should be developed to oversee all the follow-up procedures adopted by the African Commission, with the secretarial and legal support of the legal follow-up officer. The Special Rapporteur should liaise with the Democracy, Governance, Human Rights and Elections Division of the AU Commission to assist it in its task to advise the Executive Council in monitoring state compliance with the Commission's recommendations.⁸

⁶ Special Rapporteurs on Follow-Up already form part of the follow-up mechanisms provided for by the UN Human Rights Committee, the Committee Against Torture and the Committee on the Elimination of Discrimination Against Women.

⁷ The appointment of independent African experts as Special Rapporteurs has formed part of the recommendations adopted by the African Commission during a Retreat organised by the Office of the High Commissioner for Human Rights in September 2003. See *Report of the Retreat of Members of the African Commission on Human and Peoples' Rights (ACHPR) facilitated by the Office of the High Commissioner for Human Rights*, Addis-Ababa, Ethiopia, 24-26 September 2003, page 5. Available at <http://www.nhri.net/Africa.htm>. Accessed: 13 November 2003.

⁸ See section 7.4 (c)(iv) below.

The mandate of the Special Rapporteur should, amongst other factors, provide for the following functions to be spelled out in the Rules of Procedure and could be expanded upon through the adoption of resolutions by the Commission:⁹

- Upon having been found in violation of the African Charter, a state party should be given 90 days within which to report back to the Commission on the steps it has taken to implement the Commission's recommendations. The Special Rapporteur, through the Secretariat, should monitor whether state parties adhere to the 90 day time limit.
- If no information is provided within a reasonable time (no longer than 30 days) after the expiry of the deadline, the Special Rapporteur must send a reminder to the state party through the Secretariat.
- If no information is forthcoming, the Special Rapporteur should request direct follow-up consultations with the permanent representatives of the state parties in Dakar, Senegal (where more states have representatives than in neighbouring Banjul, The Gambia, where the Commission is based) or alternatively follow-up meetings could be held with state representatives attending the ordinary sessions of the Commission.
- With the assistance of the legal officer on follow-up, the Special Rapporteur should keep a data base of all the follow-up replies received. The data base should also keep a record of non-compliance with the Commission's recommendations. The Special Rapporteur should also encourage NGOs and the victims of human rights abuses to report to the Commission on the steps taken by the state to implement the Commission's recommendations. The information provided by NGOs and the complainants should also be reflected in the data base and should be communicated to the state concerned.
- If no information is forthcoming, the Special Rapporteur should consider organising a follow-up mission to the state party concerned. The AU should provide adequate funding to allow for at least one follow-up mission per year.
- The Special Rapporteur should present the Commission with a public progress report on follow-up at each ordinary session of the Commission.

⁹ Refer to the mandate of the Special Rapporteur for the Follow-Up on Views of the Human Rights Committee (sections 5.4.2 (a) and (b) of chapter 5). Also refer to the follow-up procedures adopted by the Inter-American Commission, section 5.3.3 of chapter 5.

- The Special Rapporteur should inform the Commission on actions to be taken in instances where the victims reported that no appropriate remedies were provided by a state party or where the Rapporteur concludes that “no or limited implementation has taken place”.
- The Special Rapporteur should prepare a separate chapter on follow-up progress, to be included in each Annual Activity Report of the Commission.
- It is further recommended that the Commission should consider developing a procedure whereby it holds public hearings during its ordinary sessions to verify state compliance based on the progress report submitted by the Special Rapporteur.¹⁰

The African Commission has in past made some attempts at following up on the recommendations issued under its individual complaints procedure. These efforts of the Commission have been noted in relation to aspects of both its promotional and protective mandate. The Commission has pursued follow-up in the following ways: (1) through its state reporting procedure; (2) through incorporating follow-up requirements in its recommendations on individual communications; and (3) by establishing follow-up during promotional and protective missions to state parties. Although these efforts never developed into established practices, it is recommended that these efforts should be formally included as part of a comprehensive follow-up mechanism.

The Commission has made use of the opportunity offered by the article 62 state reporting procedure to question state parties during the public examination of their state reports on the steps they have taken to implement the Commission’s recommendations.¹¹ The Commission has also in formulating recommendations, upon having found a state party in violation of the African Charter, recommended that the state must report back to the Commission, when delivering its next state report on the steps it has taken to implement the Commission’s recommendations. The Commission has however been inconsistent in its reliance upon the state reporting procedure to follow-up on state compliance. It is therefore recommended that the Commission should

¹⁰ The Inter-American Commission can hold public hearings to verify compliance based on the information it received from state parties. See section 5.3.3 of chapter 5.

¹¹ See section 4.4.1.1 (c) of chapter 4.

ensure that provision is made in either its Rules of Procedure or in the Guidelines on State Reporting to require state parties to report on the measures they have taken to implement the Commission's recommendations as part of their periodic reports. It is further recommended that the African Commission issue guidelines on possible questions to be asked by Commissioners during the public examination of state reports so as to ensure that questions are organised, systematic and useful in assessing a state party's compliance with the African Charter. Such guidelines should also require Commissioners to always inquire, if applicable, as to the steps a state has taken to comply with its recommendations.

The African Commission has also made use, although again not on a consistent basis, of the opportunities offered by promotional and protective missions to follow-up on state compliance.¹² As there are currently no guidelines or rules in the Rules of Procedure to stipulate how these missions should be conducted, there is no guarantee that follow-up will always form part of any given mission. It is therefore recommended that guidelines should either be adopted as a separate document or should be included in the Rules of Procedure to set out criteria that should always form part of promotional and protective missions, mentioning in particular follow-up.

Since the Commission has never previously followed up on the steps state parties have taken to implement its findings, the Commission would have to decide when it adopts a follow-up mechanism whether it will monitor compliance with all its recommendations issued since its inception, or with only those issued from the date the follow-up mechanism is adopted.¹³ It is recommended that the Commission should consider following up on all the recommendations it has issued thus far save for in those cases where the relief sought is no longer applicable.¹⁴ It is also recommended that by including an additional chapter on follow-up in the Annual Activity Reports of the Commission, it should adopt a methodology for categorising state compliance in a

¹² Section 3.4.1.3 of chapter 3.

¹³ The Inter-American Commission in adopting a follow-up mechanism for the first time in 2001 decided to only follow-up on cases finalised since 2000, so as not to overwhelm the system (section 5.3.3 of chapter 5). The Human Rights Committee, on the other hand, in adopting a follow-up mechanism in 1990 decided to follow-up on all the views it has issued since its inception (section 5.4.2 of chapter 5).

¹⁴ As indicated in chapter 2 the Commission has only formulated recommendations in 44 cases since its establishment. This is not a large number of cases to monitor.

manner that will allow concrete conclusions to be drawn by all stakeholders as to the status of state compliance.¹⁵ It is finally recommended that the Commission should adopt a comprehensive strategy on the publication of its follow-up efforts to ensure the widest dissemination possible.¹⁶ The Commission should make use in this regard of press releases and should publish all follow-up information on its website.¹⁷

(b) Secretariat of the African Commission

The Secretariat of the African Commission would have to develop the institutional capacity to deal with follow-up to the recommendations of the Commission. This would necessitate the appointment of a full-time legal officer on follow-up.¹⁸ The African Union has to provide the resources for such an appointment.¹⁹ Mechanisms would have to be put in place for the administration of the follow-up process, such as the development of standard letters requesting state parties to report on the measures they have taken to implement the Commission's recommendations. A data base would have to be set up to keep track of state compliance.

(c) Organs of the African Union

The adoption of follow-up procedures or procedures that would assist the establishment of a follow-up mechanism are recommended here in reference to the Assembly of Heads of State and Government, the Executive Council, the Pan-African Parliament, the AU Assembly and the Peace and Security Council.

(i) Assembly of Heads of State and Government (Assembly)

At the level of the Assembly, as the principal body of the AU, a commitment must be made to the strengthening of the African regional human rights system. In particular, the

¹⁵ See the categorisation procedures applied in chapter 2. Also see section 5.3.2 of chapter 5, for an examination of the categories adopted by the Inter-American Commission in classifying compliance. This should be compared to the practice adopted by the UN Human Rights Committee (sections 5.4.2 (d) and 5.4.3 of chapter 5).

¹⁶ See section 5.4.2 (b) where some of the media strategies adopted by the Human Rights Committee are summarised.

¹⁷ The Commission's website is available at: <http://www.achpr.org>.

¹⁸ Section 4.3 of chapter 4.

Assembly must prioritise state compliance with the recommendations of the African Commission. A commitment similar to that of the General Assembly of the Organisation of American States (OAS) is needed.²⁰ The General Assembly of the OAS, like the Assembly of the AU, adopts the Annual Reports of the Inter-American human rights treaty bodies and has in the process urged the Inter-American Commission to include a chapter on follow-up and has committed itself to studying the information included therein.²¹ The OAS General Assembly uses its annual meetings as a platform to call upon member states to implement the Inter-American Commission's recommendations and has made a financial commitment to the strengthening of the Inter-American regional human rights system.²²

(ii) Executive Council

The Executive Council, as the main political body of the AU, should develop a follow-up mandate to monitor compliance with the Commission's recommendations.²³ The Executive Council has been mandated under the Protocol establishing an African Human Rights Court to supervise the execution of the Court's judgments.²⁴ It would still however be a number of years before the Court issues its first judgment. It is therefore recommended that the Executive Council must first adopt a follow-up mandate in respect of the recommendations of the African Commission. By the time it would have to supervise the execution of judgments of the Court it would already have rules and practices in place. But apart from this incentive, the overall need to monitor compliance with the Commission's recommendations should be acknowledged at the political level, as the Commission will in all likelihood continue to be the body that would decide the most complaints on human rights violations in the African system.

The Executive Council can develop its mandate to monitor compliance with the Commission's recommendations based on the monitoring role fulfilled by the Committee

¹⁹ See section (iv) below.

²⁰ See section 5.3.3 of chapter 5.

²¹ As above.

²² As above.

²³ See section 4.7 of chapter 4. In this section it is explained in detail how the Council could go about developing a follow-up mandate.

²⁴ Article 29(2) of the Protocol.

of Ministers of the Council of Europe.²⁵ Before the entry into force of Protocol 11, the Committee of Ministers monitored compliance with its own decisions issued under article 32 of the European Convention, in addition to supervising the execution of the European Court of Human Rights' judgments.²⁶ As the Executive Council has never fulfilled such a role, it is recommended that the Council from the outset adopt rules to clarify its follow-up procedures.²⁷

The Committee could consider providing for the following procedures in its rules:²⁸

- Create a data base on state compliance with the Commission's recommendations. This could be done with the assistance of the AU Commission as outlined below in consultation with the Special Rapporteur on Follow-Up.
- Invite follow-up replies from state parties within a stipulated time frame.
- If follow-up replies are not forthcoming from a state party, provide for a procedure whereby the Chairman could engage with the Minister for Foreign Affairs of the respondent state party.
- Make provision for the adoption of interim resolutions in order to provide information on the progress of state compliance. Interim resolutions should also be utilised to call upon non-compliant state parties to comply and to make suggestions to state parties on how to go about implementation. (It cannot tell state parties how to implement the Commission's recommendations but it should have the power to make suggestions on how best to comply.)
- Widely disseminate information on the status of state compliance with the African Commission's recommendations. The Council should adopt measures to ensure that the process is transparent. It should make public the follow-up reports submitted by state parties, by publishing it as part of an interim resolution to report on the progress with compliance whilst encouraging states to fully implement the Commission's findings. Once a state has fully complied, the

²⁵ See sections 5.2.2 and 5.2.3 of chapter 5.

²⁶ As above.

²⁷ For an examination of the rules adopted by the Committee of Ministers see sections 6.2.2 and 6.2.3 of chapter 6.

²⁸ See section 5.2.3 of chapter 5 and sections 6.2.2 and 6.2.3 of chapter 6.

Council should publish all the steps taken by the state party in a final resolution.
The Council should publish its resolutions on the website of the African Union.²⁹

The Executive Council, as the body responsible for the budget of the African Union, has to allocate resources for the implementation of the follow-up mechanism. In particular, resources should be allocated for the appointment to the Secretariat of the Commission of a full-time legal officer for follow-up.³⁰ Resources would also be required to meet the additional administrative needs of the Secretariat of the Commission. Additional resources would also be needed to fulfil the following follow-up functions:

- expanding of the media unit of the Secretariat of the Commission;³¹
- funding the mandate of a Special Rapporteur on Follow-Up; and
- funding the monitoring of state compliance by the Executive Council.

(iii) Pan-African Parliament

It is recommended that the Pan-African Parliament (PAP), representative of Parliaments of all member states, should make use of its public platform to debate issues related to the strengthening of the African regional human rights system. In particular, the PAP should engage with questions around the lack of state compliance with the recommendations of the African Commission by formulating questions for written or oral reply for the attention of the Chair of the Executive Council, once the latter has developed its procedures on monitoring compliance.³² The PAP should also adopt resolutions or recommendations upon having debated issues of non-compliance to either call on state parties to implement the Commission's recommendations or to formulate proposals on how to address the problem of non-compliance. In pursuing such a stance, the PAP could be guided by the existing practices of the Parliamentary Assembly of the Council of Europe.³³ The Parliamentary Assembly has in the past actively followed state compliance in the European system and has even addressed letters to specific state parties where the execution of the European Court's judgments had been delayed.

²⁹ See <http://www.african-union.org>.

³⁰ See section 4.3 of chapter 4.

³¹ See section 4.3 of chapter 4.

³² See section 6.2.3 of chapter 6.

³³ See section 6.2.2 (b) of chapter 6.

(iv) AU Commission

Within the AU Commission there are eight Commissions. One of these, the Political Affairs Commission, is tasked with looking after human rights issues on the continent, amongst others areas such as good governance and electoral institutions.³⁴ The Political Affairs portfolio is again divided into six branches, with the Democracy, Governance, Human Rights and Elections Division carrying the responsibility to strengthen the African Commission and to set up the African Court on Human and Peoples' Rights. It is recommended that the Democracy, Governance, Human Rights and Elections Division develop the capacity to assist the Executive Council with the monitoring of state compliance in a similar way as the Directorate of Human Rights of the Council of Europe has assisted the Committee of Ministers.³⁵ In particular, this would involve monitoring the steps taken by state parties to implement the Commission's recommendations in consultation with the Special Rapporteur on Follow-Up to advise the Executive Council as to whether the steps taken are adequate. Such a course would ensure that the Executive Council as a purely political body would be in a position to decide whether state parties have complied with the legal recommendations of the Commission.

It is further recommended that the Democracy, Governance, Human Rights and Elections Division should draft model "enabling" legislation to be disseminated amongst state parties to assist them in adopting domestic "enabling" legislation to provide for the implementation of the Commission's recommendations through domestic courts. The same legislation could also provide for the execution of the African Court's judgments by domestic courts of a state party. The lack of "enabling" legislation to allow for the reopening of criminal cases under the domestic law of Burundi has been identified, in this study, as the reason for non-compliance with the Commission's recommendations in its finding against Burundi.³⁶ The adoption of "enabling" legislation is therefore a factor

³⁴ See section 4.7 of chapter 4.

³⁵ See sections 6.2.2 and 6.2.3 of chapter 6.

³⁶ The Commission, in communication 231/99 *Avocats Sans Frontieres (on behalf of Gaetan Bwampamye v Burundi)*, 14th Annual Activity Report, requested Burundi 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". *l'Association Burundaise pour la Defense des Droits des Prisonniers* (ABDP) an NGO based in Bujumbura, Burundi, explained that they have lobbied for the

that plays a significant role in the implementation of the Commission’s findings on the domestic level and will also be of importance for the execution of the ACtHPR’s judgments. Examples of “enabling” legislation can be found in the Inter-American system and, even more so, in the European system.³⁷ State parties should also provide through the adoption of “enabling” legislation or special procedures for the reopening of criminal proceedings following a finding by the African Commission or a judgment by the African Court.³⁸ The Democracy, Governance, Human Rights and Elections Division should provide guidance to state parties in this regard either through the drafting of model legislation or by the dissemination of guidelines or by organising workshops on the topic.

(v) Peace and Security Council

The Peace and Security Council could play a role in cases where the Commission finds that the facts reveal the existence of serious or massive violations of human rights.³⁹ The Peace and Security Council has primarily been established to prevent, manage and resolve conflicts on the African continent.⁴⁰ Based on the objectives and guiding principles of the Council,⁴¹ the Council could play a role in implementing those cases where the African Commission has found a state party in violation of the African Charter, based on a series of serious or massive violations of the Charter, as a direct result of

implementation of the Commission’s recommendations, but in the absence of any domestic legislation to provide for the reopening of criminal cases, their 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. ABDP recommended to Parliament the following amendment of article 46(6) of the existing legislation dealing with the revision of judgments by the Supreme Court of Burundi: “(6) When by virtue of a decision rendered by an international jurisdiction (judicial institution) or by a quasi-supranational institution, it has been confirmed that (i.e. the decision was that) there was a violation of a substantive provision of an international convention ratified by the state of Burundi” (translated from the French text). (Explanation provided by ABDP during an interview with Frans Viljoen at the 36th ordinary session of the African Commission held in Dakar, Senegal).

³⁷ See section 6.4.2 (b) of chapter 6.

³⁸ As above.

³⁹ Article 58(3) also makes provision for the Commission to bring cases of emergency to the attention of the OAU. Under the AU this would enable the Commission to bring such cases to the attention of the Council.

⁴⁰ Article 2(1) of the Protocol relating to the Establishment of the Peace and Security Council of the African Union (Protocol).

⁴¹ Article 3(f) and 4(c) of the Protocol.

internal conflict within a state.⁴² Article 58 of the African Charter provides that the Commission should refer cases revealing serious or massive violations to the AHSG of the OAU. Since the OAU never took any steps in cases referred as such by the Commission, the Commission stopped referring such cases to the AHSG. With the establishment of the Council under the AU, it offers a new opportunity for the Commission to make use of article 58.

7.5 Table G: A schematic summary of the main features on a follow-up mechanism for the African system

Body, institution or organ responsible	Actions to adopt that would constitute a basic follow-up mechanism	Incremental
African Commission	1) Amend its Rules of Procedure to provide for a follow-up mechanism, stipulating the specific steps it intends to take and what is expected from state parties. 2) The appointment of an independent expert as a Special Rapporteur on Follow-Up. 3) The Commission should adopt a resolution to clarify the legal status of its findings.	
Secretariat of the African Commission	1) Appoint a full-time legal officer on follow-up.	

⁴² As recorded in Table A in chapter 2 the cases where the Commission found serious or massive violations of the Charter and which were subsequently referred to the AHSG in accordance with article 58 of the Charter were never acted upon. See for example communication no 47/90 *Lawyers Committee for Human Rights v Zaire*, 7th Annual Activity Report and joint communication nos 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*, 9th Annual Activity Report.



	2) Create a data base on state compliance.	
Assembly of Heads of State and Government		1) The Assembly should use its six monthly sessions as a platform to call on state parties to comply with the Commission's recommendations.
Executive Council	<p>1) Allocate additional resources to provide for: the full-time appointment of a legal officer on follow-up and the mandate of a Special Rapporteur on Follow-Up.</p> <p>2) Adopt a mandate to monitor compliance with the recommendations of the African Commission. Adopt the necessary rules to outline the procedures it should follow and indicate clearly what would be expected from state parties.</p>	
Pan-African Parliament		The PAP should publicly debate the status of state compliance with the recommendations of the African Commission and should monitor compliance through addressing questions to the Executive Council inquiring as to problems experienced with compliance.
AU Commission	The Democracy, Governance, Human Rights	The drafting of model "enabling" legislation to assist



	and Elections Division should develop the capacity to advise the Executive Council on the measures state parties have taken to implement the Commission's recommendations.	state parties in the adoption of domestic "enabling" legislation and procedures to implement the Commission's recommendations and the Court's judgments domestically.
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