The African Court on Human and Peoples' Rights: will political stereotypes form an obstacle to the enforcement of its decisions?

Rowland JV Cole[*]

Abstract

This article enquires whether the present African political landscape is conducive to the effective enforcement of the judgments of the African Court on Human and Peoples' Rights. Even though African leaders have come to realise that unity will foster economic development, for some African leaders the Organisation of African Unity (OAU), now African Union (AU), is a pet project through which to project their influence. For others it is an umbrella to protect them from the international spotlight. For yet others, it is a political block which can speak with one voice in the face of foreign domination, a continuation of the quest for self-determination which was the pith of the struggle for independence from colonial rule. The article examines the current behaviouralism of African leaders and how the political landscape might affect the enforcement of the judgments of the court in domestic jurisdictions. While noting that enforcement depends on the political will of nations, a number of legal measures to ensure the enforcement of the judgments of the court are highlighted.

INTRODUCTION

The perpetration of human rights violations is not unique to the African continent. This vexing issue has been with mankind since the beginning of time. From the conquests of the Roman Empire to the Trans Atlantic slave trade; from the first and second world wars, to colonial rule, examples of mutilation, torture, plunder and unlawful detention abound. History has taught us that the strong and those with the relevant instruments of power, tend to dominate the weak and those who are unable to defend themselves. In the modern context, state institutions such as the police, the military, the secret

[*] LLB, (Hons), (USL), BL, (SLLS), LLM (UNISA). Principal Magistrate: Gaborone, Botswana. The views expressed are those of the author and do not represent or reflect the position of the Department of Administration of Justice of Botswana.

service, legal systems, and legislatures are often used as instruments of oppression. In a nutshell, if power is left unchecked, impunity results. The monopolisation of institutions of state by the executive, or more often than not, the head of state, has been the main cause of impunity in Africa. Furthermore, African Union (AU), and its predecessor the Organisation of African Unity (OAU), has until recently not concerned itself with issues of human rights. This explains why until recently, there was no human rights court on the continent despite several calls for its establishment. Courts and judicial processes provide a form of deterrence to impunity and the unbridled exercise of power on both individual and state levels. However, a court is a deterrent only if it is effective. Regional courts are supranational institutions whose judgments depend on states for enforcement. Without an effective enforcement mechanism, the judgments of the African Court on Human and Peoples' Rights (ACHPR) will be largely meaningless. As Africa moves towards integration, the present African political leadership continue to declare their commitment to human rights and the court has finally been established. The question to be answered, however, is to what extent political manoeuvrings will allow the enforcement of the court's judgments in domestic legal systems.

BACKGROUND TO THE ESTABLISHMENT OF THE COURT

In 1998, the OAU Assembly of Heads of State and Government (AHSG) adopted a Draft Protocol[1] establishing the ACHPR. However, it took another six years for the required number of states to ratify the Protocol. This finally occurred with the ratification by the Union of Comoros on the 26 December 2003 allowing the Protocol to enter into force in January 2004.[2] The judges of the court were finally elected at the Eighth Ordinary Session of the Executive Council of the AU in January 2006. It must be noted, however, that the road to the establishment of the court was a long and difficult one.

The call for an African human rights court was first formally conceived at a conference of African jurists in Lagos in 1961. The court was proposed as part of an African convention for human rights. The idea of a court was not initially popular with many African leaders who saw litigation as alien to the African way of dispute resolution.[3] It was not until two decades later that an African Charter on Human and Peoples' Rights was adopted by the AHSG in

---

1 OAU/LEG/MIN/AFCHPR/PROT1 rev.2 (1997).

2 NB Pityana 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 121.

3 S Lyons 'The African Court on Human and Peoples' Rights' (2006) 10/24, available at: http://www.asil.org/insights060919.cfm (accessed on 3 March 2009).

1981.[4] The Charter did not provide for a court but rather for a commission whose duty was to promote and ensure the protection of human rights. The African Commission on Human and Peoples' Rights had supervisory powers and could not make binding decisions. In effect, the Charter provided no effective protective mechanism or enforceable remedies.[5] The power to publicise the decisions of the Commission was conferred on the AHSG to which the Commission reported.[6] The measures taken by the Commission as well as its decisions remained confidential until approved by the Assembly.[7] The reports were mostly lacking in substance and in effect, details of the decisions of the Commission in relation to complaints were not well publicised.[8] In effect, the Commission operated 'under the auspices and control of the political OAU'.[9] It must be noted, however, that the commission later developed a practice of issuing recommendations where it found states to be in violation of the Charter,[10] even though it had no specific mandate to do so. It has made wide ranging recommendations such as requesting states to compensate victims of human rights violations, requesting states to annul legislation that violates the Charter, ordering the release of prisoners, and ordering states to investigate human rights abuses alleged to be committed by

---

4 Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force on 21 October 1986.

5 Pityana n 2 above at 122; Coalition for an Effective African Court on Human and Peoples' Rights 'About the African Court' available at: http://www.africancourtcoalition.org/editorial.asp?page_id=16 (accessed on 17 December 2008); N Enonchong 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?' (2002) 46 *Journal of African Law* 197, 214; F Viljoen & L Louw 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48 *Journal of African Law* 1, 10; R Murray *The African Commission on Human and Peoples' Rights & International Law* (2000) 22; GJ Naldi & K Magliveras 'The proposed African Court on Human and Peoples' Rights: evaluation and comparison' (1996) 8 *African Journal of International and Comparative Law* 944, 945.

6 Art 59(3); Enonchong n 5 above at 197.

7 F Viljoen *International Human Rights Law in Africa* (2007) 427; art 59(2) of the African Charter.

8 R Murray 'Decisions by the Commission on Individual Communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412, 414; complaining about the manner that the Commission coins its remedies, Viljoen describes them as 'no remedy, a very open-ended remedy, and a specific and detailed remedy'.: F Viljoen 'Strengthening the African Commission on Human and Peoples' Rights: procedures, mechanisms, partnerships and implementation' in L Wohlgemuth & E Sall (eds) *Human rights, regionalism and the dilemmas of democracy in Africa* (2006) 112, 118.

9 Murray n 8 above at 414.

10 Viljoen & Louw n 5 above at 11; Heyns 'The African regional human rights system: in need of reform?' (2001) 1 *African Human Rights Law Journal* 155, 158.

its officials and security forces and to prosecute those responsible for such violations.[11]

As academics and NGOs mounted pressure for a meaningful institution that could effectively protect human rights on the continent, the OAU at the 30th Ordinary Summit of the AHSG, mandated the secretary-general to establish a committee of government experts to 'ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights'.'[12] In 1995 a draft document on an African court on human rights was produced by a meeting of government experts in Cape Town, South Africa, organised by the OAU Secretariat in collaboration with the African Commission and the International Commission of Jurists. Interestingly, and what can been seen as a demonstration of hesitance on the part of the political leadership, only three states commented on the document.[13] After a number of meetings the Draft Protocol was adopted by a conference of OAU Ministers of Justice and attorneys-general in December 1997. The Protocol to the Charter was finally adopted by the AHSG in Ouagadougou in 1998 thereby establishing the court. The election of judges took place in January 2006. Despite the Protocol's requirement of gender balance, only two women judges were elected.

COMPOSITION AND JURISDICTION OF THE COURT

Subject matter and legal jurisdiction

The court's subject matter jurisdiction extends to the determination of disputes related to the interpretation and application of the Charter, the Protocol and other instruments ratified by state parties.[14] As Professor Pityana laments, this limits the jurisdiction of the court rendering it incompetent to impose treaty obligations on states which have not assumed those obligations by

---

11 Viljoen & Louw n 5 above at 11; F Coomans 'The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749, 756–757; see Communication No 101/93, *Civil Liberties Organization in respect of the Nigerian Bar Association v Nigeria*; *Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights,* Second Extraordinary Session, Doc II/ES/ACHPR/4,3.

12 Report of Government Experts Meeting, AHG/Res.230 (XXX), 30th Ordinary Session of the Assembly of Heads of State and Government, Tunis, Tunisia, June 1994.

13 Pityana n 2 above at 122; T Maluwa 'International law-making in the Organisation of African Unity: an overview' (2000) 12 *African Journal of International and Comparative Law* 201, 207.

14 Article 3(1) of the Protocol. Ordinarily, this article will relate to contentious matters.

themselves.[15] This jurisdiction is, however, wider than those of the Inter-American Court and European Court on Human Rights which are limited to the interpretation and application of their governing conventions and protocols. In effect, the African Court has the potential of contributing to the development of international human rights law. Further, in the exercise of its jurisdiction, the court is empowered to transfer cases to the Commission.[16]

Locus standi jurisdiction

The court's *locus standi* jurisdiction refers to those parties whom the court is empowered to entertain. This extends to

- The commission;
- The state party which has lodged a complaint to the commission;
- The state party against which the complaint has been lodged at the commission;
- The state party whose citizen is a victim of human rights violation; and
- African intergovernmental organisations.[17]

Further, NGOs with observer status before the Commission, and individuals may institute proceedings in the court[18] if the state party against which the complaint is made so consents.[19] Such consent will be made by declaration at the time of ratification of or accession to the Protocol. A state party with an interest in a case, may, with the consent of the court, be permitted to join in the relevant proceedings.[20] It is a matter of concern that NGOs are excluded from direct access to the court. It must be noted that NGOs have played a dynamic role in the work of the Commission and have contributed greatly to its initiatives.[21] It must also be noted that NGOs have formed an effective vehicle for bringing complaints before the Commission on behalf of individuals and groups.[22] To exclude NGOs from the jurisdiction of the court, therefore, is to

---

15 Pityana n 2 above at 127; RW Eno 'The jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223; K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234.

16 Article 6(3) of the Protocol.

17 Article 5(1).

18 Article 5(3).

19 Article 34(6).

20 Article 5(2).

21 Pityana n 2 above at 127.

22 See for example Communications 137/94,139/94, 154/96 & 161/97, *International PEN and others (on behalf of Ken Saro-Wiwa) v Nigeria*, Twelfth Annual Activity Report; Communication 155/96, *The Social and Economic Rights Action Centre and another v Nigeria*, Fifteenth Annual Activity Report. See M van der Linde & L Louw 'Considering the interpretation and implementation of art 24 of the African Charter on Human and Peoples' Rights in light of the *SERAC* Communication' (2003) 3 *African Human Rights*

disenfranchise the ordinary and uninformed African from benefiting from the court's litigation process. The ability of NGOs to access the court would enable several Africans who would otherwise not have the resources to approach the court, to do so. It appears, however, that the intention of the Protocol is to bar individuals from instituting proceedings against states without the consent of the latter. Only a state party can bring complaints of human rights a violation on behalf of its citizen, and individuals have no recourse if their governments refuse to bring an action on their behalf. Given the fact that African states have proved reluctant to lodge complaints against each other before the Commission,[23] there is little reason to expect that the situation will be any different as regards the court. It makes no sense that individuals who are often victims of human rights abuse do not have direct access to the court. The African Charter guarantees several individual and group rights. Yet, those who are the right holders cannot pursue these rights, nor get redress from the court when such rights are violated. Individuals should be able to vindicate their rights in the court after exhausting domestic avenues. It is most unlikely that states will accept the competence of the court to determine complaints brought against them by individuals and NGOs. The barring of individuals from the court renders the guaranteed individual and group rights in the Charter nugatory and non-justiciable. The Protocol does not change the status of individuals. One would have expected that the establishment of the court would have strengthened the protection mechanism relating to individual rights. That this is not the case, confirms that political stereotypes have not really changed and the fanfare of the commitment to human rights under the AU, is patently withering away.

Advisory jurisdiction

Contentious matters apart, the court may give advisory opinions.[24] It may exercise this jurisdiction at the request of a member state of the AU, any AU organ, or any organisation recognised by the AU.[25] An opinion may be given in relation to legal matters relating to the Charter or any relevant human rights instrument. Though opinions are not binding, they may be of persuasive value.

Law Journal 167.

23 D Weissbrodt & C De La Vega *International Human Rights Law* (2007) 335.

24 Authors traditionally categorise the court's jurisdiction as 'contentious' and 'advisory'. See for example Viljoen n 7 above at 438 and 454; Eno n 16 above at 225 and 131; A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 165, 166; N Udombana 'The African Human Rights Court and an African Union Court: a needful duality of a needless duplication?' (2004) 28 *Brooklyn Journal of International Law* 811, 832. See however 829 of the same article where the author discusses *locus standi*.

25 Article 4(1) of the Protocol.

The advantage of advisory opinions is that they may be more acceptable to states than the binding judgment of a court in which they have lost.[26] The advisory route is less confrontational. Therefore, it might form a mechanism for persuading states to make domestic changes without embarrassing them as violators of human rights.[27] It must be noted that the Protocol provides, *inter alia*, that 'any African organ ' recognised by the AU may seek advisory opinions from the court. This provision opens the doors for NGOs to seek advisory opinions from the court, thereby making its advisory jurisdiction wider than that of any other regional court.[28] One wonders whether this was deliberate. Perhaps, states feel less threatened by non-binding opinions. It must be noted, however, that this provision leaves the door open for NGOs to bring contentious matters against states under the guise of seeking advisory opinions.[29]

Composition

The court consists of eleven judges, all citizens of AU member states,[30] a characteristic not shared by similar regional documents. The judges of the court are elected in their individual capacity. They are required to be jurists of high moral character and of practical, judicial or academic competence in the field of human rights.[31] The Protocol provides that due consideration be given to gender[32] and regional balance in the nomination of judges. Collectively, the judges should represent the principal legal systems on the continent.[33] The judges are elected for a period of six years, and may serve no more than two terms. Four of the judges elected at the initial election serve for a period of two years, while the terms of four other judges expire after four years.[34] Seven judges constitute a quorum.[35] All judges – save for the President of the court – serve on a part-time basis.[36] Since judges are engaged on a part-time basis, they will inevitably be engaged in other full-time activities. This potentially

---

26 Viljoen n 7 above at 454.

27 *Ibid*; Udombana n 25 above at 833.

28 Viljoen n 7 above at 454; Eno n 16 above at 232.

29 Viljoen n 7 above at 455; AP Van der Mei 'The Advisory Jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 *African Human Rights Law Journal* 27, 36; Eno argues however, that since article 5(3) does not give these NGOs direct access to the Court, it is doubtful whether it will entertain submissions for advisory opinions from them especially on matters relating to countries that have not made a declaration in terms of article 34(6) of the protocol; See Eno n 16 above at 232.

30 Article 11(1) of the Protocol.

31 Article 11(1) of the Protocol.

32 Article 12(2) of the Protocol.

33 Article 14(2) of the Protocol.

34 Article 15(1) of the Protocol.

35 Article 23 of the Protocol.

36 Article 15(4) of the Protocol.

raises questions of their independence, including conflicts of interest, particularly as certain of the judges are in the full-time employment of their governments.[37] Though those judges so engaged are judicial officers in their countries and therefore expected to be independent, this is not always the case on the continent. One would hope that the perception and allegations that some commissioners are too close to their governments do not befall the court. The issue of securing a quorum of judges who are engaged on a part-time basis is problematic. Obviously, the judges are committed to their 'day jobs'. Cases will have to be set down well in advance and for considerable periods to ensure that all judges assigned to a case will be and remain available. This will lead to unnecessary delays. Perhaps, the sittings of the court will have to be slated for specific periods each year during which the judges will be expected to keep their diaries free. It is axiomatic, of course, that their full-time employers will slot into any such arrangement. Therefore, unless in exceptional circumstances of urgency, the court might not be able to hear cases expeditiously or as and when they are filed. To secure the independence of the judges and ensure that they are readily available all year round, it is vitally important that they be employed on a full-time basis and provided with adequate remuneration and benefits. It should be noted that the Assembly is indeed empowered to change the part-time setup of the court, and it is hoped that this will be done sooner rather than later.

POLITICAL STEREOTYPES OF AFRICAN LEADERSHIP

Political abstentionism

The political and historical backdrop of African leadership from the 1960s to the mid-1990s displays a mind-set conditioned on state sovereignty, non-interference,[38] and dictatorship. The OAU Charter emphasised sovereign equality and respect for the sovereignty and territorial integrity of member

---

37 Justice Modibo Tounty Guindo is a Magistrate of the Ministry of Justice in Mali; Justice Jean Emile Somda is a member of the Constitutional Court of Burkina Faso; Justice Sophia Akuffo is a Supreme Court Judge in Ghana; Justice Kelello Justina Masafo-Guni is a High Court Judge in Lesotho; Justice Hamdi Faraj Fanoush is a Supreme Court Judge in Libya; Justice Jean Mutsinzi is a Supreme Court Judge in Rwanda; Justice Bernard Ngoepe is the High Court Judge (president) in South Africa; Justice George Kanyiehamba is a Supreme Court Judge in Uganda. The other judges of the Court are Justice Gerard Niyungeko, professor of law University of Burundi; Justice Fatsah Ouguergouz, secretary of the International Court of Justice; Justice El Hadji Guisse, member of the UN Sub Commission on the Promotion and Protection of Human Rights.

38 Articles 3(2) and (3) Charter of the Organization of African Unity, adopted in Addis Ababa on 25 May 1963. See M Hamalengwa, C Flinterman & EVO Dankwa *The International Law of Human Rights in Africa: Basic Documents and Annotated Bibliography* (1988) 28; CM Peter 'The proposed African Court of Justice – jurisprudential, procedural, enforcement problems and beyond' (1993) 1 *East African Journal of Peace and Human Rights* 117, 133.

states.[39] This was mainly conditioned on the ardent desire to consolidate hard-won independence.[40] The OAU was mainly formed to fight colonialism and apartheid on the continent.[41] The issue of self-determination was paramount in the minds of the political elite and their followers. Consequently, the human rights cause was minimised and relegated to a purely internal issue.[42] The political scene was quickly mired in dictatorship and political plurality was replaced by one-party regimes. It was argued that what African countries needed was the unification of various tribes and regions under a single agenda based on development and national unity. Military interventions in government became endemic while some countries experimented with socialism. The cold war saw the eastern and western blocks competing for influence in Africa. Therefore, they turned a blind eye to human rights violations, and supported even the most brutal regimes who they could regard as allies. Draconian colonial laws flourished rather than being repealed.[43] As corruption grew within the political class, internal dissenters were classified as enemies. Violations of human rights grew as dissenters were silenced. External dissent was considered as interference in state sovereignty. Consequently, non-interference became a common philosophical norm governing the international relations among African states. It is not surprising, therefore, that African states never brought complaints against each other before the Commission.

The stereotype of political abstensionism governed the attitude of African leaders regarding the establishment of a court. A court delivering binding decisions which nations were obliged to enforce was incompatible with their notion of sovereignty. Arbitrary rule and compliance with legally binding human rights norms seen as diametrically opposed. It is not surprising, therefore, that it took two decades after the Lagos Conference for the Charter to be adopted. Even when it was adopted, the continent had to settle for a Commission with ineffective powers, as a compromise to ensure its acceptance by African leaders.[44] As African states did not want their dirty linen washed in public, the proceedings of the Commission were divided into two parts. There was a public session which included reports on the activities

---

39 Articles and 3(1) and 3(3) of the OAU Charter.

40 CA Odinkalu 'Back to the future: the imperative of prioritizing for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 1, 9.

41 Lloyd & Murray n 25 above at 166.

42 Odinkalu n 41 above at 9; Viljoen n 7 above at 163.

43 Odinkalu n 41 above at 8.

44 It has been suggested also that African states usually tend to form institutions with unique African characteristics. See S Sibanda 'Beneath it all lies the Principle of Subsidiarity: the Principle of Subsidiarity in the African and European Regional Human Rights Systems' (2007) 40 *CILSA* 425, 438.

of the various commissioners, the examination of state reports, and reports by NGOs on their human rights activities.[45] Complaints against states alleging human rights violations were held in closed sessions.[46] Unlike other regions, no provision was made for a court in the African Charter. The court was to come much later – almost as an afterthought and through pressure from NGOs and academics.

Africa's Renaissance

The winds of change gusting across Eastern Europe in the 1990s did not leave Africa unmoved. Demands for constitutional pluralism flourished on the continent, seeking the replacement of one-party states with constitutional pluralism. One by one they fell as popular protest led to multiparty elections and the removal of the old guard. The crown jewel of constitutional democracy in Africa was the liberation of South Africa in 1994. The period of accountability had begun. The birth of the AU shifted the emphasis away from the protection of sovereignty which had ruled supreme under the OAU.[47]

The Constitutive Act[48] of the AU evidences an enhanced commitment to human rights.[49] The emphasis shifted to the promotion of democratic principles and institutions, good governance,[50] the promotion and protection of human and peoples' rights, and the rule of law.[51] The Constitutive Act refers to the Universal Declaration of Human Rights and other relevant human rights instruments.[52] It also prohibits change of government by unconstitutional means.[53] It talks of participation of African peoples in the activities of the AU.[54] Endorsements and commitments to good governance

---

45 F Viljoen 'Recent developments in the African regional human rights system' (2004) 4 *African Human Rights Law Journal* 344.

46 *Ibid*.

47 KD Magliveras & GJ Naldi 'The African Union – a new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 415, 418.

48 Constitutive Act of the African Union, adopted on 11 July 2000 in Lome, Togo and it entered into force on 26 May 2001, CAB/LEG/23.15.

49 Lloyd & Murray n 25 above at 171.

50 Magliveras & Naldi n 48 above at 416; Odinkalu n 41 above at 13.

51 Article 4(m) of the Constitutive Act; 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, 101; Peter n 39 above at 134.

52 Articles 3(e) and (h) of the Constitutive Act; HB Jallow 'New challenges and opportunities for human rights promotion and protection in Africa' in L Wohlgemuth & E Sall (eds) *Human rights, regionalism and the dilemmas of democracy in Africa* (2006) 41, 48.

53 Magliveras & Naldi n 48 above at 424; arts 4(p) and 30.

54 Article 4(c) of the Constitutive Act.

and fair electoral practices have been made.[55] The African Renaissance and the adoption of the New Partnership for Africa's Development (NEPAD)[56] with its African Peer Review Mechanism (APRM) meant that African leaders were now ready to be told about the speck in their eyes. NEPAD consists of three initiatives. The first is the Peace and Security Initiative covering development and security, early warning and prevention, and management and resolution of conflicts. Secondly, is the Economic and Corporate Governance Initiative and third, is the Democracy and Political Governance Initiative. The third initiative is a commitment to Africa's respect for global standards of democracy particularly political pluralism, workers' unions and open, free and fair elections. Also important in this initiative are parliamentary oversight, participatory decision making, and the combatting of corruption and judicial reform.[57] By the APRM, states voluntarily submit to review by their peers. During review, their record on political, economic and corporate governance comes under scrutiny.[58] The review is based on the Declaration on Democracy, Political, Economic and Corporate Governance,[59] a document setting out certain principles to which states agree to adhere. The barriers of non-interference were shifted and the political class could now face criticism within the sphere of constructive dialogue. Plans for economic integration and joint infrastructure projects such as in energy and tourism were formulated. There was a clarion call to build a prosperous and more united Africa.[60]

The general awakening of third world countries has contributed to Africa's rising voice in world affairs, or at least in relation to its own affairs. The emergence of secondary powers like China, Brazil and India, led to an expansion of the traditional G5 to G8 and G13. Demands are being made for an expanded UN Security Council, with third world countries Africa included,

---

55 Declaration on Unconstitutional Changes of Government, adopted in Lome, Togo by the OAU Assembly of Heads of State and Government in July 2000. See C Heyns & M Killander *Compendium of key human rights documents of the African Union* (2006) 85.

56 The New Partnership for Africa's Development (NEPAD) Declaration (2001), adopted at the first meeting of Heads of State and Government Implementation Committee of NEPAD in Abuja, Nigeria in October 2001.

57 Lloyd & Murray n 25 above at 178. For the origin, purposes, and functions of NEPAD, see S Gumedze 'NEPAD and human rights' (2006) 22/1 *South African Journal on Human Rights* 144; E Baimu 'Human rights in NEPAD and its implications for the African Human Rights System' (2002) 2 *African Human Rights Law Journal* 301; KR Hope 'From crisis to renewal: towards a successful implementation of the New Partnership for Africa's Development' (2002) 101 *African Affairs* 387.

58 Viljoen n 7 above at 427; Lloyd & Murray n 25 above at 179.

59 OAU/AU Doc AHG/235 (XXXVIII), Annex I. For more on the APRM see Viljoen n 7 above at 211–216; M Killander 'The African peer review mechanism and human rights: the first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41.

60 Sibanda n 45 above at 426.

gaining permanent seats. More recent events like the economic recession and climate change resulted in third world countries to dare question the wisdom of the western hemisphere's monopoly in determining the framework and philosophy of the world economic and political order. In particular, the effects of global warming have led to the moral authority of the industrial west being questioned. Seemingly, developing nations and the southern hemisphere thus demand a greater say in world affairs. In all this, African states have become more united under the AU and speak more and more with one voice.

Of renaissance or block protectionism – What is Africa's agenda?

Notwithstanding the public glamour and rhetoric of democracy, human rights and good governance, old habits seem to die hard. The Protocol's article 34(6) limitation on the court's jurisdiction seems to represent a continuation of the trend to protect the sovereignty of states.[61] It would appear that previous drafts of the Protocol permitted individuals and NGOs accredited to the Commission, direct access to the court. Such direct access was permitted in urgent cases or cases of serious, systematic or massive violations of human rights.[62] It is unfortunate that this provision was removed in subsequent drafts. One does not need to guess from what quarters the decision to remove NGO and individual access emanated. One only need ask who stands to benefit from such exclusion. Knowing full well that individuals are mostly the victims of human rights violations and that individuals might be the most likely to frequent the portals of the court, the African leadership has denied them such access. This speaks volumes of the attitude of African leaders in committing to human rights and good governance. Initial reluctance to ratify the Protocol shows that the idea of the court was greeted with limited enthusiasm. The effect of the article 34(6) limitation is that complaints against states still have to pass through the Commission. This negates the purpose of setting up the

---

61 Pityana n 2 above at 128.

62 Article 6(1) of the text resulting from Government Legal Experts Meeting on the Question of the Establishment of an African Court of Human and Peoples' Rights, 6–12 September 1995 Cape Town, South Africa reads – 'Notwithstanding the provisions of Article 5, the Court may, on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the Court, without first proceeding under Article 55 of the Charter.' OAU/LEG/EXP/AFC/HPR (I), (1996) 8 *African Journal of International and Comparative Law* 493; Protocol, text resulting from the Second Governmental Legal Experts Meeting on the Establishment of an African Court of Human and Peoples' Rights 11–14 April 1997, Nouakchott, Mauritania; see also AA Mohamed 'Individual and NGO participation in human rights litigation before the African Court of Human and Peoples' Rights: lessons from the European and Inter-American Courts of Human Rights' (1999) 43 *Journal of African Law* 201; IA Badawi El-Sheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: introductory note' (1997) 9 *African Journal of International and Comparative Law* 943, 947.

court as a means by which to strengthen the complaints mechanism of the Commission.[63]

It seems that the allegiance of African states to competing cold war ideological differences which supposedly caused a split on the continent, has been replaced by an assertion of an African agenda. Increasingly, African leaders speak with one voice. Central to this is a growing camaraderie among African leaders. It appears that Africa is emerging as a new block. But there is cause for concern in this development. Under the guise that Africans should be their own masters and hence should be left alone to solve their own problems, this emerging block seems to be a new cover for African leaders to protect themselves from accounting for their atrocities. As African leaders continue to shed their skins under the new dispensation, current behavioural patterns tend towards protectionism of each other and a more diametrical opposition to perceived interference from outside the continent. Though the APRM provides some form of accountability, its effectiveness remains to be seen from the compliance level of states in relation to matters raised under review. The attitude of the Southern African Development Community (SADC) and its quiet diplomacy towards the regime of President Robert Mugabe in Zimbabwe despite its impunity, is a stark example of this new camaraderie. South Africa's pro-Mugabe stance during its tenure at the UN Security Council is inconsistent with that country's domestic human rights credentials. The ramshackle power-sharing governments negotiated in Kenya and Zimbabwe[64] after stolen elections and massive human rights violations, show that the commitment of African leaders to human rights and fair electoral practices is languid. Such dysfunctional governments have resulted in unnecessary delays in the conduct of government business. Using incumbency and state institutions such as electoral commissions and security forces, the sitting governments in Kenya and Zimbabwe forced themselves on the will of the people by unconstitutional means in what amounts to power snatching.

---

63 Viljoen n 7 above at 439.

64 The 2007 Elections in Kenya which saw the incumbent Mwai Kibaki declared the winner was heavily disputed by the opposition led by Raila Odinga. This was followed by riots which saw hundreds of people killed. The quagmire was settled with the formation of a power sharing government with Kibaki as president and Odinga as prime minister. Similarly in the Zimbabwe 2008 elections, the electoral commission did not announce the results until after several weeks. When the announcement was made, president Mugabe's ruling ZANU/PF party was declared the winner. This was followed by massive intimidation, arrest and torture of opposition supporters. In a power sharing deal, Mugabe retained the post of president and opposition leader Morgan Tsvangirai became prime minister.

The International Criminal Court's (ICC) indictment for the Sudanese leader Omar al-Bashir has rallied African leaders to the cause yet again. Though the African block was the most enthusiastic in signing up and ratifying the ICC Statute,[65] in what has become a deeply politicised issue, African states initially threatened to pull out of the ICC but finally resolved not to hand over Bashir for trial. The African Court should not suffer a similar fate should its judgments prove unpalatable to African leaders.[66] At its Third Ordinary Session, the AU Assembly refused to adopt the report of the Commission which made serious allegations of human rights violations in Zimbabwe, including arrest and torture of government opponents following the 2002 elections in that country.[67] The reasons given by the Assembly for its refusal to adopt the report were that the Zimbabwean government was not given an opportunity to respond to the report, was surprised by it, and had not been given prior access to it. This is surprising considering the fact that the Commission would usually ask the relevant government to comment before concluding its reports.[68] It is clear, therefore, that the Assembly's decision to reject the report was ill-founded and merely meant to protect another government. The Constitutive Act of the AU talks about the imposition of sanctions on member states that refuse to comply with decisions and policies of the AU.[69] However, though Mugabe steadfastly refuses to follow the principles of democracy, human rights and good governance embraced by the Constitutive Act, and continues to perpetrate his rule through violence and vote rigging, the SADC and the AU continue to extend their hand of camaraderie to him.

President Abdoulaye Wade of Senegal, one of Africa's long-standing shining democracies, has been accused of trying to perpetrate his rule by installing his son as his successor. Though he has denied this, he recently appointed his son Karim Wade to cabinet after the latter lost municipal elections for the position of mayor of Dakar. President Wade subsequently proposed constitutional changes to create a vice president. Even though he denies the allegations of

---

65 See BK Murungi 'Implementing the International Criminal Court Statute in Africa: some reflections' (2001) 17 *East African Journal of Peace and Human Rights* 136, 137–138; CS Igwe 'The ICC's favourite customer: Africa and international law' (2008) 42 *CIlSA* 294, 309.

66 'It is rather unfortunate that within the OAU we have witnessed states threaten to walk out of the organization after decisions which did not please them were taken by the continental body. Africa is now mature and states should be able to swallow their egos and accept the decisions of the African Court without threatening to withdraw their recognition of the Court's jurisdiction.': Peter n 39 above at 132.

67 Viljoen n 46 above at 345. Elections held in 2008 suffered a similar fate.

68 *Ibid*.

69 Article 23(2).

critics that this seat is a launching pad for his son to succeed him, it smirks in the face of democracy why he proposes to make such dramatic and seemingly unnecessary constitutional changes in the face of public opposition.[70] This is a typical example of a single man trying to manipulate institutions of government, a clear return to the yesteryears of dictatorship and bad governance.[71]

President Mamadou Tandja of Niger, having served his two-term constitutional limit, has launched a bid to extend his rule. In this regard, he has proposed a referendum to make constitutional changes. He was opposed by members of parliament, some of whom took the matter to Niger's constitutional court. The court ruled that the move by Tandja was unconstitutional. He then proceeded to dissolve parliament. Consequently, tensions have mounted in Niger leading to public demonstrations and violence, as Tandja proposes to proceed with the referendum in August 2009, issuing a presidential decree to the effect.[72] On the 12 June 2009, the constitutional court set aside the decree, holding it to be unconstitutional. President Tandja proceeded to dissolve the court and set up a new one with new members.

In recent times, the AU and sub regional leaders have taken tough stands against unconstitutional change of government as in the cases of Mauritania, Madagascar and Guinea.[73] It should be noted, however, that this only happens when the incumbent is removed by unconstitutional means and not when the incumbent retains power by manipulating state institutions. Mugabe and Kibaki were not brought to book when it was clear that they stole the elections

---

70 Since Senegal has an office of the prime minister, critics wonder what would be the purpose of the office of the vice presidency.

71 For a discussion on the centralisation of powers by president Wade, see P Mbow 'Senegal the return of personalism' (2008) 19 *Journal of Democracy* 156.

72 The Economic Community of West African States (ECOWAS) has expressed concern at the move by President Tandja. See 'Region warns Niger's leader on plan to keep power'. Available at: http://af reuters.com/article/nigerNews (accessed on 7 June 2009); the ECOWAS Protocol on Democracy and Good Governance (Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security), Protocol A/SP1/12/01, calls for adherence to democratic principles. President Tandja was overthrown in a military *coup d'état* on 18 February 2010, after this article had been submitted for publication.

73 In Mauritania president Sidi Mohamed Ould Cheikh Abdullahi was removed from power on the 6 August 2008 by high ranking generals. In Madagascar, president Marc Ravalomanana was unconstitutionally removed from power in March 2009 by Andry Rajoelina (mayor of Antananarivo) with the support of the military. In Guinea, a military junta seized power on the 23 December 2008 immediately after the death of president Lansana Conte who had ruled that country for decades.

and then proceeded to massacre and terrorise protesters.[74] This display of camaraderie and double standards clearly demonstrates the inconsistency in the behavioural pattern of the political leadership. Notwithstanding the hype about human rights protection and good governance, the agenda of the political leadership seems to border on block protectionism. That such protectionist tendencies seem to favour the leadership rather than the interests and aspirations of the people, does not augur well for the effectiveness of the court. As the enforcement of the court's judgments ultimately depends on the political acquiescence of states, the stereotype of the political leadership is relevant to the success of the enforcement regime.

The larger problem behind the rhetoric

The stereotypes described in the previous paragraph are symptoms of a much larger problem. Behind the rhetoric of change lies the political and social structure of the African nation state. Several African states are still patrimonial, as opposed to the rational-legal, states.[75] In the rational-legal state, legality is the foundational source of legitimacy. Authority is depersonalised and allegiance is owed to no one.[76] In the patrimonial state, on the other hand, rule is personalised and the discretion and personality of the ruler is the source of authority. Reward and social relations are based on kinship rather than merit or individual contractual relations.[77] Though multiparty elections were held in most African states in the 1990s, this did not really result in democracy.[78] The underlying reason for the failure of transformation into democratic societies is the social structure of the African societies and the absence of strong democratic institutions. In the African customary framework, reverence is shown for elders and those in positions of authority. Literacy is high among those in leadership and the illiterate always believe what their educated leaders say. Some African leaders still carry the 'father of the nation' tag. This 'big man syndrome' enables those in power to manipulate the system. Therefore, while it is possible to change African governments through the ballot box, power remains highly personalised. The absence of strong institutions like independent courts, human rights

---

74 See press statement by Philip Alston, UN Special Rapporteur on extrajudicial, arbitrary or summary executions, Mission to Kenya 16–25 February 2009, available at: http://www.scribd.com/doc/12821980/Alston-Press-statement-of-UN-special-Rapporteur-on-Kenyas-extrajudicial-killings (accessed on 7 June 2009).

75 Viljoen n 7 above at 472, citing YP Ghai 'Constitutions and governance in Africa: a prolegomenon' in S Adelman & A Paliwala (eds) *Law and crisis in the Third World* (1993) 63–64.

76 Viljoen n 7 above at 472.

77 *Ibid*.

78 As above 473.

commissions, strong legislatures, an independent press, professional security forces, and well-resourced academic and research institutions, means that executive overreach is subject to minimal control. Even South Africa which has strong democratic institutions, has a ruling party (the African National Congress (ANC)) with a large majority in parliament. Prior to the 2009 elections the ANC had a two-thirds majority in parliament.[79] They were able to use this majority to disband the Scorpions,[80] after the latter investigated and exposed corruption among high government officers who were also party officials. The shifting of goal posts to suit personal interests is replete on the continent. Even where there is change of government through the ballot box, it is not uncommon for the incoming government soon to replace top civil servants with their kinsmen. The fact of the matter remains that without strong legal and democratic institutions, the political leadership retains a firm grip on the system and the leaders are a law unto themselves. African governments are known to be at loggerheads with their judiciaries. Governments tend not to comply with court orders, and the executive arms of government is notorious for undermining the independence of the judiciary.[81] It is highly possible, therefore, that this domestic practice will surface on the international arena.[82] This situation potentially forms an obstacle to the enforcement regime of the court's judgments.

Considering other obstacles to enforcement

There are still more impediments to the enforcement of the judgments of the court. Putting stereotypes aside, it is well-known that states find it difficult to trade away their sovereignty to supranational entities.[83] However, this is the price they have to pay for the benefits of regional and economic integration. States that opt out of regional integration are often said to suffer the disadvantages of isolation. The benefits of free trade and a united political block are often highlighted. In order to be persuaded to sacrifice their sovereignty, states must be made to feel the effects of regional integration and the disadvantages of not towing the line. More importantly, once states opt to become part of regional bodies, the regional body must show a willingness to implement sanctions against defaulters, depriving them of the benefits of membership. In the result, states are put in a position to balance their

---

79 The ANC still maintains close to two thirds majority in parliament.

80 A crack security unit which was set up to fight crime and corruption.

81 KO Kufour 'Securing compliance with the judgments of the ECOWAS Court of Justice' (1996) 8 *African Journal of International and Comparative Law* 1, 7.

82 *Ibid*.

83 *Ibid*.

sovereignty against the disadvantages they stand to suffer from an effective sanctions regime.

Closely connected to the issue of sovereignty is the issue of national interest. Politicians may simply refuse to comply with judgments that do not serve the national interest. Compliance with the view of the government will amount to an admission of the violation complained of. Governments may also believe that compliance will open a floodgate of cases. Further, the political climate might make it inexpedient to comply with the judgment, eg because it would be unpopular in the national arena. Citizens of states, for example, usually do not believe in giving up territory to other states in cases of border disputes, even when this ensues from the judgment of a court. If the timing of a judgment is wrong, such as when elections are approaching, a government might well resist the judgment for fear of losing the popular vote.

The absence of direct access by individuals and NGOs is a telling and significant obstacle to the possibility of enforcement.[84] Though the Constitutive Act of the AU embraces people participation, it is unfortunate that the people are excluded from the legal process of the court. Individual participation and NGO participation are essential to ensure compliance with judgments. The AU should embrace a culture of democracy which involves people-participation in all stages of law making, legislation and implementation.[85] Social dialogue between those who govern and the governed should be encouraged within the AU. Individual access to the court forms part of this dialogue. Participation at this level facilitates a forum for post-litigation discussion, follow-up and pressure for implementation.[86]The follow-up actions by the complainant NGO in the *SERAC* case[87] before the Commission, serve as a good pointer of how assiduous NGOs can be in their bid to secure compliance. SERAC created wide publicity for the decision by circulating copies and a letter explaining it to the president of Nigeria, relevant government departments, the judiciary, media houses, and other relevant stakeholders.[88] SERAC also met with various stakeholders, including victims,

---

84 *Id* at 9.

85 *Id* at 10.

86 *Ibid*.

87 Communication 155/96, *The Social and Economic Rights Action Centre and another v Nigeria*, above at note 23. See also JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the twenty-first century: the case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, 788, where the authors catalogue the effectiveness of human rights advocates in securing compliance with judgments of the Inter-American Court; see further N Jayawickrama *The judicial application of human rights law (national, regional and international jurisprudence)* (2002) 152.

88 Van der Linde & Louw n 23 above at 184.

to discuss strategies for the implementation of the decision.[89] Meetings were also held with government departments which were relevant to the implementation of the decision and their progress was monitored.[90] It must be noted that it is not only in human rights litigation before the Court that people-participation is absent. The entire integration process of the continent is undemocratic. African leaders continue to negotiate and set deadlines for integration without consulting their citizens. Governments would ordinarily negotiate economic integration without necessarily and directly consulting the general populace. After all, it is assumed that they have a mandate from the people through the electoral process. The African leadership, however, intends to unite the continent politically, ultimately forming a single African government. One would have expected referenda in each country on this all important question. Political integration affects the very soul of a nation. African countries fought for self-determination, a right that each nation claimed as a people, and which is recognised by the African Charter on Human and Peoples' Rights. Such a right should not be given up without reference to the people. Citizens of African countries cherish their nationalities. It is axiomatic that citizens of wealthier African states mistrust their poorer neighbours coming in, in large numbers.[91] While the elite, the educated and civil society may be aware of the consequences of unification, the common man is oblivious to the happenings at Addis Ababa, Cape Town or Cairo. The organisation of national referenda on the question of a single African state will provide the much needed publicity and education which will in turn result in the peoples' acceptance of unification. Opening up of borders on the basis of decisions taken by heads of states in a capital city and without consultation, is a recipe for conflict and disaster. Unfortunately, the unification process is executive-based and patently undemocratic.

The lack of international and domestic legislative enforcement mechanisms is a further obstacle to the enforcement of the court's judgment. Under article 30 of the Protocol, states undertake to abide by the judgments of the court. Further, article 23(2) of the Constitutive Act provides for sanctions against countries that fail to comply with decisions and policies of the AU. Article 30 of the Protocol is clearly not an enforcement mechanism. Further, article 23(2) of the Constitutive Act is hardly an effective enforcement mechanism in respect of the court's judgments. Article 23(2) is a provision of general

---

89 *Ibid*.

90 *Ibid*.

91 Though recent xenophobic violence in South Africa is a pointer in this regard, xenophobia against fellow Africans generally exists in wealthier African countries to which foreign workers gravitate.

application. It refers generally to sanctions in relation to states that refuse to comply with policies and decisions of the AU. It does not operate as a direct consequence of non-compliance with the court's judgments. Compliance is monitored by the Executive Council. Therefore, enforcement under article 23(2) can only result from a political decision. The article does not make any special provision governing the execution of the court's judgments. A special 'sanction-enabling' provision, giving states a deadline within which to comply with judgments, and a further time limit within which sanctions should be implemented by the Assembly after the compliance period expires, would contribute positively.

ENFORCING THE JUDGMENTS OF THE COURT

Current enforcement framework

It is a principle of international law that the judgments of a transnational organ do not have positive legal effect in the domestic legal order of the state to which it is directed, or overturn any domestic law which it seeks to override.[92] International courts are not courts of appeal in relation to domestic courts and do not substitute the decisions of domestic courts with their own. Their judgments are directed to, and bind the state on the international plane.[93] The African Court on Human and Peoples' Rights is not a domestic court of appeal and it does not have the authority to overturn the decisions of domestic courts. It is for states to abide by the decisions of the court. By article 30 of the Protocol, the state parties bind themselves to comply with the judgments of the court and to ensure their execution. The states in effect undertake to carry out their treaty obligations in line with the principle of *pacta sunt servanda*.[94] But there are no consequential provisions in relation to non-compliance by states. Article 31 provides for the court to report annually to the Assembly. The report should specify states who have refused to comply with its orders. The Assembly delegates the monitoring of compliance to the Council of Ministers (now the Executive Council).[95] The report system amounts to the public naming and shaming of defaulters.[96] The question that arises is whether tyrants really care about public moral opinion. It appears, therefore, that the execution of the court's judgments really depends on the undertaking and willingness of states to cooperate.

---

92 Pityana n 2 above at 128.

93 *Ibid*.

94 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, 628; AZ Dremczewski *European Human Rights Convention in Domestic Law: a comparative Study* (1983) 20.

95 Art 29(2) of the Protocol.

96 Hopkins n 16 above at 238.

Article 1 of the African Charter on Human and Peoples' Rights provides that all parties recognise the rights contained therein and 'shall undertake to adopt legislative or other measures to give effect to them'. Not only does this mean that states should legislate and make sure that their domestic systems are in line with Charter rights, providing for Charter rights in domestic law, it also means that Charter rights must be enforceable in the domestic arena. In terms of the Protocol, state parties undertake to abide by decisions of the court.[97] The court's decisions, particularly its interpretation and application of the Charter and Protocol, will form a positive authority and an integral part of what may be termed African human rights law. States are bound by their international obligations, and their undertaking under the Charter should include an obligation to give decisions of the court binding force in their jurisdictions. Article 23(2) of the Constitutive Act provides for sanctions in the event of non-compliance. Sanctions are not automatic and have to be adopted by the Assembly. In effect, the decision to implement sanctions is political. The effective enforcement of the decisions of the court therefore rests within the political realm.

Possible enforcement mechanisms

Domestic and regional legal systems should complement each other in giving effect to the judgments of the court.[98] Pitifully, legal norms that apply at Union level have not really yet influenced domestic legal orders. Reference to and the application of the Charter in domestic courts is sparse,[99] even in countries with a monist tradition. Courts do not refer to the decisions of the Commission, perhaps because not only are they not binding, but because the Commission is not a court. Its decisions, therefore, are not law. But the fact that there is not even a measure of engagement with Commission decisions, signals how badly the 'human rights and legal norms and jurisprudence' of the AU fare in the domestic fora. Moreover, the decisions of the Commission are not widely disseminated and often do not even come to the attention of judicial officers in domestic courts.[100] The incorporation of the Charter and Protocol into domestic law will serve as a suitable way of giving them effect in domestic law.[101] This will allow victims of human rights violations to ventilate

---

97 Article 30.

98 See I Salami 'Legal considerations for devising a governance structure for the African Union' (2008) 2 *African Journal of International and Comparative Law* 262, 265–270.

99 F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1, 15.

100 Jallow n 53 above at 50.

101 R Murray 'A comparison between the African and European Courts of Human Rights' (2002) 2 *African Human Rights Law Journal* 195, 211; Hopkins n 16 above at 235.

their grievances in domestic courts, thereby reducing the workload of the court. It will also be a commitment by each state, binding themselves to the judgments of the court thereby making it difficult for them to ignore unpalatable judgments. In effect, domestic courts could serve as a means of giving effect to the Protocol. Individuals will be able to enforce their rights under the Charter in domestic courts. The judgments of the court do not have legal force in the domestic context. It is therefore desirable to have Charter rights protected by national legislatures and administrators as opposed to a weak form of international protection.[102]

The regional mechanism should give effect to the acceptance of the court's jurisdiction in domestic law. The Protocol should expressly put states under a duty to pass legislation for the enforcement of the court's judgments in their domestic systems. The Protocol should, in addition, incorporate a provision enabling the enforcement of the court's judgments in domestic jurisdictions in terms of the local procedure governing the enforcement of judgments against foreign states. This will enable litigants to enforce judgments against states where damages are awarded by the court. In this way, awards for damages by the court could be executed as if they were judgments of the local courts concerned.[103] Awards for damages are easier to enforce than other orders since they do not require any compliance from governments. The Protocol should make it possible to execute on the properties and assets of states against which damages have been awarded, wherever such properties or assets may be found. This will make it possible for litigants to attach state properties in foreign countries where the agents of the state against whom execution is sought cannot interfere, except through the legal process.

CONCLUSION

For many years African leaders resisted the idea of an African court for fear that it would threaten their sovereignty. Happily, the court has finally arrived. What makes it significantly different from the Commission, is that its judgments are binding on states who undertake to comply with them. Though states did not score high marks for compliance with the decisions of the Commission, the APRM shows that they might be ready for external scrutiny. It is hoped, therefore, that they will comply with judgments of the court which

---

102 Murray n 102 above at 210.

103 An example of such a provision can be found in art 68(2) of the American Convention on Human Rights which reads – "That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." OAS Treaty Series No 36, 1144 UNTS 123, entered into force on 18 July 1978. Available at: http://www1.umn.edu/humanrts/oasinstr/zoas3con htm (accessed on 10 June 2009).

they themselves have created. This is crucial as the enforcement of its judgments by and large depends on political will. The parties to the Protocol have also undertaken to comply with the judgments of the court. But compliance cannot be left with the states alone. Though the Assembly may ultimately sanction a state for non-compliance, in the final analysis this leaves the compliance mechanism of the court entirely in the hands of politicians. The compliance mechanism should rather resort within the legal framework. In this regard, the Protocol should be amended to provide for the award of damages and for execution in domestic jurisdictions. Integration of the Protocol into domestic law will also serve to reinforce the enforcement of the judgments of the court. Over and above that, individuals and NGOs must be given direct access to the court. Charter rights were meant to protect individuals and any prospects of protecting and enforcing them through the court lies with individuals and not states. In addition, where sanctions become an option, defaulting states must be given time limits for compliance with judgments, failing which the Assembly must be under a duty to impose sanctions. In this way, the integrity of the court will be protected and the enforcement of its judgments will not remain at the discretion of the political leadership. The establishment of the court has reset the stage and created a new platform for the protection of human rights in Africa. It must be noted that unless its judgments are enforceable without state cooperation, the court will end up as yet another failed project.