

# The right to an effective remedy under the African Charter on Human and Peoples' Rights: between rigidity and measured pragmatism: 20 years of practice

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## Summary

*The question of remedies lacks clarity in international human rights law, in particular under the African Charter on Human and Peoples' Rights. Yet no protected right would have any meaning to its claimants without provision for effective mechanisms to give effect to it including an effective remedy when breached. The very concept of a right carries with it a duty to redress its violation. While the African Charter does not contain a specific provision on the right to an effective remedy, a somewhat rudimentary jurisprudence and practice has emerged through 'situational' interpretation. This article considers the chequered practice of the African Commission with regard to this right under the Charter arguing that the 'remedies jurisprudence' from the Commission lacks in theorization, is inconsistent and uncoordinated. As such, the Commission's laudable efforts in elaborating substantive Charter standards are not complemented by reasoned remedies jurisprudence. The article outlines the right to effective remedies in two respects. It reviews generally the Commission's jurisprudence specific to this right with a view to establishing its thinking. By reviewing the practice of the Commission respecting to the communications procedure, it considers the Commission's effectiveness as a forum of recourse for human rights violations. It also considers, in an abridged manner, how the Protocol to the African Court on Human and Peoples' Rights may change the regime on remedies under the Charter.*

## 1. Introduction

The African human rights system founded on the African Charter on Human and Peoples Rights<sup>1</sup> has in its twenty years travelled difficult road. Although the path of this regional initiative was a chartered one,<sup>2</sup> in its pursuit to offer region-specific solutions for human rights concerns while drawing from other experiences, it has not been immune to the obstacles that confront a somewhat revolutionary idea in an unreceptive political environment where human rights were largely considered a foreign (western) concept. From the Charter's embryonic days at the 1961 Lagos Conference on the Rule of Law, through the Dakar Conference and its eventual adoption in Nairobi to Banjul twenty years later, it has been a journey of many false starts indeed.<sup>3</sup> Celebrated at inception as the most important development in human rights protection on the continent,

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<sup>1</sup> African [Banjul] Charter on Human and Peoples' Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982), entered into force 21<sup>st</sup> October 1986

<sup>2</sup> The African regional human rights system was preceded by the European and Inter-American systems established by the European Convention on Human Rights and Fundamental Freedoms (1950) and the American Convention on Human Rights (1978), together with the American Declaration of the Rights and Duties of man (1948)

<sup>3</sup> On the legislative history of the Charter, see M Hansungule 'The African Charter' 8 *African Human Rights Yearbook* (seek proper citation); AE Anthony 'Beyond the paper tiger: the challenge of a human rights court in Africa' (1997) 32 *Texas Int'l LJ* 511; C Heyns 'The African regional human rights system: the African Charter' (2004) 108 *Penn State Law Review* 679 685-686

commentators got over the euphoria and began to interrogate the Charter for what it really was - a far from perfect, sparsely-drafted instrument that would need creativity to achieve its intended objectives. It has been no surprise therefore, that the Charter and its main oversight body, the African Commission have received some of the most trenchant criticisms relating to various aspects ranging from the scope and content of protected rights, to the nature of enforcement mechanisms established and to various practices under the Charter.<sup>4</sup> Yet in this period there have also been a lot of recognisable developments rightly applauded by commentators.<sup>5</sup> Most notably, the constructive elaboration of sparsely drafted Charter provisions has seen some of the most outstanding jurisprudence issue from the African Commission.<sup>6</sup> As a result, there exists now a burgeoning corpus of continental human rights jurisprudence. This development has been accompanied by the deployment of various procedures aimed at effectively implementing various Charter mandates. Against this background, it is fitting to look back twenty years since the commencement of the African Charter (and the continental system at large) to assess its achievements in improving, albeit in a small way, the lives of people on the continent through its standard elaboration and implementation roles. This article, which is cast in this context, considers historically a specific aspect under the African Charter – the right to an effective remedy.

A survey of the jurisprudence of the African Commission discloses that the question of remedies has been considered in two different contexts: admissibility proceedings and ‘substantive jurisprudence’ in the elaboration of specific rights under the African Charter. The question has however been largely canvassed within the context of the admissibility

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<sup>4</sup> See for instance J Oloka-Onyango ‘Beyond the rhetoric: reinvigorating the struggle for social and economic rights in Africa’ (1995) 35 *California Western International Law Journal* 1; M Mutua ‘The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties’ (1995) *Virginia Journal of International Law* 339; C Heyns ‘The African Human Rights system: in need of reform?’ (2001) 2 *AHRLJ* at 155-174; S Gutto ‘The reform and renewal of the African regional human and peoples’ rights system’ (2001) 2 *AHRLJ* at 175184; KA Acheampong ‘Reforming the substance of the African Charter on Human and Peoples’ Rights: Civil and political rights and socio-economic rights’ 2 *AHRLJ* 185-204; CA Odinkalu ‘The role of case and complaints procedures in the reform of the African regional human rights system’ 2 *AHRLJ* 225-246

<sup>5</sup> See various in M Evans & R Murray (eds.) *The African Charter on Human and People’s Rights: The system in practice, 1986-2000* (2002). Plaudits relate mainly to the Commission’s contribution in elaborating standards

<sup>6</sup> See C Heyns (n 3 above) at 688-689. Some of the landmark decisions include *Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v. Nigeria*, (2001) [Communication No. 155/96 elaborating a number of rights but notably the right to environment; a number of Constitutional Rights Project cases against Nigeria (concerning fair trial guarantees, the right to life and self determination among others); *Modise v Botswana* (2 communications respecting the right to political participation); and *Commission Nationale v Chad* (communication 74/92 respecting interpretation of the Charter)

procedure, hence seems to have dictated, as we note later, the main focus of Commission's commentary on national remedies. This paper does not however delve into a detailed examination of the admissibility procedure, which has received able and comprehensive comment elsewhere.<sup>7</sup> Before the African Commission, as is the case for any international forum adjudicating a state's human rights performance through individual complaints, the question of exhaustion of local remedies, among other factors,<sup>8</sup> is often the subject of inquiry at the preliminary stage. During this process when the Commission has to consider whether to admit a complaint for further consideration on merits, domestic mechanisms are subjected to scrutiny to establish among other things, how effective they are (or have been) as avenues of recourse for the alleged human rights violations. Apart from the admissibility inquiry, as used in this paper, the concept of effective remedy can be considered in light of two components: as a substantive right own its own right; and as a constituent element of other rights enshrined under the Charter. This paper also considers the effectiveness of the Commission as a forum of recourse for human rights violations. In this regard, the paper contemplates the suitability of the Commission by an assessment of its practice of relevant procedures, notably the individual communications procedure.

## 2. The right to an effective remedy

While the protection of human rights is a primary aim of modern international law, terminological uncertainty bedevils the subject of remedies in international law generally.<sup>9</sup> Additionally, questions abound largely with respect to the lack of adequately theorized jurisprudence from international as well as national tribunals on the subject of remedies.<sup>10</sup> Given the number of international oversight bodies disposing different mandates, with limited 'cross-fertilization,' the existing corpus of jurisprudence on the question of remedies is for the most part uncoordinated and incoherent.<sup>11</sup> At the regional level,

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<sup>7</sup> On the Commission's practice regarding the admissibility procedure generally see F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (n 5 above) 61-99. See also generally NJ Udombana 'So far, so fair: the local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* 1

<sup>8</sup> In terms of article 56 of the African Charter, a matter will only be admitted for consideration if: it is compatible with the Charter; its authors are not anonymous; it is not written in disparaging language; is submitted within a reasonable time; and does not deal with cases which have been settled by the state(s)

<sup>9</sup> D Shelton *Remedies in International Human Rights Law* (2003) 1-4; Haasdijk (1992) *Leiden Journal of International Law* 245 cited in Shelton at 4

<sup>10</sup> D Shelton, as above

<sup>11</sup> For a discussion of the various mandates see D Shelton, 177-237

although the African Commission has repeatedly pronounced itself on the question of effective remedies, demonstrably, it has not usefully illuminated it, a fact that perhaps has led commentators to afford but fleeting attention to the question in the African regional human rights context.<sup>12</sup>

Generally, the term ‘remedy’, often used interchangeably with ‘redress’ can be understood to refer to ‘the range of measures that may be taken in response to an actual or threatened violation of human rights’<sup>13</sup> It entails substantive as well as procedural facets.<sup>14</sup> In its substantive sense, remedy connotes the outcome of proceedings, and the relief afforded to the claimant.<sup>15</sup> In this sense, it covers a range of measures which includes but not limited to declarations, compensation and reparations.<sup>16</sup> The avenues and enabling processes by which claims relating to human rights violations are articulated fulfils its procedural element. These may include courts, administrative tribunals, commissions or other competent bodies.<sup>17</sup> For our purposes, focus is on the African Commission.

In *Dawda Jawara v The Gambia*,<sup>18</sup> the Commission set out the three elements of a remedy that stands Charter muster: availability, effectiveness and sufficiency. The Commission proceeded to elucidate:

[a] remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

Although the Commission has elaborated three aspects of a remedy, distinguishing effectiveness from availability (accessibility) and sufficiency, it is submitted that all three elements should be considered, as used in its literature and jurisprudence, constitutive of a remedy that is ‘effective’ for human rights violations under the Charter.<sup>19</sup> As evident

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<sup>12</sup> As part of her study on remedies in international law, Dinah Shelton substantially considers the Inter-American and European regional experiences, but affords only cursory treatment of the African Human Rights system. See D Shelton (n 9 above) 219-216

<sup>13</sup> Shelton (n 9 above) 4

<sup>14</sup> D Shelton (n 9 above) 7

<sup>15</sup> As above

<sup>16</sup> A range of measures exist both at national as well as international law (in the latter case, based on the law of state responsibility)

<sup>17</sup> D Shelton, at (n 9 above) 7

<sup>18</sup> *Sir Dawda K Jawara v The Gambia* (Communication 147/95 and 149/96) para 32

<sup>19</sup> In the Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, (Fair Trial Guidelines) Part C (b), the Commission notes that the right to an effective remedy includes access to justice, reparation for the harm suffered and access to the factual

from this jurisprudence, for a remedy to be considered effective, substantive as well as procedural benchmarks must be met. As reiterated here, the Commission has repeatedly stated that domestic avenues of recourse adopted must ‘vindicate a right’,<sup>20</sup> speaking to ‘sufficiency’ of the remedy, and that the path to securing such remedial measures should not be riddled with procedural hindrances, whether calculated or incidental to an otherwise proper process.<sup>21</sup> Another element that merits special mention as a constituent of an effective remedy is the question of time. In terms of article 56 (5), as reiterated by the Commission, one need not exhaust local remedies if these are unduly prolonged,<sup>22</sup> clearly demonstrating that time is an important factor and that a delayed remedy cannot be regarded as an effective one.

### 3. The substantive basis of the right to remedy

As noted in the introduction, the African Charter does not provide specifically for the right to an effective remedy, a fact decried in literature.<sup>23</sup> This ‘omission’ can be explained by at least two factors. One could take the view that it is one of the many substantive rights that should have been included in the Charter but were not, especially when the regional initiative is seen within the context of the general character of the Charter as a tentative, sparsely drafted instrument described variously as ‘opaque’ and ‘difficult to interpret’<sup>24</sup> and which was perhaps the best that could be achieved considering the prevailing political realities at the time of its adoption.<sup>25</sup> It is also possible that the drafters of the Charter could have considered it superfluous to include such a right, which would be considered as an implied right. This is reflected in the Latin maxim *ubi jus ibi remedium*, for the violation of every right, there must a remedy. In this regard, the

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information concerning the violations. See Guidelines at <[http://www.justiceinitiative.org/db/resource2?res\\_id=101409](http://www.justiceinitiative.org/db/resource2?res_id=101409)> (accessed on 20<sup>th</sup> June 2006)

<sup>20</sup> *Constitutional Rights Projects v Nigeria* (Communication 60/91 with respect to Wahab Akamu & Others) 10

<sup>21</sup> Ibid

<sup>22</sup> See *Dawda Jawara*, para 28-30

<sup>23</sup> See G Naldi ‘Future trends in human rights in Africa: the increased role of the OAU?’ in M Evans & R Murray (n 5 above) 1 35 10 citing Kuffuor ‘Safeguarding Human Rights: A critique of the African Commission on Human and Peoples’ Rights,’ *Africa Development* 18 (1993) 65 at 66-69 and W Benedek, ‘The African Charter and the Commission on Human and Peoples’ Rights: How to make it more effective’ (1993) *NQHR* 11 25 at 31

<sup>24</sup> Odinkalu (n 4 above) 398

<sup>25</sup> See generally C Heyns ‘Civil and Political Rights in the African Charter’ in M Evans & R Murray (n 5 above) alluding to substantive inadequacies of the Charter in this regard. See also KA Acheampong (n 4 above) and C Heyns (n 4 above)

view is that in a justiciable regime of rights such as that established by the Charter,<sup>26</sup> the right to a remedy is so self-evident that it need not be specifically enshrined.<sup>27</sup> In a human rights treaty such as the Charter, the right is constituent of the general obligation requiring state parties to give effect to the norms contained therein.<sup>28</sup> In some cases, as is the case for the African Charter, it is bolstered by references to remedies in the formulation of certain rights.<sup>29</sup> Apart from the general obligation contained in article 1, two other provisions in the Charter are relevant to remedies. Article 7 enshrines the right of an individual to have their cause heard, including the right of recourse ‘to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.’ On its part, article 26 obliges states to guarantee the independence and the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights enshrined in the Charter.<sup>30</sup>

Despite the apparent lack of express normative sanction in the Charter relating to remedies, the Commission has based its mandate to order remedies in part on the scattered provisions outlined above, in particular article 1,<sup>31</sup> and in part on its relevance as the sole oversight body established under the Charter and on the utility of the individual communications procedure. Indeed, the Commission’s jurisprudence reviewed further below has arisen largely out of the need by the Commission to justify itself as a relevant institution relating to all Charter rights, after the initial view that its relevance was limited to gross human rights violations. In *Legal Assistance Group & Others v Zaire*,<sup>32</sup> the Commission stated:

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<sup>26</sup> See *Commission Nationale v Chad*, noting that the rights enshrined in the Charter are not mere platitudes, but impose obligations that have to be implemented

<sup>27</sup> See Roht-Arriaza, N (ed) *Impunity and Human Rights in International Law and Practice* (1995) 17 noting that the idea that violations should be redressed, that reparation should be made to the injured is ‘among the most venerable and most central of legal principles’

<sup>28</sup> Art 1 of the Charter provides: ‘The member states of the Organisation of African Unity [AU], parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them’

<sup>29</sup> For instance arts 7(1) & 21(2) of the Charter which provide for recourse to national tribunals for human rights violations and compensation for spoliation of natural resources respectively; Art 10 of the Charter establishes expressly the right to compensation for miscarriage of justice; Arts 7 of the Charter on the right to freedom and security of the person prohibiting arbitrary arrest and illegal detention provides for a right to remedies such as compensation where this right is infringed

<sup>30</sup> Art 26 African Charter

<sup>31</sup> For the elucidation of general state obligations under the Charter, see generally *SERAC Case* (n 6 above); *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, (Communication 74/92)

<sup>32</sup> *Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Inter africaine des Droits de l’Homme, Les Témoins de Jehovah v Zaire* Communications 25/89, 47/90, 56/91, 100/93 (joint), para 37

The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of...

In the wake of this decision, one commentator observed that the Commission ‘thus recognises that the bottom line of the Communications procedure is the redress of the violations complained of.’<sup>33</sup> The ever burgeoning body of jurisprudence is a result of its continued assertion of this power.

This lack of clarity as to specific substantive basis of the right to an effective remedy does not obtain with respect to other major international human rights instruments, both of regional and universal reach, which have specific stipulations in this regard. The Universal Declaration of Human Rights (UDHR) provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.<sup>34</sup> On its part, the International Covenant on Civil and Political Rights (ICCPR)<sup>35</sup> similarly obliges states to provide an effective remedy to any person whose rights have been violated.<sup>36</sup> Under the European Convention, the right to an effective remedy is equally separately justiciable.<sup>37</sup> Similarly, the American Convention on Human Rights<sup>38</sup> as well as the American Declaration of the Rights and Duties of Man<sup>39</sup> is explicit in this regard. Even, at the African level, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa departs from the approach of the Charter by providing for effective remedy as a free-standing right, requiring states to ‘provide for appropriate

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<sup>33</sup> CA Odinkalu, (n 4 above) 374

<sup>34</sup> Art 8 UDHR

<sup>35</sup> Art 2 (3), see also arts 9(5) & 14(6) International Covenant on Civil and Political Rights (ICCPR) 999 U.N.T.S. 171 (1967)

<sup>36</sup> Nowak M *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 58 noting that art 2(3) refers to both judicial and non-judicial remedies See for instance *Chonwe v Zambia* (Communication 821/98) para 7 available at <<http://www.unhchr.ch/tbs/doc.nsf>>

<sup>37</sup> Art 13 European Convention Rights and Fundamental Freedoms ECHR 213 UNTS 22, as reaffirmed by art 47 of the Charter of Fundamental Rights of the European Union have provisions providing similarly that everyone whose rights and freedoms as set forth in the instruments are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity

<sup>38</sup> Art 25 American Convention of Human Rights (ACHR) 1144 UNTS 123 as elaborated in the celebrated case *Velasquez Rodriquez v Honduras (Preliminary Exceptions)* (1987) 1 Inter-Am.Ct.HR (ser. C), para 91 to require that states ‘ have an obligation to provide effective judicial remedies to victims of human rights violations...’ and in *Genie Lacayo v Nicaragua* (1998) 30 Inter-Am.Ct.HR (ser.C) relating to the procedural elements of the right

<sup>39</sup> Art XXIV American Declaration of the Rights and Duties of Man (American Declaration)

remedies to any woman whose rights or freedoms, ... have been violated ....<sup>40</sup> Save for the UDHR which is not a binding as a matter of treaty law,<sup>41</sup> the inability to obtain a remedy through national mechanisms for an infringement of protected rights is therefore a free-standing and separately actionable breach of these treaties. Pursuant to these specific stipulations, both the Inter-American and European systems have accumulated sizeable case law.<sup>42</sup>

#### 4. Forum and redress: what remedies?

The question as to what remedies are envisaged under the Charter is an essential one. To compound the lack of a free-standing right to an effective remedy under the African Charter, neither the African Charter nor the rules of procedure specifies what remedy or range of remedies may be ordered on a finding of violation of a Charter right, which remedies may be relevantly applicable domestically in terms of Charter standards. The jurisprudence of the Commission has so far focused almost entirely on national remedies.<sup>43</sup> As a consequence, little has been said about how specific substantive rights in the Charter relate to remedies discourse at international law. The paper returns to this question later. The Commission has in its admissibility jurisprudence adopted the view that mechanisms that meet the effectiveness yardstick for admission of a matter must be of judicial provenance. Apparently, remedies not of a judicial character, including of a quasi judicial nature, will not suffice.<sup>44</sup> What seems to be the operating principle can be teased out of some of its decisions. In clarifying what is a 'local remedy' in terms of admissibility requirements, the Commission has ruled many communications inadmissible for failure to exhaust local remedies. In one such case, the matter was not admitted for consideration on merits on account that the complainant had *only* approached the Commission on Human Rights and Administrative Justice of Ghana, (CHRAJ) although the CHRAJ had ruled in his favour and awarded him compensation. It stated in *Cudjoe v Ghana*,<sup>45</sup> that:

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<sup>40</sup> Art 26 Protocol to the African Charter on the rights of women

<sup>41</sup> The right to a remedy codified in the UDHR may have crystallized into customary international law, as the other main provisions of the declaration. See art of the Namibian Constitution which suggests as such: P Alston

<sup>42</sup> See D Shelton (n 9 above) 122-143 discussing some of the cases

<sup>43</sup> See analysis at section 5 below

<sup>44</sup> F Viljoen (n 7 above) 84

<sup>45</sup> *Alfred B. Cudjoe v Ghana* (Communication 221/98) Para 13

[i]t should be clearly stated, the internal remedy to which article 56.5 refers entails remedy sought from courts of a judicial nature, which the Ghanaian Human Rights Commission is clearly not.

This view resonates with earlier decisions which regard favorably complainants who have made an attempt to go to the courts for redress. In *Cudjoe*, which we return to shortly, the complainant had not seized any court to appeal the state's failure to implement the decision of the administrative commission before approaching the African Commission. In the *Jawara Case*, perhaps the most important pronouncement on the subject of admissibility thus far, the Commission reiterated the need to exhaust judicial remedies:

[t]he existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the *judiciary* of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.<sup>46</sup> (Emphasis mine)

Similarly in *Constitutional Rights Project v Nigeria*,<sup>47</sup> the Commission granted an exception to the exhaustion of local remedies rule because the domestic process related to 'a discretionary, extraordinary remedy of a *non-judicial* nature.' (Emphasis added). It is contended here that the insistence on judicial remedies is unduly narrow and injudicious as it does not contemplate all possible deployable measures as disclosed by state practice. This 'rigidity' excludes other avenues of redress that may satisfy state obligations relating the right effective remedies. In fact, the Commission's insistence on remedies of a judicial nature, which Commission has favoured amicable settlement of complaints lodged with it is paradoxical. A court of law or any institution of that nature with its onerous procedural prescriptions, especially in the adversarial tradition, is hardly the forum before which to conduct an amicable discussion. On the African continent as elsewhere, experience teaches that the dealings between an all powerful state and victims who seek to 'tarnish' its name internationally by complaining about human rights breaches at home can hardly be described as amicable.<sup>48</sup>

Recognising that victims can never really be restored fully to the *status quo ante*, an effective remedy for harm caused should imply *any* measure taken to 'wipe out' as far as

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<sup>46</sup> *Dawda Jawara Case*, para 35

<sup>47</sup> *Constitutional Rights Project* (n 20 above) 10-11

<sup>48</sup> Communications to the Commission recount variously of victims who have had to go into exile, tortured and generally subjected to ill treatment on this account

possible, the injury and satisfy the victim of the violation by effectively, and adequately addressing the alleged violation.<sup>49</sup> It should not matter whether such measures are judicial or otherwise. Increasingly on the continent, there are initiatives, prompted by the need to address the question of access to justice, to consider other institutions not necessarily of a judicial character to which human rights violations can be referred for redress. In a number of countries, National Human Rights Commissions (NHRCs) are vested with various powers relevant to redress human rights breaches, including adjudicatory powers with substantial weight attached to their properly determined findings and decisions.<sup>50</sup> Administrative tribunals and other commissions that may not satisfy the current Charter standard have been, or are widely in use. If one adopts the position, informed by practice, that a particular remedy need not be judicial to be suitable, the conclusion would be that the Commission missed an opportunity to pronounce itself comprehensively on the question of acceptable remedies. It is argued that to the extent that all disputes and cases in general end up in the courts, the Commission's position relating to judicial remedies would be correct, if it relates *only* to domestic avenues to be exhausted before recourse to the Commission, and not as a general rule relating to what remedies are acceptable to remedy violations of Charter rights. This position is supported by the Commission's own view espoused in the Fair trial Guidelines<sup>51</sup> and the recent addition to the African Charter, the Protocol on Women's Rights which compliments the Charter with respect to women's rights which recognizes the variety of remedies that may be used appropriately to provide redress:

The parties shall undertake to (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law

The emphasis here is on the appropriateness of the remedy and the competence of the relevant body. The Commission may be said to defeat its articulated purpose - to furnish redress for human rights violations, by insisting on avenues that may not be peremptory

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<sup>49</sup> See F Viljoen (n 7 above) 83 referring to the general principle

<sup>50</sup> See for instance s 116 Constitution of South Africa, read together with the Human Rights Commission Act, No. 54 of 1994. The Ugandan National Human Rights Commission has quasi judicial powers and has been instrumental in addressing fundamental rights violations in that country. The Kenyan National Human Rights Commission, though largely inactive is vested with similar powers

<sup>51</sup> Part C (c) (1) stating that 'any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities'

under relevant domestic law, or otherwise futile. While it is true that ‘domestic remedy’ as contemplated by article 56 of the African Charter includes all avenues of appeal or review,<sup>52</sup> in *Cudjoe* while it is not clear on the facts whether the domestic human rights Commission’s decision was final (which would render recourse to ‘mainstream’ courts legally untenable and unnecessary). The African Commission seems to have assumed that *merely* because that the body pronouncing the remedy was administrative in nature, an option remained available before the courts and that failure to seize such meant local remedies remained. A sampling of domestic experiences, together with a study of international practice may be necessary to permit the Commission, or to formulate proper guidelines globally applicable under the Charter and supplementary instruments.

## 5. Analysing the jurisprudence

Although the early years of the Commission were marked by want of confidence, and to an extent a measure of self-interested hesitancy,<sup>53</sup> the absence of clarity in the Charter regarding remedies has not prevented it from making orders necessitated by a need to remedy violations which it has found. While the Commission’s has clarified its role with regard to the complaints procedure, its stand and approach has been for the most part inimical to its articulated function – ensuring that human rights violations are redressed. It has in most, if not all its dealings attempted to steer clear from confrontation with governments even when not warranted. Unfortunately, this stance has affected negatively its ability and willingness to make firm orders relating to remedial measures to be undertaken by states for human rights violations. Its almost demure approach is summarised in its operational credo in *Free Legal Assistance Group v Zaire*<sup>54</sup>-amicable settlement. Further, as a review of its jurisprudence discloses, the recognition of its main role has largely not been backed by concrete action. Perhaps attributable to the fact that states parties were reluctant to vest real adjudicatory powers in any oversight body (having rejected the idea of a court altogether at the drafting stage of the Charter),<sup>55</sup> the Commission has had to hesitantly grow into its quasi-judicial role by, so to speak, ‘testing

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<sup>52</sup> F Viljoen (n 7 above) 83 citing *Bob Njoku Ngozi v Egypt* (Communication 40/90) para 57

<sup>53</sup> See V Dankwa ‘The promotional role of the African Commission on Human and Peoples’ Rights’ in M Evans & R Murray (n 5 above) 335-352 and A Motala ‘Non-governmental organisations in the African system’ in M Evans & R Murray (n 5 above) 246 279 at 246--249

<sup>54</sup> *Free Legal Assistance Group* (n 31 above)

<sup>55</sup> See F Viljoen ‘A Human Rights Court for Africa, and Africans’ 30 *Brooklyn Journal of international Law* 1 at 4-5 discussing the circumstances of the abandonment of the idea of an African human rights court

the waters' and seeking universal approval and acceptance. Consequently, where there has been the slightest indication after a complaint was lodged with it that the respondent state was inclined to settle the matter domestically, the Commission has been more than happy to adopt and endorse what in many cases been a false promise aimed at avoiding the Commission's public attentions and injurious publicity.<sup>56</sup> As a consequence, victims have been 'robbed' of, in some cases the only available opportunity to obtain justice.<sup>57</sup>

Contrary to lack of specific provision on effective remedy, there is clarity with respect to the question of protective measures,<sup>58</sup> which the Commission has administered liberally. Pursuant to this, the Commission has made orders almost as a matter of routine for preservative measures ranging from the stay of an execution,<sup>59</sup> torture & degrading treatment,<sup>60</sup> release of illegally detained persons<sup>61</sup> among others, pending final determination of relevant communications.<sup>62</sup> As is argued below, the creativity and relative boldness of the Commission with respect to remedies, though not entirely satisfactory, has been demonstrated in the unsure zone beyond sanctioned provisional measures.

Substantively, it appears that none of the communications presented to the Commission have alleged specifically the violation of a right to an effective remedy. Should this have been the case however, it is unlikely that the Commission would have entertained such complaint on its merits for lack of compatibility with the Charter, as this requires that the

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<sup>56</sup> Cf American Convention on Human Rights under which the conciliation procedure specifically provided for in article 48(1)(f) is applied when it proffers a real prospects of success. *Velásquez Rodríguez Case* (Preliminary Objections), Inter-Am. Ct.H.R. (Ser. C) No. 1, paras 44-45 (1987). See also Odinkalu (n 4 above) 402

<sup>57</sup> See for instance *Botswana v Modise* (communication 97/93) where the Commission invited the government of Botswana to consider amicable settlement prompting a lengthy and unsuccessful process at the Commission even after the state had failed to resolve the matter at hand for 16 years. See also *International PEN v Côte d'Ivoire* (Communication 138/94 on behalf of Senn and Sangare); *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (Communication 133/94);

<sup>58</sup> Rule 111 (1) of the Rules of Procedure of the Commission provides that: [b]efore making its final views known to the Assembly on the communication, the Commission may inform the state party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation. In so doing, the Commission shall inform the state party that the expression of its views on the adoption of those provisional measures does not imply a decision on the substance of the communication

<sup>59</sup> *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation v Nigeria* (Communications 137/94, 139/94, 154/96 and 161/97 on behalf of Ken Saro-Wiwa Jr); *Avocats Sans Frontières (on behalf of Gaëtan Bwampanye) v Burundi* (Communication 231/99)

<sup>60</sup> Ibid.

<sup>61</sup> *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (communication 133/94)

<sup>62</sup> The Commission has made varying orders for measures to be taken by defendant states depending on the complaint at hand so that the Commission process is not rendered vain

particular provision breached be cited.<sup>63</sup> Expecting the Commission to make orders for remedies as a matter of routine, complainants have rarely motivated requests for remedies. As argued below, this means that the Commission has had limited if no assistance in developing proper jurisprudence on remedies.

Orders made for remedies have either been immediate, as in the case of provisional measures or long term and permanent. As noted above, while the Commission has been willing to make orders for provisional measures as a matter of routine when requested, its record in the latter case is less than impressive. Beyond provisional measures, it has been more inclined to order for remedies couched in broad formulations lacking generally in specificity for instance requiring that the respondent state adopt relevant legislation,<sup>64</sup> or bordering on the vague or ‘futuristic’ requiring that the state undertakes ‘measures to see the full respect of the Charter.’<sup>65</sup> In the case of specific individual remedies such as compensation, when requested, the Commission has, in approach similar to the Inter-American Court and Commission,<sup>66</sup> rightly left it to the state to make the final determination as to quantum of damages in terms of domestic law after finding a violation of a Charter right.<sup>67</sup> Rarely, the Commission has defied what appears as practice to make specific orders with respect to individuals especially where the violation has been particularly blatant.<sup>68</sup>

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<sup>63</sup> For a complaint to be compatible with the Charter, it must among other things, allege breach of a right set out in the Charter. See art 56 (2); F Viljoen (n 7 above) 61 109 69

<sup>64</sup> *Paul S Hays v The Gambia* (Communication 90/93) in which the Commission requested ‘the government of the Gambia to bring its laws in conformity with the provisions of the Charter’

<sup>65</sup> See *Avocats Sans Frontières v Burundi* (n 53 above) requesting Burundi ‘to draw all the legal consequences of this decision; and to take appropriate measures to allow the reopening of the file and the reconsideration of the case in conformity with the laws of Burundi and the pertinent provision of the African Charter on Human and People's Rights [and] calls on Burundi to bring its criminal legislation in conformity with its treaty obligations emanating from the African Charter’;

<sup>66</sup> *Velasquez Rodriguez v Honduras* (Merits) 1 Inter-Am.Ct.HR (ser. C)

<sup>67</sup> *Embaga Mekong Loui v Cameroon* (Communication 59/91)

<sup>68</sup> See *Malawi African Association & others v Mauritania* (Communications 54/91, 61/91, 98/93, 196/97, 210/98, 164/97 joint) consisting perhaps the most concrete and specific recommendations by the Commission yet; *Annette Pagnouille v Cameroon* (Communication 39/90 on behalf of Abdoulaye Mazou) requiring the reinstatement of a judge and the release from prison of a detained person (in the latter instance, the release had already been effected by the time of the order). See also *Movement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (Communication 207/97 decided 2001) Where the Commission holding that Burkina Faso was in violation of articles 3, 4, 5, 6, 7(1)(d) and 12(2) of the African Charter, recommended that Republic of Burkina Faso draws all the legal consequences of this decision, in particular, by: identifying and taking to court those responsible for the human rights violations cited above; accelerating the judicial process of the cases pending before the courts; compensating the victims of the human rights violations stated in the complaint (emphasis mine)

While the Commission's efforts to shed its initial image as a mere 'talk shop' to a forum where an attempt to tackle human rights violations is made, the Commission has not interrogated the ease with which complainants can obtain ordered remedies, especially where the trend has been to defer to the state concerned without follow up and to trust that it will act accordingly. While complainants have to furnish proof that remedies at the domestic level are either unavailable or ineffective before their complaint can be heard, the Commission has let states 'off the hook' on the slightest indication that they are prepared to address the situation. Having found during the admissibility procedure that domestic remedies are either ineffective or not available, one can rightly conclude that a failure to take a firmer stand when deciding on remedies has been one of the main shortcomings of the Commission as reflected below.

## **6. The Commission process as a 'remedy'**

To make a holistic assessment regarding the achievements of the African Charter, one must look not just at how well standards have been elaborated, but also how supervisory mechanisms established under the Charter function to achieve their mandate – for our purposes, providing effective recourse under the communications procedure where domestic systems have failed. This section looks at the performance of the Commission processes (in this case, the communications procedure) as an avenue of recourse available to victims of human rights violations. The reason is evident: if the forum to which recourse is made does not work, the reason for doing so is negated.

At least three elements are important in assessing the Commission process as an effective avenue for human rights violations: the provision of a substantive right that enables individuals or relevant organisations to approach it for redress; procedural facility in realising this right; and mechanisms of implementing decisions rendered, especially given that it is an supra-national entity bereft of the usual enforcement capabilities available to states. In the first instance, one of the most significant contributions of the Commission since it was constituted in 1987 is, in spite of doubt in the text,<sup>69</sup> determining that the Charter permits individual complaints (communications) and that the Commission has mandate to examine them.<sup>70</sup> The fact that a major part of the Commission's work (and

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<sup>69</sup> See art 55 captioned 'other communications.' This is now settled position. Decisions by the Commission reiterate this point

<sup>70</sup> See Heyns (n 3 above) 694

indeed any meaningful international oversight mechanism) relates to the implementation of this protective procedure points to its significance.

As regards implementation mechanisms and procedure, a number of factors have impeded pursuit of remedies before the Commission. First, by strictly applying the admissibility criteria, access to the Commission for many deserving cases has been difficult.<sup>71</sup> Second, the communications procedure (with respect to decisions elaborated) lacks an effective verification process, with the Commission relying solely on the good faith of governments, even where this has been demonstrably absent.<sup>72</sup> This raises issues of conformity with state obligations under the article 1 of the Charter. While the Commission firmly embraces the principle recognising that one of its main functions is to endeavour to provide a remedy for *all* violations, its implementation has been wanting.<sup>73</sup> A number of communications bear this out. In the matter *Henry Kalenga v Zambia*,<sup>74</sup> as has been the case for matters involving amicable settlement (urged without fail by the Commission), the Commission failed to take measures to establish the veracity of a letter from a government minister stating that the complainant had been released from administrative detention and proceeded to declare the matter amicably resolved.<sup>75</sup> A similar scenario played itself out in *Comité Culturel & others v Benin*<sup>76</sup> where a settlement was presumed, merely because the political environment within which violations complained of no longer existed on change of government.<sup>77</sup> Despite this, the Commission has on some occasions tried to acquit itself by requiring states to report, though belatedly, on measures taken to implement its decisions through the state reporting mechanism<sup>78</sup> noting rightly in one case that ‘the release of the alleged victims does not nullify any violation of the victims' rights’ and that the reply of the government

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<sup>71</sup> On admissibility, see Viljoen (n 7 above)

<sup>72</sup> See Viljoen (n 55 above) 15. In *Centre for Minority Rights and Democracy v Kenya* the government has ignored provisional measures adopted to preserve lands belonging to a minority group by alienating the said land and allowing construction activity while the Commission continues to consider the process ; *Constitutional rights project v Nigeria*

<sup>73</sup> Odinkalu (n 4 above) 375

<sup>74</sup> *Henry Kalenga v Zambia* (Communication 11/88)

<sup>75</sup> The communication had been filed with the Commission in 1986, the letter was written in 1990 stating that he had been released in 1989

<sup>76</sup> *Comité Culturel pour la Démocratie au Bénin v. Bénin* (Communication 16/88) (Merits), *Hilaire Badjougoume v. Bénin* (Communication 17/88) and *El Hadj Boubacar Diawara v. Bénin* (Communication No. 18/88) joint

<sup>77</sup> Odinkalu (n 4 above) 376 in a commentary on the case notes that there was no evidence that the Commission made sufficient effort to verify from the authors whether they considered the steps taken by the new government to be sufficient

<sup>78</sup> See *Legal Resources Foundation v Zambia* (Communication 211/98 decided on 7 May 2001) where the Commission requested Zambia ‘to report back to the Commission when it submits its next country report in terms of Article 62 on measures taken to comply with [its] recommendation

concerning the release of the complainant did ‘not absolve it of the liability in respect of any violations that may have occurred.’<sup>79</sup> Third, the Commission process has in many instances been too long as to negate the purpose of recourse to it. In lamenting that ‘delay has characterised findings on admissibility’ (where the most delays have been incurred), Viljoen<sup>80</sup> seems to apportion blame largely to the Commission and its Secretariat. It seems apparent that the Commission appears not to uphold standards that it strictly applies to states with regard to effectiveness of remedies, and to complainants regarding exhaustion of local remedies. While it has repeatedly affirmed that where domestic remedies are unduly prolonged it would be needless for a victim to pursue them, it has not lived by this creed. Perhaps because of its insistence on dialogue even when states have not been enthusiastic to engage in constructive talk, complaints have not been addressed in time rendering the communication procedure an ineffective remedy.<sup>81</sup>

Related to, though distinct from verification of decisions, the normative standing of decisions of the Commission is another important factor. While there is growing consensus on the acceptance of the Commission’s determinations as binding decisions, the lack of firm judicial imprint must have something with states failing to implement them.<sup>82</sup> States have largely ignored or dragged their feet when it comes to giving effect to the Commission’s decisions, which are mere recommendations until they are formally adopted through the formal structures of the African Union (previously OAU) with its attendant political baggage.<sup>83</sup> For this reason, commentators consider the Court Protocol as a major development in the enforcement of human rights on the continent on account

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<sup>79</sup> See *Civil Liberties Organisation v Nigeria* (Communication 67/91). See also *International Pen v Côte d’Ivoire* (Communication 138/94 on Behalf of Senn and Sangare decided in 1995) para 7 stating that: the release of victims does not extinguish the responsibility of the government for any violations that it may have committed in respect of their imprisonment. A cause of action may still stand for reparations for the prejudice suffered by imprisonment

<sup>80</sup> F Viljoen (n 7 above) 64

<sup>81</sup> *Botswana v Modise* (n 57 above) which took 16 yrs in domestic courts and another 16 before the Commission made a decision. In this, incoherence is evident as the Commission has been willing in some cases to proceed where cooperation from the state has been wanting. See for instance *Commission Nationale v Chad* (n above) para 25 where the Commission decided that ‘where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given.’ See also *Modise Case* (n 55 above) para 95

<sup>82</sup> See generally GM Wachira & Ayinla ‘A critical examination of the African Charter on Human and Peoples’ Rights: Towards strengthening the African human rights system’ in International Commission of Jurists (Kenya Chapter) *Judicial Watch Report* (forthcoming, 2006)

<sup>83</sup> Wachira & Ayinla, as above

that the decisions of the Court will be judicial in nature, thus directly binding.<sup>84</sup> Before considering the Court Protocol, and how it may change the regime on remedies, a brief sketch of the issues the Commission could have dealt with in its decisions in the context of remedies is outlined.

## 7. Sketching the real substantive issues

The remedies jurisprudence of the Commission can be said to be a case of redundant elaboration. First, by focussing largely on admissibility, specifically on the rule on exhaustion of local remedies, its jurisprudence relates, and is restricted to national remedies.<sup>85</sup> Nothing has been said of the remedies possible under the Charter and IHRL generally. Second, no analysis whatsoever has been undertaken of the relevant provisions on remedies, (specifically article 7) and no links established at the Charter and international level between these and provisions enshrining specific substantive rights. In *Jawara* as in a number of other cases, the Commission has indicated that the local remedies rule must be applied in tandem with article 7 which guarantees the right to a fair trial.<sup>86</sup> Third, the Commission has, in its decisions on remedies rightly left it to states to supply redress within their laws and domestic processes after finding a violation. While the Commission has elaborated the general state obligations under the Charter as entailing the duties to respect, protect, promote and fulfil,<sup>87</sup> it has not proffered much jurisprudential guidance to states on this important question. The result is that the Commission's jurisprudence, to the extent that it can be discerned, is lacking in theorization. Of the four constituent state obligations enunciated by the Commission, the secondary duty to protect, perhaps the most relevant to this debate requires that the state 'protect right-holders against other subjects by legislation and provision of effective remedies'<sup>88</sup> which necessitates as per the Commission, 'the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.'<sup>89</sup> The Commission has nevertheless not, in any of its decisions or elsewhere, clarified the broad principles or

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<sup>84</sup> F Viljoen (n 55 above),

<sup>85</sup> See Nsongura Udombana 'So far, so fair: the local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American J Intl Law* 1

<sup>86</sup> *Jawara Case* para 33-34

<sup>87</sup> See generally SERAC (n 6 above)

<sup>88</sup> SERAC case para 47. On the general obligations under the African Charter, see generally NJ Udombana 'Between promise and performance: revisiting states' obligations under the African Human Rights Charter' (2005) 40 *Stanford Journal of International Law* 105

<sup>89</sup> *Ibid*

what specific remedies would be applicable generally under the Charter. Where reference has been made to international law, this has mostly been general as in *Amnesty International v Sudan*, a case alleging, among others, summary executions during war, the Commission stated that ‘...the state [Sudan] must take all possible measures to ensure that they are treated in accordance with international humanitarian law.’<sup>90</sup>

Considering that previously the Commission has found violation but failed to pronounce itself on remedies,<sup>91</sup> the Commission’s current enunciation on remedies can be said to be an improvement. This is however still largely inadequate as the formulation is in the main both exhortatory and general.<sup>92</sup> Typically the Commission’s conveniently brief ‘holding’ to communications variously ‘urges’, ‘requests’, ‘invites’ or ‘recommends’ for states: ‘to draw all legal consequences of [its] decision[s];’<sup>93</sup> ‘to take necessary steps;’<sup>94</sup> ‘draw necessary legal conclusions.’<sup>95</sup> The Commission (and the Court once operational) needs to be firmer, clearer and less ambiguous when specifying the remedies.<sup>96</sup>

Granted that the Commission cannot supervise or interfere with national implementation of the Charter and remedies ordered in vindication of protected rights as the Commission has on various occasions reiterated,<sup>97</sup> failure to provide broad theoretical direction on possible non-compliance of various measures and state practice in this regard reflects a lack of depth in its decisions that may as well be viewed as a major failure in its duties. The inadequacy of its jurisprudence is cast in starker relief by the particularistic and untheorised pronouncements on remedies ordered by it. Consequently, the impact of universally contested issues such as amnesties widely

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<sup>90</sup> *Amnesty International v Sudan* (Communication 48/90) para 48

<sup>91</sup> See for instance *Huri-Laws v Nigeria* (communication 228/98); *Forum of conscience for Sierra Leone v Sierra Leone* (communication 223/98)

<sup>92</sup> See Introduction, *Compilation of decisions of the African Commission* (2001) 13

<sup>93</sup> For instance *Avocats Sans Frontières* (n 65 above)

<sup>94</sup> For instance *Constitutional Rights Project & Others v Nigeria* (Communication 140/94, 141/94, 145/95)

<sup>95</sup> For instance *Annette Pagnouille v Cameroon* (Communication 39/90)

<sup>96</sup> In one of its latest decisions, despite the complexity of the case and the wide ranging violations alleged, the Commission merely urged the respondent states ‘to abide by their international obligations’ (including under the UN Charter) and recommended ‘that adequate reparations be paid, according to the appropriate ways to the complainant state for and on behalf of the victims of the human rights...’ See *DRC v Uganda, Rwanda & Burundi* (communication 227/97). [20<sup>th</sup> Annual Activity Report, 96-111]

<sup>97</sup> In *Legal Resources Foundation v Zambia*, at 59, the Commission stated that [...]an international treaty body like the Commission has no jurisdiction in interpreting and applying domestic law. Instead a body like the Commission may examine a state’s compliance with the treaty in this case the African Charter.... [T]he point of the exercise is to interpret and apply the African Charter rather than to test the validity of domestic law for its own sake

deployed in post conflict Africa and other situations entailing gross human rights violations on effective remedies have but received a fleeting mention.<sup>98</sup> The dynamism of remedial aspects respecting gross violations of which it was thought the Commission had original mandate remain unexplored.<sup>99</sup> While ‘fishing’ for cases by an already burdened institution is not urged here, pronouncing itself on what is internationally impermissible in terms of specific remedies and circumstances is hardly remote from the gist of its mandate at any given time. It flows from a finding of a violation of the Charter. In fact, it would be perfectly consistent with its ample Charter mandate requiring it to ‘give its views or make recommendations to governments...to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African governments may base their legislation... and interpret all the provisions of the present Charter....’<sup>100</sup> Complainants may also be to blame for the skeletal and uncoordinated state of the Commission’s remedies jurisprudence because of their failure to specifically articulate themselves adequately or at all with respect to remedies. Shelton notes that in only one complaint to the Commission has an applicant specifically requested for compensation.<sup>101</sup> Lack of input from complainants may be said to have stunted remedies jurisprudence.

Without going into detail, one can for instance sketch a few scenarios that have previously begged for authoritative comment by the Commission. These are mere sketches and necessarily warrant a more profound scrutiny. For instance, on the question of applicable remedies, a declaration of rights alone can hardly be sufficient for most violations. Prosecutions may be mandatory in certain circumstances, especially with regard to human rights violations that amount to international crimes. While in *Movement Burkinabe Case*,<sup>102</sup> the Commission prescribed the prosecution of persons involved in alleged human rights breaches, no underpinning reasons were proffered in light of international law generally. Compensation may only be legally proper and adequate for

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<sup>98</sup> See *Malawi African Association & others v Mauritania* (Communications 54/91, 61/91, 98/93, 196/97, 210/98, 164/97 joint). See also cursory references to amnesty in the Commission’s Fair Trial Guidelines, Part C (d)

<sup>99</sup> *Malawi African Association* ample opportunity was missed for the Commission to pronounce itself on the question

<sup>100</sup> Art 45 African Charter; *Legal Resources Foundation v Zambia* (n 84 above) para 61

<sup>101</sup> Shelton apportions blame to complainants and their representatives for not addressing the question of remedies in their communications, considering it as a given once a violation is found. The relevant bodies have thus been denied informed opinion on the question

<sup>102</sup> *Movement Burkinabe Case des Droits de l’Homme et des Peuples v Burkina Faso* (n 68 above)

certain crimes.<sup>103</sup> Although relevant cases have been brought to it, the Commission has not, in the context of remedies, interrogated issues related to ‘massive violations,’ which involve more than the complainant(s) and do require innovative remedies beyond individualized relief and the concerns of an individual victim.<sup>104</sup>

## 8. Future prospects: enter the African Court

It is argued here that the adoption of the African Court Protocol which has now entered into force is likely to change the question of remedies in a number of respects by addressing some of the weaknesses of the Commission.<sup>105</sup> This is however dependent on two main factors considered – institutional and contextual. To begin with, unlike the African Charter, the Protocol to the African Charter on Human and Peoples’ Rights relating to the Establishment of the African Court on Human and Peoples’ Rights (Court Protocol)<sup>106</sup> brings necessary clarity and specificity to the question of what remedies are applicable under the Charter. While reiterating the substantive basis for provisional measures,<sup>107</sup> the Charter clarifies the Court’s power relating to remedies:

If the Court finds that there has been a violation of human and peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.<sup>108</sup>

While this legal sanction to make compensation as well as reparation orders is addressed to the Court, in view of the Court’s complementary relationship with the Commission,<sup>109</sup> it is particularly useful in clarifying the power of the Commission in this regard, should the Commission continue to receive and determine complaints even after the Court

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<sup>103</sup> For a study of compatibility of national amnesties with the African Charter, specifically with respect to effective remedies, see generally GM Musila ‘Whistling past the graveyard: amnesty and the right to an effective remedy under the African charter: the case of south Africa and Moçambique’ (Unpublished LLM Thesis, University of Pretoria, 2004) accessible at <http://www.chr.up.za>

<sup>104</sup> Massive violations may involve the violation of several rights (with respect to a single complainant) or violations involving many people. In *Temoins de Jobovab v Zaïre case* (n above) the Commission did appreciate that massive violations, especially where many people are involved require special attention

<sup>105</sup> On the possible enhancement the African Court will bring to the African regional human rights system, see generally F Viljoen (n 55 above)

<sup>106</sup> Protocol to the African Charter on Human and Peoples’ Rights relating to the Establishment of the African Court on Human and Peoples’ adopted came into force

<sup>107</sup> On this art 27 provides that in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary

<sup>108</sup> Article 27 of the Court Protocol

<sup>109</sup> Arts 2, 5, 6 Court Protocol

becomes fully operational.<sup>110</sup> By mandating the Court to make ‘appropriate’ orders, article 27 codifies a wide discretion that can, and should be invoked to make orders other than compensation and reparations drawing from the experience of other international human rights oversight bodies such as the Inter-American and European Courts of Human Rights. In its continued role, the Commission should, as it has done previously, on the facility in the Charter allowing it to draw from the experience of other regional, international human rights oversight bodies as well as domestic jurisdictions to develop progressive jurisprudence.<sup>111</sup> This argument is pursued further in the concluding sections of this paper.

It has been suggested that the Court is better equipped than the Commission to meet better its protective mandate under the Charter.<sup>112</sup> Apart from the qualifications of the judges of the Court (who are required to have legal & human rights backgrounds), to the extent that they are not, as the case of the commissioners of the Commission diplomats and civil servants with the tendency to lean in favour of (nominating) governments, they will enjoy greater independence.<sup>113</sup> One may take the view that the Court has come to fruition at a time when there is renewed commitment to human rights within the African Union (AU), whose Constitutive Act now implants human rights squarely on the agenda of the continental body.<sup>114</sup> Whilst some commentators have expressed their optimism about the possible gains of the transition on the human rights and democracy fronts,<sup>115</sup> others, drawing on history, are not as positive.<sup>116</sup> While universal acceptance of the Court by all members of the African Union is not expected,<sup>117</sup> the current political context creates an environment favourable for the operation of the Court which should take with zeal to its mandate of further elaborating the Charter and other relevant standards,

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<sup>110</sup> On the dynamics of the relationship between the Court and the Commission, see C Heyns (n 4 above) 162-173. It has been suggested that with both bodies operational, the Court should handle ‘the most important cases’ with the Commission reserved the role of receiving and ‘sieving’ the complaints

<sup>111</sup> Art 60 & 61 of the African Charter provide a normative sanction:

<sup>112</sup> Viljoen (n 55 above)

<sup>113</sup> Judges appointed with the input of various stakeholders are elected in their personal capacities

<sup>114</sup> See article 3 Constitutive Act of the African Union adopted July 11, 2000, entered into force May 26, 2001

<sup>115</sup> See generally VO Nmeihelle ‘The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?’ (2003) 7 *Singapore Journal of International and Comparative Law* 412

<sup>116</sup> See for instance NJ Udombana ‘Can the Leopard Change Its Spots? The African Union Treaty and Human Rights’, (2002) 17 *American University Int’l L. Rev.* 1177

<sup>117</sup> So far, only 15 states have ratified the Court Protocol. For the Court to entertain individual complaints, a declaration is required in terms of art 36(4) of the Protocol

including the right to an effective remedy, which as argued has not received much reasoned attention from the Commission.

## 9. Conclusion

This paper argued that the remedies jurisprudence of the African Commission on Human and Peoples' Rights is wanting in three basic respects – depth, inconsistency and lack of coordination. In its 'practice', the Commission has oscillated between rigidity perhaps explained by the lack of substantive basis for this right as well as its questionable standing as an oversight body and a somewhat hesitant, barely positive situational response to the need to fulfil its general protective mandate under the Charter by which it has recognised that no violation should go without redress. While it has not developed any meaningful jurisprudence of its own in this regard, it has equally been unprepared to deploy the facility in the Charter that sanctions the application of more progressive jurisprudence from other relevant international oversight bodies, which though not entirely satisfactory, is more advanced.<sup>118</sup> Even where the Commission has pronounced itself on remedies, its undue 'deference' to states has stunted its ability to objectively and fearlessly execute its mandate hence its overemphasis on dialogue, amicable settlement and good faith. In this regard, it was concluded that while the Court Protocol changes the situation normatively by expressly enshrining for remedies, more is required in order to ensure that rhetorical commitment to human rights are matched by gains by victims of human rights violations.<sup>119</sup>

One thing to reiterate here, while other regional experiences have their specific problems with respect to remedies, the depth of available jurisprudence is inspiring. While the African Commission still grapples with 'getting off the blocks,' the bodies mandated with implementation of those regional instruments have made some strides in developing reasoned jurisprudence in this regard. Though largely scattered and lacking in a theorization, important issues have been addressed, including possible remedies applicable in various circumstances such as in cases of massive violations. Notably, the Inter-American Court (and Commission) has been bold enough to order states to take specific actions and have developed innovative means to structure damage awards, such

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<sup>118</sup> Shelton lamenting lack of coordination of jurisprudence from European and Inter-American Court of Human Rights

<sup>119</sup> See C Heyns (n 3 above) 700-702

as trust funds.<sup>120</sup> The African Commission (and Court) can learn from the shortcomings of their regional counterparts: failure by litigants as well as the institutions themselves to draw meaningful lessons from each others' conclusions; adoption of a narrow reading of existing international and national jurisprudence, thus 'refusing to recognize that both bodies of law offer support for far broader remedies'; failure to understand (as the African Commission has) the importance of their role in remedying human rights violations and that this goes beyond individual complainants, a fact disclosed by their rigidity in the interpretation of their remedial mandates.<sup>121</sup> If resources were all it takes, one can be confident that the African Court, and Commission to the extent that it will retain its relevant mandate once the Court is operational, have a rich pool from which to craft a well reasoned jurisprudence on remedies.

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<sup>120</sup> D Shelton, (n 9 above) 181

<sup>121</sup> See generally RB Bilder & B Stephens 'Remedies in International Law: Book Review and Note' 95 *American Journal on International Law* 257 at 258; D Shelton (n 9 above) 37