

Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights

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Summary

The African Commission on Human and Peoples' Rights was inaugurated on 2 November 1987, with a mandate to promote and protect human rights in Africa. The commemoration of its thirtieth anniversary in 2017 presented another appropriate opportunity to revisit the long-standing debate on its quasi-judicial character, the status of its recommendations and its (in)ability to effectively monitor states' compliance. This article assesses the challenges associated with the Commission's seemingly 'non-binding' recommendations and the perceived effect on its mandate, and proposes two solutions for their circumvention. First, the article suggests that if non-compliance is taken broadly as a sustained infraction of states' obligations under article 1 of the African Charter on Human and Peoples' Rights and allied instruments, the Commission's recommendations can be elevated to binding African Union decisions that subsequently become enforceable under article 23(2) of the AU Constitutive Act. Second, it is proposed that where a state against which a violation has been found fails to comply

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with the Commission's recommendations, the latter may institute an action before the African Court under article 5 of the Protocol Establishing the African Court against that state for non-compliance with its obligations under the Charter.

Key words: *human rights; implementation; compliance; recommendations; quasi-judicial; non-binding; African Commission; African Court; African Union*

1 Introduction

A system of law that tolerates defiance hardly ever commands obedience. So too is a human rights system at the supranational level barely capable of ensuring effective safeguards if it lacks the requisite political support for its domestic implementation.¹ True to these assertions, the current relationship between state parties to the African Charter on Human and Peoples' Rights (African Charter) and the African Commission on Human and Peoples' Rights (African Commission) is one mired by defiance. The never-ending deficit of state adherence to African Commission recommendations² regenerates the 'compliance' argument and brings under closer scrutiny the triangular relationship between the Commission, the rights enshrined in the African Charter and supplementary instruments, and state parties. For Viljoen, 'compliance' is 'the fulfilment of a state obligation under a treaty'.³ Under the African Charter, the implementation of obligations acquired under article 1 (article 1 obligations) is a threshold for state compliance. However, the African Commission's responsibility to monitor state implementation, investigate allegations of violations or determine complaints often is pre-emptively blocked, in no small way by its inability to make decisions and recommendations that are binding on states.

Undoubtedly, the Commission is the principal regional human rights body responsible for promoting human and peoples' rights and ensuring their protection in Africa.⁴ Established under the African

1 F Viljoen 'The African human rights system and domestic enforcement' in M Langford et al (eds) *Socio-economic rights judgment and the politics of compliance: Making it stick* (2017) 351; GM Wachira & A Ayinla '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* 466, where they state very succinctly that '[a] human rights guarantee is only as effective as its system of supervision'.

2 Recommendations, in this context, include recommendations based on the African Commission's Concluding Observations on state reports and decided cases (communications).

3 Viljoen (n 1 above) 351; A Chayes et al 'Managing compliance: A comparative perspective' in EB Weiss & H Jacobson (eds) *Engaging countries: Strengthening compliance with international environmental accords* (1998) 39.

4 Art 30 African Charter.

Charter as a treaty body within the framework of the Organisation of African Unity (OAU), now the African Union (AU), the African Commission is vested with the mandate to promote, protect and interpret the Charter's sundry provisions, and perform any other functions entrusted to it by the OAU/AU Assembly of Heads of State and Government (OAU/AU Assembly).⁵ However, there are two major limitations to the effective discharge of its mandate. One, the African Commission is a quasi-judicial body whose decisions are understood not to be binding on state parties. Two, by its current bureaucratic structure and functioning, it is unable to effectively utilise the avenue of the African Court on Human and Peoples' Rights (African Court) to persistently hold non-compliant states accountable under the Charter.

This article attempts to articulate, from a prism intended to provoke scholarly thought and political action, ways of navigating the African Commission out of the murky waters of state defiance in order to accomplish its expected outcomes. In so doing, it is clarified from the outset that rather than rehearse the arguments already articulated by many highly-acclaimed scholars on state (non)compliance, the focus of the article is on enabling the work of the African Commission through the institutional support of AU organs such as the Assembly and the Executive Council and the Court. Hence, the issues identified and addressed here are not whether the Commission's recommendations were designed to be non-binding or have 'a direct effect' on states.⁶ Rather, it is whether, having regard to state parties' article 1 obligation to take steps to recognise the freedoms guaranteed by the African Charter, they will not merely be fulfilling that obligation if they comply with such recommendations. In other words, the article questions whether a state party's failure to comply with recommendations targeted at the promotion and protection of the Charter rights does not invariably amount to a sustained violation of the article 1 obligation itself, rather than a violation of the Commission's recommendations. The second question is whether a state party's failure to implement its article 1 obligation reasonably allows the AU Assembly to make binding decisions on Commission recommendations and impose sanctions for non-compliance under article 23(2) of the Constitutive Act. Lastly, where state parties fail to implement recommendations, can the African Commission seek to enforce their Charter obligations through the avenue of the Court?

5 African Charter art 45(1)(a)(b)(c), (2), (3) & (4).

6 AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 *African Human Rights Law Journal* 14; F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015); M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008).

Two working hypotheses respond to the above queries. First, it is proposed that although African Commission recommendations are by themselves non-binding, the African Charter anticipates that, by deferring them to the AU Assembly which can take binding decisions on them, non-conforming state parties can subsequently be held accountable for their obligations and may be susceptible to sanctions under article 23(2) of the AU Constitutive Act. Second, by having unlimited access to the African Court, the Commission can sue a non-compliant state party for breach of its article 1 obligation. In justifying the possibilities for 'bypassing' the Commission's current challenges, an effort will be made to streamline the conversation against the backdrop of the link between the Commission's mandate and the substantive provisions of the Charter.

The article is divided into six sections. Section one is the introductory section above; sections two and three assess the Commission's 'watchdog' functions and the impact of states' non-compliance on its mandate. In sections four and five, much is said about how the Commission's recommendations can be politically enforced by the AU Assembly, the Executive Council (and, to some extent, the Peace and Security Council), and judicially through the African Court in fulfilment of states' article 1 obligation. The potential limitation of the article's propositions and the conclusion are detailed in section six. The article adopts desktop and exploratory approaches. It also explains a select number of cases and reports that demonstrate instances where states have not perfected the Commission's recommendations.

2 African Commission and the burden of state 'resistance'

Considering that the year 2017 was significant in the life of the African Commission as it marked the thirtieth anniversary of the Commission's operationalisation,⁷ its 30-year life-circle provides another opportunity for critical reflection on its sojourn so far and an appraisal of the obstacles that deflate its effectiveness with a view to better facilitating its efficiency. Apparently, the obstacles posed by non-compliance are incalculable. From an outright failure to undertake law reform to a barefaced refusal to implement recommendations and, by extension, the provisions of the African Charter itself, these, in no small measure, clog the wheels of the Commission's effectiveness and its determination to deliver on its mandate. As noted by the First OAU Ministerial Conference on Human Rights, there is a need to not only evaluate the Commission's functioning and ascertain the extent of its accomplishment, but also

⁷ The African Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission was subsequently relocated to Banjul in The Gambia, where it is hosted and from where its day-to-day activities are run.

to 'assist it to remove all obstacles to the effective discharge of its functions'.⁸

2.1 Institutional credibility versus state sovereignty

For some 30 years, the human rights commitment of the African Commission and state parties has been anything but mutual and quite often at a distant parallel. The obligation of states as primary implementers of human and peoples' rights and the responsibility of the Commission as monitor are always in constant friction. The implementation of the African Charter marked by perplexing contradictions, thereby causing its intended beneficiaries to suffer considerably. It is ironic that while there has been nearly one hundred per cent ratification of the Charter by African states, this has not necessarily matched compliance.⁹ African states have neglected to channel the same speed and energy with which they subscribe to international instruments, into domestic action for better human rights results. The rush in treaty adoption is very quickly decelerated by domestic inaction. Several reasons explain this unpleasant trend.

The African Commission, for one, is not a judicial body and does not have a status that is equal to a continental court of law such as the African Court. It is only a quasi-judicial body and its decisions and recommendations often are conceived of as not binding on state parties. This reality evidences many a scenario where state parties found culpable under the African Charter and supplementary instruments do not comply with its decisions and recommendation and do so without the slightest consequence.¹⁰ Despite the African Commission's international status, independence, high moral fibre and impartiality, it has had more than a fair dose of determined resistance from states. With a natural penchant for suspiciously holding tenaciously to their sovereignty in the face of internal infractions, the idea of constantly being told what to do by a panel mandated to monitor human rights compliance in Africa, may be a hindrance to states. However, the blatant disregard for a continental institution of the Commission's calibre without a feel of the 'heat', if not some 'burns', from the AU, exacerbates an already-growing culture of impunity and fatal abuse of continental principles and institutions.

It cannot be true that the African Commission is not worthy of support and commendation. During the discharge of its arduous mandate over the years, the Commission has steadily evolved as an apparatus for entrenching human rights and democratisation in

8 Para 23 Grand Bay Declaration.

9 The only exception being Morocco which only returned to the AU in January 2017, after it had withdrawn its members in 1984 due to the OAU's recognition of Western Sahara as an independent territory.

10 Viljoen & Louw (n 6 above) 12; Wachira & Ayinla (n 1 above) 471; CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 228.

Africa. By subtly but increasingly ‘bending the arm’ of repressive African states through its promotional, protective and interpretive authority, it tends to realise, on an ongoing basis, the goal of fostering a human and peoples’ rights culture in Africa. As seen in the classic cases of *Centre for Minority Rights Development v Kenya (Endorois case)*,¹¹ *Purohit v The Gambia (Gambian mental health case)*,¹² *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria (Saro-Wiwa case)*¹³ and *Socio-Economic Rights Action Centre (SERAC) v Nigeria (SERAC case)*,¹⁴ it tends to beam its searchlight on errant states to assess their conduct *vis-à-vis* the demands of the African Charter. The avalanche of high-profile decided cases is evidence of its determination to break through the sacred curtains of state sovereignty, to tread uncharted grounds, to interrogate spaces previously jealously guarded by states, and to pronounce on issues that states previously considered as being exclusively their internal affairs. As the African Commission rightly noted in *Article 19 v Eritrea*,¹⁵ the African Charter would be rendered meaningless if states were permitted to construe its provisions in a manner that limits or negates its substantive guarantees. Consequently, even if to a lesser extent, the Commission’s naming-and-shaming of states importantly reinforces the need to push states to act within the tenor of their obligations under international law.¹⁶

11 (2009) AHRLR 75 (ACHPR 2009).

12 (2003) AHRLR 96 (ACHPR 2003).

13 (2000) AHRLR 212 (ACHPR 1998).

14 (2001) AHRLR 60 (ACHPR 2001) paras 57-58, 61-63; F Coomans ‘The Ogoni case before the African Commission on Human and Peoples’ Rights’ (2003) 52 *International and Comparative Law Quarterly* 751.

15 (2007) AHRLR 73 (ACHPR 2007) paras 105 & 108.

16 *Saro-Wiwa case* (n 13 above) para 115. The African Commission held that it was a blot on the Nigerian legal system for the government to have executed Ken Saro-Wiwa despite the Commission’s pleas and global opinion to the contrary, something that should never happen again. *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) paras 76-77 (DRC case). The African Commission disapproved of the military occupation of the DRC by Burundian, Rwandan and Ugandan forces. The Commission held that such action was impermissible under the African Charter and international law. *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) paras 76-77, where the Commission held that the African Charter does not give states a free hand to deal arbitrarily with non-nationals and that the arbitrary arrest and deportation of non-nationals lawfully working in Angola, which caused them to lose their jobs, was a violation of the African Charter; *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 73 (the Commission found that a military *coup* was a violation of the right of Gambians to freely choose their government); *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 70: ‘[N]o state party to the Charter should avoid its responsibilities by recourse to the limitations and “claw-back” clauses in the Charter’; *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 77, where the African Commission held that a decree allowing the government to seal the premises of a media organisation and seize its publications violates the African Charter. Other cases include *Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003) paras 64 & 66; *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000) paras 134-135.

It is generally acknowledged that the work of the African Commission is essential to the effective observance of human rights in Africa.¹⁷ However, as recognised by the OAU/AU Ministerial Conference on Human Rights, 'the primary responsibility for the promotion and protection of human rights lie with the state'.¹⁸ This imperative makes the Commission an appropriate mechanism for continuous dialogue with African governments on the implementation of their article 1 obligation.¹⁹ The following two grounds clarify that by the nature and tenure of its establishing mandate, the Commission is (a) a necessary counter measure against repressive and abusive state conduct; and (b) a forum for continuous engagement and dialogue with state parties on the discharge of their article 1 obligation.

The activation of the African Commission in 1987 ushered in great expectations among keen human rights watchers. It signalled for the first time that the massive human rights violations that preceded the pre-Charter era would be rebuffed by a vigilant continental human rights watchdog. Several indices precipitated this rousing expectation. First, the formation of the African Commission was a breakaway from the past in terms of the OAU's approach to human rights monitoring. The surge in civil wars and armed conflicts between the early 1960s and late 1970s, including the gross human rights violations perpetuated by Bokassa in the Central African Empire, Nguema in Equatorial Guinea and Idi-Amin in Uganda led to an unprecedented number of crises on the political and refugee fronts.

The OAU Assembly, as a necessary response, adopted the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (OAU Refugee Convention) as a standard-setting measure to address the chaos and instability that came with the transnational exodus of people. However, although laudable in many respects, this response was inadequate and did very little to salvage the situation. Specifically, the OAU Refugee Convention, among other reasons, failed to accommodate a treaty mechanism that would have been responsible for monitoring compliance. With no monitoring body in place, the potential of the Convention as a catalyst for change in national laws and practices was immediately lost.²⁰

Not surprisingly, at that time African states had little tolerance for human rights scrutiny. There was such a rigid attachment to the principles of sovereignty, territorial independence and non-interference in the internal affairs of member states, that it compounded the OAU's ability to intervene during crises to prevent or curtail the deterioration of human rights.²¹ This leeway, sustained

17 Para 23 Grand Bay Declaration.

18 Para 15 Grand Bay Declaration; para 27 Kigali Declaration.

19 Para 23 Grand Bay Declaration.

20 F Viljoen *International human rights law in Africa* (2012) 158.

21 Arts 3(1), (2) & (3) OAU Charter 1963; compare *DRC* case (n 16 above) para 74.

by the provisions of the OAU Charter, occasioned the 'grandstanding' of regimes notorious for perpetuating massive human rights violations and conflicts. In the face of brutal atrocities, the OAU stood idly by, while hapless victims had to bear the torrents of agony and pain meted out to them. However, criticism of the OAU's position of indifference, coupled with pressures from the United Nations (UN), eventually led to the 1979 UN-sponsored Monrovia Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa.²² These spurred African states to action and to concede, to a limited extent, a portion of their sovereign authority, even if only pertaining to human rights-related matters. This series of events led to the African Commission's creation under the African Charter.

Second, the attendant recognition of fundamental freedoms and the Commission's establishment brought about a relative limitation of state sovereignty. It gave rise to the authority of the African Commission to monitor, identify and otherwise recommend action(s) that reasonably warrant African governments to address domestic human rights concerns. It signalled a new era of continental thinking and expectation from states in that it set the tone for domestic human rights conditions to cease to be entirely deferred to states. It also demonstrated that states were to be increasingly monitored by the Commission for better human rights compliance. Simultaneously, the Charter's provision for Commission recommendations to not only states but also the OAU/AU Assembly manifestly opened up a possibility for decisive action by the OAU/AU should states fail to implement their article 1 obligation. This promising possibility, were it to be supported by the necessary political will of the AU Assembly, created room for a significant paradigm shift in the way state parties deal with the Commission's recommendations and decisions. However, this has hardly been the case.

The African Charter's one foot in the door of states' sovereignty, nonetheless, has not prevented the Commission from reiterating the sovereignty principle in favour of states. In *Gunme v Cameroon*,²³ the Commission observed that while a state could not rely on the excuses of sovereignty and territorial integrity to ignore allegations of political or ethnic domination by one group over another, the Charter could not be relied on to threaten the territorial integrity and sovereignty of a state party.

22 African Commission on Human and Peoples' Rights 'African Commission on Human and Peoples' Rights' <http://www.achpr.org/about/history/> (accessed 21 May 2018).

23 (2009) AHRLR 9 (ACHPR 2009) paras 181 & 191; *Katanga Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 5 ('[t]he Commission is obligated to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights'). Compare *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) paras 2 & 56.

Lastly, if status is a yardstick for compelling state compliance, then the African Commission's institutional essence largely is reinforced by its competence and extensive mandate. It is composed of eleven commissioners selected from amongst African personalities of the highest reputation and proven credentials in terms of integrity, impartiality, high moral standing and competence in human and peoples' rights. The commissioners are elected by the AU Assembly from a list of suitably qualified persons nominated by state parties to the African Charter. Commissioners serve in their personal capacity and no two commissioners may come from the same state. The kernel of these salient requirements is to have a commission that is not susceptible to national or diplomatic influence and cloaked with an international persona that commands the respect of all state parties. This intention is further illustrated by the Commission's ability to make its own rules and regulate its own proceedings.

In terms of the extensiveness of its mandate, the African Commission is one of the very few mechanisms in the world responsible for monitoring all three generations of human rights at the same time. Consistent with the idea in the African Charter that all human rights are indivisible, interrelated, interdependent and justiciable,²⁴ it has occasionally read into the Charter rights that are not expressly provided for, but which can be associated with existing substantive rights. As an apparatus for social change, the Commission presents a platform for supporting states in mainstreaming civil and political rights, socio-economic rights and development-related rights in domestic legislation. In the *SERAC* case, the Commission took a progressive approach towards the interpretation of the African Charter's text when it held that '[g]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties'.²⁵ In that case, the Commission also took on the responsibility of locating the right to housing in the African Charter, even where no express provision was made for it. It held that although the Charter does not categorically provide for the right to shelter, this right could be deduced from the combined provisions of articles 14, 16 and 18(1) pertaining to the right to enjoy the best attainable state of mental and physical health, the right to property and the protection of the family.²⁶

One manifest burden on the African Commission is its inability to derive the much-anticipated results that regular dialogue with states

24 Viljoen (n 20 above) 214; *Gambian mental health case* (n 12 above) para 48; para 1 Grand Bay Declaration; para 1 Kigali Declaration.

25 *SERAC case* (n 14 above) para 57; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) paras 19-20, where the Commission held that 'if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation'; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 144; Viljoen (n 20 above) 296.

26 *SERAC case* (n 14 above) paras 60-61; Viljoen (n 20 above) 217.

should otherwise have afforded it. Despite the increasing need to foster state compliance through frictionless and non-combative channels,²⁷ the goal of hosting fruitful state-commission engagement has not yielded the desired outcomes. Under the African Charter, states are invited to frequently engage with the Commission through the avenues of state participation, state reporting, promotional visits and communications, among others. These channels provide state parties with a veritable forum to frequently dialogue on the implementation of their regional and international obligations. To guide the engagement process, the African Commission has made comprehensive provisions in its revised Rules of Procedure of 2010 (Rules of Procedure) to not only facilitate state reporting and participation, but also to keep track of its recommendations.²⁸

As a general principle under the Rules of Procedure, state parties may be invited to discuss any human rights issue that is of interest to them.²⁹ Where they are not invited, they may request to participate and may propose the inclusion of matters in the African Commission's agenda or merely join the session to enlighten the Commission on issues within their peculiar knowledge. However, the state reporting process and communications procedure, by far, are the most important contact points between the Commission and states. In the case of the reporting process, state parties are availed an important opportunity to redeem their reporting obligations under article 62 of the African Charter and article 26 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (African Women's Protocol). To ease the process, the African Commission has laid down specific guidelines in addition to its Rules of Procedure on how national periodic reports should be developed and submitted.³⁰ It has also issued further guidelines on how reports should be made on specific thematic issues such as socio-economic and women's rights.³¹ After consideration of state parties' reports, the Commission issues what are often referred to as Concluding Observations.³²

In the case of communications, a similar stream of engagement is open to states.³³ Under this channel, state parties may initiate inter-state proceedings against other states, have proceedings instituted

27 Viljoen (n 20 above) 350.

28 Rule 78 Rules of Procedure.

29 Rules 62, 63(1) & 64 Rules of Procedure.

30 Guidelines for National Periodic Reports 1989.

31 State party reporting guidelines for economic, social and cultural rights in the African Charter on Human and Peoples' Rights 2010 (Tunis Reporting Guidelines); Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

32 Centre for Human Rights *A guide to the African human rights system* (2016) 28-29.

33 Exceptions are cases of extreme emergency where the communication depicts a situation of massive or serious human rights violations, in which case the African Commission should draw the attention of the AU Assembly and the Peace and Security Council to the matter pursuant to Rule 84 of its Rules of Procedure.

against them by individuals, groups or non-governmental organisations (NGOs) for breaches of the provisions of the African Charter or may request to participate as *amici curiae* in proceedings in which they originally were not parties. The adversarial nature of proceedings originated by communications in no way diminishes the rapport between states and the African Commission. Given that the Charter encourages the amicable settlement of disputes, the Commission facilitates the settlement process and plays a key role in drawing up a memorandum of understanding between the parties.³⁴ In *Henry Kalenga v Zambia*³⁵ the Commission amicably resolved a communication alleging false imprisonment against Zambia. This channel of engagement has equally been utilised by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). In 2016, the Children's Committee brokered a landmark settlement between the Institute for Human Rights and Development in Africa (IHRDA) and Malawi.³⁶ The IHRDA had sued Malawi because section 23(5) of the Malawian Constitution defined a child as any person below 16 years of age and was inconsistent with article 1 of the African Charter on the Rights and Welfare of the Child 1990 (African Children's Charter), which defines a child as anyone below 18 years. Following agreement between the parties, Malawi undertook constitutional reforms to bring its definition of the child in line with that of the African Children's Charter, thereby giving a striking example of circumstances where a state has employed the avenue of dialogue and constructive engagement to comply with its human rights obligations.

By itself, the African Commission's quasi-judicial status is not as consequential as the wilful defiance by state parties, and the non-binding nature of its recommendations does not necessarily warrant the negative exercise of state discretion. Indeed, had the Commission's interaction with states been productive, the chances of government reticence to recommendations after participating in the reporting process or the Commission's contentious proceedings would have been less likely.³⁷ In the face of their article 1 obligations, the *non-bindingness* of the Commission's recommendation does not outrightly permit states that consciously participate in the reporting process to thereafter flout so-called 'non-binding' decisions and recommendations. If a state is bound by its commitments under a treaty, which in this case are the duties to protect rights, adjust its laws and policies and report on those measures, then it must not be allowed, after making a report, to plead *non-bindingness*. It is paradoxical to undertake obligations under a treaty and thereafter to

34 Rule 109(6) Rules of Procedure.

35 (2000) AHRLR 321 (ACHPR 1994).

36 African Committee of Experts on the Rights and Welfare of the Child 'Amicable Settlement on Communication No 004' <http://www.acerwc.org/amicable-settlement-on-communication-no-004/> (accessed 21 May 2018).

37 Viljoen & Louw (n 6 above) 15.

refuse to comply with decisions which are made in furtherance of those undertakings. Such irony seriously affects the entrenchment of accountability in the African human rights system.

Indeed, different analytical approaches have been developed to explain why states comply with international law. For the purposes of this article, three approaches are identified, namely, the enforcement approach, the managerial approach and the process or social construction approach.³⁸ Under the enforcement approach, while realists argue that state compliance is less likely to occur if the cost of compliance outweighs its benefits, rational institutionalists are of the opinion that the monitoring, sanctioning and adjudicatory mechanisms of international organisations and regimes add to the burden of non-compliance by states.³⁹ On the contrary, the managerial approach contemplates that non-compliance is involuntary; that states often are not compliant with international law due to the limited resources at their disposal and, therefore, by no deliberate effort on their part.⁴⁰ Scholars in this school argue that state compliance with international rules is not necessarily persuaded by the threat of sanctions, but through 'the dynamic created by the treaty regimes' to which states belong.⁴¹ To keep compliance at an acceptable level, they argue, states must be allowed to operate within the interactive process of constant dialogue among parties to the treaty, the treaty body and the wider public.⁴² However, social constructivists argue that compliance with international rules can occur only where they are domestically recognised by states through a 'process' of legitimacy, socialisation and internalisation.⁴³

Intense contestations have emanated from these schools of thought as to why nations obey international law. Henkin states that with international law lacking an enforcement machinery, state implementation of international norms only occurs when it is in their interests to do so.⁴⁴ This suggests that compliance occurs based primarily on moral, rather than legal, considerations. It is predicated on the assumption that nations 'conform' to rather than 'obey' international rules. Koh explains that a state's compliance with

38 TA Börzel et al 'Obstinate and inefficient: Why member states do not comply with European law' (2010) 43 *Comparative Political Studies* 1363-1364. See also H Pickering 'Why do states mostly obey international law?' 4 February 2014 <http://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/> (accessed 8 April 2018), which identifies the theories of realism, liberalism and constructivism to explain why states comply with international norms.

39 Börzel et al (n 38 above) 1367-1368.

40 Börzel et al 1369.

41 HH Koh 'Why do nations obey international law?' (1997) *Faculty Scholarship Series* 2599-2601 http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers (accessed 4 April 2018).

42 A Chayes & AH Chayes *The new sovereignty: Compliance with international regulatory agreements* (1998) 25; Chayes et al (n 3 above) 39-62.

43 Börzel et al (n 38 above) 1370-1371; JT Checkel 'Why comply? Social learning and European identity change' (2001) 55 *International Organisation* 553-558.

44 L Henkin *How nations behave* (1979) 49.

international law, rather than an outright phenomenon, involves ‘the complex process of institutional interaction’ between global norms and domestic legal orders.⁴⁵ He argues that compliance by states with international norms can best be understood by reference to the process by which they interact with international rules in a way that translates international obligations into action.⁴⁶ However, there are those that argue that the ‘process’ argument does not sufficiently address the legal implications of state consent to a treaty. Under international law, the ratification of a treaty implies that a state agrees to be bound by its provisions and consequences and undertake to execute its provisions in good faith. This is understood by the Latin maxim *pacta sunt servanda*. According to Von Stein, the voluntariness of international treaties makes them legitimate and binding, and states are bound by the treaties to which they consent.⁴⁷ Lister equally argues that since international law functions as a single system, ‘it must be consented to all together or not at all’.⁴⁸ Hence, Guzman stresses that the importance of consent to the functioning of the system warrants that deviation from it must be carried out with caution.⁴⁹

Therefore, considerations of process as a reference point in the compliance dialogue cannot preponderate over the significance and implication of consent to be bound and to ensure domestic compliance. As will be explained below, further consent to the Constitutive Act and the African Court Protocol to be bound by decisions of the AU and the Court even further reinforces the obligations of states to ensure compliance or be sanctioned.

2.2 Connecting the broken link between the African Charter obligations and the mandate of the African Commission

The founding of the African Commission as a quasi-judicial monitoring mechanism under the African Charter does not from the outset sanction state defiance. This is implicit because the Charter evidences an inextricable link between its substantive provisions and the Commission’s mandate. The state obligation to be bound by the entire African Charter accordingly leaves no ostensible room for indiscriminate compliance, neither does it entertain subjective interpretations of the weight to be appropriated between its

45 Koh (n 41 above) 2602.

46 Koh 2618.

47 J von Stein ‘Compliance with international law’ 3 12 <http://www.janavonstein.org/uploads/4/6/1/9/46194525/isa-compendium-update.pdf> (accessed 8 April 2018).

48 M Lister ‘The legitimating role of consent in international law’ (2011) 11 *Chicago Journal of International Law* 663 690.

49 AT Guzman ‘The case against consent in international law’ (2012) *UC Berkeley: Berkeley Program in Law and Economics* <https://escholarship.org/uc/item/11p1v5fw> (accessed 9 April 2018); A Guzman ‘The consent problem in international law’ 10 March 2011 <https://escholarship.org/uc/item/04x8x174> (accessed 9 April 2018).

substantive provisions and the Commission's recommendations. If a progressive interpretation of state parties' omnibus obligations under article 1 is to be undertaken, then a favourable assumption can be made that the expectation of compliance with recommendations emanating from the Commission is implicit in that obligation. As such, by that article, states that have willingly asserted an intention to be bound by the Charter can arguably be understood to have invariably expressed a disposition to give positive, rather than dismissive, consideration to the Commission's recommendations.

Several indices support the argument in favour of a comprehensive state duty – that is, the intention expressed at the time of ratification to recognise rights and be favourably disposed to the African Commission's recommendations. First, under article 1 of the African Charter, state parties are obliged – not persuaded – to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to these.⁵⁰ This prescriptive obligation is further enhanced by the similarly voluntary state undertaking to submit periodic reports on the measures so adopted every two years. Analogous obligations abound in the African Women's Protocol, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa 2016 (Older Persons' Protocol) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities 2018 (Disability Rights Protocol).⁵¹ It follows, therefore, that the threefold obligation to recognise the enshrined rights, to adopt measures that bring domestic law in consonance with treaty prescriptions and to make regular periodic reports, indispensably highlights the essence of the African Commission's role in bringing about states' compliance with the Charter and its supplementary protocols.

Second, in addition to its reporting function, the African Commission probes into human rights issues in Africa and makes recommendations to governments that require implementation at the national level. No mode of conducting human rights inquiries or investigations is specifically prescribed under the Charter. Rather, the Commission may make inquiries through 'any appropriate method of investigation', such as through document gathering, studies and research into human rights issues, seminars and symposia, fact-finding missions to the state concerned or the consideration of communications (complaints) submitted to it.⁵² Apart from inquiries of these kinds, it is also vested with the authority to formulate and prescribe rules and principles pertaining to human and peoples' rights upon which African governments can, and often times should, legislate. To do this, the African Commission may act pursuant to an

50 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) paras 47 & 61.

51 Art 22(1) Older Persons' Protocol; art 28(3) Disability Rights Protocol.

52 Art 45(1)(a) African Charter.

inquiry or a need merely to give normative clarification on any of the Charter provisions or its supplementary protocols.

In all this, the African Commission finds itself making some pronouncement which congruently eventually requires some state action. From the consideration of state reports, the Commission issues Concluding Observations; from inquiries, it issues reports; and from communications decisions (and accompanying recommendations). In all three categories of outcomes, the Commission makes some form of recommendation or decision which, to be effective, demands some ostensible conduct by state parties. The pertinent question that soon comes to mind is whether a state party to which the Commission has issued such a recommendation is bound to implement it. The answer, in this author's view, is hardly a straightforward answer. Several considerations, rather than an outright 'no', will apply. While a state party is not automatically bound – on the surface of the plain text of the African Charter – to implement African Commission recommendations, it is bound by article 1. That commitment, arguably, is greatly complemented by the obligation to regularly submit periodic reports to the Commission, as a compliance monitor under article 62 of the African Charter and article 26 of the African Women's Protocol.⁵³ In effect, where a state fails to honour article 1 or any other treaty obligations, the African Commission can activate its 'recommending' power under article 45 of the Charter by making 'concluding observations' on potential measures to take to bring national action in line with the state's international human rights obligations.

Third, it is possible to argue that the obligation to take not only legislative but also 'other measures' to give effect to the provisions of the African Charter in article 1 contemplates practicable measures suggested by the African Commission. If progressively interpreted, and it is hoped that the African Court will have a chance to make a pronouncement on the issue in the nearest future, 'other measures' as envisaged by the Charter cannot be divorced from measures which the Commission suggests after a thorough consideration of a state party's report. Given its expertise and function, there is no doubt that it is in the most favourable position to recommend feasible and attainable measures that can help states comply with their obligations under the African Charter. Besides, by the tenure of article 45 of the Charter, it is a mandatory function of the Commission to 'give its views or make recommendations to governments'. The use of 'shall' implies that the Commission's duties under article 45 are not disjointed from the combined provisions of articles 1 and 62 of the Charter. Accordingly, it is suggested that the Commission's responsibility to make recommendations necessarily emanates from its duty to monitor state compliance with their obligations under article

53 n 51 above. As at 21 May 2018 the Older Persons' Protocol had five signatories and was yet to be ratified by any state.

1 and to report on this under article 62. Consequently, the absence of a categorical statement in the Charter on the 'bindingness' of the Commission's recommendations does not automatically imply that they are non-binding. Based on the above, it is inferred that state parties, nonetheless, cannot ignore such recommendations.

3 Non-compliance – A festering wound

The assumption that the quasi-judicial character of the African Commission and its non-binding recommendations may be grounds for non-compliance, even though misconceived, has of late precipitated a fast decline in the Commission's visibility on the monitoring and adjudicatory fronts. In its 30 years of operation, it has had an undulating record of achievement with its greatest gains in the mid-1990s and early 2000s when many African states returned to democratic rule. Today, many of the Commission's notable records are fast deteriorating in value, and what is left of its good old productive days are now rather statistics than practical human rights results. Whereas Africa boasts some 54 states that have ratified the African Charter and 37 states having ratified the African Women's Protocol, only some 47 states have reported under the Charter and a fraction of those under the Women's Protocol.⁵⁴ Currently, only ten states have submitted up-to-date reports.⁵⁵ Six states have never submitted any initial or periodic reports;⁵⁶ 20 states are late by between three and 13 reports each;⁵⁷ while some 18 states are late by one or two reports.⁵⁸ In other words, while 48 states have at one point or the other submitted reports, 44 states are currently in default. This is despite the fact that the African Commission has made some 67 missions to states with an average of two visits per state.⁵⁹ Undoubtedly, the 30-year period under review surely witnessed 'better attendance at Commission sessions', but it is only a superficial

54 African Union 'OAU/AU Treaties, Conventions, Protocols & Charters' <https://www.au.int/web/en/treaties/status> (accessed 5 April 2017).

55 Angola, Botswana, Côte d'Ivoire, DRC, Eritrea, Mauritania, Niger, Nigeria, Rwanda and Togo; African Commission on Human and Peoples' Rights 'State reporting' <http://www.achpr.org/states/> (accessed 21 May 2018).

56 Comoros, Equatorial Guinea, Guinea Bissau, São Tomé and Príncipe, Somalia and South Sudan; African Commission (n 55 above); M Killander 'Human rights developments in the African Union during 2014' (2015) 15 *African Human Rights Law Journal* 537.

57 Benin (5); Burundi (3); Cape Verde (13); Central African Republic (6); Chad (10); Congo (5); Egypt (7); The Gambia (12); Ghana (9); Guinea (10); Lesotho (8); Libya (3); Madagascar (4); Seychelles (7); Sudan (3); Swaziland (9); Tanzania (5); Tunisia (6); Zambia (6); and Zimbabwe (5); African Commission (n 55 above).

58 Algeria (1); Burkina Faso (1); Cameroon (2); Djibouti (2); Ethiopia (2); Gabon (2); Kenya (1); Liberia (2); Malawi (2); Mali (1); Mauritius (1); Mozambique (2); Namibia (1); Sahari Arab Democratic Republic (2); Senegal (2); Sierra Leone (2); South Africa (1); and Uganda (2); African Commission (n 55 above).

59 African Commission on Human and Peoples' Rights 'State reporting' <http://www.achpr.org/states/stats/> (accessed 21 May 2018).

indication that 'the African human rights system has become entrenched in the affairs of state'.⁶⁰ As Viljoen rightly notes, many states still disregard their reporting obligations.⁶¹

Also, irrespective of the African Commission having issued more than 12 Concluding Observations with accompanying recommendations, the margin of compliance by states has been anything but appreciable. For instance, in its Concluding Observations on Nigeria's 5th periodic report,⁶² the Commission made a litany of recommendations which included that Nigeria legislate on affirmative action for women, including the provision of quotas to increase women's representation in decision-making positions. As if the reference was inconsequential, the government acted in opposition. In fact, in 2016 Nigeria's senate voted down the Gender and Equal Opportunities Bill on 'religious grounds' notwithstanding the fact that it has domesticated the African Charter and ratified the African Women's Protocol.⁶³ Similarly, following the recommendations to Cameroon, Mozambique and Togo, no significant effort has been made to align domestic legislation and policy with their regional and international human rights obligations.⁶⁴ These incidents speak of the African Commission's fast-diminishing authority as an effective human rights watchdog on the continent.

The mortification of the African Commission's Concluding Observations have also not spared the Commission's decisions on communications lodged before it. States have equally shown a clear

60 Viljoen (n 20 above) 298.

61 As above.

62 African Commission on Human and Peoples' Rights 'Concluding Observations and Recommendations on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter on Human and Peoples' Rights (2011-2014)' 57th ordinary session 4-18 November 2015, Banjul, The Gambia http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf (accessed 5 April 2017).

63 M Payton 'Nigerian senate votes down gender equality bill due to "religious beliefs"' 17 March 2016 <http://www.independent.co.uk/news/world/africa/nigerian-senate-votes-down-gender-equality-bill-due-to-religious-beliefs-a6936021.html> (accessed 5 April 2017); 'Nigeria anger as Gender and Equal Opportunity Bill fails' BBC News 16 March 2016 <http://www.bbc.com/news/world-africa-35820970> (accessed 5 April 2017).

64 African Commission on Human and Peoples' Rights 'Concluding Observations on the 3rd periodic report of the Republic of Cameroon' 15th extraordinary session, 7-14 March 2014, Banjul, The Gambia http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf (accessed 5 April 2017); African Commission on Human and Peoples' Rights 'Concluding Observations and Recommendations on the second and combined periodic report of the Republic of Mozambique on the implementation of the African Charter on Human and Peoples' Rights (1999-2010)' 17th extraordinary session, 19-28 February 2015, Banjul, The Gambia http://www.achpr.org/files/sessions/17th-ao/conc-obs/1-1999-2010/concluding_observations_mozambique_eng.pdf (accessed 5 April 2017); African Commission 'Concluding Observations and Recommendations on the combined 3rd, 4th and 5th periodic report of the Republic of Togo' 51st ordinary session, 18 April-2 May 2012, Banjul, The Gambia http://www.achpr.org/files/sessions/51st/conc-obs/3rd-2003-2010/achpr51_concobs_3_4_5_togo_2012_eng.pdf (accessed 5 April 2017).

unwillingness to bring fellow state parties under the Commission's scrutiny. The only known inter-state communication was the *DRC* case.⁶⁵ Regarding other communications – those brought by individuals, groups and NGOs – there is hardly a celebrated case of state compliance. Between 1988 – when the first non-inter-state communication⁶⁶ was lodged – and 2018, the African Commission determined more than 280 communications, yet full compliance with its recommendations is contemplated to oscillate between 13 and 14 per cent.⁶⁷ In the notable *SERAC* case, for example, the Commission recommended to Nigeria to compensate the Ogoni victims of human rights violations, provide relief and resettlement assistance to the displaced, and undertake 'a comprehensive clean-up of lands and rivers damaged by oil operations'.⁶⁸ Not only has the Nigerian government failed to assuage the victims more than a decade later, but it is yet to undertake a comprehensive clean-up of their land and continues to permit a series of avoidable large-scale oil spillages by oil majors in the Niger Delta region.⁶⁹ In 2011 the UN Environment Programme (UNEP) issued a report indicating that the chronic exposure of the Ogoni people to the contaminated environment can

65 *DRC* case (n 16 above); Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*) ICJ (19 December 2005) (2005) ICJ Reports 2005 168; G Nzongola-Ntalaja 'The international dimensions of the Congo crisis' http://projectcongo.org/images/The_20International_20Dimensions_20of_20the_20Congo_20Crisis.pdf (accessed 5 April 2017); R Carroll 'Court orders Uganda to pay Congo damages' 20 December 2005 <https://www.theguardian.com/world/2005/dec/20/congo.uganda> (accessed 5 April 2017).

66 (2000) AHRLR 140 (ACHPR 1988).

67 African Commission (n 59 above); Viljoen & Louw (n 6 above) 2 & 5, who place compliance with the Commission's recommendations between 1994 and 2004 at 14%. In a recent study, full compliance between 2000 and 2015, however, is pegged at 13%, while partial compliance is estimated at 41%; VO Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five selected African states' unpublished LLD thesis, University of Pretoria, 2018 128.

68 *SERAC* case (n 14 above) para 71.

69 Amnesty International 'Nigeria: Hundreds of oil spills continue to blight Niger Delta' <https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/> (accessed 5 April 2017); Deutsche Welle 'Oil spills keep devastating Niger Delta' <http://www.dw.com/en/oil-spills-keep-devastating-niger-delta/a-18327732> (accessed 5 April 2017). The Nigerian federal government inaugurated a Governing Council and a Board of Trustees for the Hydrocarbon Pollution Remediation Project (HYPREP) in 2016 in response to the UNEP report, and is yet to comprehensively clean up polluted areas as recommended by the African Commission; L Nwabughiohu 'Ogoni clean up governing board, BoT: See full list of Buhari's appointees' *Vanguard* 5 August 2016 <https://www.vanguardngr.com/2016/08/ogoni-clean-up-governing-board-bot-see-full-list-of-buharis-appointees/> (accessed 5 April 2018); D Iheamachor 'MOSOP seeks end to delay in Ogoni clean-up' *Vanguard* 19 March 2018 <https://www.vanguardngr.com/2018/03/mosop-seeks-end-delay-ogoni-clean/> (accessed 5 April 2018).

lead to 'acute health impacts' and that it would take up to 30 years to clean up polluted lands.⁷⁰

A similar scenario of non-compliance is The Gambia's response to the Commission's recommendations in the *Gambian mental health case*,⁷¹ where the Gambian government was requested to undertake a review of the Lunatics Detention Act (LDA) enacted in 1917 and only last revised in 1964. The Gambia was urged to repeal and replace the LDA with new mental health legislation that aligns with the African Charter, adequately cater for the medical and material wellbeing of institutionalised Gambians and, in the interim, establish an expert board to review the cases of those detained under the LDA and make recommendation for their treatment or discharge.⁷² More than a decade later, The Gambia has only adopted a Mental Health Policy and Plan.⁷³ However, no concrete legislative action that directly responds to the Commission's recommendations has been taken on the issue by the government.⁷⁴ This might be considered to reflect the dominant trend of state parties' response to recommendations. Although the African Commission in its Rules⁷⁵ has devised a system for following up on its recommendations, it lacks a coherent strategy to respond to pressing cases.⁷⁶ The limitation of resources, the dearth of staff and the inability to adaptively engage the Assembly on the need to muster the required political will to take on non-compliant states puts its relevance in limbo.⁷⁷

The above scenarios arguably sustain the conclusion that state parties' persistent disregard for recommendations that are sanctioned by the African Charter is tantamount to a violation of their treaty obligations. On the surface, the failure to adhere to the Commission's recommendations may have a whiff of contempt for the institution, but the infraction, in effect, targets not only the spirit and letter of the African Charter, but also the African human rights system as a whole. If the African Commission's references to states are encouraged by an intended and legitimate official goal to bring an otherwise inconsistent domestic state of affairs in line with the Charter's

70 United Nations Environment Programme 'Environmental assessment of Ogoniland' (2011) 41 214 http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf (accessed 5 April 2017).

71 *Gambian mental health case* (n 12 above).

72 *Gambian mental health case* para 85.

73 World Health Organisation 'Best practices – WHO African region' http://www.who.int/mental_health/policy/country/BestPractices4_AFRO.pdf (accessed 12 May 2018).

74 Viljoen (n 1 above); C Mbazira 'The right to health and the nature of socio-economic rights obligations under the African Charter: The *Purohit case*' (2005) 6 *ESR Review* 17-18.

75 Rule 112 Rules of Procedure.

76 Viljoen (n 20 above) 295.

77 AU Assembly 'Decision on the report of activities of the African Commission on Human and Peoples' Rights Doc EX.CL/446 (XIII)' Assembly/AU/Dec.200(XI) Egypt (30 June-1 July 2008) para 4, which 'REITERATES the need for the ACHPR to be provided with adequate resources'.

prescriptions, then states' response to such references should and must be seen to favourably support them. A contrary riposte by states negates such genuine endeavour by the Commission and contravenes their article 1 obligations.

4 'Teething' the African Commission's recommendations

The current institutional and state-imposed obstacles beleaguering the African Commission cannot be expected to suddenly disappear. The AU policy-making organs, especially the Assembly, the Executive Council and the Peace and Security Council, must each rise to the challenge of complementing the important functions of the Commission with a more affirmative human rights approach supported by action. Since it would be pointless for states to adopt treaties that they have no interest in honouring, the AU must reaffirm its commitment to human rights as a core value of the AU and its preparedness to take more decisive action to enforce the human rights treaty obligations of member states should they neglect to do so. Only by being resolute will the AU truly manifest an attentiveness to protect such intrinsic continental principle.

As it stands, a chain reaction of state impunity is fast settling deeply into state conduct. Each time a violation of the African Charter occurs at no price and compliance with the African Commission's Recommendation on such violation is not enforced, it opens a floodgate of state impunity to regional commitments on all fronts. Such a regressive situation not only replays the failures of the defunct OAU, but also reinforces old beliefs that the AU is not very different from its predecessor. If the AU cannot be relied upon to stamp its feet against blatant violations of binding instruments such as the African Charter and non-compliance with recommendations made pursuant to it, then it is likely that it will also fail to do so when it matters most, for example, where states flout the orders of the African Court.⁷⁸ It would seem that the 'wound' of non-compliance with the orders of supra-national (quasi-)judicial institutions in Africa is festering. If unstopped, it may lead to unanticipated negative results such as the unfortunate demise of the Southern African Development Community (SADC) Tribunal⁷⁹ and the impulsive state disobedience to orders of

78 CS Martorana 'The new African Union: Will it promote enforcement of the decisions of the African Court on Human and Peoples' Rights?' (2009) 40 *George Washington International Law Review* 599.

79 K Premhid 'The SADC Tribunal's disappointing rebirth' 9 September 2014 <http://hsf.org.za/resource-centre/hsf-briefs/the-sadc-tribunals-disappointing-rebirth> (accessed 6 April 2017); N Fritz 'Quiet death of an important SADC institution' *Mail & Guardian* 29 August 2014 <https://mg.co.za/article/2014-08-29-quiet-death-of-an-important-sadc-institution> (accessed 6 April 2017). See also the

the West African Community Court of Justice.⁸⁰

In the face of the African Commission's throes, two things are imperative: The AU Assembly cannot continue its indecisiveness, and the Commission's bureaucratic challenges must not continue unattended. These two issues must be addressed immediately. For the African Commission to reassert itself, a rearrangement of its functioning and work would need to take place in two ways. First, there must be a paradigm shift in the manner in which the AU responds to the Commission's reports and recommendations. The Assembly must not merely adopt the Commission's activity reports and recommendations. It will have to transform them into binding decisions enforceable under article 23(2) of the AU Constitutive Act. Second, a comprehensive overhaul of the Commission's bureaucracy is urgently needed if it is to have in place, in relation to states' article 1 obligations, a compliance monitoring structure that effectively relates with the African Court on a regular basis. This will require a re-organisation of the Commission in a way that significantly cuts down its bureaucratic bottlenecks, a financial oiling of its processes and an effective monitoring and enforcement unit well-resourced and equipped to track state (non)compliance as a functional litigation machinery ready to approach the African Court. These two points are expatiated on below.

4.1 From non-binding recommendations to binding AU decisions

To circumvent the first hurdle of non-compliance, it is vital that the African Commission's recommendations in its activity reports to the AU Executive Council and Assembly be considered and adopted as binding decisions of the Union.⁸¹ This is because under the African Charter, the Commission functions within the framework of the OAU/AU and is placed under the supervisory authority of the OAU/AU Assembly.⁸² The AU Assembly is the apex organ of the AU responsible

speech by the former president of the SADC Tribunal, AG Pillay 'SADC Tribunal dissolved by unanimous decision of SADC leaders' <http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf> (accessed 6 April 2017).

80 C Osioma 'Is the ECOWAS Court of Justice a toothless bulldog that only barks? Issues arising from the decision of the High Court of Accra in *Mr Chude Mba v The Republic of Ghana*' 4 March 2016 <http://www.spaaibade.com/resources/wp-content/uploads/2016/03/Is-the-ECOWAS-Court-of-Justice-a-Toothless-Bulldog-that-Only-Bark1.pdf> (accessed 5 April 2017); C Chikelu '27 ECOWAS court decisions awaiting compliance from member states – Odinkalu' *Leadership* 5 February 2015 <http://leadership.ng/news/409745/27-ecowas-court-decisions-awaiting-compliance-member-states-odinkalu> (accessed 6 April 2017); 'ECOWAS court frowns at non-enforcement of decisions by member states' *Premium Times* 22 April 2014 <http://www.premiumtimesng.com/news/159166-ecowas-court-frowns-non-enforcement-decisions-member-states.html> (accessed 6 April 2017); compare HS Adjolahoun 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the *Koraou* slavery judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 346.

81 Wachira & Ayinla (n 1 above) 469.

82 Arts 30, 41, 46, 47 & 49 African Charter.

for monitoring the implementation of AU standards, decisions and policies, and ensuring compliance by member states.⁸³ It superintends the actions of all AU organs and bodies and takes final decisions on their recommendations. In relation to the Commission, the Assembly conducts several important administrative and supervisory functions. First, under the African Charter, the African Commission has an obligation to submit to the Assembly a report on its activities, commonly known as an 'activity report'. The Assembly was responsible for considering, assessing and approving the activity reports of the Commission.⁸⁴ However, in 2003, the Assembly mandated the Executive Council to 'consider the Annual Activity Report of the Commission on Human and Peoples' Rights and to submit a report to it'.⁸⁵ The Assembly may act further based on the Executive Council's report. Second, it is responsible for electing or confirming the nomination of members of the Commission.⁸⁶ Third, it is responsible for approving the day-to-day running costs and remuneration of members and staff of the Commission. These form a substantial part of the AU's regular budget.⁸⁷ Also, prior to the establishment of the Peace and Security Council, the Assembly was responsible for dealing with urgent matters involving serious and massive violations brought to its attention by the African Commission.⁸⁸

The Assembly's responsibilities have tremendous implications for compliance with the African Commission's recommendations. It can transform the Commission's recommendations to AU decisions so as to become binding and enforceable on member states. The Constitutive Act highlights human rights as a key element of the AU's objectives and principles. Under article 3, it is provided that the objectives of the AU shall be to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments. It is also provided for in article 4 that the AU shall function in accordance with the principles of human rights. These provisions clearly indicate that human rights issues arising from key African human right instruments are real issues to which the Assembly must dutifully respond. They lend weight to the Assembly's role in supporting the Commission's effective functioning and deterring state defiance. Certainly, the Assembly's decisions are the most potent solution to the Commission's dilemma of non-compliance. The Assembly has the final say in all matters pertaining to the AU and the ability to ensure state compliance with African

83 Arts 6(2) & 9(1)(e) Constitutive Act; Viljoen (n 20 above) 179.

84 Arts 53 & 54 African Charter.

85 AU Assembly 'Decision on the 16th annual activity report of the African Commission on Human and Peoples' Rights Doc. Assembly/AU/7 (II) Assembly/AU/Dec.11 (II) Mozambique (10-12 July 2003) para 5.

86 Arts 33 & 34 African Charter.

87 Art 44 African Charter.

88 Art 58 African Charter.

Commission recommendations if such decisions are supported by the threat of sanctions.

It is not incontrovertible that the African Charter itself has left unresolved the kind of action the AU Assembly (and the Executive Council) is expected to take on recommendations contained in the Commission's activity reports. Does the Charter require the AU executive organs to merely adopt the Commission's recommendations or does it anticipate that they go a step further to take expressly-couched decisions in relation to states indicted by the activity report? This is quite unclear. A cursory look at article 54 of the African Charter does not clearly indicate what the effect of the Assembly's adoption of the activity report is and, therefore, leaves unsettled an essential aspect of the Assembly's function.⁸⁹ The mist created by this lack of clarity has led to ambivalent explanations of the consequence to be attached to the AU's decision adopting the Commission's activity reports. On the one hand, a mere adoption of the report elicits two equally-valid interpretations. The first suggests that the Assembly's *adoption* of the report, which details in it the Commission's recommendations to culpable states, can be understood to be a binding decision of sorts.⁹⁰ In this case, it will have binding consequences for the states concerned, and sanctions may lie in the event of a breach. Although suggestive, this is not the current approach of the AU Assembly.⁹¹ The alternative view is that the mere adoption of the African Commission's activity report without more does not by itself transform the Commission's recommendations into binding AU decisions. At the moment this seems to be the AU's approach: Decisions adopting the Commission's report do not outrightly impose an expectation of compliance by the states concerned.

On the other hand, it is suggested that for there to be a transformation of the African Commission's supposedly non-binding recommendations to binding AU decisions, the AU Assembly and the Executive Council must not simply approve the activity report but must also expressly adopt a decision, the wording of which must be clear in that the state(s) concerned in each given case must take steps to implement the Commission's recommendations. By adopting this interpretation, it is expected that the decision must be premised on the recommendations of the Commission and must clearly require the states concerned in the activity report to take certain steps to bring them in line with their obligations under the African Charter.

Arguably, the appropriation of oversight powers over the African Commission to the OAU/AU Assembly (rather than state parties to the

89 See also arts 58 & 59 of the African Charter.

90 Viljoen (n 20 above) 181; Viljoen & Louw (n 6 above).

91 AU Assembly (n 77 above) para 2, which also illustrates that the Assembly only 'adopts and authorises' the publication of the 23rd and 24th Activity Reports of the African Commission on Human and Peoples' Rights and their Annexures.

African Charter) was foreseeably to procure and deploy its superintending authority over non-compliant states. While it is acknowledged that the OAU/AU in the past has adopted resolutions urging states' compliance with Commission decisions and recommendations,⁹² this has hardly been adequate. The Assembly's failure, therefore, to take decisive action on errant states in part is a neglect of its responsibility that has contributed to the declining fortunes of the African Commission. Indeed, it was such similar failures of the defunct OAU Assembly over the Commission's reports and recommendations that partly laid the foundation for the transformation of its functions under the AU Constitutive Act into a more forceful one. The realisation that unless there was a complete overhaul of the old arrangement, nothing meaningful could be done about contemptuous states, led to the decision to empower the AU Assembly with the authority to impose sanctions pursuant to article 23(2) of the Constitutive Act.

Although the AU Assembly's responsibility to take binding decisions on Commission recommendations is both a political and discretionary one, it must be exercised – it is argued – circumstantially and judiciously. It should not be left to the vagaries of politics and the foibles of discretion.⁹³ Rather, it must be a responsibility triggered by the expectations of law (in this case, human rights law) to guarantee the rights enshrined in its instruments, and the requirement to allow states to comply voluntarily with its dictates or be compelled where they neglect to do so. This responsibility to act may be considered inchoate, in a sense, in that it is activated only after a state, having been afforded an opportunity to comply with Commission recommendations and its article 1 obligation, fails to do so. The responsibility must be triggered by circumstances of fact in relation to the victim(s) and the actor – state or non-state – and weighed against the essence and intendment of the law, whenever there has been a finding of a human rights violation.

As established earlier in the article the inseparable connection between the substantive guarantees and the African Commission's monitoring function in the African Charter demand that recommendations made in response to findings of violations be complied with. Where states fail to comply, the Commission is permitted by the Charter not just to submit a report on its activities but also to make recommendation(s) to the Assembly on the way forward. Since the Commission is entitled to make recommendations

92 See, eg, AU Executive Council 'Decision on the activities of the African Commission on Human and Peoples' Rights (ACHPR)' Doc EX.CL/998 (XXX) EX.CL/Dec.948(XXX) Ethiopia (25-27 January 2017) para 4, where it merely 'encourages member states to comply with decisions and recommendations of the ACHPR, and inform the ACHPR of the measures taken'.

93 Viljoen & Louw (n 6 above) 13 argue that '[t]he implementation of treaty body findings depends on the will of state parties'.

in its reports as it considers fit,⁹⁴ the underlying role of the AU Assembly in its affairs is a clear indication that the Charter left the final determination of the enforceability of recommendations to the Assembly.

Another useful political avenue that the African Commission can explore to circumvent the obstacle of non-compliance is the Peace and Security Council (PSC). Whilst no role is created for the PSC under the African Charter, the Assembly, which has superintending functions over the Commission, can delegate any of its powers and functions to any other AU organ.⁹⁵ Pursuant to the exercise of this power, the Assembly established the PSC as an essential organ of the AU responsible for the promotion of peace, security and stability in Africa.⁹⁶ In this sense, the PSC is regarded as possessing a human rights mandate that, very conveniently, complements that of the African Commission.

More importantly, the PSC is guided by the principles enshrined in the Constitutive Act, the UN Charter, the Universal Declaration of Human Rights and, in particular, 'fundamental human rights and freedoms'.⁹⁷ Given the role of the AU Chairperson in the day-to-day running of the African Commission, the PSC, in conjunction with the AU Chairperson, is also tasked with the responsibility of following up on the progress made by member states towards the protection of human rights and fundamental freedoms.⁹⁸ In this way, the PSC maintains a close working relationship with the Commission 'in all matters relevant to its objectives and mandate'.⁹⁹ Specifically, the Commission is obliged to bring to the PSC's attention any information relevant to the PSC's objectives and mandate.¹⁰⁰

Considering the African Commission's lack of a comprehensive policy to deal with urgent cases, the delegation of the Assembly's role under the African Charter to the PSC (as a more accessible, responsive and specialised organ) offers an appropriate solution to the Commission's pending quagmire. In line with the African Charter and its Rules of Procedure, the Commission can and should refer urgent cases involving massive or serious violations of human and peoples' rights to the Assembly and the PSC.¹⁰¹ This is instructive because not only does the PSC hold meetings at more regular intervals than the Assembly, but its decisions are binding on AU member states. Member states agree that the PSC acts on their behalf, accept to implement its decisions, and undertake to fully cooperate with it to

94 Arts 52, 53, 54 & 58 African Charter.

95 Art 9(2) Constitutive Act.

96 Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002 (PSC Protocol) art 6.

97 Art 4(c) PSC Protocol.

98 Art 7(1)(m) PSC Protocol.

99 Art 19 PSC Protocol.

100 As above.

101 Art 58 African Charter; Rule 84(1) Rules of Procedure.

prevent, manage and resolve crises and conflicts in Africa.¹⁰² In order to ensure compliance with these obligations, the PSC can decide on any issue that dwells on its mandate and exercise the Assembly's delegated powers.¹⁰³ Rather than dissipate time and energy on getting its recommendations to pass at the AU bi-annual summits, the Commission can utilise the forum of the PSC and the good office of the AU Chairperson to pursue effective momentary measures in responding to pressing cases and ensuring compliance.

4.2 Consequences of non-compliance with AU decisions

AU decisions and directives are generally binding and enforceable on all member states.¹⁰⁴ Any member state that fails to comply with AU laws, decisions, principles and policies may be subject to sanctions. Article 23(2) suggests that in the face of non-compliance, the imposition of sanctions is entirely a matter of will. Although no criteria are prescribed for the exercise of the AU's sanctioning power and, indeed, some discretion is warranted, this is not necessarily a limitation to its exercise. This is so because to guide the judicious exercise of its discretion on the imposition of sanctions, the Assembly established the Rules of Procedure of the AU Assembly 2002 (AU Assembly Rules).¹⁰⁵ The basic conditions for the exercise of such sanctioning power are the non-payment of assessed contributions; violations of the principles enshrined in the Constitutive Act and its Rules; non-compliance with AU decisions; or unconstitutional changes of government. Where there is a finding of any of these elements, it is a matter for which a sanction can be determined and imposed.¹⁰⁶ The Assembly poignantly emphasises that '[t]he non-implementation of Regulations and Directives shall attract appropriate sanctions in accordance with article 23 of the Constitutive Act'.¹⁰⁷ Decisions, directives and regulations are automatically binding and enforceable 30 days after they have been published in the AU official journal or as specified in the decision.¹⁰⁸

Under the Assembly's Rules, the responsibility to recommend sanctions is delegated to the Executive Council. Once recommended, the Assembly must give its approval under article 23(2) where a member state contravenes AU decisions and policies and has shown no reasonable cause for its failure.¹⁰⁹ Potential sanctions for non-

102 Arts 7(2), (3) & (4) PSC Protocol.

103 Art 7(1)(r) PSC Protocol.

104 Art 23(2) Constitutive Act; arts 7(2), (3) & (4) PSC Protocol.

105 African Union 'Rules of Procedure of the Assembly of the Union' Assembly of the African Union 1st ordinary session 9-10 July 2002, Durban, South Africa ASS/AU/2(I)-a http://www.au2002.gov.za/docs/summit_council/assemrop.pdf (accessed 8 April 2017).

106 Rule 4(1)(g) AU Assembly Rules.

107 Rule 33(2) AU Assembly Rules.

108 Rules 4(1)(g), 34(1)(2) & 36 AU Assembly Rules.

109 Rule 36(1) AU Assembly Rules.

compliance are a denial of transportation and communication links with other AU member states, a denial of AU Assembly hosting rights or a denial of its voting right in the sessions of the Assembly.¹¹⁰ Other measures may be of a political or economic nature.

Considering the ability of decision-making organs of the AU such as the Assembly, the Executive Council and the PSC to not only promote but also enforce state compliance with the African Commission's recommendations, it is evident that the African human rights system will achieve no meaningful progress if inaction continues to dictate the AU's position. It being clear that semi-judicial bodies such as the Commission and the Committee, and judicial bodies such as the African Court must depend heavily on AU action against non-compliant states, the conditions for triggering these organs to act must flow from the breach of AU principles and instruments more than the political whim of member states. The violation of regional instruments, by itself, is sufficient to activate the AU's disciplinary action against guilty states. The failure to abide by a Commission decision or recommendation, made after a finding of state culpability, is evidence of a sustained violation of AU instruments and principles. Accordingly, a recommendation to the AU Executive Council and the Assembly should be considered and decided upon in line with the Assembly's Rules to enforce compliance.

5 The African Court channel: Enforcing compliance through litigation

The other major alternative to the tragedy of non-compliance having binding consequences for states is the African Court. As of today, the African Court is the only truly functional judicial organ of the AU.¹¹¹ Established in 1998, it complements the protective mandate of the African Commission as enshrined in the African Charter and related instruments.¹¹² The Court has jurisdiction over 'all cases and disputes submitted to it' concerning the interpretation and application of the

110 Rules 36(2), 5(3) & 26(2) AU Assembly Rules.

111 The multiplication of treaties and the slow pace of ratification of the amended African Court Protocols have delayed the transformed African Court from coming to fruition and substantially deflated the objective of continental accountability. Eg, the Protocol on the Statute of the African Court of Justice and Human Rights 2008, which is intended to fuse the AU Court of Justice established under articles 5(1)(d) and 18 of the Constitutive Act with the current African Court has been ratified by only six AU member states as at June 2017, and the Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights 2014 (Malabo Protocol) has not been ratified by any African state as at June 2017.

112 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998 (African Court Protocol) arts 1 & 2; arts 28 & 32 African Women's Protocol; arts 22(3) & (4) Older Persons' Protocol; D Juma 'Access to the African Court on Human and Peoples' Rights: A case of the poacher turned gamekeeper' (2007) 4 *Essex Human Rights Review* 7.

Charter, its Protocol, other relevant human rights treaties ratified by a respondent state, and over the determination of any question pertaining to its jurisdiction or lack of it.¹¹³ The fact that the African Commission and the African Court share the mandate to protect human and peoples' rights on the continent in itself creates room for potential conflict. Conscious of this and as a strategy to ensure coherence and co-ordination in their separate but reinforcing roles, the two institutions mutually agree to meet at least once a year and as often as is necessary in furtherance of their complementary and important institutional relationship.¹¹⁴ In 2010, both institutions adopted synchronised rules of procedure for this purpose.

Based on their rapport, the African Court offers an important procedural route to enforce state compliance in scenarios where the African Commission has (i) established a violation of the provisions of the African Charter or related instruments; and (ii) made recommendations that are neglected by a state party. This enforcement channel is relevant to the Commission's deteriorating role for two reasons. First, the Court's jurisdiction is binding on all state parties to the African Court Protocol.¹¹⁵ Parties to the Protocol accept its jurisdiction in the event that cases are submitted against them and undertake to comply with its judgment in any matter to which they are parties.¹¹⁶ They equally guarantee the execution of its judgments. By this token, states are not at liberty to disregard the Court's judgment in the same way they treat recommendations.

Second, the African Commission has unfettered access to the African Court through which it can seek to enforce states' article 1 obligations.¹¹⁷ Under the African Court Protocol, access is granted to the Commission; a complaining state party (in the case of inter-state cases); a respondent state party; a state party whose national is the victim of a human rights abuse; and African intergovernmental organisations.¹¹⁸ By contrast, individuals and NGOs do not have 'direct' or automatic access to the Court unless the state against which they complain has ratified the Protocol and made a declaration pursuant to article 34(6).¹¹⁹ Without such declaration, they cannot directly access the Court to either seek redress for a breach of the

113 Arts 3(1)(2) & 7 African Court Protocol.

114 Rules 114 & 115 Rules of Procedure; Rule 29 Rules of Court 2010.

115 *Atabong Atemnkeng v African Union* App 14/2011 paras 40-41.

116 Art 30 African Court Protocol; Rule 61(5) Rules of Court: 'The judgment of the Court shall be binding on the parties.'

117 Art 5(1)(a) African Court Protocol; Rules 118(3) & (4) Rules of Procedure.

118 In *African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights* Request 002/2013 para 100(3), the Court held that the Committee is not an African intergovernmental organisation within the meaning and tenure of art 5(1)(e) of the African Court Protocol and so does not have a right of access to the Court.

119 Art 5(3) African Court Protocol; *Alexandre v Cameroon and Nigeria* App 008/2011 para 10.

substantive Charter provisions or enforce compliance with recommendations. However, the African Commission's unfettered access to the African Court in respect of states that have ratified the Charter and the Court Protocol provides individuals and NGOs – or victims generally – indirect access.¹²⁰ It can institute cases, on behalf of applicants in communications filed before it or on its own motion, against states for violations of African Charter rights or pursue the enforcement of its recommendations pursuant to their article 1 obligations.

Regrettably, the African Commission has hardly risen to the occasion to explore strategic litigation to enforce compliance under article 1 of the African Charter. The gross indifference to a large number of its over 280 decided communications still has not prompted the Commission to take on errant states through the avenue of the African Court. Due to its own failure, it has only instituted three cases before the Court since the Court's inception in 2002, and obtained only two decisions on the merits.¹²¹ When the Commission first approached the Court in 2011, it performed so woefully that its application was struck out for want of diligent prosecution.¹²²

The efficacy of the African Commission's follow-up mechanism on state compliance and its willingness to utilise litigation before the African Court have been challenged. In *Femi Falana v African Commission on Human and Peoples' Rights*,¹²³ the applicant, a renowned Nigerian lawyer, was frustrated that his request to the Commission to refer a particular communication to the African Court on behalf of alleged victims of massive and serious human rights violations in Burundi had been ignored. Strangely, in a rather awkward procedural move, he approached the African Court for an order requesting the Commission to refer the communication against Burundi to the Court. Because of glaring procedural issues, his application failed. Despite the failure, the case achieved the intended result: It exposed the latent deficiencies associated with the African Commission's follow-up machinery and the impact of its current bureaucratic composition on its functioning.

120 Centre for Human Rights (n 32 above) 45-46.

121 *African Commission on Human and Peoples' Rights v Libya* App 002/2013 (judgment), where the Court found a violation of the rights of Saif al-Islam Gaddafi under the Charter, ordered Libya to terminate the illegal criminal procedure before the domestic court and report on the measures taken within 60 days of the judgment. A few weeks after the Court's judgment, he was pardoned of the death sentence and released; R Donaghy 'Gaddafi's son Saif al-Islam "released from prison in Libya"' *Middle East Eye* 7 July 2016 <http://www.middleeasteye.net/news/gaddafi-s-son-released-prison-libya-1632253259>; *African Commission on Human and Peoples' Rights v Kenya* App 006/2012; merits decision of 26 May 2017 (accessed 30 June 2018).

122 *African Commission on Human and Peoples' Rights v Libya* App 004/2011 para 26.

123 App 019/2015 paras 3-4.

The Commission's failure to exploit litigation not only justifies the growing criticism of it, but also reveals the need for its urgent reorganisation. One of the reasons for its fast-declining authority is its inability to evolve, adapt its bureaucratic structure to meet the urgency of human rights issues, and respond appropriately. It has failed to enlarge the size of its Secretariat and staff, especially the number of legal officers that treat communications and follow up on decisions and recommendations. Staff training and retraining are also low. Accordingly, the Commission is unable to effectively track its recommendations and the extent of implementation. Second, it is acknowledged that the Commission cannot shoulder all the blame for its shortcomings. Being poorly resourced and catered for, it thrives on the very meagre resources the AU allocates to it to stay afloat. It has no serious investment in its mandate, and barely enough legal officers for the whole continent. Given the enormity of its responsibility and the 54 states it currently monitors, it is expected that it should have at least two times its present professional work force, if it is to make judicious use of litigation before the African Court.

6 Conclusion

The long and short of the argument here is that the article 1 obligation to give effect to the provisions of the African Charter is more broadly linked to the Commission's mandate to give its views or recommendations to governments. This connection raises an implied expectation that its recommendations, made pursuant to articles 1 and 45 of the Charter, will be given positive consideration and effect by states. Where states fail to do so, the Commission's report and recommendations to the AU Executive Council and the Assembly can be decided upon and so become binding on the states concerned. Failure to comply with AU decisions may warrant sanctions under article 23(2) of the Constitutive Act. Alternatively, the Commission may enforce compliance with its recommendations by approaching the African Court under article 5(1)(a) of the African Court Protocol to enforce a non-compliant state's article 1 obligation.

The above propositions are not without potential challenges. If the patent and latent obstacles currently bedevilling the enforcement of the African Commission's decisions and recommendations must be bypassed in order to further the goal of human rights protection in Africa, then both the AU and the Commission must be prepared to take bold steps. Whilst it has been argued that legal considerations rather than political persuasions should be the primary trigger of AU action against state defiance, nothing seems to work where the necessary political will is lacking.¹²⁴ Two points summarise this unfortunate state of affairs. First, whereas the breach of its instruments

124 Viljoen & Louw (n 6 above) 15.

and core principles should ordinarily activate the AU sanctioning process, neither the AU Executive Council nor the Assembly have in the past swung into action to penalise errant states for breaches of their article 1 obligations and non-compliance with recommendations. Second, the proposal to overhaul the functioning and bureaucracy of the Commission also hinges largely on the political will of the AU executive organs to increase allocations to the Commission. If the Commission's Secretariat is to be well-resourced and transformed for better outcomes, then the political will of the AU is an inescapable imperative.