

# State compliance with decisions of the African Court: the case of *Alfred Agbesi Woyome v Ghana*

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**ABSTRACT:** Ghana is a state party to the African Charter on Human and Peoples' Rights and the Protocol thereto on the Establishment of an African Court. In the case of *Alfred Agbesi Woyome v Ghana*, the African Court on Human and Peoples' Rights ruled that Ghana should stay execution of a judgment debt against the applicant until the final determination of the substantive case before the African Court on its merits. The Ghanaian Supreme Court disregarded this ruling and ordered that Ghana should continue the process of identifying and attaching assets owned by the applicant to defray the judgment debt. In analysing the Ghanaian Court's decision, this case commentary finds that the lack of compliance with the orders of the African Court negatively affects respect accorded to this regional judicial institution.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### L'exécution des décisions de la Cour africaine par les Etats: cas de l'affaire *Alfred Agbesi Woyome c. Ghana*

**RÉSUMÉ:** Le Ghana est un État partie à la Charte africaine des droits de l'homme et des peuples et a reconnu la compétence de la Cour africaine des droits de l'homme et des peuples. Dans l'affaire *Alfred Agbesi Woyome c. Ghana*, la Cour africaine a décidé que le Ghana devait surseoir à l'exécution d'un arrêt condamnant le requérant à rembourser une dette jusqu'à ce qu'elle juge l'affaire portée devant elle au fond. La Cour suprême du Ghana a ignoré la décision de la Cour africaine et a ordonné que le Ghana poursuive le processus d'identification et de saisie des actifs appartenant au demandeur afin de rembourser la dette. En analysant la décision de la juridiction ghanéenne, cette contribution constate que le non-respect des ordonnances de la Cour africaine affecte négativement le respect accordé à cette institution judiciaire régionale.

**KEY WORDS:** African Court, Protocol to the African Charter, compliance, Ghana, *Woyome* case

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**1 INTRODUCTION**

For many years the African Union (AU) and its system for protection of human rights, especially the African Commission on Human and Peoples' Rights (African Commission), was referred to as a 'toothless bull dog' because of its inability to enforce decisions in cases of breach of fundamental human rights and freedoms.<sup>1</sup> The African Court on Human and Peoples' Rights (African Court) was then established in hope of rectifying the situation.<sup>2</sup> It is essential to note that the African Court is not an appellate court in the hierarchy of domestic courts.<sup>3</sup> Hence, implementation and compliance with its decisions within the domestic arena is problematic since it appears to rely on good faith of member state parties. This problem was observed from Ghana's Supreme Court's decision in an application requesting it to implement an order from the African Court granting a stay of execution in the case of *Woyome v Ghana*.<sup>4</sup>

Woyome, the applicant in the case, and the government of Ghana entered into a contract under which the applicant provided engineering services to Ghana. However, there was dispute over the validity of the contract. The matter ended in the Ghanaian Supreme Court where the applicant was sued, together with two other defendants, by Mr Martin Alamisi Amidu under article 2 of the 1992 Constitution of Ghana.<sup>5</sup> The Supreme Court found that payment of the contract sum of

- 1 A Ayinla & GM Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: a possible remedy' (2006) 6 *African Human Rights Law Journal* 465; E Mulembe 'Human rights and development in the twenty-first century: the African challenges' (1999) 31 *Zambia Law Journal* 41 at 67.
- 2 Founded under the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights, adopted in 1998, entered into force in 2004.
- 3 *Mtingwi v Malawi* (Application 1 of 2013) [2018] 1; (15 March 2013) para 14.
- 4 *Alfred Agbesi Woyome v Ghana* (Application 1/2017) (24 November 2017).
- 5 *Amidu No.3 v Attorney-General, Waterville Holdings (Bvi) & Woyome (No.2)* (2013-2014) 1 SCGLR 60.

GH¢51,283,480.59 to the applicant was unconstitutional. Subsequently, the applicant applied for a review of the judgment. The review bench of the Court in a unanimous ruling delivered by Dotse, JSC on 29 July 2014 ordered the applicant to pay to the government of Ghana the said contract amount which appears to be substantial. The applicant alleged that Justice Dotse, while refusing the review, included sentences that the applicant interpreted as biased and prejudicial to his case.<sup>6</sup> The sentences included: 'the tendency where state resources are allowed to be dissipated must be brought to an end' and also '... this review application should resist any attempt to use this court as a conduit by which any acts of unconstitutionality in the siphoning of public funds will be given a semblance of authority and judicial blessing.'<sup>7</sup>

The applicant applied to the African Court alleging infringement of his human rights under the African Charter on Human and Peoples' Rights (African Charter) particularly article 2 on enjoyment of rights and freedoms recognised without distinction, article 3 on equality before the law and equal protection of the law and article 7 on the right to a fair trial. Before the hearing of this substantive case, however, the applicant asked for an interim order from the African Court for a stay of execution of the judgment delivered by the Ghanaian Supreme Court requesting him to refund the money. He brought the preliminary motion because as the sole and constitutional body entrusted with the responsibility to represent the government of Ghana in civil proceedings, the Attorney-General, the first respondent in that application, had proceeded to levy execution by resorting to judicial processes regulating execution of judgments. Subsequently, the Attorney-General also began valuing the applicant's properties in an effort to retrieve the money.

The applicant argued that if Ghana is allowed to continue valuing and taking his property he would suffer irreparable harm should the application before the African Court be eventually decided on its merits in his favour. In arguing before the African Court, the applicant also maintained that the interim measures should be ordered due to the urgency and gravity of the situation. The respondent state, Ghana, opposed the application for the interim measures and argued, among other grounds, that the question for determination was whether it was entitled under the laws of Ghana to recover the debts owed by the applicant.<sup>8</sup> Also, that the issue is not (1) whether alleged irreparable breaches of human rights can be legitimately raised following its efforts to recover; or (2) whether this action would amount to a breach of Ghana's obligation under the African Court.<sup>9</sup> The applicant, after filing this preliminary motion to the African Court, applied to the Ghanaian

6 As above, para 35.

7 As above.

8 In making its case, the government referred to art 40 of the Ghana 1992 Constitution on the need to protect the interests of Ghana in international relations.

9 See generally arts 5(3) & 34(6) of the Protocol.

Supreme Court<sup>10</sup> pleading a stay of execution proceedings pending the final determination of the matter before the African Court. Before the Supreme Court could decide this application, the African Court ruled that Ghana should stay execution of the judgment against the applicant until the final determination of the substantive case on its merits. Four days after the decision of the African Court on the preliminary matter, the Supreme Court of Ghana also delivered its ruling<sup>11</sup> on the question of stay of execution. The Supreme Court, without considering the decision of the African Court on the preliminary motion, dismissed the application as having no merit. As a result, the Attorney-General did not comply with the decision of the African Court and continued the court processes of identifying assets owned by the applicant to defray the judgment debt.

This commentary relates to this decision of the Ghanaian Supreme Court. We submit that two possible scenarios could have emerged from the applicant's substantive case at the African Court if the interim order for stay of execution had been observed by Ghana and the applicant's properties preserved. These are that the African Court could have eventually ruled that (1) his rights had not been violated or (2) that his rights had been violated. In the former, the government wins and could proceed with attachment of the applicant's property. Also, in this former scenario, the interim order for stay of execution may only have delayed attachment of the properties and the government would still have had the opportunity to recover the money. In the latter scenario, the applicant wins and is able to keep his property. In both scenarios, at least, justice would have not only been done but also seen to have been done.

Indeed, during the course of writing this case commentary, the African Court ruled on the substantive matter and found in favour of Ghana.<sup>12</sup> Ghana had argued that the Protocol to the African Charter on the Establishment of an African Court (Court Protocol) had not been domesticated and that the application did not raise human rights claims. Ghana also argued that the African Court could not review decisions of the Ghana Supreme Court. While ruling in favour of Ghana that no human rights had been infringed, the African Court did caution against inflammatory speeches of judges, labelling Justice Dotse's statements as being unfortunate. The Court held that the statements did not give an impression of preconceived opinions and did not reveal bias especially since there were other judges on the panel and the decision about the review was unanimous. The African Court also established its jurisdiction over the case stating that article 3 of the Court Protocol only required ratification and not domestication.

Considering the decision of the Ghanaian Supreme Court not to acknowledge the preliminary decision of the African Court one wonders about the reaction of Ghana, as a state party to the Protocol, had the

10 *Martin Alamisi Amidu v The Attorney-General and 2 others* (2017) Supreme Court Civil Motion No. J8/08/2018. Judgement delivered on 28 November 2017.

11 As above.

12 *Woyome v Ghana* (Application 1/2017) 1970 African Court 13 (28 June 2019).

African Court given an adverse decision. This case discussion is concerned with the response of Ghana's Supreme Court to Woyome's application for stay of execution because it presented a conundrum about the enforceability of decisions from the African Court. The decision was against the tenets of state party obligation under the African Charter and its Court and has the potential to negatively affect respect accorded this regional judicial institution. The objective therefore is to present an analysis of the Supreme Court's decision to determine the basis of denial of stay of execution as ordered by the African Court. This discussion is divided into seven parts. Part 2 presents the contextual framework, which is the literature review. Part 3 presents the methodology. Part 4 outlines the findings, which presents the Supreme Court's decision and Part 5 presents our discussion. Finally, part 6 is the recommendations for the way forward. Part 7 is the conclusion.

## 2 THE CONTEXTUAL FRAMEWORK

### 2.1 The African Court on Human and Peoples' Rights

The African Court was established in terms of article 1 of the Court Protocol. The Court Protocol was adopted on 10 June 1998, in Ouagadougou, Burkina Faso, by the then Organization of African Unity (OAU).<sup>13</sup> The Protocol entered into force on 25 January 2004. The African Court became operational in 2006 and is composed of 11 Judges elected by the Executive Council and appointed by the Assembly of Heads of State. The African Court has jurisdiction over all cases and disputes submitted to it regarding the interpretation and application of the Charter, the Court Protocol and any other relevant human rights instrument ratified by states.<sup>14</sup> As the Charter deals with human and peoples' rights, any allegation of a breach of the rights of an individual falls in the purview of the Court. However, as illustrated in the case of *Michelot Yogogombaye v Senegal*,<sup>15</sup> there is an avenue for individuals to access the Court but only when the violating state party has made a declaration recognising the competence of the Court to receive individual complaints.<sup>16</sup> Further, the individual must have exhausted all local remedies. Ghana has recognised the competence of the African Court to receive individual complaints.

The African Court has the mandate to order reparations and compensation and its decisions are final and binding on all parties. As at June 2019, the Protocol had been ratified by 30 member states of the

13 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 10 June 1998 <http://www.achpr.org/instruments/court-establishment/> (accessed 13 June 2019).

14 As above.

15 Appl. 1/2008, ACtHPR, Judgment (15 December 2009).

16 Art 34(6) of the Protocol.

African Union, namely: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Congo, Côte d'Ivoire, Comoros, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Uganda, Rwanda, Sahrawi Arab Democratic Republic, Senegal, South Africa, Tanzania, Togo and Tunisia. Of the 30 state parties to the Protocol, only seven, namely: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali and Tanzania, had made the declaration under article 34(6) accepting the jurisdiction of the African Court to receive cases from individuals and non-governmental organisations.<sup>17</sup> Rwanda, which previously made the declaration has since withdrawn, revealing the difficulty states have with subsuming their judicial sovereignty with that of the African Court.<sup>18</sup>

As at June 2019, a total of 216 applications had been received by the African Court. 201 were from individuals, 12 from NGO's and 3 from the Commission. As at the time of writing, the Court had so far finalised 58 applications, transferred 4 applications to the Commission and had 154 applications pending. All the decisions of the African Court are communicated to the parties, in accordance with article 29(1) of the Protocol. Under article 31 of the Protocol, the Court submits an Activity Report to the Assembly, specifying cases completed, those pending and cases in which states had not complied with decisions of the court.

The expectation is that the African Court would be a supranational institution that would 'give teeth' to the Charter and hold state parties accountable for violations of human rights.<sup>19</sup> Yet the Protocol does not describe how the Assembly is to respond to reports of noncompliance although the Executive Council, on behalf of the Assembly, is to monitor the execution of the African Court's orders. Without an effective enforcement mechanism however, these aspirations for the African Court cannot be met and the judgment of the African Court is useless.

## 2.2 Problems with compliance and implementation of the African Court's decisions

The typical follow-up procedures for enforcement of human rights standards do not seem to be effective or work to engender compliance of states.<sup>20</sup> In the 2016 activity report from the African Court to the

17 See <https://au.int/en/treaties> for more information on list of state parties that have deposited the article 34(6) declaration (accessed 15 November 2019).

18 On 3 March, 2016, the Court received a notification to the effect that the Republic of Rwanda has deposited with the AUC, a letter withdrawing from the art 34(6) declaration it deposited in February 2013.

19 C Heyns 'A human rights court for Africa' (2004) 22 *Netherlands Quarterly of Human Rights* 325-327; M Mutua 'The African human rights court: a two-legged stool?' (1999) 21 *Human Rights Quarterly* 351; FIDH 'Admissibility of complaints before the African Court, practical guide' June 2016 <https://www.refworld.org/pdfid/577cd89d4.pdf> (accessed 25 September 2019).

20 M Hakimi 'Secondary human rights law' (2009) 34 *Yale Journal of International Law* 601.

Assembly, Tanzania for example, in the case of Ally Rajabu 007/2015 and the case of John Lazaro 003/2016 on the issue of imposing the death penalty informed the African Court that it would be unable to implement the orders of the Court.<sup>21</sup> Activity reports also reveal that Ghana in the first *Woyome* decision of the African Court on the preliminary matter of stay of execution, informed the Court that it would await the African Court's final decision but in reality did the opposite.

States that ratify international or regional human rights treaties do so with the understanding that no nation is an island and that in matters of human rights, there is the need to set universal standards. These standards basically mean the right to life, liberty and property for all people without discrimination<sup>22</sup> and access to justice for all victims of violations of rights. Oba has observed that domestic human rights legislation may not be enough to stop massive human rights violations and this makes a strong case for concerted action by the international community and intervention by supranational courts.<sup>23</sup> Noting that international law is now being used in municipal courts to challenge violations of human rights in particular, points to a growing awareness of the African Charter in some African countries since the 1990s.<sup>24</sup> It has been also contended that the common law rules on enforcing foreign judgments, whereby foreign judgements are directly enforced in domestic arena, could also apply to enforce judgments rendered by international courts and tribunals.<sup>25</sup> For example, under the common law, the procedure for enforcing foreign judgments is just for the judgment creditor to issue a writ and plead that the judgment debt is due and owing.<sup>26</sup> In Ghana, the statute on the issue, Part V of the Courts Act 1993 (Act 459),<sup>27</sup> allows Ghana to have reciprocal relationship with any other country whereby judgment given by domestic superior courts could be enforced in both countries. Contending that judgements from international courts like the African Court should also be considered 'foreign judgments' means that in the absence of legislation incorporating provisions of the Charter and its Protocol into domestic

21 EX.CL/999.

22 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III). <https://www.refworld.org/docid/3ae6b3712c.html> (accessed 15 August 2019), see especially arts 2, 3 & 17.

23 A Oba 'The African Charter on Human and Peoples' Rights and ouster clauses under the military regimes in Nigeria: before and after September 11' (2004) 4 *African Human Rights Law Journal* 275 at 300.

24 As above 301. See also the Ghanaian case of *Ernest Adofo v Ghana Cocoa Board* (2013-2014) 1 SCGLR 377, where Dr Date-Bah JSC held that rights of workers under the ILO Convention No. 87 of 1948 (Freedom of Association and protection of the right to organise) and article 2 of the ILO Convention No. 98 of 1949 (The right to organise and collective bargaining) cannot be restricted by domestic law.

25 R Liwanga 'From commitment to compliance: enforceability of remedial orders of African human rights bodies' (2015) 41 *Brooklyn Journal of International Law* 100 at 145.

26 R Oppong 'Recognition and enforcement of foreign judgments in Ghana: second look at the colonial inheritance' (2005) 31 *Commonwealth Law Bulletin* 19 at 23.

27 Courts Act, 1993 (ACT 459) with Courts (Amendment) ACT, 2002 (ACT 620) with the Courts (Amendment) ACT 2004, (ACT 674) secs 81-88.

laws, municipal courts (such as the Supreme Court of Ghana) could nevertheless implement and enforce orders of the African Court as foreign judgment. Such an understanding would make it easier to implement judgment from the African Court in domestic courts of member countries like Ghana.

All but one AU member states are party to the African Charter<sup>28</sup> and commitments to human rights principles feature in almost all AU documents. Prior to 2004, much of the work of the AU in the area of human rights was undertaken by the African Commission. The Commission is charged with promotion and protection of human and peoples' rights under conditions laid down by the Charter and also with interpretation of the Charter.<sup>29</sup> The Commission however attracted much discontent because although it played a prominent role in developing African jurisprudence in human rights, it was cash strapped, lacked the mandate to adjudicate cases brought by individuals and could not give binding opinions.<sup>30</sup> As noted above, the African Court rectified the situation when the Court Protocol allowed individuals to claim rights against state parties.

However, adhering to universal standards in human rights and to the jurisdiction of international and regional human rights bodies like the African Court, signifies the need to surrender some aspect of state autonomy for the common good of humankind. Surrendering state autonomy is very difficult for sovereign states and many defer to the theory of dualism to evade domestic application and enforcement of universal standards.<sup>31</sup> But of what use are these human rights standards when they can neither be implemented nor decisions enforced domestically to the benefit of individual victims? The main obstacles to domestic enforcement of decisions from the African Court are (1) dualism and lack of compliance; (2) lackluster judiciary; and (3) failing national human rights institutions.

The first obstacle is dualism and lack of compliance with the African Court's decisions. In monists' states like the Netherlands and France, domestic courts can apply international law principles in deciding cases.<sup>32</sup> Similarly, individuals are at liberty to rely on international law rules to support arguments in national courts. Consequently, monists believe that when a state ratifies an international human rights treaty, it becomes *ipso facto* part of its law and their parliament need not pass laws to give effect to them before they become operational. Under monism, whenever there is a conflict between international law and

28 54 out of 55 AU member states – all except Morocco – have ratified the African Charter.

29 Art 45 of the Charter.

30 LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 13 *Sur-International Journal on Human Rights* 119 at 128.

31 J Kalb 'The persistence of dualism in human rights treaty implementation' (2011) 30 *Yale Law & Policy Review* 71 95; A Roberts 'Comparative international law? the role of national courts in creating and enforcing international law' (2011) 60 *International and Comparative Law Quarterly* 57 at 59.

32 D Sloss 'Domestic application of treaties' (2011) <http://digitalcommons.law.scu.edu/facpubs/635> (accessed 13 June 2019).



municipal law, international law principles are supreme and must take precedence over the national law.<sup>33</sup> Conversely and traditionally, dualist states like Ghana hold the position that international law and municipal laws are two different laws altogether and the rules of international law are not applicable in municipal courts unless parliament passes a law to give effect to them. Hence, when dualist states become parties to an international treaty, the treaty does not automatically apply in domestic law. At best an international treaty is of persuasive authority unless and until Parliament ratifies it and enacts legislation incorporating the international treaty into domestic law. Hence, to dualist states, international and regional human rights law is inapplicable in municipal courts in the absence of an enactment by parliament giving effect to it. In the Ghanaian context, article 75 of the Constitution states:

- (1) The president may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.
- (2) A treaty, agreement or convention executed by or under the authority of the president shall be subject to ratification by –
  - (a) Act of parliament; or
  - (b) A resolution of parliament supported by the votes of more than one-half of all the members of parliament.

In addition to the above, although a treaty ratified by Parliament binds Ghana internationally, for the treaty to be domestically applicable and capable of invocation in Ghanaian courts, Parliament must further pass a specific legislation to domesticate or transform it into Ghanaian law.<sup>34</sup>

As noted by Ian Brownlie,<sup>35</sup> international practice however seems to favour the position that a state cannot rely on provisions of its own law or deficiencies in that law in response to claims of alleged breach of its international obligation.<sup>36</sup> Brownlie argued further that in treaty obligations there is a general duty to bring national law in conformity with obligations under international law.<sup>37</sup> In the *Free Zones* case, the Permanent Court of International Justice pronounced, amongst others, that France cannot rely on domestic legislation to limit the scope of its international obligations.<sup>38</sup> Further, although the Vienna Convention on the Law of Treaties recognises the fact that a treaty is a written

33 D Harris *Cases and materials on international law* (2010) 61.

34 K Mensah & C Nyinevi *The lawyer's companion, a guide to researching Ghanaian case law* (2015) 457. See also *Republic v High Court (Commercial Division) Accra; ex parte Attorney-General (NML Capital Ltd & Republic of Argentina, Interested Parties)* (2013-2014) 2 SCGLR 990 (the Argentine Warship Case). This case addresses the incorporation of customary international law and treaties into Ghanaian law. See also *Magaret Banful & Henry Nana Boakye v Attorney-General* (Writ no. J1/7/2016) unreported. (Judgement: 22 June 2017) (The Guantanamo Detainees Case) which addresses the making and ratification of treaties under art 75 of the 1992 Ghanaian Constitution.

35 I Brownlie *Principles of public international law* (2003) 34.

36 As above. See also *Free Zones of Upper Savoy and District of Gex (Fr. v Switz.)*, 1932 P.C.I.J. (ser.A/B) No. 46 (June 7).

37 Brownlie (n 35) 35.

38 n 36, para 25.

document between sovereign states,<sup>39</sup> article 26 of the Convention establishes that every treaty in force is binding on the parties to it and must be performed in good faith. Article 18 defines good faith to mean that a state must refrain from acts which would defeat the objects and purpose of a treaty. Article 27 of the Convention also affirms the principle that a state party may not invoke the provisions of its internal laws as justification for its failure to perform its obligation under a treaty.

The second obstacle is the problem of lacklustre judiciary in nation states. The concept of dualism makes implementation and enforcement largely dependent on the political will of state parties to enact legislation to give effect to the human rights obligations undertaken under treaties. The judiciary is the other arm of government and acts of the judiciary are imputed to the state.<sup>40</sup> As already seen, under article 30 of the Court Protocol states agree to be bound by decisions of the African Court and to ensure their execution. It is conceded however that although a decision reached by the African Court is final and binding on parties to the dispute, as already mentioned, the Court is not an appellate court in the hierarchy of domestic courts and enforcement of its decisions within domestic arena relies on the good will of state parties. Hence, although compliance is to be monitored by the executive,<sup>41</sup> execution of judgments is based on willingness of state parties to cooperate.<sup>42</sup>

National courts however continue to grapple with ideas of ‘judicial sovereignty’ and find it difficult to implement decisions from supranational judicial institutions like the African Court. Egede,<sup>43</sup> for example, argues that holding that human rights treaties are not enforceable unless domesticated defeat the very purpose for ratifying the treaties in the first place; which is to secure rights for the benefit of individuals.<sup>44</sup> He proposed that treaties can be applied indirectly and be of persuasive authority because they can be said to have attained some legitimacy as customary international law.<sup>45</sup> But we contend that

39 Vienna Convention on the Law of Treaties 1969, art 2(1).

40 The Supreme Court’s decision seemed to be welcomed by the government especially the Deputy Attorney-General who was quoted as lauding the decision, Ghana Justice, *Supreme Court right for ‘ignoring’ African Court in Woyome case – Dame*, at <https://www.ghanajustice.com/2017/11/supreme-court-right-for-ignoring-african-court-in-woyome-case-dame> (accessed 10 April 2019). See also Citifm, *Ghana’s Supreme Court rejects African Court ruling on Woyome* at <http://citifmonline.com/2017/11/ghanas-supreme-court-rejects-african-court-ruling-woyome/> (accessed 10 April 2019).

41 The Executive Council is composed of the ministers of foreign affairs or other such ministers or authorities as are designated by the governments of member states.

42 C Anyangwe ‘Obligations of states parties to the African Charter on Human and Peoples’ Rights’ (1998) 10 *African Journal of International and Comparative Law* 628.

43 E Egede ‘Bringing human rights home: an examination of the domestication of human rights treaties in Nigeria’ (2007) 51 *Journal of African Law* 249.

44 Egede (n 43) 273.

45 Egede (n 43) 276.

such interpretation will depend on an activist judiciary.<sup>46</sup> Unfortunately in many parts of the world, including Ghana, judges especially those at the highest appellate courts, are appointed by the executive usually to influence policy and these judges, absent domestic law, may find it difficult to be independent in politically charged cases like the *Woyome* case where politics and law seem to collide.

Failing national human rights institutions are also an obstacle to domestic implementation of decisions from the African Court. National human rights institutions could be a conduit for state party compliance with decisions of the African Court. According to the Paris Principles,<sup>47</sup> part of the mandate of a national human rights institution is to give advisory opinions on legislative and administrative provisions in force in the particular country including making recommendations on bills and making proposals and reports on any matters concerning the promotion and protection of human rights.<sup>48</sup> National human rights institutions are therefore agents for proposing bills and laws and they should advise governments on such matters. Human rights institutions are to bring rights home by engaging other stakeholders in implementation of decisions from the African Court.<sup>49</sup> Therefore, human rights institutions must be more proactive and not gagged. Unfortunately, these institutions like Ghana's Commission on Human Rights and Administrative Justice are usually cash strapped and incapable of undertaking proper investigation in sophisticated cases involving the government. Additionally, some of these institutions like Ghana's Commission are quasi-independent and officials are still appointed with approval from the President.

The *Woyome* case revealed the impotency of national human rights institutions. Ghana's Commission did not intervene and chose to be silent when the Supreme Court refused to obey or acknowledge the interim order from the African Court. Indeed with the exception of few commentators who were alarmed that the decision of the Supreme Court could deter investors,<sup>50</sup> not much outcry followed the decision. The least the Commission could have done was act *suo muto* and write a position paper to the government on the obligations of state parties on

46 A Huneus 'Courts resisting courts: lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 493 533, where the author noted that the assumption is that independent courts enforce human rights commitments, constraining the executive, and promoting compliance with human rights regimes.

47 See website of Council of Europe <https://www.coe.int/en/web/portal> (accessed 13 June 2019).

48 As above.

49 See Network of African National Human Rights Institutions (NANHRI), *National Human Rights Institutions and African Regional Mechanisms*, <https://nhri.ohchr.org/EN/ExternalPublications/Guidelines%20on%20Implementation%20of%20decisions%20of%20Regional%20Human%20Rights%20Organs%20English%20Version.pdf> (accessed 4 August 2019) 9-12.

50 ASEPA, 'Disrespect for international treaty obligations forcing foreign investors out of Ghana' newswiregh <https://www.ghanaweb.com/GhanaHomePage/business/Disrespect-for-international-treaty-obligations-forcing-foreign-investors-out-of-Ghana-ASEPA-693481> (accessed 18 April 2019).

such matters. National human rights institutions should act as internal watchdogs and pressure points on the government.

The above concerns necessitated this research into the Supreme Court's decision to determine the basis for denial of stay of execution proceedings and its consequences for decisions from the African Court.

### **3 METHODOLOGY**

The main data for our case discussion was obtained from the actual judgments of both the African Court and the Ghanaian Supreme Court. We also performed desk review and qualitative analysis of archival materials that included books, journal articles, international human rights documents and commentaries on the African Court. Internet search engines used were google and yahoo and websites visited were jstor and heinonline. The key words used in our search were 'African Court', 'Protocol to the African Charter', the 'enforcement of African Court's decisions', 'Ghana', and 'Woyome case'. The materials were read carefully looking out for key messages given to civil society, especially messages on the difficulty in domestication of human rights treaties and ways of addressing the problem in Africa. We presented our findings using prominent themes emerging from our analysis of the court cases which illustrated the underlying reasons for the Ghanaian Courts' decision. Our discussion is based on how these reasons could be addressed and overcome to optimise domestication and enforcement of the African Court's decisions. Our case discussion will be useful in evaluation and improvement of services of the African Court. It would also increase knowledge in international human rights law and lay basis for further research in this area for betterment of this institution.

### **4 FINDINGS: THE GHANA SUPREME COURT'S DECISION ON ORDER FOR STAY OF EXECUTION GIVEN BY THE AFRICAN COURT**

The decision of the Supreme Court of Ghana is founded on the case of *Martin Alamisi Amidu v Attorney-General and 2 others*.<sup>51</sup> The findings are placed under two themes which are (1) constitutional road block to stay of execution and (2) failure to plead human rights violation. The African Court orders on the applicant's preliminary application were that Ghana:

51 Civil Motion No.J8/08/2018 dated 28 November 2017 *Martin Alamisi Amidu v Attorney-General, Waterville Holdings (BVI) Ltd & Alfred Agbesi Woyome*, brought under 'Motion on Notice Pursuant to art 40 & 134 of the Ghanaian Constitution, 1992 & The Supreme Court Rules, 1996 (C.I. 16) Rule 73 for the Stay of Execution ...'

- (a) Stay the attachment of the applicant's property and take all appropriate measures to maintain the status quo and to avoid the property being sold until his application is heard and determined.
- (b) Report to the Court within fifteen days from the date of receipt of the order on the measures taken to implement this order.

In response to the applicant's motion for stay of execution proceedings, namely, the process of identifying and attaching his properties till final judgment from the African Court,<sup>52</sup> the Supreme Court of Ghana per Yeboah JSC, on 28 November 2017, without addressing the import of the African Court's decision, dismissed the application. As already mentioned, the order for attachment was previously given by the Supreme Court when it found that the applicant had defrauded the country and must pay back the sum. In justifying the dismissal of the applicant's motion, the Supreme Court held:

- (1) That the Attorney-General of Ghana by going into execution, was only following the dictates of the 1992 Constitution which he could not disobey. That the Attorney-General was just obeying the mandate ascribed him under article 88<sup>53</sup> in conjunction with article 2.<sup>54</sup> Also, that the Attorney-General was duty bound to follow the orders of the Supreme Court to levy execution against the applicant in accordance with article 2(2), (3) and (4) of the constitution.<sup>55</sup> The Supreme Court reasoned that if refusing to carry out the terms of the order or direction of the Supreme Court constituted a high crime such as was potent enough to unseat a president or vice-president in office then none of the parties in the suit, being of lesser status than a president or vice, could neglect, refuse or otherwise fail to obey the orders of the Supreme Court.
- (2) That the applicant had failed to demonstrate any breaches of his rights or freedoms in the exhaustively copious compendium of fundamental rights and freedoms spelled out from articles 12 to 33 of the 1992 Constitution breach of which the court should determine the application in his favour.
- (3) That a stay of proceedings was a very serious and grave step with possibly far-reaching consequences for parties in a suit, and as such was a discretionary jurisdiction which ought to be employed only sparingly and in exceptional cases. That there was a burden on the applicant to show by available materials that there existed grounds for the grant of a stay of proceedings before a court could put a temporary halt to proceedings as he sought. And since the applicant had failed to discharge said burden there was neither sufficiency nor conviction of reasons for the court to halt the levying of execution against him by the Attorney-General.

#### 4.1 Constitutional road block to stay of execution

On the first holding, the Supreme Court noted that the action by private individual Martin Alamisi Amidu which culminated in the execution

52 *Martin v Attorney-General* (n 51).

53 Art 88 of the Ghanaian Constitution gave powers to the Attorney-General of Ghana to discharge all legal duties including initiating and prosecuting criminal and civil cases on behalf of the state.

54 Art 2 of the Constitution stipulates that any person alleging that an enactment or an action is done in contravention of the Constitution, could bring an action before the Supreme Court.

55 Arts 2(2), (3) and (4) of the Constitution stipulates that a judgment of the Supreme Court in a suit invoking its original jurisdiction is entitled to absolute obedience.

process was brought under article 2 of the 1992 Constitution of Ghana. Article 2(1) of the Constitution states:

A person who alleges that –

- (a) An enactment or anything contained in or done under the authority of that or any other enactment; or
  - (b) Any act or omission of any person
- is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

The Court noted that it was the Supreme Court itself that gave orders for payment of the money by the applicant to the government of Ghana and hence, it is its duty to enforce the judgment in compliance with article 2(2), (3) and (4) of the 1992 Constitution which provides as follows:

- 2(2) The Supreme Court shall for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.
- (3) Any person or group of persons to whom an order or direction is addressed under clause (2) *of this article by the Supreme Court, shall duly obey and carry out the terms of the order or direction*
- (4) Failure to obey or carry out the terms of an order or direction made given under clause (2) of this article constitutes a high crime under this Constitution and shall in the case of the president or vice-president, constitute a ground for removal from office under this Constitution.<sup>56</sup>

According to the Court, the foregoing constitutional provision imposes strict compliance by President and the Vice-President and that failure to comply with the directions from the Court could lead to their impeachment. To the Court, since the breach of the above directions has far-reaching consequences, an ordinary citizen like the applicant must strictly comply with the directions given by the Court in the exercise of its original jurisdiction. The Court also held that the Attorney-General in representing the government of Ghana by executing the judgment under article 88 of the 1992 Constitution is carrying out the constitutional duties imposed on it and no more. The Court further stated that the constitution of a sovereign state like Ghana is supreme and all institutions of state derive their authority from it. The Court thus held that the execution of the judgment by the Attorney-General is a step to fulfil a constitutional mandate imposed on it when article 2 is read in conjunction with article 88. Consequently, the Court found no merit in the submissions of the applicant.

## 4.2 Failure to plead human rights violation

The second and third holdings were in response to the applicant's submission that if execution proceedings were not stayed before the application is heard by the African Court, his human rights would be violated. In making this submission, the applicant drew the Court's attention to various exhibits clearly showing that the applicant had actually filed an application on 4 September 2017 at the African Court

<sup>56</sup> Emphasis by the Supreme Court.

and same had been responded to by Ghana, the state party to this application. He submitted that since the matter was actively pending before the African Court, to determine the issues of human and peoples' rights affecting him, it would be fair and just for the government of Ghana to stay the proceedings till the final determination of the proceedings pending at Arusha, Tanzania. He further argued that Ghana which is a party to the Protocol, is obliged to comply with interim measures of the African Court within the time stipulated by the Court and to guarantee its execution.

In response, the Ghanaian Supreme Court held that the applicant had failed to demonstrate potential human rights violations by evidence; or to furnish the Court of record with such potential human rights violations. It also held that despite numerous provisions on fundamental human rights under the Ghanaian 1992 Constitution, the applicant could not refer to any of the provisions in the Constitution or any statutes whatsoever to demonstrate any breaches of his rights and freedoms. Yeboah JSC made references to Atkin's *Encyclopaedia of Court Forms in Civil Proceedings*<sup>57</sup> and some cases<sup>58</sup> which all affirm the common law principles that a stay of proceedings would be granted if there were special circumstances for its grant. The cases established that the burden lies with the applicant to show by available materials that there exist grounds for the motion. The Supreme Court decided that the applicant failed to discharge the burden and refused to grant the stay of execution proceedings.

## 5 DISCUSSION

The arguments on state judicial sovereignty made in this case are similar to those espoused by the government of Ghana through its Deputy Attorney-General before the African Court in the substantive matter. The Supreme Court's ruling in allowing those arguments and refusing to grant a stay of execution is very significant. As already stated, the African Court on 28 June 2019 ruled in the substantive matter and held for Ghana. Despite the African Court ruling, the case is a lesson on the importance of this regional human rights institution. There is a Ghanaian adage from old folklore that says that 'one does not point to his hometown with his left hand',<sup>59</sup> meaning that one should appreciate what he has including his origins, however humble. In Ghana it is always considered a sign of disrespect or bad manners to use the left hand in greeting or in making gestures. This adage can be related to the decision given by the Supreme Court. The African Court is a conduit for rights for individual Africans and must be celebrated. There is no denying the fact that the Supreme Court knew or ought to

57 Second edition, volume 35.

58 *Republic v Committee of Inquiry (RT Briscoe (Ghana Ltd))* (1976) 1 GLR 166 CA; *Brutuwa v Aferiba & Others* (1979) GLR 566.

59 See AWAKE! Akan proverbs — a mirror on social norms, Watch Tower online library <https://wol.jw.org/en/wol/d/r1/lp-e/102003206#h=3> (accessed 8 May 2019).

know about the jurisdiction of the African Court especially since our current Chief Justice, Sophia Akuffo JSC, had served as a pioneer judge and one of the Chairpersons at the African Court.

The Ghanaian Supreme Court missed the opportunity to elevate the African Court and educate the public. Instead the importance of the African Court was minimised in considerations of judicial supremacy and constitutional provisions. The African Court adequately debunked these considerations in its final decision so there is no point in belabouring the issue except to say that the Ghanaian Court erred when it stated that the applicant had failed to lead evidence before it to demonstrate any breach of his rights or freedom. The domestic court ought not to have pronounced on this issue since it was the subject matter of the substantive application before the African Court. Besides, Ghana being a party to the application before the African Court cannot be a judge in its own cause and conclude that it has not violated any of the applicant's rights or freedoms. The unfortunate pronouncement of the Ghanaian Supreme Court is prejudicial to the determination by the African Court on whether or not Ghana has violated the applicant's rights. Indeed, the Court erred when it stated that the applicant had failed to refer to any of the provisions under Chapter 5<sup>60</sup> of the 1992 Constitution or any statutes whatsoever to demonstrate any breaches of his rights and freedoms.

From the Court's own pronouncements, the applicant drew its attention to various exhibits which clearly showed that the applicant had actually filed an application on 4 September 2017 at the African Court. As has been pointed out earlier, the application before the African Court alleged violations of articles 2, 3 and 7 of the African Charter by the respondent state, Ghana. The substance of the forgoing articles under the Charter have been enshrined under article 17 (equality and freedom from discrimination), article 19 (fair trial) and article 20 (protection from deprivation of property) of the 1992 Constitution of Ghana. It is worth stating that Ghana's provisions on fundamental human rights and freedoms under Chapter 5 of its constitution is more situated in the provisions of the African Charter.<sup>61</sup> It could thus be concluded from the foregoing that the domestic court erred in its observation on specific rights or freedoms the applicant was alleging their violation by Ghana.

Further, the Supreme Court of Ghana narrowly interpreted article 2(4) of the 1992 Constitution. The Court grounded its decision to dismiss the applicant's motion for a stay of execution and proceedings on article 2(4) of the Constitution, which provides that failure to obey the orders or directions of the Court constitutes high crime. Under the article, a President or Vice-President could be impeached for being guilty of high crime. The Supreme Court therefore reasoned that the Attorney-General in representing the government of Ghana by

60 This chapter deals with fundamental human rights and freedoms.

61 RO Mensah 'Constitutional boundaries to human rights in Ghana: measuring the scope of private and public interests in the right to sexual orientation' in M Addaney (ed) *Women and minority rights law in Africa: reimagining equality and addressing discrimination* (2019) 151.



executing the judgment is carrying out the constitutional duties imposed on it and that failure to do so will result in dire consequences like impeachment. The above interpretation by the Court is erroneous in the sense that high crime is not applicable to the context of the application before the Court. The Court itself has the power to stay its proceedings or execution of its judgment at any time if there is a good reason for doing so. It is submitted that staying execution of the Court's judgment or its proceedings due to the interim measures of the African Court or pending the final determination of the application before it or both constitutes judicial exercise of its power. Once the Court has stayed the execution of its judgment, the issue of high crime will not arise since there will be no obligation to carry out the terms of the Court's judgment until the order staying the said execution has been quashed by the Court. From the forgoing, therefore, the Supreme Court's reasoning in relation to article 2(4) of the 1992 Constitution of Ghana is unfortunately not tenable.

In addition, a constitution must be interpreted as a whole. Essentially, in interpreting any constitutional provision, a court is enjoined to ensure that its interpretation of the said constitutional provision will be in harmony with the other provisions of the Constitution. In this particular case, by focusing on only article 2(4) of the Constitution, the Supreme Court of Ghana failed to also point out that a President or a Vice-President can be impeached under article 69(1)(a) of the Constitution for wilful violation of a human right provision under the Constitution. The article in question states in part:

The president shall be removed from office if he is found, in accordance with the provisions of this article –

- (a) to have acted in wilful violation of the oath of allegiance and the presidential oath set out in the second schedule to, or in wilful violation of any other provision of this Constitution.

Hypothetically, this means that, had the African Court determined that Ghana had indeed violated the rights and freedoms of the applicant, steps could have been initiated to remove the President of Ghana from office especially as Ghana failed to comply with interim measures of the African Court. Contrary to the interim position of the African Court, by deciding that the government of Ghana could go into execution, the Supreme Court caused Ghana to compromise its obligations under the Court Protocol. The domestic court's decision had also put the President of Ghana in a very delicate position even if personally, he was willing to comply with the interim measures of the African Court. Contrary to the view of Ghana's Supreme Court in the case of *Martin Alamisi Amidu v Attorney-General and 2 others* where the applicant failed to establish a special circumstance to justify the stay of its proceedings, the foregoing complexities were enough reasons for which the Court should have granted the request of the applicant.

Since the judiciary is one branch of government, its actions are deemed to be those of the state. Hence, the actions of the Supreme Court of Ghana are imputed to Ghana. The applicant was not seeking to evade the payment of the judgment debt but rather prayed to the honorable Court for stay of execution pending the determination of the matter before the African Court. The decision of the Supreme Court to

proceed with execution irrespective of the order for stay from the African Court was unfortunately misplaced. That the constitutional provision must be complied with does not mean that it precludes a stay of execution especially if its enforcement would make proceedings in the African Court of no effect.<sup>62</sup> If such a stance were maintainable, no application for a stay of execution would ever deserve to be granted. The posture of Ghana's Supreme Court weakens the African Court. The message, however unintended, is that the African Court decisions can be disobeyed with impunity. State parties cannot elect when to abide by decisions of the African Court. Such posture leads to dilution of human rights standards. The possibility of constitutional blockade to compliance with the African Court's decisions means that realisation of rights for individuals is not guaranteed. Individuals may lose respect and confidence in the African Court's ability to provide remedy for human rights abuses and may be deterred from relying on the African Court.

Finally, as already noted, the Ghanaian Supreme Court came to its conclusion because of the vexing issue of dualism. There are many benefits that accrue to a country by virtue of being part of a human rights treaty or court. One such benefit is less international scrutiny and a sense of belonging to the international community.<sup>63</sup> The assumption is that African countries sign human rights treaties to appease donor agencies and organisations and to be in good standing with these organisations.<sup>64</sup> Unfortunately, in some cases, after ratifying these human rights documents there is no corresponding substantive change in domestic law and its application. For example, although Ghana has signed and ratified the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol, till date, there is no specific legislation on women's rights. The few rights guaranteed women are found scattered across the 1992 Constitution and a few sections of the Criminal Offences Act, 1960 (Act 29) and the Domestic Violence Act, 2007 (Act 732). Such is the case even though the rights accorded women in the Maputo Protocol go beyond the few provisions in Ghanaian law. Of what use is membership of a treaty to individuals if they cannot get access to justice?

62 See *Dzobo v Agbeblewu and Others* (1991) 1 GLR 294 where the court held that an appellate court to which an application for the stay of execution of a judgement which was the subject matter of an appeal had been made ought to see to it that the appeal, if successful, was not nugatory. See also *Djokoto & Amisah v BBC Industrials Co. (Ghana) Ltd & City Express Bus Services Ltd* (2011) 2 SCGLR 825. This case also held that in deciding applications for stay of execution, the courts must grant stay where the balance of hardship will fall on the applicant. See further *Amankwah v Kyere* (1963) 1 GLR 409 which established that a stay of execution simply means to suspend the enforcement of a judgement or order. It does not take away other rights or prevent the exercise of any remedy or right which exists apart from the process of the court.

63 G Bekker 'The African Court on Human and Peoples' Rights: safeguarding the interests of African states' (2007) 51 *Journal of African Law* 154.

64 Bekker (n 63) 158.

## 6 RECOMMENDATIONS

### 6.1 Naming and shaming

Naming and shaming is an informal enforcement tool that has been used to coerce state parties into compliance with decisions of supranational institutions and standards.<sup>65</sup> After the Second World War, when debates were held on whether to form regional arrangements on human rights, critics of regionalism had concerns that regional arrangements would lead to dilution and lowering of human rights standards and also that remedies in cases of individual violations may delay because of the need to first exhaust all local or regional remedies. Despite the concerns regional human rights systems flourished, starting with the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>66</sup> to the American Convention on Human Rights,<sup>67</sup> and then the African Charter.

These bodies were established because it was hoped that within regions it would be fairly easy to enforce commitments of states to each other since states would be less resistant to change agreed to by their peers. It was also hoped that publicity about human rights would be more effective within the regional arrangements and that deviation from human rights standards could be easily sanctioned by bonds of mutuality. The above hopes have not materialised to a large extent and since traditional state reports and the loose follow up system for enforcing human rights have been slow in ensuring compliance, we suggest that naming and shaming should be utilised by the African Court. Publicising names of defaulters in the activity book is a start but there is need for this to be highlighted in every sphere of the AU activity so that presidents and government officials from countries with bad human rights records are not given positions within the Union.

Further, it is high time that the AU, especially the Executive Council responsible for monitoring compliance on behalf of the Assembly of Heads of States, begins to name and shame countries that have not yet operationalised the AU human rights documents in domestic law. It is recommended that the AU should liaise with the various national human rights institutions to undertake this exercise to audit domestication of human rights documents. Apart from providing data, this

- 65 B Taebi & A Safari 'On effectiveness and legitimacy of 'shaming' as a strategy for combatting climate change' (2017) 23 *Science and Engineering Ethics* 1289. See also K Kinzelbach & J Lehmann 'Can shaming promote human rights? publicity in human rights foreign policy: a review and discussion paper' (2015) [https://www.gppi.net/media/Kinzelbach\\_Lehmann\\_2015\\_Can\\_Shaming\\_Promote\\_Human\\_Rights.pdf](https://www.gppi.net/media/Kinzelbach_Lehmann_2015_Can_Shaming_Promote_Human_Rights.pdf) (accessed 2 May 2019).
- 66 Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9 <https://www.refworld.org/docid/3ae6b38317.html> (accessed 15 August 2019).
- 67 Organization of American States (OAS), *American Convention on Human Rights, 'Pact of San Jose'*, Costa Rica, 22 November 1969 <https://www.refworld.org/docid/3ae6b36510.html> (accessed 15 August 2019).

exercise will make NHRIs more relevant, since many have become dormant in their respective countries.

## **6.2 States must become parties to human rights treaties only after domestication**

It is recommended that one method of preventing state parties from raising constitutions and other domestic laws as an obstacle to the enforcement of their human rights obligations is to ensure that a state party is recognised as part of an international human rights agreement or treaty when such a state has passed the appropriate domestic law giving effect to the human rights obligations undertaken in the agreement. The closest example is membership of the European Union and its Charter which is based on not only being a party to the European Convention on the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights, but also on embedding the Court in domestic arena in order to grant rights to individual citizens.<sup>68</sup> Until then, states must only be known as 'signatories' to treaties. This is an effective recommendation which may require changes to international law rules but its benefit would be immense since most African countries want to be part of the human rights system, especially for public relations purposes.<sup>69</sup> Belonging to such systems is usually a precondition for foreign aid<sup>70</sup> and western development grants. Indeed, many development partners of African countries do not want to grant aid that would facilitate human rights violations.<sup>71</sup> It is proposed that such a rule will ensure that many states take the necessary steps to domesticate human rights obligations undertaken at international and regional and even sub regional level.

## **6.3 Liaising with all stakeholders and publicity for the African Charter in individual countries**

From the Universal Declaration<sup>72</sup> to the African Charter,<sup>73</sup> states are encouraged to publicise, educate and teach the human rights provisions. Under the Charter, state parties

shall have the duty to promote and ensure through teaching, education and publication, the respect for the rights and freedoms contained in the present

68 R Spano 'The future of the European Court of Human Rights – subsidiarity, process-based review and the rule of law' (2018) 18 *Human Rights Law Review* 473.

69 E Massimino 'The power of human rights law' (2015) 41 *Human Rights* 2-4 24-25.

70 O Hathaway 'Why do countries commit to human rights treaties?' (2007) 51 *Journal of Conflict Resolution* 588 at 596.

71 J Quigley 'Perestroika African style: one-party government and human rights in Tanzania' (1992) 13 *Michigan Journal of International Law* 611 647.

72 Art 26, sec 2 of the UDHR.

73 Art 25 of the Charter.

Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.<sup>74</sup>

It is recommended that this mandate can be effectively achieved when the African Court liaises with all stake holders, not only the NHRIs but also the judiciary, law faculties and members of Bar associations. Publicity would demystify the Court and also encourage acceptability and accessibility. It is important for domestic stakeholders like the judiciary to understand the nature of state party obligations before the African Court. Many African judges including those in Ghana are willing to use international or regional human rights law and cases in domestic court decisions but these are only resorted to for persuasive authority.<sup>75</sup> Decisions from the African Court however are expected to be binding and complied with and so publicity is very important if decisions of the African Court are not to be seen as *brutum fulmen*, meaningless thunderbolts and in this sense, ineffectual legal judgments.

## 7 CONCLUSION

The Ghanaian Supreme Court's decision has many implications for how the African Court is viewed and the ability of the African Court to provide a remedy for violation of individual human rights in the country and in Africa. The decision highlighted the need to strategise to prevent state parties using constitutional blockade to deny domestic realisation of human rights. The decision also revealed a number of flaws in domestic implementation of human rights and the lack of power of the African Court to enforce its decisions. Hopefully, this case discussion has contributed to debate in this area, increased knowledge of the African human rights system generally and laid the ground for further research.

74 As above art 25.

75 See generally, *CHRAJ v Ghana National Fire Service & the Attorney General*, Suit No. HR 0063/2017 (23 April 2018) the Ghanaian Human Rights Court drawing extensively on CEDAW, held that Fire Service Regulation 33(6), which authorised dismissal of women who got pregnant within the first year of employment, was discriminatory, unjustifiable, illegitimate and illegal; *Mensah v Mensah* (2012) 46 Ghana Monthly Judgments 48, Dotse JSC referred to the Universal Declaration and CEDAW to grant a woman equal share in matrimonial property; *Attorney-General v Dow*, (1992) BLR 119 (CA) the Botswana Court of Appeal declared sections of the Citizenship Act, 1982, as amended by the Citizenship (Amendment) Act, 1984 (Act No. 17 of 1984) ultra vires the Constitution. In making this decision, the Court noted that although Botswana had ratified the African Charter but had not incorporated it into domestic law, the Charter and the UDHR could still aid in interpretation of the Botswana Constitution.