

THE EFFICACY OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS IN PROTECTING AND PROMOTING HUMAN RIGHTS IN AFRICA: A FOCUS ON THE IMPLEMENTATION OF THE COMMISSION'S RECOMMENDATIONS AND CONCLUSIONS

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'Some have argued that there is no reason for establishing special machinery devoted to the promotion and protection of human rights like Human Rights Commissions ... such bodies are not a wise use of scarce resources and that an independent judiciary, democratically elected president and parliament [,] and a vibrant civil society are sufficient to ensure that human rights abuses do not occur. However, where Human Rights Commissions fulfil the prerequisites to effective functioning, there is no doubt that they play an important role in the promotion and protection of human rights. They are complementary to already established institutions and by the nature of their work are in [a] position to make unique contribution[s] to a country's efforts to protect its citizens and to develop a culture that is respectful of human rights and fundamental freedoms.'¹

Abstract

This article analyses the impact of non-implementation of the African Commission on Human and Peoples' Rights' decisions and recommendations in Africa. The article concludes that there are still lots of pains to endure before the African system of human rights protection can favourably compare with its more advanced counterparts. Therefore, this article suggests that, in order to ensure compliance of Commission's decisions, there is a need to have an institutionalized follow-up mechanism to encourage and monitor compliance whether within the framework of the body or by co-operating with relevant enforcement bodies or authorities.

Key words: Human Rights, Africa, Commission, Charter

1.0 Introduction

The African Commission on Human and Peoples' Rights (ACHPR)² is a quasi-judicial body tasked with promoting and protecting human rights and collective (peoples') rights throughout the African continent as well as interpreting the African Charter on Human and Peoples' Rights (herein after, "the African

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2 For the Purpose of this work, the African Commission on Human and Peoples' Rights shall be abbreviated as ACHPR.

Charter”) and considering individual complaints of violations of the Charter.³ The African Commission on Human and Peoples’ Rights plays a great role in the promotion and implementation of human rights in Africa as enshrined in the African Charter on Human and Peoples Rights. The African Commission on Human and Peoples’ Rights was established in accordance of article 30 of the African Charter on Human and Peoples’ Rights. The African Charter came into force on 21 October 1986. Article 30 of the Charter provides *inter alia* that:

“The African Commission...shall be established within the Organisation of African Union to promote human and peoples’ rights and ensure their protection in Africa. [Emphasis supplied]”

This article focuses on the African Commission on peoples’ Rights particularly on the implementation of Commission’s decisions and recommendations. Therefore, this article explores the problems of non-implementation of the Commission’s decisions and its impact on protection and promotion of human rights in Africa. In doing so, this article would share various cases decided by the Commission. At the end of this work, the author shall provide legal mechanisms which will enable the Commission’s decisions to be legally binding upon states for the purpose of promoting and protecting Human rights in Africa.

2.0 Brief History of the African Commission on Human and Peoples Rights

The African Commission on Human and Peoples’ Rights as explained above, is the body established under the African Charter to promote and protect human and people’s rights in Africa.⁴ It was established in July 1987 in Addis Ababa, Ethiopia, and its secretariat is based in Banjul, Gambia. The main role of the Commission is to monitor the implementation of the African Charter.⁵ The ACHPR is a mechanism tasked with promoting and protecting the rights guaranteed by the African Charter on Human and Peoples’ Rights. In addition to that, the Commission is also tasked with the function of interpreting the Charter as it applies to particular cases and can advance further legal principles to guide African governments in ensuring their legislation and practices adhere to the Charter.⁶

Since its inception in 1963, the Organisation of African Unity (OAU) focused on decolonization of African countries and the eradication of apartheid. In spite of the Organisation’s endorsement of the principles of the Universal Declaration on Human Rights of 1948 in the preamble of the OAU Charter, the promotion and protection of human rights within OAU member states was not a major priority.

³ See, E. Ankumah, and A. Evelyn, ‘African Commission on Human and Peoples’ Rights’, *KluwerLaw Review*, (1996), 34 also see, A. Bösl, & J. Diescho, *Human Rights in Africa. Legal Perspectives on their Protection and Promotion*, (London: Macmillan, 2009), at 87, also see, the African Charter on Human and Peoples Rights, adopted in Nairobi June 27, 1981 and entered into force October 21, 1986, Article 45 of the Article 45 (2) this article provides for mandate of the Commission. The Commission is established under article 30 of the Charter.

⁴ The Commission is established under article 30 of the African Charter on Human and Peoples Rights Adopted in Nairobi June 27, 1981 Entered into Force October 21, 1986. Also see OAU Doc OAU/CAB/LEG/67/3/Rev 5. Reprinted in Human rights law in Africa 1996 (1996) 7.

⁵ African Commission on Human and Peoples Rights available at www.ishr.ch/node/404/pdf (Accessed on 23 June 2016).

⁶ Human Rights Centre Uganda available at http://www.hrcug.org/index.php?option=com_content&view=category&layout=blog&id=60&Itemid=191(accessedon 23 June 2016).

As such, it concentrated its efforts on political and economic independence, non-discrimination and apartheid in Southern Africa, at the expense of individual liberty.

In the early days of its existence, different groups which included Media, Church, inter-governmental and non-government organisations (NGOs) mounted pressure on the OAU by exposing some of the most gruesome human rights abuses on the continent. They accused the Organisation of abandoning its primary goal of restoring dignity to the humiliated African peoples. It was accused of double standards for condemning apartheid in South Africa while failing to condemn the massive human rights violations committed by some of its own members.

This pressure encouraged the establishment of a human rights protection mechanism on the continent. The processes for establishing human right protections mechanisms were influenced by the 1961 Lagos conference organised by the International Commission of Jurists (ICJ). This Conference focused on rule of law. The Conference, which was attended by one hundred and ninety-four African Jurists,⁷ addressed several human rights issues within the context of rule of law. "The Law of Lagos, which was the outcome of the Conference's resolution, invited African Governments to, among other things, study the possibility of establishing international machinery for the protection of human rights in Africa. The Jurists, however, noted that this would not be easy to achieve; but the target would give impetus to "positive action by the Commission's national sections in Africa"⁸, and it would "open a crucial chapter in human rights movements in Africa."⁹

Although, African leaders rejected a draft Charter that provided for a Court of Mediation, Conciliation and Arbitration to be set up by means of separate treaty, they created, without hesitation, the "Commission of Mediation, Conciliation and Arbitration"; an ad hoc mechanism for the peaceful settlement of disputes among the OAU Member States, to accomplish the purpose of the Charter. A Protocol to the Charter adopted in 1964, did not only define the duties and powers of the Commission, but also made the Commission became an integral part of the OAU Charter.¹⁰

Aside the International Commission of Jurists, the pivotal role of the United Nations Commission on Human Rights (UNCHR) in the process of the establishment of African Commission cannot be undermined. After the Lagos Conference, the UN Commission, with a view to establish an African Commission on Human Rights, organized seminars in different African States. The seminar on "Human Rights in Developing Countries", held in Dakar, Senegal in 1966, was concerned with gaining support within the OAU for the creation of a regional Commission on human rights for Africa.¹¹ Participants at the Cairo Conference unanimously

⁷ Comprising of practicing lawyers and teachers of law, from 23 African Nations as well as 9 countries of other Continents. See, T. O., Elias, *New Horizons in International Law*, 2th edn (Netherlands: Brill, 1992), at 95, also see, C. D. Dakas, 'The Lessons of History', 4 *Journal of Public and Private Law*, (2003), 7.

⁸ Law of Lagos, 7 January 1961', 3 *International Commission of Jurists Journal*, 3 (1961), 3.

⁹ *Ibid*, at 6.

¹⁰ https://globaljournals.org/GJHSS_Volume12/7-Over-Two-Decades-of-African.pdf (accessed 24 November 2016).

¹¹ www.chr.up.al.za/publication/occ_pages/ocl/3html (accessed on 23 November 2016).

reached consensus to, *inter alia* "Appeal to all Government of Member States of the OAU to give their support and co-operation in establishing a regional Commission on human rights in Africa."¹²

The Economic Commission for Africa (ECA) Conference on "Legal Process and the individual," held in Addis Ababa, 1971, did not only welcome the recommendations made at the Cairo Conference, entrusting the OAU with the establishment of Human Rights Commission for Africa, but also recommended that the OAU should hasten the implementation of the said recommendations. But the functions of the Commission, which the ECA recommended, were that of promotion rather than interpretation of human rights.¹³ Other several seminars organized in various African States also gave supports to the establishment of both African Convention and African Commission.¹⁴

Also, in pursuance of the recommendations of the African Jurists at the Lagos Conference, the International Commission of Jurists, in collaboration with the Senegalese Association of Legal Studies and Research, organized a colloquium in Dakar, Senegal in 1978. The participants recommend the establishment of a Human Rights Commission to tackle the problem of flagrant violation of human rights in Africa. They also set up a Committee to ensure that their recommendations were carried out.¹⁵

All these arrangements ultimately culminated in the adoption of the African Charter on Human and People's Rights in 1981. The Charter makes adequate provisions for the establishment and mandate of African Commission.¹⁶

2.1 Functions and Mandate of the African Commission on Human and Peoples Rights

The Commission is empowered to promote and protect human and peoples' rights and ensure their protection in Africa. The main purpose of promoting human and peoples' rights is mainly to reduce the likelihood of their violation.¹⁷

The Commission is further empowered to interpret all the provisions of the Charter and also perform any other tasks entrusted to it by the Assembly of Heads of State and Government of the African Union.¹⁸ The interpretation of the Charter and the performance of any other tasks are aimed at complementing the promotion and protection mandate of the Commission.

12 UN, Seminar on the "Establishment of Regional Commission on Human Rights with Special Reference to Africa, Cairo Egypt, 1969, 12-15, UN Doc.ST/TAO/HR/38.

13 E. Osita, *Human Rights in Africa: Selected Problems*, (Lagos: Nigerian Institute of International Affairs & Macmillan, 1984), pp.202-203.

14 For example, Dar-Es-Salaam Seminar, *alias*, UN Seminar on the Study of New Ways and Means for promoting Human Rights with Special Reference to the Problems and Needs of Africa, Tanzania Oct.23 Nov5 1973', UN Doc/ST/TAO/HR/48.

15 The setting up of the Committee tagged "The Follow up Committee", was headed by Judge K. Mbaye. As traced, "The Committee visited several African States considered supportive of human rights. It was in the course of one of such visits that President Senghor of Senegal agreed to present a proposal for the establishment of an African Human Rights Commission at the next Session of the OAU". See C.D. Dakas, *supra*, note 7, at 16.

16 African Charter on Human and Peoples' Rights, 27 June 1981, Doc.OAU/CAB/LEG/67/3/Rev.5. 21 ILM 52, ('982) (hereinafter African Charter or Charter).

17 C. A. Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights' *African Human Rights Law Journal*, 2 (2000), 925.

18 The African Charter of Human and Peoples Rights, Article 45(3) and (4).

The Charter is the principal instrument for the promotion and protection of human rights in Africa; however, the African Charter is complemented by other conventions and protocols.¹⁹ It marks the beginning of an organised commitment to protecting human rights in Africa.²⁰ As a human rights instrument specifically designed to respond to 'African concerns, African traditions and African conditions',²¹ the African Charter is an all-encompassing international human rights instrument with a special significance to the African continent owing to the provision of three generations of rights, namely civil and political rights,²² economic, social and cultural rights,²³ and peoples' rights.²⁴ Moreover, the Charter is the only regional instrument incorporating collective rights under the concept of 'peoples' rights',²⁵ and also provides for both state²⁶ and individual²⁷ duties.

The above functions of the Commission can be summarized into three main categories that is: firstly, protection of human and peoples' rights as provided for under the African Charter; Secondly, promotion of human and peoples' rights and lastly, interpretation of human and people's rights.²⁸ The Commission is empowered to decide whether alleged human rights abuses violate the Charter and makes recommendations to AU governments to promote and protect human rights or address past violations, organises seminars/conferences, conducts country promotional visits, disseminates reports on various human rights issues, violations and/or recommendations, interprets the Charter and adopts further principles to elucidate the Charter and investigates human rights violations through fact-finding missions

For the purpose of implementing the Charter, the Commission meets twice a year. It examines State reports, adopts resolutions, and studies individual complaints. The Commissioners also report on country visits, promotion activities, and thematic studies. At each session, the Commissioners interact with Human Rights Defenders. Using these reports, the ACHPR gives general observations to the States concerned. It can also pass on its general observations, the State party report and its comments to the Assembly of Heads of State and Government of the African Union.²⁹

19 Other Conventions that complement the African Charter are, African Charter on the Rights and Welfare of the Child, Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Protocol of the Court of Justice of the African Union, Protocol on the Statute of the African Court of Justice and Human Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, to mention but few.

20 C. Flinterman & C. Henderson, 'The African Charter on Human Rights and Peoples' Rights', in *An Introduction to the International Protection of Human Rights*, eds. R. Hanski & M. Suksi, (Finland: Abo Akademi University, 1999) at 387.

21 T. Boven 'The Relations between Peoples' Rights and Human Rights in the African Charter' 7 *Human Rights Law Journal* (1986), 186; also, cited by E. Ankumah, *supra*, note 3 at 1.

22 The African Charter on Human and Peoples Rights, Articles 2-13.

23 *Ibid*, articles 14-18.

24 *Ibid*, articles 19-24.

25 R. Kiwanuka 'The Meaning of Peoples' Rights in the African Charter on Human and Peoples' Rights' 2 *American Journal of International Law*, (1988), 80 and E. Ankumah, *supra*, note 3, at 160.

26 The African Charter on Human and Peoples Rights, Articles 1, 25 & 26.

27 *Ibid*, Articles 27-29.

28 *Ibid*, article 45.

29 *Ibid*, article 62.

2.2 Binding Nature of the Commission's Recommendations

The Commission's recommendations, in forms of resolution and conclusions, are always referred to as 'decisions'. It may be argued that these decisions have no binding legal effect because no article in the Charter or provision in the Rules of Procedure defines the status of the Commission's decisions. However, legal silence of the status of the Commission's recommendation does not necessarily render such recommendation unenforceable but rather, it can be right argued that, considering the fact that the Commission is the only enforcement mechanism within the African human rights system, then it can be assumed that, the intention of states to establish such Commission was that it should have a power to give decisions and enforce its decision. This is, however, not the case. Although, when you read the charter thoroughly and look on the intention of the charter and purpose of why the Commission was established, then, it can be submitted that recommendations made by the Commission are binding.³⁰ The Recommendations are binding because through signing and ratifying the Charter, states signify their intention to be bound by and to adhere to the obligations arising from it even if they do not enact domestic legislation to effect domestic incorporation.³¹ This principle is also expressed in article 14 of the Vienna Convention on the Law of Treaties of 1969.³²

Article 1 of the Charter provides that member states 'shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'. The use of the word 'shall' means that the provision is mandatory. One such 'measure' which can be employed to give effect to the articles of the Charter is by the Commission making recommendations on communications. Member states are therefore obliged to 'undertake to adopt' this measure 'to give effect' to the rights, duties and freedoms enshrined therein.

The adherence to the Commission's recommendation 'measure' by the respondent state is also another 'measure' within the meaning of article 1 of the Charter giving effect to provisions of the Charter. It is submitted, therefore, that the use of the words 'shall' in article 1 of the Charter automatically renders the recommendations of the Commission binding in the same way that the provisions of the Charter bind member states.

2.3 Status of the Commission's Decisions and Implementation

The African Commission on Human and Peoples Rights can be very effective instrument in promoting and protection human rights in Africa. This is because

30 <https://www.opensocietyfoundations.org/fact-sheets/african-commission-human-and-peoples-rights> (accessed on 24 November 2016).

31 *Botswana Case of Attorney-General v Dow* [1994] 6 BCLR 1.

32 The Vienna Convention, which entered into force on 27 January 1980, article 14 provides as follows: '1. The consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such consent to be expressed by means of ratification; (b) it is otherwise established that the negotiating States were agreed that ratification should be required; (c) the representative of the State has signed the treaty subject to ratification; or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. 2. 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.'

it is flexible, less bureaucratic, and accessible to the common person.³³ The Commission is the continent's leading human rights protection and promotion mechanism.

Since its establishment, the Commission has considered over 400 communications from individuals and non-governmental Organisations (NGOs). It has also considered one inter-state communication. Through these communications, the Commission has gradually developed the provisions of the Charter and expended them to meet contemporary situations not anticipated by the Charter at its birth.³⁴

Despite its importance in promotion and protection of human rights in Africa, the recommendations and decisions handed down by the Commission have not been matched by implementation. The Commission as a quasi-judicial body, only hands down recommendations and conclusions. Non-implementation of those recommendations and conclusions has been a huge challenge to the victims of human rights violations as the offending state is totally at liberty to choose whether to respect and implement the recommendations or not. However, the establishment of African Court on Human and Peoples' Rights in 2006 has seen the Commission utilising article 2 of the Protocol establishing the African Court on Human and Peoples' Rights.³⁵ This view was supported in the case of *African Commission on Human and Peoples' Rights v. Libya*³⁶ in case, the Court held as follows:

- a) The Court uphold Commission's order of 15 March 2013 and of 10 August 2015 and order the respondent state (Libya) to comply therewith;
- b) The Court declares that, pursuant to articles 3 and 5 (1) (a) of the Protocol, it has jurisdiction to hear the application filed by the African Commission on Human and Peoples' Rights;
- c) The Court finds that Libya has violated and continues to violate articles 6 and 7 of the African Charter on Human and Peoples' Rights;
- d) Therefore, the Court orders the respondent state to protect all the rights of Mr. Kadhafi as defined by the Charter by terminating illegal criminal procedures instituted before the domestic courts;
- e) The Court finally, orders Libya to submit to the Court a report on the measures taken to guarantee the rights of Mr. Kadhafi within sixty (60) days from the date of notification.

This case shows how the Commission's recommendations and conclusions can be enforce through the African Court on Human and Peoples' Rights.

33 C. P. Maina, 'Human Rights Commission in Africa: Lessons and Challenges', in *Legal Perspectives on their Protection and Promotion*, eds. A. Bösl & J. Diesch, (Windhoek : Macmillan Education Namibia, 2009) at 369, also available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/11_Peter.pdf (Accessed on 23 June 2016).

34 S. B. Keetharuth, 'Implementation of Decisions of the African Commission on Human and People's Rights,' at 1. Also available at <http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/documents/sheilakeetharuthpres.pdf> (Accessed on 23 June 2016).

35 Article 2 of the Protocol provides *inter alia* that the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the African Charter on Human and Peoples' Rights.

36 [2013] Application no. 002 of 2013.

In *African Commission on Human and Peoples' Rights v. Kenya*³⁷, the African Court on Human and Peoples' Rights granted the Applicant's (Commission) request and the Court provisionally orders the following:

- a) The respondent immediately reinstates the restrictions it has imposed on land transactions on Mau Forest Complex and refrains from any act or thing that would or might irreparably prejudice the main application before the court, until the final determination of the said application
- b) The respondent reposts to the Court within a period of fifteen (15) days from the date of receipt hereof, on the measures taken to implement this order.

The African Charter does not lay down procedures for implementation of Commission's recommendation and conclusions. Unlike, the African Charter, the Commission's Rule of Procedure lay down specific procedures for implementation of the recommendations. Rules of Procedure of the African Commission on Human and Peoples' Rights, Rule 112, provides mechanism on how Commission's recommendations can be implemented. The Rule provides that:

- 1) After the consideration of the Commission's Activity Report by the Assembly, the Secretary shall notify the parties within thirty (30) days that they may disseminate the decision.
- 2) In the event of a decision against a State Party, the parties shall inform the Commission in writing, within one hundred and eighty (180) days of being informed of the decision in accordance with paragraph one, of all measures, if any, taken or being taken by the State Party to implement the decision of the Commission.
- 3) Within ninety (90) days of receipt of the State's written response, the Commission may invite the State concerned to submit further information on the measures it has taken in response to its decision.
- 4) If no response is received from the State, the Commission may send a reminder to the State Party concerned to submit its information within ninety (90) days from the date of the reminder.
- 5) The Rapporteur for the Communication, or any other member of the Commission designated for this purpose, shall monitor the measures taken by the State Party to give effect to the Commission's recommendations on each Communication.
- 6) The Rapporteur may make such contacts and take such action as may be appropriate to fulfil his/her assignment including recommendations for further action by the Commission as may be necessary.
- 7) At each Ordinary Session, the Rapporteur shall present the report during the Public Session on the implementation of the Commission's recommendations.
- 8) The Commission shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to any situations of non-compliance with the Commission's decisions.

³⁷ [2012] Application no. 006 of 2012.

- 9) The Commission shall include information on any follow-up activities in its Activity Report.

These are procedures set forth for the purpose of implementing Commissions' recommendations. Rule 112 is complemented by Rule 114 (1) and (1), which provides that Pursuant to Article 2 of the Protocol, the Court shall complement the protective mandate of the Commission as provided for in Articles 30 and 45 (2) of the African Charter. The complementarity relationship between the Commission and the Court is set out and organized by Articles 5, 6(1) & (3), 8 and 33 of the Protocol.

3.0 The Nature of the Commission's recommendations

The Commission is empowered under article 53 to make recommendations and its promotional mandate.³⁸ Therefore, 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.

However, signing and ratification of African Charter signifies States' intention to be bound by it and states are required as a matter of principle, to adhere to the obligations imposed by the Charter to member states regardless whether the same have been domesticated in a given states.³⁹ Therefore, although African states did not voluntarily agree to surrender their sovereignty to a regional quasi-judicial body like the African Commission, but, by ratifying the Charter, it is obvious that they were aware that they were required to abide by its provisions.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 an obligation upon states to demand concrete results.⁴³ Therefore, irrespective of whatever system of governance

38 The African Charter on Human and Peoples' Rights, Article 45(1)(a).

39 See the *Botswana Case of Attorney General V Dow* [1964] 6 BCLR 1 and *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46; see also J. Dugard, *International law: A South African Perspective*, 4th edn (New York: Cornell Faculty of Law, 1992) at 266. See also D. J Harris, *Cases and Materials on International Law*, 5th Edn (London: Sweet and Maxwell, 1991), at 747. the Vienna Convention, Article 14 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'.

40 G. Naldi, 'Reparations in the Practice of the African Commission on Human and Peoples Rights', 14 *Leiden Journal of International Law*, (2001), 684.

41 The Vienna Convention on the Law of Treaties, Article 26, 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'. It further states under Article 31(1) 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 The Vienna Convention, Article 26, also See *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 75; *Jawara v. The Gambia* (2000) AHRLR 107.

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 v Nigeria* (2000) AHRLR 262.

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

Some states have indeed questioned the African Commission's assumption of a quasi-judicial function,⁴⁸ 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*,⁴⁹ 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 Nigerian Constitution which domesticated the African Charter, 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.⁵⁰

The government of Nigeria, in response, criticised the African Commission and asserted that such a recommendation was an affront to its sovereignty because

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

45 The Vienna Convention, Article 27 states that '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, article 13, also Year Book of the International Law Commission 286 UN Doc A/CN.4/SER.A/1949; I. A. Shearer Starke's international law (1994) at 22.

46 See *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 43. See Vienna Convention, article 27 and *Caso Loayza Tamayo v Peru* [1997], also available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_33_ing.pdf (accessed on 23 June 2016).

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

48 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.

49 (2000) AHRLR 188 (ACHPR 1995) para 20, also in *Prince v. South Africa* (2004) AHRLR 105 (ACHPR 2004), the respondent state expressly questioned the jurisdiction of the Commission over the communication. The Commission expounded two important doctrines, namely the Margin of Appreciation and Subsidiarity. The Margin of Appreciation is the logical result of the application of the principle of subsidiarity. It's a discretion that a state's authority is allowed in the implementation and application of domestic human rights norms and standards. This discretion that the state is allowed, rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape a society. Accordingly, the African Commission, in considering the matter, has to take into account the legal and factual situation in South Africa. It should not view this communication *in abstracto*, but in the light of the specific circumstances pertaining in the Respondent State. The South African Constitutional Court did take into account such specific circumstances: the ratio for the decision to limit the right to freedom of religion in terms of the Constitution was that the use of cannabis by Rastafari could not be sanctioned without impairing the State's ability to enforce its drug legislation in the interest of the public at large. While the doctrine of Subsidiarity, the Commission states that the principle of subsidiarity indeed informs the African Charter, like any other international and/or regional human rights instrument does to its respective supervisory body established under it, in that the African Commission could not substitute itself for internal/domestic procedures found in the Respondent State that strive to give effect to the promotion and protection of human and peoples' rights enshrined under the African Charter.

50 C. Anyangwe 'Obligations of state parties to the African Charter on Human and Peoples' Rights' 10 *African Journal of International and Comparative Law*, (1998), 625.

the Commission lacked the judicial capacity to make such a recommendation.⁵¹ The Commission consequently replied that it is bound by the African Charter to consider communications fully, carefully, and in good faith.⁵² It added that when the Commission finds that a state is 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 that⁵³

'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'.

The findings of the research show 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.⁵⁴ In effect, notwithstanding the undefined and debated nature of the Commission's decisions, it can rightly be argued 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,⁵⁵ among others. It can be concluded in this aspect 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, the Charter provides that when it appears after deliberations of the Commission that one or more Communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.⁵⁶ The Rules of Procedures of the African Commission on Human and Peoples' Rights, also states that in special cases, the Commission 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'.⁵⁷ For example, in *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria*,⁵⁸ the African Commission called on Nigeria not to execute the complainant,

51 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;

52 *Idem*.

53 *Idem*.

54 The Vienna Convention, articles 14, 26, 27 & 31(1) and the African Charter on Human and Peoples' Rights, article 1.

55 *Ibid*, article 1, 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.

56 African Charter on Human and Peoples' Rights, article 58.

57 The African Commission's Rules of Procedure 1998, Rule 111.

58 *International Pen & Others (on behalf of Saro-Wiwa) v. Nigeria* (2000) AHRLR 212 (ACHPR 1998).

pending the final outcome of the communication before it. The state, however, executed the complainant in total disregard of the provisional 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.⁵⁹

Provisional measures allow a meaningful consideration of the Commission's eventual findings and states should consider them as binding.⁶⁰ It is the authors' position that by ratifying the African Charter, state parties undertook to fulfill the obligations there under, including an undertaking not to do anything that would undermine the objective of the Charter.⁶¹ Provisional measures can only be enforced by the Commission, if the same is referred to the Court for it to issue binding interim measures.⁶² In addition to that, state parties are obliged to comply with provisional measures and to the bare minimum refrain from inflicting irreparable damage, pending the finalisation of the case before the Commission.⁶³

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'⁶⁴ and ensure the implementation of the same,⁶⁵ and has thus remained passive with respect to the consequences of its recommendations.⁶⁶ 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.⁶⁷

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. These reports are then published and are available to the public after adoption by the AU Assembly. This process of publicizing or naming and shaming has tended to make some states take the recommendations

⁵⁹ *Ibid*, paras 114, 115 & 116.

⁶⁰ *Idem*.

⁶¹ The Vienna Convention, Article 31(1).

⁶² See, the case of *African Commission on Human and Peoples' Rights v. Libya*, and *African Commission on Human and Peoples' Rights v. Kenya* (*supra*, note 36 and 37).

⁶³ 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 State*, Case no. 104 of 27 June 2001, ICJ at 506 para 109, where the Court held that orders indicating provisional measures are (legally) binding.

⁶⁴ F. Viljoen, 'A Human Rights Court for Africa, and Africans,' 30 *Brooklyn Journal of International Law*, (2004), 15.

⁶⁵ 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).

⁶⁶ 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.

⁶⁷ See the European Convention, article 46; the American Convention on Human Rights article 68; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, article 30.

of the African Commission seriously,⁶⁸ 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,⁶⁹ it has been observed that the Commission has not always been explicit or clear in its findings and indication of remedial measures.⁷⁰ 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.⁷¹ 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 bound to be contested. Sometimes, the Commission makes a finding only of a violation of the victim's rights, without anything further.⁷²

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,⁷³ 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'.⁷⁴

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

68 Notably, some states have recently even taken to pressurising 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 author notes 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.

69 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*.

70 C. A. Odinkalu, *supra*, note 17, at 242. Also see, *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001); *Avocats Sans Frontières (on behalf of Bwampanye) v Burundi* (2000) AHRLR 48 (ACHPR 2000)) or 'take the necessary steps' to bring their practice in conformity with the African Charter (for instance, in *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996); *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998)).

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

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

73 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).

74 F. Viljoen, *supra*, note 64, at 15 and 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).

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.⁷⁵ In the African, the Economic Community of West African States (ECOWAS) is relevant in this particular approach.

Despite the presence of 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'.⁷⁶ 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;⁷⁷ which has led to some international lawyers equating enforcement with the use of, or threat of use of, economic or other sanctions or armed force.⁷⁸ 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.⁷⁹ The AU Constitutive Act, on the other hand, makes provision for the enforcement of the AU's decisions.⁸⁰ 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.

4.0 Enforcement of 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,⁸¹ 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,⁸² which includes a separate annexure dealing with communications and its recommendations thereon. As noted above, these reports are submitted to the AU Assembly for consideration and adoption.⁸³ 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,

75 C. Heyns, et al 'A Schematic Comparison of Regional Human Rights Systems: An update' 4 *International Journal on Human Rights*, (2006), 168.

76 R. Bernhardt, 'General report', in *International Enforcement of Human Rights*, eds. J. A. Jolowicz, (Berlin: Springer-Verlag, 1985) at 5.

77 The United Nations Charter, 1945, Article 45.

78 H.J. Steiner & P. Alston, *International Human Rights in Context: Law, Politics and Morals*, (Oxford: Clarendon Press, 1996) at 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.

79 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.

80 Unlike the OAU Charter, which made no provision for the enforcement of its principles, the AU Constitutive Act, article 23(2) provides for the same.

81 The Rules of Procedure of the African Commission, Rules 1 & 2(1).

82 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.

83 The African Charter on Human and Peoples' Rights, Articles 54 & 59(1).

despite the fact that the African Charter only envisages the submission of such reports to the AU Assembly.⁸⁴ While the consideration by the Executive Council's consideration is a great achievement, 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, the publication of a report has once been suspended,⁸⁵ and on two occasions the Executive Council has recommended the deletion of certain aspects⁸⁶ 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 author submits 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.⁸⁷ Also, rule 33 of the Rules of Procedure of the AU Assembly⁸⁸ categorises the decisions of the Assembly as follows:

84 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.

85 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.

86 The AU Assembly at its 6th Summit in Khartoum, Sudan in January 2006, decided 'to adopt and authorize, 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.'

87 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 article 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).

88 These Rules of Procedure are made pursuant to article 8 of the Constitutive Act.

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; and
- 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. Recommendations, Declarations, Resolutions, and Opinions etc. These are not binding and are intended to guide and harmonise the viewpoints of member states. 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.⁸⁹

Notwithstanding the foregoing deductions on the status of the African Commission's recommendations, a reading of articles 45(1)(c)⁹⁰ and 59(2) of the African Charter, article 3(h) of the Constitutive Act⁹¹ 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 responsibility⁹² of monitoring compliance with recommendations.⁹³

89 G. M. 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' *Judiciary Watch Report*, (2006) at 84.

90 The African Charter on Human and Peoples' Rights, article 45(1)(c) 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).

91 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.

92 K. Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more Effective Reporting Mechanism' 2 *African Human Rights Law Journal*, (2002), 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.

93 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. For instance, 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,⁹⁴ 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,⁹⁵ but also monitoring the implementation of policies and decisions of the Union as well as ensuring compliance of all member states.⁹⁶ 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 pro-vide them with the necessary powers and resources to enable them to discharge their respective mandates effectively.⁹⁷

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.'⁹⁸ Shame or peer pressure can be mobilised against recalcitrant states, which can change behaviour by inducing shame.⁹⁹ 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 interpretation¹⁰⁰ 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 its general Activity Report and adopted as directives.¹⁰¹ It would be invaluable to attach legally binding value to the decisions of the AU Assembly on recommendations of the

94 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'.

95 Constitutive Act, article 9(1)(b).

96 *Ibid*, article 9(1)(e).

97 *Ibid*, Preambular para 10.

98 C. Heyns, *supra*, note 75, at 701.

99 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.

100 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.

101 According to Ben Kioko, the Legal Counsel of the African Union, in a discussion held on 10 May 2006 in Banjul, 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.

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,¹⁰² 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 AU on the condemnation and rejection of unconstitutional changes of government¹⁰³ 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.¹⁰⁴ 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.

¹⁰² See, *Denmark v. Greece*, application no. 3321/67, *Norway v Greece*, application no. 3322/67, *Sweden v Greece*, application no. 3323/67 and *Netherlands v Greece*, 3344/67 found in (1969) 12 Yearbook of the European Convention on Human Rights. See also N. J. Udombana, 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights' 17 *American University International Law Review*, (2002), 1205.

¹⁰³ R. Cornwell 'Madagascar: First Test for the African Union', 12 *African Security Review*, (2003), 1.

¹⁰⁴ 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/unandafrika/transcript36.htm> (accessed 6 July 2016).

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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ For reasons of anticipating and preventing conflicts, the Council established a 'continental early warning system'¹⁰⁸ 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 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.¹⁰⁹ 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.

105 *Protocol Relating to the Establishment of the Peace and Security Council of the African Union.*

106 *Ibid.* Articles 3, 6 & 7.

107 *Ibid.* Article 7.

108 *Ibid.* Article 12.

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

5.0 Implementation of Commission's Recommendations through the African Court on Human and Peoples' Rights

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' Rights¹¹⁰ whose judgments would indisputably be binding,¹¹¹ hence the establishment of the African Court.¹¹²

The establishment of the African Court in 2006 was 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 Court delivers legally authoritative and conclusive decisions,¹¹³ and state parties to the African Court Protocol specifically undertake to implement the findings of the Court, including ordered remedies.¹¹⁴ 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 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.¹¹⁵ The other route would be when the African Commission refers a case to the Court after considering the communication.¹¹⁶ It is therefore hoped that the complementarity between the African Commission and the African Court will achieve in ensuring protection of human rights in Africa. In terms of enforcement, interestingly, rule 114 of the Rules of Procedure of the Commission¹¹⁷ 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

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

111 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) at 3-7.

112 Adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, 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).

113 Protocol to the African Charter, article 30, F. Viljoen, *supra*, note 64, at 14.

114 Protocol to the African Charter, on Human and Peoples' rights on the Establishment of an African Court on Human and Peoples' Rights, article 30.

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

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

117 Rules of Procedure of the African Commission on Human and Peoples' Rights, 2010.

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 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.

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,¹¹⁸ 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.¹¹⁹ This is akin to the positions under the European and Inter-American systems, where enforcement is vested in an organ of the political body.¹²⁰ Furthermore, the African Court is required to specify instances of states' non-compliance with its decisions in its annual report to the AU Assembly.¹²¹ Therefore, such reports, once adopted by the AU Assembly, will also assume the status of AU decisions, as earlier analysed,¹²² 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.¹²³

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 Justice¹²⁴ through the adoption of an instrument fusing both courts¹²⁵. The instrument would replace the initial Protocols establishing the two individual courts.¹²⁶ The Court name is the African Court of Justice and Human Rights (ACJHR)¹²⁷ which comprises of two sections, that is, a General Section

118 Rules of Procedure of the African Commission on Human and Peoples' Rights, 2010, Rule 112, provides procedures on how to enforce Commission's recommendations, however, this practice has not been achieved.

119 Protocol to the African Charter, article 29(2).

120 C. Heyns, *supra*, note 75, at 168. See also the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 46.

121 Protocol to the African Charter, article 31.

122 That is, in respect of the African Commission.

123 Constitutive Act.

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

125 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 article 1.

126 *Ibid*, article 1.

127 *Ibid*, article 2.

and a Human Rights Section.¹²⁸ Consequently, the 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.¹²⁹

Under the 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 ACJHR will issue final and binding decisions¹³⁰ and the Executive Council will be charged with the responsibility of monitoring the execution of its decisions, on behalf of the AU Assembly.¹³¹ 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.¹³²

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 merged African Court (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 institutions 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 author 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).

128 *Ibid*, articles 5 & 16.

129 *Ibid*, article 7.

130 *Ibid*, articles 47(1) & (2).

131 *Ibid*, article 44 (6).

132 *Ibid*, article 47(4) & (5).



6.0 Conclusion

Compliance by states in any decision made by any Judicial or Quasi-judicial body or organ 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. 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.

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 hybrid enforcement framework is feasible under the AU structure as a possible solution to the problem of non-compliance with human rights in Africa, its utilization largely remains an aspiration. This is because, in order for this political framework to have the desired impact on the African Commission's decisions and recommendations, there must be a willingness on the part of the component members of the AU 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. 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. Therefore, apart from reviewing the African Charter to accommodate the manner in which the Commission's recommendation may be enforced and implemented, there is as well a need to ensure that there a strong political will to honour the decisions made by the Commission.