

Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy

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Summary

It has been two decades since the African Commission was inaugurated and still its effective execution of its mandate is debatable. While it has undoubtedly made some progress, particularly in its protective mandate of considering communications from individuals, the recommendations it has hitherto issued have largely been ignored by state parties. This paper, written from an insider's perspective — the authors having worked with the African Commission — argues for a review of the system in practice in a bid to ensure the enforcement of the Commission's recommendations. It calls on the Assembly of Heads of State and Government of the African Union to adopt the recommendations of the African Commission as its binding decisions, whose breach attracts sanctions. The paper finally examines the possible role of the newly established African Court on Human and Peoples' Rights in the enforcement of the decisions of the African Commission.

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1 Introduction

A human rights guarantee is only as good as its system of supervision. The African Commission on Human and Peoples' Rights (African Commission)¹ is the only institution charged with the promotion and protection of human and peoples' rights in Africa, as articulated in the African Charter on Human and Peoples' Rights (African Charter).² Under its protective mandate, the African Commission considers cases of alleged violations of the African Charter, known as 'communications'.³ Where it makes a finding of violations of the Charter, it often⁴ issues decisions and 'recommendations' on the appropriate remedies.⁵ However, the attitude of state parties,⁶ since the Commission's inception two decades ago, by and large has been generally to ignore these

¹ The African Commission (established under article 30 of the African Charter) was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. See African Commission Information Sheet 1 http://www.achpr.org/english/information_sheets/ACH-PR%20inf.%20sheet%20no.1.doc (accessed 20 July 2006).

² African Charter on Human and Peoples' Rights, adopted 27 June 1981 in Nairobi, Kenya, OAU Doc CAB/LEG/67/3 Rev 5, entered into force on 21 October 1986 art 30.

³ The communications are either from states (arts 47-54 African Charter) or non-state entities (NGOs, national human rights institutions) or individuals (arts 55-59 African Charter). By the 39th ordinary session of the African Commission, the Commission's database puts this number at 320 communications, all but one of which are from individuals and NGOs, namely Communication 227/99, *DRC v Burundi, Rwanda & Uganda* Twentieth Activity Report 2006.

⁴ It is noted that the African Commission's practice of issuing of recommendations pursuant to communications is a practice of the Commission that has taken several years to develop, as its earlier decisions were characterised by findings of admissibility of violations or not, without anything more. See generally Institute for Human Rights and Development *Compilation of decisions on communications of the African Commission on Human and Peoples' Rights: 1994-2001* (2002) 3-7.

⁵ The mandate of the African Commission in accordance with art 45 of the African Charter is four-fold: the promotion, protection and interpretation of the African Charter and the performance of any other task assigned by the Assembly of Heads of State and Government.

⁶ The few instances of compliance with the African Commission's recommendations would include *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1994) (V Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 345; *Pagnouille (on behalf of Mazou) v Cameroon* (2000) AHRLR 57 (ACHPR 1997) (comments made by the state representative of Cameroon during the delivery of its initial state report at the 31st ordinary session of the African Commission on 6 May 2002 in Pretoria, South Africa).

recommendations,⁷ with no attendant consequences.⁸ As a result, victims of human rights violations often find themselves without any remedy, even after resorting to the African Commission, which erodes and undermines its credibility and authority as an effective protector of the rights enshrined in the African Charter.⁹

The weary debate on the binding nature or otherwise of the recommendations of the African Commission constitutes a major cause of states' failure to abide by them.¹⁰ This paper therefore examines this

⁷ See 'Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach' 24th ordinary session, OAU DOC/OS/50b (XXIV), para 2 (1998), reprinted in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights, on compliance of state parties to adopted recommendations of the African Commission: A legal approach* (2001) 355. (Please note that the legal status of this document is uncertain as it is not available in the archives of the African Commission, neither is it reflected in the relevant Twelfth Annual Activity Report of the Commission. The reference made also to Agenda 11(b) of the 24th session is inconsistent with the records of the Commission.) See also SBO Gutto 'The compliance with regional and international agreements and standards by African governments with particular reference to the rule of law and human and peoples' rights' in P Anyang'Nyongo *et al* (eds) *New Partnership for Africa's Development (NEPAD): A new path?* (2002); F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 2.

⁸ Instances of states' disregard of the Commissions recommendations resonate in Africa. A typical example of a continued violation of human rights is *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003), whereby 11 detainees and victims of human rights violations, whom the African Commission had ordered to be released immediately, at its 34th session in November 2003, remain *incommunicado*. See Ensuring the Implementation of ACHPR Rulings, Amnesty International Seminar, The Gambia, 10 May 2006; states also blatantly disregard provisional measures, as exemplified in *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998). The Nigerian state disregarded the African Commission's provisional measures and executed Ken Saro-Wiwa. Recently also the Kenyan state has disregarded interim measures issued pursuant to Communication 276/2003, *CEMIRIDE (on behalf of the Endorois community) v Kenya* http://www.minorityrights.org/news_detail.asp?ID=342 (accessed 22 May 2006). Some token public relations measures have at times been taken by states, but lacking proper political backing, as demonstrated by the Nigerian state pursuant to *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001). (The Nigerian government had established, *inter alia*, the Niger-Delta Development Commission (NDDC) pursuant to the African Commission's decision (this may not be directly attributed to the Commission's decision in view of other loud calls for government action in the Niger-Delta.) The NDDC was established to address the environmental and other socially related problems in the Niger Delta area and other oil-producing areas of Nigeria. Notwithstanding this, there are continued media reports of human rights violations in this region, leading to unrest. See the Niger-Delta Development Commission (Establishment etc) Act 6 of 2000 [http://www.nigeria-law.org/Niger-DeltaDevelopmentCommission\(Establishment%20etc\)Act2000.htm](http://www.nigeria-law.org/Niger-DeltaDevelopmentCommission(Establishment%20etc)Act2000.htm) (accessed 21 July 2006).

⁹ Non-Compliance of States Parties (n 7 above).

¹⁰ F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 13; see also 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* 428; EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 24 74-5; C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights (1998) 10 *African Journal of International and Comparative Law* 625.

debate and argues that, notwithstanding the hitherto contestable nature of the Commission's recommendations, states are bound to respect and implement them in view of the principle of *pacta sunt servanda* under the Vienna Convention on the Law of Treaties,¹¹ and article 1 of the African Charter.¹²

Another contributor to the non-compliance by states of the African Commission's recommendations is that the Commission, unlike some other regional and global human rights bodies, does not have an institutionalised¹³ follow-up system to ensure the implementation of its recommendations and decisions, 'even though some *ad hoc* follow-up and inconsistent measures had been initiated on few occasions'.¹⁴ The Commission has in a variety of forums attempted to follow up on the implementation of its recommendations through promotional and protective missions to state parties or by incorporating follow-up measures as part of its findings on individual communications.¹⁵ It has also enquired about the status of implementation of its past recommendations during the presentation of state reports, and during the consideration of other communications affecting the same states.¹⁶ These efforts have yielded few, if any, concrete results. The paper therefore proposes the establishment of an institutionalised follow-up mechanism by the African Commission for monitoring the implementation of its decisions and issuance of specific recommendations.

Furthermore, noting that the regional human rights regime lacks actual enforcement tools *per se*, the paper examines the norms and institutions developed under the auspices of the African Union (AU) in relation to human rights, and the possibilities they offer to the Commission to solve the nagging problem of non-compliance with its decisions. This is especially in view of article 23(2) of the Constitutive Act of the AU (Constitutive Act),¹⁷ which holds the main key to the infusion of the necessary bite into the human rights enforcement system, by providing for sanctions against state parties which fail to implement the decisions of the AU. The paper argues that through the submission of the African

¹¹ The Vienna Convention on the Law of Treaties, entered into force on 27 January 1980.

¹² Art 1 of the African Charter provides: 'The member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall *undertake to adopt legislative or other measures to give effect to them* (our emphasis).

¹³ See eg Rules of Procedure of the Inter-American Commission (2003) art 46; the UN Human Rights Committee and the UN Committee against Torture sourced at [http://193.194.138.190/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a6878e3a2-f04e466c125703b002db52a/\\$FILE/CERD_C_67_FU_1\(E\).doc](http://193.194.138.190/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a6878e3a2-f04e466c125703b002db52a/$FILE/CERD_C_67_FU_1(E).doc) (accessed 22 July 2006).

¹⁴ Viljoen (n 10 above) 15.

¹⁵ Dankwa (n 6 above).

¹⁶ As above.

¹⁷ Constitutive Act of the African Union OAU Doc CAB/LEG/23 15 (11 July 2000), entered into force 26 May 2001.

Commission's recommendations via its Annual Activity Reports to the Assembly of Heads of State and Government of the AU (AU Assembly), and their consequent adoption by the Assembly, they should become 'binding decisions' of the AU, within the context of article 23(2) of the Constitutive Act, which attract sanctions where they are not implemented; and implores the AU to adopt such a pro-human rights interpretation of article 23(2). The paper also explores the possible role that the Peace and Security Council of the AU (PSC) can play in view of the recommendations of the African Commission in cases of serious or massive violations of human rights in view of article 58 of the African Charter, and article 19 of the Protocol establishing the Peace and Security Council (PSC Protocol).¹⁸

Finally, the paper examines the role of the newly established African Court on Human and Peoples' Rights (African Court) in the enforcement of the decisions of the African Commission, and as the long-awaited medium for having legally binding and enforceable decisions under the regional human rights regime.

2 The African Charter and its implementing mechanism

The adoption of the African Charter in 1981 and subsequent establishment of the African Commission¹⁹ to promote and protect the Charter-guaranteed rights occurred at a time when African leaders were still reluctant to fully incorporate human rights into the political discourse.²⁰ It came at a time when the African political community — the Organisation of African Unity (OAU) and its component states — adhered to a strict interpretation of the principle of non-interference, even at the expense of the lives and rights of their citizens.²¹ Consequently, unlike their European and Inter-American contemporaries, African leaders at the time shunned the idea of a supra-national human rights court, and opted for the African Commission, vested with wide promotional and protective functions with very restrictive room for manoeuvring in the enforcement of its decisions.²²

¹⁸ Protocol relating to the Establishment of the Peace and Security Council of the African Union, adopted on 10 July 2002; entered into force on 26 December 2003 <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 26 May 2006).

¹⁹ The African Commission is the only mechanism created under the African Charter to monitor state parties' compliance. Its mandate includes promotional activities, protective activities (including complaints), the examination of state party reports and the interpretation of the African Charter; art 45 African Charter.

²⁰ See further Ankumah (n 10 above) 4-8; G Naldi 'Future trends in human rights in Africa: The increased role of the OAU' in Evans & Murray (n 6 above) 1.

²¹ Naldi (n 20) above.

²² As above.

Although caught between these hard African realities and the soft African Charter,²³ the African Commission has made some commendable achievements, particularly in the exercise of its protective mandate of considering communications, where it has developed the practice of making recommendations,²⁴ which now form an important case law, supplementing and considerably developing the original treaty text.²⁵ The African Commission makes recommendations notwithstanding that it is not clear from the African Charter what kind of findings it is able to make after the consideration of individual communications,²⁶ or indeed whether it can make a finding at all, and what the possible remedies are.

However, this innovativeness falls short of a measure for ensuring compliance with these recommendations, and most state parties have disregarded these recommendations with no attendant consequences. Hence, the African Commission's finding of a violation on the part of a state party does not necessarily afford a remedy to the victim, and despite wide ratifications of the African Charter,²⁷ many states continue in the wanton violation of rights. This state of affairs has earned the Commission numerous criticisms as a toothless outfit operating at the will and whim of its political master, the AU Assembly.²⁸

Consequently, and notably, without the requisite enforcement mechanisms to ensure states' implementation of such recommendations, human rights protection on the continent remains elusive²⁹ and the lack of implementation calls for an evaluation of the system in practice, the subject of this paper. Some of the reasons advanced for the non-implementation of the African Commission's recommenda-

²³ See generally C Odinkalu 'The role of the case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 225, on how the African Commission has largely reinvented the seemingly weak African Charter.

²⁴ I Österdahl 'Implementing human rights in Africa: The African Commission on Human and Peoples' Rights and individual communications' (2002) 15 *Swedish Institute of International Law Studies in International Law*, noting that the issuing of recommendations by the Commission is an innovative way of fulfilling its protective mandate.

²⁵ C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 685-686; n 23 above.

²⁶ See art 52 of the African Charter in respect of findings in non-state communications, which is not clear either. See Österdahl (n 24 above).

²⁷ The African Charter has been ratified by all members of the AU.

²⁸ See Naldi (n 20 above) 12; Ankumah (n 10 above) 9; Viljoen (n 10 above) 6; UO Umzurike *The African Charter on Human and Peoples' Rights* (1997) 78; Organization of African Unity 'Making human rights a reality for Africans' August 1998 (AI Index IOR63/01/98).

²⁹ At present, the African Commission's follow-up to ensure the enforcement of its recommendations is made through *note verbales*, during field missions and during its ordinary sessions when state delegates are present. In view of the results achieved, this approach has proven to be unsatisfactory. See also K M'baye 'Keynote address on the African Charter on Human and Peoples' Rights' *ICJ Nairobi Conference Report* 2-4 December 1985, ICJ Geneva (1986) 27.

tions include the lack of political will on the part of state parties, a lack of good governance, outdated concepts of sovereignty,³⁰ a lack of an institutionalised³¹ follow-up mechanism for ensuring the implementation of its recommendations, weak powers of investigation and enforcement³² and the non-binding character of the Commission's recommendations,³³ the last of which is the most cited reason why states have not been inclined to enforce its recommendations. The next section therefore examines the debate on the nature of the Commission's recommendations.

2.1 The nature of the Commission's recommendations

The authors note that while the African Charter gives the African Commission express powers to make 'recommendations' in respect of state communications under article 53, the in-depth study that the AU Assembly may ask it to undertake in cases of serious and massive violations of human and peoples' rights under article 58(2), and its promotional mandate,³⁴ there is nothing in the Charter that suggests that the Commission may make 'recommendations' to the states as a result of its consideration of individual communications.³⁵ Therefore, the authors reiterate that the issuing of recommendations by the African Commission on individual communications is an innovative way of fulfilling its protective mandate. However, neither the African Charter nor the Rules of Procedure of the African Commission define the status of the Commission's recommendations.

Nevertheless, it is trite that by signing and ratifying the African Charter, states signify their intention to be bound by and adhere to the obligations arising therefrom, even if they do not enact domestic legislation to effect domestic incorporation.³⁶ This principle is expressed in article 14 of the Vienna Convention on the Law of Treaties of 1969.³⁷

³⁰ Viljoen & Louw (n 7 above) 9-10.

³¹ Rules of Procedure of the Inter-American Commission (n 13 above) art 46.

³² Naldi (n 20 above).

³³ As above.

³⁴ Art 45(1)(a) African Charter.

³⁵ African states vested the African Commission with neither judicial nor quasi-judicial powers, their original intent being to create a body for promoting rather than protecting human rights.

³⁶ See the Botswana case of *Attorney General V Dow* 1964 6 BCLR 1 *per* Ammisah JP 27-30 and Aguda JA 43-47; *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46; the *Saro-Wiwa* case (n 8 above) para 113. See also J Dugard *International law: A South African perspective* (1992) 266. See also DJ Harris *Cases and materials on international law* (1991) 747.

³⁷ Art 14 of the Vienna Convention provides that '[t]he consent of a state to be bound by a treaty is expressed by ratification when, *inter alia*, the treaty provides for such consent to be expressed by means of ratification, or the consent of a state to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification'.

Therefore, while it is true that African states were not keen to surrender their sovereignty to a regional quasi-judicial body like the African Commission,³⁸ by ratifying the Charter it is obvious that they were aware that they were required to abide by its provisions.³⁹ Article 27 of the Vienna Convention further provides that a state 'cannot [consequently] plead provisions of its own law or deficiencies in that law' in answer to a claim it is in breach of a treaty obligation.⁴⁰

The African Commission has adopted this position by stating that the effective implementation of the African Charter is based on the principle of *pacta sunt servanda*,⁴¹ which is to the effect that agreements are binding on parties, and are to be implemented in good faith.⁴² Under this principle, an African state's ratification of the African Charter creates for that state an obligation that demands concrete results.⁴³ Therefore, irrespective of whatever system of governance may be in place, a state is constrained by norms prescribed in a treaty and must discharge the duties established thereunder.⁴⁴ As a result, a state cannot invoke the provisions of its domestic legislation, including its constitution, to evade its treaty obligations.⁴⁵ The African Commission adopts the view that when a state ratifies the African Charter, it is obligated to uphold the fundamental human rights contained therein, even if it does not enact domestic legislation to effect the Charter's incorporation.⁴⁶ The Commission has reiterated that 'international treaties which are not part of domestic law and which may not be directly

³⁸ n 20 above.

³⁹ Naldi (n 20 above) 2; Viljoen (n 10 above) 6.

⁴⁰ See the Inter-American Court's decision in *Caso Loayza Tamayo v Peru* <http://www.wcl.american.edu/hrbrief/v7i2/newsasystem.htm> (accessed 21 July 2006).

⁴¹ Art 26 of the Vienna Convention on the Law of Treaties explains the principle of *pacta sunt servanda* as meaning that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Art 31(1) of the Vienna Convention on the Law of Treaties further stipulates that a treaty must be interpreted in good faith in the light of its objects and purpose. The protective purpose of the African Charter will be realised optimally if the Commission's findings constitute legal obligations.

⁴² Art 26 Vienna Convention (n 41 above). See *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 75; *Jawara v The Gambia* (n 36 above) para 46.

⁴³ As the Permanent Court of International Justice articulated, 'A state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken'; *Advisory Opinion No 10, Exchange of Greek and Turkish Populations*, 1925 PCIJ (ser B) 10 at 20; see *Media Rights Agenda* (n 42 above) para 75.

⁴⁴ *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) para 26.

⁴⁵ Art 27 Vienna Convention: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' See also Draft Declaration on Rights and Duties of States art 13 [1949] *Year Book of the International Law Commission* 286 UN Doc A/CN.4/SER A/1949; IA Shearer *Starke's international law* (1994) 22.

⁴⁶ See *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 43. See art 27 Vienna Convention and *Caso Loayza Tamayo v Peru* (n 37 above).

enforceable in the national courts nonetheless impose obligations on state parties'.⁴⁷

The Commission's view has, however, been criticised by various authors⁴⁸ who argue that the findings of the Commission are not legally binding and that states consequently are not legally bound.⁴⁹ Murray, for example, notes that the Commission 'considers its decision as an authoritative interpretation of the Charter and thus binding on states despite having been established as "little more than a subcommittee" of the political OAU'.⁵⁰ Naldi also argues that the 'recommendations of the African Commission lack the formal binding force of a ruling of a court of law but have a persuasive authority akin to the opinions of the United Nations Human Rights Committee and as such an expectation of compliance appears to have been engendered'.⁵¹

Some states have indeed questioned the African Commission's assumption of a quasi-judicial function,⁵² in response to which the Commission has tried to define the extent of its mandate and the status of its decisions. In *Civil Liberties Organisation v Nigeria*,⁵³ the African Commission found the Federal Republic of Nigeria to have violated articles 7 and 26 of the African Charter, when its military government suspended the Charter as domesticated, and ousted the jurisdiction of the courts in Nigeria to adjudicate the legality of any of its decrees, through the use of ouster clauses. The Commission held categorically that the obligations of the Nigerian government remained unaffected by the purported revocation of the domestic effect of the Charter; and that the decisions of the African Commission are legally binding on the government of Nigeria, as are the provisions of the Charter itself.⁵⁴

The government of Nigeria, in response, criticised the African Commission and asserted that such a recommendation was an affront to its sovereignty because the Commission lacked the judicial capacity to make such a recommendation.⁵⁵ The Commission consequently replied

⁴⁷ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) paras 59-60.

⁴⁸ See eg G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 684; R Murray *The African Commission on Human and Peoples Rights and international law* (2000) 54-55.

⁴⁹ Österdahl (n 26 above) 154-155; E Enonchong 'The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197.

⁵⁰ See Murray & Evans (n 7 above) 758.

⁵¹ Naldi (n 20 above) 10.

⁵² See submissions by the Federal Republic of Nigeria to the 2nd extraordinary session of the African Commission held 18-19 December 1995, Kampala, Uganda, ACHPR Documentation, Banjul, The Gambia.

⁵³ (2000) AHRLR 188 (ACHPR 1995) para 20.

⁵⁴ n 53 above, paras 19 & 20. See further C Anyangwe 'Obligations of state parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.

⁵⁵ African Commission on Human and Peoples' Rights 'Account of Internal Legislation of Nigeria and the Dispositions of the African Charter on Human and Peoples' Rights' Doc II/ES/ACHPR/4; n 53 above.

that it is bound by the African Charter to consider communications fully, carefully, and in good faith.⁵⁶ It added that when the Commission concludes that a communication finds a state in violation of the African Charter, its duty is to make such clearly and indicate what action the government must take to remedy the situation. With regard to the allegations of its lack of judicial capacity, the African Commission held that⁵⁷

the communications procedure as set out in article 55 of the Charter is quasi-judicial, in that communications are not necessarily adversarial. Complainants are complaining against some act or neglect of a government, and the Commission must ultimately, if it is unable to effect a friendly settlement, decide for one side or the other.

From the foregoing, the authors note that states are bound by their obligations under the African Charter, including the quasi-judicial jurisdiction of the African Commission, and the resultant recommendations and decisions.⁵⁸ In effect, notwithstanding the undefined and debated nature of the Commission's decisions, the authors argue that the 'legal' or 'moral' nature of the recommendations is not so much the question, but rather the fact that parties simply have an obligation to implement them in view of the cited principle of *pacta sunt servanda*, and the provisions of article 1 of the African Charter,⁵⁹ among others. The authors therefore submit that the binding nature of the recommendations of the African Commission is more of a political question than a legal one, because the implementation of the recommendations of the African Commission in the respondent state is dependent on political will.

Also related to the discourse on implementation is the issue of provisional measures issued by the African Commission in emergency cases. This is not provided for in the Charter, but in the Commission's Rules of Procedure, which provide that it may inform a state party on the 'appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of [an] alleged violation before a decision has been finalised on a communication'.⁶⁰ For example, in *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,⁶¹ the African Commission called on Nigeria not to execute the complainant, pending the final outcome of the communication before it. The state, however, executed the complainant in total disregard of the provisional

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ That is, a reading of arts 14, 26, 27 & 31(1) of the Vienna Convention and art 1 of the African Charter combined.

⁵⁹ Art 1 of the African Charter states that member states shall recognise the rights under the Charter and shall undertake to adopt legislative or other measures to give effect to them.

⁶⁰ Rule 111 of the African Commission's Rules of Procedure 1998.

⁶¹ *Saro-Wiwa* case (n 8 above).

measures issued by the Commission. The Commission subsequently found that the death penalty imposed and execution of the complainant violated the African Charter, and held that the execution in the face of the Commission's provisional measures under its rule 111 defeated the purpose of the rule.⁶²

Provisional measures allow a meaningful consideration of the Commission's eventual findings and states should consider them as binding.⁶³ It is the authors' position that by ratifying the African Charter, state parties undertook to fulfil the obligations thereunder, including an undertaking not to do anything that would undermine the objective of the Charter.⁶⁴ Notwithstanding the fact that even provisional measures are not considered legally binding, state parties are obliged to comply with them and to the bare minimum refrain from inflicting irreparable damage, pending the finalisation of the case before the Commission.⁶⁵

However, notwithstanding the argument by the Commission that state parties are obliged to respect and implement its decisions, the authors note that there has not been any authoritative move on the part of the African Commission to develop a 'consistent follow-up system to gather information about states' responses to its recommendations'⁶⁶ and ensure the implementation of same,⁶⁷ and has thus remained passive with respect to the consequences of its recommendations.⁶⁸ Accordingly, there is a need to institutionalise an enforcement system to ensure that the Commission's recommendations are implemented, in order that the Commission may rise up to meet the expectations of complainants who have entrusted it with their complaints and grievances.⁶⁹

In accordance with article 59 of the African Charter, the African Commission has, since its Seventh Annual Activity Report, included a separate annexure dealing with communications, naming the states against which communications had been filed, and stating its findings and recommendations where it had found violations of the Charter.

⁶² n 8 above, paras 114, 115 & 116.

⁶³ As above.

⁶⁴ Art 31(1) Vienna Convention.

⁶⁵ The ICJ has, however, held that the provisional measures are binding. See the judgment of the ICJ in the *La Grande case (Federal Republic of Germany v United States)* Case 104 of 27 June 2001, ICJ at 506 para 109) where the Court held that orders indicating provisional measures are (legally) binding.

⁶⁶ Viljoen (n 14 above) 15.

⁶⁷ See Draft Resolution on the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights, annexed to Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach, 24th session OAU DOC/OS/50b (XXIV) (1998).

⁶⁸ n 56 above.

⁶⁹ See the European Convention art 46; the American Convention on Human Rights art 68; art 30 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

These reports are then published and are available to the public after adoption by the AU Assembly. This process of publicising or naming and shaming has tended to make some states take the recommendations of the African Commission seriously,⁷⁰ but without proper follow-up by the Commission, states continue to ignore them. Therefore, within its own structure, it is suggested that the Commission also adopts a strategic approach to follow-up. More importantly, the Commission should complement its findings of violations of the African Charter and sound reasoning with unambiguous specification of the appropriate remedies. This primary suggestion is because, while improving on its practice of making recommendations,⁷¹ it has been observed that the Commission has not always been explicit or clear in its findings and indication of remedial measures.⁷² In many situations, the Commission finds that a victim is entitled to compensation, but fails to determine what the compensation should be, thus leaving it to the state in question to configure the appropriate remedial measures.⁷³ Such open-ended remedies do not make it clear to states what they are required to do, and that the lack of clarity would as well impede any follow-up or implementation as the form and nature of the remedy is

⁷⁰ Notably, some states have recently even taken to pressuring the AU Assembly through the Executive Council to suspend the publication of the African Commission's Annual Activity Report for incorporating unfavourable resolutions and recommendations. See Assembly/AU/Dec 49 (III). The AU Assembly suspended the publication of the African Commission's Seventeenth Annual Activity Report, at its 4th Summit in Addis Ababa, Ethiopia. The report was suspended at the behest of Zimbabwe, since it incorporated a report on a fact-finding mission to that country. See also Assembly/AU/Dec 101(VI) para 1. The AU Assembly sought the deletion of certain aspects of the Nineteenth Activity Report before publication, at the Assembly's 6th Summit in Khartoum, Sudan. The report had, among others, resolutions on the human rights situation in Eritrea, Ethiopia, Sudan, Uganda and Zimbabwe. While this development has been criticised for its perceived interference with the independence of the African Commission, it is also illustrative of the fact that states are wary of being adversely mentioned in reports of the African Commission. Consequently, the authors note that the 'naming and shaming approach' is effective, even though minimally so, and urge the AU Assembly to be more supportive of the Commission by not yielding to states' demands that lead to the suspension of, or deletion of, parts of the Commission's Activity Reports; more so because this approach compromises the independence and effectiveness of the Commission.

⁷¹ Eg, the African Commission made notably concrete and specific recommendations in its decisions in *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) and *SERAC* (n 8 above).

⁷² Odinkalu (n 23 above) 242. The most common formulation at the conclusion of decisions is the 'urging' of states to 'draw the necessary legal conclusions' (eg *Pagnouille* (n 6 above); *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001); *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi* (2000) AHRLR 48 (ACHPR 2000)) or 'take the necessary steps' to bring their practice in conformity with the African Charter (eg *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996); *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998)). See also Harrington (n 4 above) 5.

⁷³ See *Embaga Mekongo v Cameroon* (2000) AHRLR 567 (ACHPR 1995).

bound to be contested. Sometimes, the Commission makes a finding only of a violation of the victim's rights, without anything further.⁷⁴

It is therefore suggested that the African Commission adopts a standard approach to its findings, specifying the violations, remedies recommended and time limit for implementation. It is further suggested that the Commission includes reports on the status of compliance by states in its activity reports, which report is in turn submitted to the AU Assembly,⁷⁵ which then adopts them in line with article 59 of the African Charter. This will be similar to the practice of the United Nations (UN) Human Rights Committee which 'provides an annual report noting the status of state compliance with its findings'.⁷⁶

Such an institutionalised follow-up mechanism would also be akin to the position under the Inter-American human rights system where the General Assembly and the Permanent Council of the Organization of American States are charged with the primary political responsibility for monitoring compliance with decisions of the Inter-American Commission and the Inter-American Court of Human Rights.⁷⁷ In the European human rights system, the Council of Europe's Committee of Ministers fulfils similar obligations of monitoring compliance of the decisions of the European Court of Human Rights.⁷⁸

The authors, however, note that, notwithstanding the importance of a follow-up system within the structure of the African Commission to ensure the implementation of its decisions, the latter is still not imbued with enforcement powers. This assertion requires an explanation of the present authors' conception of the term 'enforcement' which has been defined as 'comprising all measures intended and proper to induce respect for human rights'.⁷⁹ Enforcement therefore involves securing compliance by all necessary means. For instance, the only use of the term 'enforcement' in the UN Charter occurs in relation to the enforcement under chapter VII of decisions of the Security Council;⁸⁰ which has led to some international lawyers equating enforcement with the use of,

⁷⁴ *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000); *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

⁷⁵ Draft Resolution on Compliance (n 67 above).

⁷⁶ Viljoen (n 10 above) 15 fn 81, citing Report of the Human Rights Committee, UN Human Rights Committee 57th session CH 6, Follow-up activities under the Optional Protocol 118, UN Doc A/57/40 (vol 1) (2002).

⁷⁷ C Heyns *et al* 'A schematic comparison of regional human rights systems: An update' (2006) 4 *SUR International Journal on Human Rights* 168.

⁷⁸ As above. See also art 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222, entered into force 3 September 1953 (as amended by Protocols 3, 5, 8, & 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998 respectively).

⁷⁹ R Bernhardt 'General report' in R Bernhardt & JA Jolowicz (eds) *International enforcement of human rights* (1985) 5.

⁸⁰ Art 45 Charter of the United Nations, 1945.

or threat of use of, economic or other sanctions or armed force.⁸¹ The African Commission lacks such powers of 'actual' enforcement, and what it does is merely to promote and protect human rights, with the necessary co-operation of concerned states rather to enforce human rights.⁸² The AU Constitutive Act, on the other hand, makes provision for the enforcement of the AU's decisions.⁸³ Consequently, the next section examines the effect of the adoption of the African Commission's recommendations by the AU Assembly, and the possible enforcement mechanism for such within the political framework of the AU.

3 Possible enforcement mechanisms under the African Union

3.1 The relationship between the African Commission and the African Union

Antecedent to an analysis of the possible enforcement of the African Commission's recommendations through the AU, it is important to attempt to clarify the relationship between the two institutions. The extent to which the AU mechanisms can be employed to enforce the Commission's recommendations would largely depend on whether the latter is an institution of the AU, or a subsidiary organ, or if the two are parallel institutions with the duty to co-operate in the enforcement of human rights in Africa.

It is important to note that, while the African Union's Constitutive Act makes reference to human rights and the African Charter, it specifically failed to list the African Commission as an AU institution under its relevant article 5. This has led to debate as to whether the African Commission is an organ of the AU and to what extent the Constitutive Act envisions human rights and their protection and promotion of importance. Therefore, consequent to the uncertainty about their relationship, the AU Assembly, at the Durban Summit, incorporated the African Commission and other existing human rights institutions into

⁸¹ HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (1996) 347. Compliance with international law generally takes place within a state and depends on its legal system, on its courts and other official bodies but as with other international obligations, the international system can exert influence on the state to comply.

⁸² As was earlier stated, the African Commission's enforcement powers and that of other relevant bodies lay with the Assembly of Heads of State and Government of the OAU; which power was not used.

⁸³ Unlike the OAU Charter, which made no provision for the enforcement of its principles. See art 23(2) of the AU Constitutive Act (n 17 above).

the AU structure under article 5(2) of the AU Constitutive Act⁸⁴ to 'operate within the framework of the African Union'.⁸⁵ In this regard, Kindiki⁸⁶ has contended that on a literal interpretation of article 5(2), the AU Assembly could not have acted under this provision because the institutions in question already existed. Instead, the institutions should have been integrated into the AU through article 3(h) of the AU Constitutive Act, which provides that the AU will promote and protect human rights 'in accordance with the African Charter and other relevant human rights instruments' under which these institutions were created.⁸⁷

Some analysts believe that this express omission was deliberate,⁸⁸ while others think the non-inclusion of the African Commission into the Constitutive Act illustrates its ineffectiveness and a desire by the AU to sideline it.⁸⁹ The latter hold the view that 'had the Commission been very active in the field of human rights to make its impact felt on the continent or to be seen as a very important tool for socio-economic and political development, such impact would not have escaped the mind of the drafters of the Act'. Rather, it is the opinion of the authors that the omission of such an important institution in the treaty establishing the African political body is reflective of the status of human rights on the agenda of the body, notwithstanding that the African Commission is perceived as being efficient or otherwise. It is a body whose continued existence cannot be compromised, except if the AU had a better alternative in mind to safeguard the rights of the African people on a continent rife with human rights violations.

It is also important to note relevant long-standing arguments on the status of the African Commission, pre-dating the AU. In this regard, some analysts have considered the Commission as having been established as 'little more than a subcommittee' of the political OAU.⁹⁰ On

⁸⁴ See AU 'Decision on interim period' 1st ordinary session of the AU Assembly of Heads of State and Government AU DOC ASS/AU/Dec 1(1) para 2(XI) http://www.africa-union.org/official_documents/Decisions_Declarations/durban%202002/Durban%202002%20Assembly%20of%20the%20African%20Union.pdf (accessed 28 July 2006).

⁸⁵ As above.

⁸⁶ K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 97.

⁸⁷ n 86 above, 103.

⁸⁸ See generally GM Wachira 'A critical examination of the African Charter on Human and Peoples' Rights: Towards strengthening the African human rights system to enable it effectively to meet the needs of the African population' (2006) 3 *Judiciary Watch Report* 12.

⁸⁹ MK Hansungule, addressing NGOs at the 31st session of the African Commission on Human and Peoples' Rights held in Pretoria, South Africa, from 2 to 16 May 2002, in RW Eno 'The promotion of human rights in the new African dispensation' (2006) (draft article on file with the authors).

⁹⁰ See eg Murray & Evans (n 7 above) 758.

the other hand, the Commission has also been considered as not being *stricto sensu* an organ of the AU, but 'a non-political and independent institution',⁹¹ which is designed to operate within the structure of the AU and collaborate with the AU Assembly in the execution of its function to promote and protect human rights in Africa.⁹²

Notwithstanding this debate, it is the authors' view that the AU has indeed recognised the African Commission by way of incorporation, and has assumed the African Charter obligations of the former OAU⁹³ in the appointment of members of the Commission,⁹⁴ and in its funding⁹⁵ There is, however, an imperative need for further clarification of the nature of the relationship between the two institutions, especially in view of recent incidents of perceived interference with the Commission's functional independence by the AU Assembly.⁹⁶

Notably, the AU Assembly at its 2nd ordinary session⁹⁷ in July 2003, had asked the African Commission⁹⁸

to continue, in concert with the Commission of the African Union, to enhance interaction and co-ordination with the different organs of the African Union in order to strengthen the African Mechanism for the Promotion and Protection of Human and Peoples' Rights and report to Council at its next session.

In essence, the African Commission is required to clarify its relationships with African human rights bodies, the organs of the AU and other initiatives with human rights components. However, the Commission is yet to do so formally, although before its 39th ordinary session in Banjul in May 2006, the Commission held a brainstorming session with other organs of the AU and a few invited stakeholders on their relation-

⁹¹ K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 284-285.

⁹² Arts 45(4) & 59 African Charter.

⁹³ Art 33 of the Constitutive Act (n 17 above) provides that the AU 'shall replace the Charter of the [OAU]'. See generally PR Myers *Succession between international organisations* (1993). See also Ayinla (n 96 below).

⁹⁴ Art 33 African Charter. See also AU Decision on the Appointment of Members of the African Commission on Human and Peoples' Rights Doc EX/CL/57 (III), Assembly/AU/Dec 23 (II), <http://www.africa-union.org/root/au/Documents/Decisions/hog/12HoGAssembly2003.pdf> (accessed 27 July 2006). See also Ayinla (n 96 below).

⁹⁵ Art 41 African Charter. See also Ayinla (n 96 below).

⁹⁶ n 70 above. See also A Ayinla 'From Durban to Maputo: An interim assessment of the state of human rights under the African Union' (unpublished article on file with the authors).

⁹⁷ Held in July 2003 in Maputo, Mozambique.

⁹⁸ Assembly/AU/Dec 11 (II) para 3. See also Decision on the Fifteenth Annual Activity Report of the African Commission AHG/DEC 171 (XXXVIII) decisions 38th ordinary session of the Assembly of Heads of State and Government of the OAU 8 July 2002 Durban, South Africa AHG/decisions 171-184 (XXXVIII). The Assembly *inter alia* called on the African Commission to propose ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the African Union, and submit a report thereon at the next session of the Assembly.

ship and ways of strengthening the African human rights system.⁹⁹ It is hoped that this initiative will produce the desired results since similar forums and activities had been conducted with little if any implementation.¹⁰⁰

It is crucial that the African Commission develop concrete strategies and make proposals to the AU Assembly on their relationship in effectively protecting and promoting human rights on the continent. These will range from its status as an organ of the AU, its functional independence, financial and administrative issues and the implementation of its recommendations.

3.2 Enforcing the recommendations of the African Commission through the African Union

The African Commission holds bi-annual ordinary sessions for a period of two weeks each,¹⁰¹ to consider, *inter alia*, communications on alleged violations of the African Charter. Thereafter, it produces a report of its activities during the year, known as the Annual Activity Report,¹⁰² which includes a separate annexure dealing with communications and its recommendations thereon. These reports are submitted to the AU Assembly for consideration and adoption.¹⁰³ It is worth noting that the current practice is that the report is first considered by the Executive Council before it is tabled for adoption by the AU Assembly, despite the fact that the African Charter only envisages the submission of such reports to the AU Assembly.¹⁰⁴ While the consideration by the Executive Council is a welcomed development, given that it could lead to more concrete considerations of the Commission's decisions, which the AU Assembly did not have the time for, it has nevertheless had the negative effect of eroding the independence of the Commission and undermining the finality of its decisions in respect of its mandate. Consequently,

⁹⁹ Report of the Brainstorming Session on the African Commission on Human and Peoples' Rights 9-10 May 2006, Banjul, The Gambia (on file with the authors).

¹⁰⁰ Other such forums and activities include a 2002 Evaluation Report, 2003 Addis Ababa Retreat and the Uppsala International Conference on June 2004.

¹⁰¹ Rules 1 & 2(1) of the Rules of Procedure of the African Commission (n 60 above).

¹⁰² It is noted that there has been a recent departure from the 'Annual' Activity Report practice when the Commission in January 2006 was required to and therefore submitted an Activity Report to the AU Assembly, only after its 38th session, that is, the Nineteenth Activity Report (2006). Thereafter, the African Commission has submitted its Twentieth Activity Report only after its 39th session. This change has been attributed to the fact that the AU Assembly now meets twice a year.

¹⁰³ Arts 54 & 59(1) African Charter.

¹⁰⁴ n 103 above. Indeed, at the 6th Summit of the AU Assembly in Khartoum, Sudan in January 2006, the Assembly instructed the African Commission to submit its reports to the Executive Council and or to the Assembly (n 102 above).

the publication of a report has once been suspended,¹⁰⁵ and on two occasions the Executive Council has recommended the deletion of certain aspects¹⁰⁶ of a report, in what has been interpreted as political interference by the political organs of the AU.

It is therefore hoped that the ongoing consultations between the African Commission and the other organs of the AU will result in the necessary clarification of their relationship, especially as it relates to the functional independence of the former.

In relation to the enforcement of the African Commission's recommendations, it is noted that article 59 of the African Charter only requires that the Commission's Activity Reports are submitted to the AU Assembly for the latter's adoption. The Charter does not expressly specify the effect of the adoption of such recommendations by the AU Assembly, nor does it oblige the latter to take any action thereafter. This is particularly significant because the African Charter specifies the African Commission's powers to make recommendations to the AU Assembly in respect of inter-state communications under article 53 and in cases of serious or massive human rights violations under article 55, but does not specify the effect of those recommendations, nor does it oblige the Assembly to take any action thereon. However, it could be inferred that once the Commission makes recommendations to the AU Assembly, it is the latter's prerogative to determine appropriate ways and means of enforcing them.

The authors submit that on the adoption of the African Commission's recommendations by the AU Assembly, they become the latter's decisions, in view of article 9(1)(b) of the Constitutive Act, which provides that one of the functions of AU Assembly shall be to receive, consider and take decisions on reports and recommendations from other organs of the Union.¹⁰⁷ Also, rule 33 of the Rules of Procedure of the AU Assembly¹⁰⁸ categorises the decisions of the Assembly as follows:

¹⁰⁵ Assembly/AU/Dec 49 (III). The decision to suspend the publication of the Seventeenth Annual Activity Report at the 4th Summit of the Assembly in Addis Ababa, Ethiopia was made after Zimbabwe protested that the report did not incorporate its response to the findings of the Commission on a fact-finding mission which was part of the Annual Activity Report's annexes. This is despite the fact that the African Commission had solicited time and again the said response to no avail before its inclusion in the Annual Activity Report.

¹⁰⁶ The AU Assembly at its 6th Summit in Khartoum, Sudan in January 2006, decided 'to adopt and authorise, in accordance with article 59 of the African Charter on Human and Peoples' Rights (the Charter), the publication of the Nineteenth Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe'.

¹⁰⁷ On the status of the African Commission in the AU, the AU Assembly, at its 1st (Durban) Summit, incorporated the Commission into the AU structure under art 5(2) of the AU Act. See AU 'Decision on interim period' 1st ordinary session of the AU Assembly of Heads of State and Government AU DOC ASS/AU/Dec 1(1) para 2(XI).

¹⁰⁸ These Rules of Procedure are made pursuant to art 8 of the Constitutive Act.

- 1 The Decisions of the Assembly shall be issued in the following forms:
 - (a) Regulations: these are applicable in all member states which shall take all necessary measures to implement them.
 - (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.
 - (c) Recommendations, Declarations, Resolutions, and Opinions etc. These are not binding and are intended to guide and harmonise the viewpoints of member states.
- 2 The non-implementation of Regulations and Directives shall attract appropriate sanctions in accordance with article 23 of the Constitutive Act.

Rule 34 of the Rules of Procedure of the AU Assembly also provides that Regulations and Directives shall be automatically enforceable 30 days after the date of the publication in the official journal of the AU or as specified in the decision. Recommendations of the African Commission, on adoption by the AU Assembly, thus far, have been in the category of recommendations, since they are not classified on adoption as directives or regulations. They are adopted as part of the Activity Report of the Commission, but are neither published in the official journal of the AU, nor is there any time specified for their enforcement. This means that the adopted Annual Activity Report of the Commission and recommendations therein at present fall within the ambit of recommendations of the AU Assembly which are not legally binding.¹⁰⁹

Notwithstanding the foregoing deductions on the status of the African Commission's recommendations, a reading of articles 45(1)(c)¹¹⁰ and 59(2) of the African Charter, article 3(h) of the Constitutive Act¹¹¹ and rule 77 of the Rules of Procedure of the African Commission implies that the AU Assembly is the ultimate body with the primary political responsibility¹¹² of monitoring compliance with recommendations.¹¹³

¹⁰⁹ Wachira (n 88 above).

¹¹⁰ Art 45(1)(c) of the African Charter, which requires the African Commission to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights', also emphasises a relationship of co-operation and collaboration with all the relevant organs of the OAU (now AU).

¹¹¹ This provides that one of the objectives of the AU is to promote and protect human and peoples' rights in accordance with the African Charter.

¹¹² Quashigah (n 91 above) 284 notes that the African Commission is designed to operate within the structure of the OAU and collaborate with the Assembly of Heads of State and Government in the execution of its function to promote and protect human rights in Africa.

¹¹³ It is undisputed that under the African Charter, the African Commission has no enforcement powers and that its decision is not 'formally' binding irrespective of its stated opinion or follow-up measures. These are all still subject to the political will of states. However, it is submitted that the binding nature or otherwise of the decisions of an international body is not sufficient to ensure compliance unless the appropriate mechanisms are in place to ensure compliance. Eg, without an efficient enforcement mechanism, which is being proposed, the prospective binding decisions of the proposed Court can also be flouted.

More importantly, under the AU Constitutive Act,¹¹⁴ the functions of the AU Assembly include not only receiving, considering and taking decisions on reports and recommendations from the other organs of the Union,¹¹⁵ but also monitoring the implementation of policies and decisions of the Union as well as ensuring compliance of all member states.¹¹⁶ This demonstrates a commitment on the part of the AU to monitor the implementation of all its decisions, generally notwithstanding their sub-classifications into regulations, directives or recommendations. Furthermore, there is a determination by the AU to take all necessary measures to strengthen [the] common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively.¹¹⁷

From the foregoing, the AU structure latently provides a political framework for the enforcement of the recommendations of the African Commission. 'The regional political organisation is the primary body through which peer pressure must be channelled.'¹¹⁸ Shame or peer pressure can be mobilised against recalcitrant states, which can change behaviour by inducing shame.¹¹⁹ If that does not work, the AU can mobilise stronger forms of sanctions against states, in view of article 23(2) of its Constitutive Act, which vests the AU with the power to impose sanctions on any member state that fails to comply with the decisions and policies of the AU, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly. A pro-human rights interpretation¹²⁰ of article 23(2) of the Act will extend the application of this provision to recommendations, notwithstanding the provision of rule 33(2), which restricts its application to regulations and directives of the AU alone. In this regard, it is argued that the provision of the Constitutive Act overrides that of the rules made thereunder, and in itself is overarching and covers recommendations, as it refers to decisions and policies of the AU, generally speaking.

Besides, it is also suggested that the recommendations of the African Commission to the AU Assembly should be considered separately from

¹¹⁴ Constitutive Act (n 17 above). The African political community has recently reiterated and made fresh commitments to human rights in Africa under the auspices of the AU as the AU Constitutive Act makes firm commitments to human rights integrating 'political, economic, and human rights priorities'.

¹¹⁵ Art 9(1)(b) Constitutive Act.

¹¹⁶ Art 9(1)(e) Constitutive Act.

¹¹⁷ Preambular para 10 Constitutive Act.

¹¹⁸ C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 701.

¹¹⁹ n 70 above.

¹²⁰ Human rights might, inadvertently, not have been intended to be covered by the provision. However, the implementation of these provisions can be broadened to cover the enforcement of human rights, the promotion and protection of which are two of the main objectives of the AU.

its general Activity Report and adopted as directives.¹²¹ It would be invaluable to attach legally binding value to the decisions of the AU Assembly on recommendations of the African Commission and classifying them as directives, which would bring them within the purview of rule 33(2) and remove any doubt as to whether or not non-compliance with them can attract appropriate sanctions in accordance with article 23 of the Constitutive Act.

The power of the AU Assembly to sanction in this manner could be compared with that under article 8 of the Statute of the Council of Europe which confers on the Committee of Ministers the power to sanction non-compliant member states. Although it is noted that the Committee of Ministers has only once invoked this article, in what could be termed as 'special circumstances' in the *Greek case*,¹²² this ever-existent, although remote, possibility of expulsion from the Council of Europe provides some modicum of compulsion, and a political supervisory structure within the European system. The relevant article 8 of the Statute of the Council of Europe provides as follows:

Any member of the Council of Europe, which has seriously violated article 3, may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from date as the Committee may determine.

Article 3 mentioned therein provides as follows:

Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter 1.

Although the Constitutive Act of the AU did not go as far as the Statute of the Council of Europe in its prescription of expulsion as a sanction, it is argued that that a pro-human rights interpretation of article 23(2) of the Act will achieve similar results. It is worth remarking that the suggested AU political enforcement mechanism has been tested, for example, in Madagascar, which was barred from the AU inauguration summit in the year 2002 because of doubts over the legitimacy of its president, in accordance with article 4(p) of the Constitutive Act of the

¹²¹ According to Ben Kioko, the Legal Counsel of the African Union, in a discussion held with one of the authors on 10 May 2006 in Banjul, The Gambia, during a brainstorming on the African Commission and AU organs. He said that a decision was still pending on which decisions would fall under which category as per rule 33. It is hereby submitted that the African Commission should motivate and make a case for its recommendations on communications being categorised as directives.

¹²² See Case 3321/67 *Denmark v Greece*, Case 3322/67 *Norway v Greece*, Case 3323/67 *Sweden v Greece* and Case 3344/67 *Netherlands v Greece*, in (1969) 12 *Yearbook of the European Convention on Human Rights*. See also NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1205.

AU on the condemnation and rejection of unconstitutional changes of government¹²³ and in Togo, by suspending and urging its members to impose economic and travel sanctions on the Togolese government during an unconstitutional change of leadership.¹²⁴ It was a success as the Togolese leadership realised the impact of the suspension and sanctions and reverted to the rule of law and conducted elections.

From the foregoing, it is submitted that the above-listed provisions of the AU Constitutive Act clearly provide a political framework for the enforcement of human rights norms within the AU structure. Nonetheless, the AU human rights enforcement mechanism is latent and has to be activated by the African Commission and other existing human rights institutions. In this respect, it is suggested that the Commission, in view of its powers under article 53 of the African Charter and rule 41, should make a formal recommendation to the AU Assembly to use its political framework to ensure compliance with the Commission's recommendations.

Also related to the possible enforcement mechanism under the AU is the proposed co-operation between the Peace and Security Council of the AU and the Commission.¹²⁵ The Council has the mandate to anticipate and prevent conflicts, and promote peace, security and stability in Africa, in order to guarantee *inter alia* the protection of human rights and fundamental freedoms of the African people by member states.¹²⁶ The Council also has the power to follow up, within the framework of its conflict prevention responsibilities, the progress towards, *inter alia*, the promotion and protection of human rights and fundamental freedoms of the African people by member states.¹²⁷ For reasons of anticipating and preventing conflicts, the Council established a 'continental early warning system'¹²⁸ and article 19 of the Protocol obliges the Council to seek close co-operation with the African Commission in all matters relevant to its objectives and mandate, and also obliges the Commission to bring to the attention of the Peace and Security Council any information relevant to its objectives and mandate.

A reading of the foregoing relevant provisions of the Protocol establishing the Council creates a picture of mutual co-operation between the Commission and the Council, whereby the Commission, in view of

¹²³ R Cornwell 'Madagascar: First test for the African Union' (2003) 12 *African Security Review* 1.

¹²⁴ After the death of President Gnassingbe Eyadema of Togo in February 2005, his son was quickly unconstitutionally installed as the president, a move widely condemned by the AU and the international community, which imposed sanctions on Togo; <http://www.un.org/av/radio/unandafrica/transcript36.htm> (accessed 6 July 2005).

¹²⁵ PSC Protocol (n 18 above).

¹²⁶ Arts 3, 6 & 7 PSC Protocol.

¹²⁷ Art 7(m) PSC Protocol.

¹²⁸ Art 12 PSC Protocol.

its mandate under article 58 of the Charter, in drawing the attention of the AU Assembly to cases of serious or massive violations of human rights, extends such reporting to the PSC. Besides, in terms of article 58 of the Charter, the early warning signals of conflict may be detected by the Commission through its communications procedure, for example, where a chain of communications reveals a systematic violation of human rights by a state.¹²⁹ The PSC, on the other hand, in this symbiotic relationship, may employ its structure to follow-up, within the framework of its conflict prevention responsibilities, the progress towards a state's implementation with the recommendations of the Commission, which relates to its mandate.

Having analysed the possible political enforcement framework within the AU Assembly and the PSC, the next section of the paper examines the significance of the newly established African Court on Human and Peoples' Rights for the enforcement of the recommendations of the African Commission, and for the creation of a legally enforceable human rights regime in Africa.

4 Implementation through the proposed African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights¹³⁰

Many have sought a structural solution to the problem of enforcement of human rights in Africa in the form of an African Court on Human and Peoples' Rights¹³¹ whose judgments would indisputably be binding,¹³² hence the establishment of the African Court.¹³³ The first judges of the Court were sworn in on 2 July 2006, at the 7th AU Summit, and the Court is expected to take off in the near future.

The establishment of the African Court is an indispensable component of an effective regime for the protection of human rights, as norms prescribing state conduct are not meaningful unless they are anchored in functioning and effective institutions such as courts. The African

¹²⁹ Eg. *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) which preceded the Rwandan Genocide of 1994.

¹³⁰ AU decision EX CL/Dec 237 (VIII), adopted by the 8th ordinary session of the Executive Council held in Khartoum, Sudan, January 2006.

¹³¹ n 69 above.

¹³² Harrington (n 4 above) 6.

¹³³ Adopted by the Assembly of Heads of State and Government of the OAU in Ougadougou, Burkina Faso, on 9 June 1998 OAU/LEG/MIN/AFCHPR/PROT (111), and came into force on 25 January 2004. However, the 3rd ordinary session of the Assembly of Heads of State and Government of the AU decided to integrate it with the Court of Justice of the AU (Protocol of the Court of Justice adopted by the 2nd ordinary session of the Assembly of the AU in Maputo, 11 July 2003) Assembly/AU/Dec 45 (111).

Court will deliver legally authoritative and conclusive decisions,¹³⁴ and state parties to the African Court Protocol specifically undertake to implement the findings of the Court, including ordered remedies.¹³⁵ Besides, states will no longer hide under the cover of the non-binding nature of decisions as the reason for their non-compliance. The African Court will also provide remedies and bring the African human rights system at par with its regional contemporaries and develop African human rights jurisprudence.

Besides state parties and African intergovernmental organisations, which can go to the African Court directly, individual cases will reach the Court mainly in two ways: Direct access to the African Court by individuals is possible only in respect of states that have made a declaration in terms of article 34(6) of the African Charter.¹³⁶ The other route would be when the African Commission refers a case to the Court after considering the communication.¹³⁷ It is therefore hoped that the African Commission and the African Court will work out some complementary arrangement and avoid duplications. The African Commission consequently will remain a tribunal of first and last instance in respect of most of the individual cases. In terms of enforcement, interestingly, rule 118 of the draft new Rules of Procedure of the Commission¹³⁸ provides that it may refer cases of non-compliance to the African Court where the respondent state party concerned has ratified the African Court Protocol, and such state 'has not complied with its recommendations made in accordance with article 59 of the African Charter within 120 days'. This means that the decisions of the African Commission that remain unenforced by respondent states can be referred to the African Court for enforcement via legally binding measures, as far as they relate to state parties to the African Court Protocol. This is, however, the prerogative of the African Commission, as it may not refer a case of non-compliance where 'there is a reasoned decision by the majority of its members to the contrary'. More so, this is a provision of a draft of the Rules of Procedure, which is subject to modifications in light of the ongoing discourse on the 'complementarity' of the African Court and the African Commission.

Notwithstanding this unique possibility, there is no complementary provision in the yet to be drafted rules of procedure of the African Court, obliging it to enforce the recommendations of the Commission.

¹³⁴ Art 30 Protocol to the African Charter; Viljoen (n 10 above) 14.

¹³⁵ Art 30 Protocol to the African Charter.

¹³⁶ Thus far, only the Republic of Burkina Faso has made the declaration.

¹³⁷ Like in the Inter-American human rights system; see American Convention on Human Rights 1969 art 51. See also Inter-American Commission's Rules of Procedure (2003) art 44.

¹³⁸ Draft Rules of Procedure of the African Commission, presented to the 39th ordinary session of the African Commission, by the Working Group on Specific Issues Relating to the Work of the Commission, May 2006 (on file with authors).

While the Court is obliged under the Protocol to consider cases brought by the Commission, this does not necessarily translate into an obligation to enforce the recommendation of the Commission as it comes, without reopening the case. It is the authors' view that a progressive approach by the African Court towards this provision would be to enforce such referred recommendations. The authors, however, consider it necessary that the African Commission should still have its own implementation mechanism, for its integrity's sake, because having to wait for the Court to enforce its decisions would inevitably delay the availability of relief to victims, especially those who cannot approach the Court directly. Besides, this possibility of referral to the Court for enforcement relates only to the few state parties. Hence, the Commission remains with the daunting task of giving and enforcing relief for human rights violations to the majority of victims.

The African Court Protocol provides for institutional control of the enforcement of its judgments. It provides in article 30 that states are bound to execute its decisions, and that the Executive Council shall be notified of judgments and shall monitor their execution thereof on behalf of the Assembly.¹³⁹ This is akin to the positions under the European and Inter-American systems, where enforcement is vested in an organ of the political body.¹⁴⁰ Furthermore, the African Court is required to specify instances of states' non-compliance with its decisions in its annual report to the AU Assembly.¹⁴¹ Therefore, such reports, once adopted by the AU Assembly, will also assume the status of AU decisions, as earlier analysed,¹⁴² in which case, the indicated non-compliance by states may in turn attract sanctions under article 23(2) of the AU Constitutive Act, as envisaged in respect of the African Commission's recommendations.¹⁴³

There is, however, a new development in relation to the African Court. The AU has decided to merge the human rights court, that is, the African Court, and the African Court of Justice¹⁴⁴ through the adoption of an instrument fusing both courts¹⁴⁵ (the draft merger instrument). The draft instrument would replace the initial Protocols establishing the two individual courts.¹⁴⁶ The Court, named the African

¹³⁹ Art 29(2) Protocol.

¹⁴⁰ nn 77 & 78 above.

¹⁴¹ Art 31 Protocol.

¹⁴² That is, in respect of the African Commission.

¹⁴³ Constitutive Act (n 17 above).

¹⁴⁴ Protocol on the Court of Justice of the African Union, 2nd ordinary session of the AU, Maputo, Mozambique, July 2003.

¹⁴⁵ Draft Protocol on the Statute of the African Court of Justice and Human Rights, EX CL/253 (IX), Annex II Rev submitted to the 9th ordinary session Executive Council of the AU, 25-29 June 2006, Banjul, The Gambia (on file with authors). See art 1.

¹⁴⁶ n 145 above, art 1.

Court of Justice and Human Rights (ACJHR)¹⁴⁷ will comprise of two sections, that is, a General Section and a Human Rights Section.¹⁴⁸ Consequently, the draft merger instrument stipulates a transitional period of one year from its entry into force, for the African Court to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the new ACJHR. After that, the former ceases to exist.¹⁴⁹

Under the proposed merged court, that is, the ACJHR, *locus standi* has been broadened to include individuals and relevant human rights organisations accredited to the AU or any of its organs. Accordingly, the old requirement of an additional declaration to allow individual and NGO petitions has been dispensed with, and the majority of victims can approach the ACJHR directly. Similar to the African Court, the proposed ACJHR will issue final and binding decisions¹⁵⁰ and the Executive Council will be charged with the responsibility of monitoring the execution of its decisions, on behalf of the AU Assembly.¹⁵¹ As novel provisions and, quite specifically, the merger instrument, requires that the ACJHR refers cases of non-compliance with its judgments to the AU Assembly, which shall decide upon measures to be taken to give effect to that judgment, and which may thereby impose sanctions by virtue of paragraph 2 of article 23 of the Constitutive Act.¹⁵²

This newly proposed role of the AU in relation to the enforcement of the decisions of the ACJHR quite confirms the previous analyses of the authors in relation to the enforcement of the recommendations of the African Commission and the decisions of the African Court. It brings to the fore, once again, the fact that the AU is the ultimate enforcer of the decisions of the human rights bodies, whatever form they may assume. Hence, without the requisite political will by member states, which is only achievable within the AU structure, even the decisions of the ACJHR are open to blatant disregard by state parties, notwithstanding their acceptance of the binding nature of its decisions.

Consequently, the effectiveness of a human rights court, either in the form of the new African Court or the proposed ACJHR, hinges on the effectiveness of the current African Commission. It is therefore imperative to improve the decision-making process of the African Commission, as well as the processes of adopting and enforcing its decisions. The assertion that a court will render binding decisions and thus give some credence to the human rights system is true. However, if the political will to promote and protect human rights on the continent is there, states can abide by recommendations taken even by quasi-judicial insti-

¹⁴⁷ n 145 above, art 2.

¹⁴⁸ n 145 above, arts 5 & 16.

¹⁴⁹ n 145 above, art 7.

¹⁵⁰ n 145 above, arts 47(1) & (2).

¹⁵¹ n 145 above, art 44 (6).

¹⁵² n 145 above, arts 47(4) & (5).

tutions such as the African Commission. In the same vein, if the requisite political will is absent, the binding nature of the decisions will not make any difference. Whereas this paper advocates the use of sanctions to ensure compliance, the authors note that it is more important for states to voluntarily respect their human rights obligations, and the decisions of the Commission and the Court(s).

5 Conclusion

The respect for and compliance by states with any decision by a supranational (human rights) body do not necessarily derive from the judicial or quasi-judicial nature of the decision-making body and the consequent nature of its decision, but depend on the presence of the requisite political will to honour its international treaty obligations. This is the case with state parties' response to the African Commission, and even their anticipated response to the human rights court, be it the new African Court or the proposed ACJHR. However, to encourage such political will, there is a need for the relevant decision-making body to have an institutionalised follow-up mechanism to encourage and monitor compliance and where, despite this, there is an absence of the requisite political will, then there is need for an enforcement mechanism to ensure compliance through the effective use of sanctions, whether within the framework of the body or by co-operating with relevant enforcement bodies or authorities. Consequently, a case has been made for the creation of an institutionalised follow-up mechanism within the African Commission structure, and for ultimate enforcement measures through co-operation with the AU Assembly and the PSC, within their political norm enforcement frameworks, as expounded. This proposal is in view of the fact that any regional human rights system worth its name requires strong in-built control systems to encourage states to honour their human rights obligations; and drawing inspiration from the European experience, this is realisable within the political structure of the AU.

Notwithstanding its possible political enforcement mechanism, there is still a need by the AU, through its regular policies and deliberations, to aid its member states in the realisation of the necessity, responsibility and benefits of compliance with human rights, especially without its intervention. More so, although the proposed hybrid¹⁵³ enforcement framework is feasible under the AU structure as a possible solution to the problem of non-compliance with human rights in Africa, its utilisation largely remains an aspiration. This is because, in order for this political framework to have the desired impact on the African Commis-

¹⁵³ That is, the combination of the legal, Charter-based human rights enforcement mechanism with the AU political norm enforcement mechanism.

sion's decisions and recommendations, there must be a willingness on the part of the component members of the AU¹⁵⁴ to adopt a pro-human rights stance to the provisions, and interpret such to extend to the recommendations of the Commission, as explicated in this paper. Thus, the question of political will comes to the fore once again. Experience has shown that treaties and regional institutions by themselves do not necessarily translate into better protection of human rights, unless accompanied by the necessary political will. Thus, the actualisation of the proposed co-operation is largely hinged on the sincerity or otherwise of the architects of the AU — whether the political will finally and formally expressed in respect of human rights is genuine.

¹⁵⁴ A point to stress is that the promising norms and institutions developed under the auspices of the AU should offer opportunities to the NGO community and the civil society in general to lobby for a stronger human rights regime under the AU than it was able to achieve under the Charter regime. That is the only way to ensure that the human rights mandate of the AU is not pushed to the back burner. See CAA Parker & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365.