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## Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?

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**Summary:** *The African Commission on Human and Peoples' Rights in recent years has put in place various measures to monitor the implementation of its decisions on individual communications. These include a series of panels and seminars, amendments to its Rules of Procedure, extending the mandate of its Working Group on Communications, clarifying more expressly roles for national human rights institutions and civil society organisations, and calling on states to establish focal points and other procedures at the national level. This article considers the effectiveness of these measures and critically evaluates the role of the African Commission in monitoring the implementation of its decisions. The article draws on the findings of a four-year research project conducted by the University of Bristol's Human*

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*Rights Implementation Centre, in collaboration with the Centre for Human Rights at the University of Pretoria; the Human Rights Centre at the University of Essex; and the Middlesex University. This project tracked the implementation of selected decisions on individual communications, from the regional and UN human rights bodies, against nine countries from Africa, the Americas and Europe. These decisions were used as case studies to identify and examine the processes in place at the national, regional and international levels, to monitor and facilitate implementation. Among the themes explored was an examination of the extent to which there may be a difference in the discourse and behaviour of various domestic actors depending on which body issued the decision. In relation to decisions of the African Commission, this research identified that while there has been increased attention paid by the Commission to the issue of monitoring the implementation of its decisions, it nevertheless lacks strategic direction and there is a risk that the momentum and opportunities created by these initiatives will be lost without further strategic and institutional development by the Commission to clarify its role.*

**Key words:** *African Commission; implementation; decisions; monitor*

## 1 Introduction

When the African Charter on Human and Peoples' Rights (African Charter) entered into force and the African Commission on Human and Peoples' Rights (African Commission) started operating in the late 1980s, it was considered pioneering that this new quasi-judicial body was even willing to pronounce on complaints from individuals or organisations alleging violations of the African Charter's provisions. The idea of a court had been rejected during negotiations on the drafting of the African Charter, it was argued, in part, because this did not fit the 'African' approach of settling disputes in an amicable manner. The final provisions of the African Charter suggest, on paper, a potentially weak organ in the African Commission, albeit with both a protective and promotional mandate.

Over the years the African Commission moved from interpreting the African Charter as providing it with the mandate to decide on complaints submitted by individuals and non-governmental organisations (NGOs), initially adopting decisions of only one or two paragraphs in length, to increasingly lengthy decisions that often list detailed reparations that the state authorities must take to remedy the violations found. Yet, as others have observed, relatively little attention had been paid to 'the degree to which, and under what

conditions, states implement the judgments of the legal bodies designed to interpret and enforce those conventions'.<sup>1</sup> During the last decade there has been growing interest in examining the extent to which states implement decisions or judgments from supranational human rights bodies, including the African Commission, partly in response to what has been described as an 'implementation crisis'.<sup>2</sup> Within this discourse, scholars such as Heyns have considered the criticism levelled at the human rights bodies for the perceived lack of implementation with their decisions and the consequent impact on their legitimacy.<sup>3</sup>

This article argues that, although the African Commission has to deliver a broad mandate with limited resources, nevertheless, the Commission has a variety of means by which it can, and does, monitor and facilitate implementation of its decisions. However, it has struggled to use these measures systematically and develop a coherent role for itself in implementation. This position has been further complicated by having to share the space, since 2004, of protecting rights in the African Charter with an African Court on Human and Peoples' Rights (African Court). With the African Commission for a long time having been criticised for its ineffectiveness, one of the reasons for the creation of the African Court was the hope that binding judgments from a continental judicial body would be more likely to be complied with than the perceived 'non-binding' decisions from the African Commission.<sup>4</sup> While this has not been proved correct, and research has demonstrated that factors other than the legal status of a decision or judgment are more significant in determining levels of implementation,<sup>5</sup> this nevertheless adds a further dimension to how the Commission should define its role.

There is a school of thought that 'enforcement' through processes and clear consequences are more likely to result in implementation

- 1 Open Society Justice Initiative *From judgment to justice: Implementing international and regional human rights decisions* (2010) 12.
- 2 Open Society Justice Initiative (n 1) 11; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 1.
- 3 C Heyns & F Viljoen *The impact of the United Nations human rights treaties* (2002) 6; Murray & Long (n 2); P Engstrom 'Reconceptualising the impact of the Inter-American human rights system' (2017) 8 *Direito & Práxis Revista* 1250.
- 4 UO Umzurike 'The protection of human rights under the Banjul Charter on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* 82; G Naldi & K Magliveras 'The proposed African Court of Human and Peoples' Rights: Evaluation and comparison' (1996) 8 *African Journal of International and Comparative Law* 945; N Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 64.
- 5 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights between 1993 and 2004' (2007) 101 *American Journal of International Law* 33; Murray & Long (n 2).

by states.<sup>6</sup> Consequently, one of the main criticisms of the African Commission, and other supranational bodies, is that the lack of enforcement mechanisms makes them weak and hinders implementation of their findings.<sup>7</sup> However, other scholars have argued that persuasion, dialogue and cooperation is more effective in securing implementation.<sup>8</sup> In practice, supranational bodies can, and do, play a variety of roles in implementation, such as monitoring, persuading, facilitating, and naming and shaming. Drawing upon a project aimed at tracking implementation of supranational bodies' decisions,<sup>9</sup> this article argues that the African Commission can increase the likelihood of implementation of its decisions by clarifying its role and developing a more strategic approach to using both soft and more forceful approaches at various stages in the post-decision process.<sup>10</sup>

Although the African Commission has set up procedures and used its existing mechanisms, as will be seen below, as a way of tracking the measures taken by states, it has employed these inconsistently and has not made full use of the range of tools at its disposal. Overall, it is difficult to discern a clear approach to monitoring implementation.

This lack of clarity has had an impact not only on the extent to which it considers it should, through dialogue, persuade states to implement its decisions, or take more forceful measures, but also how much discretion and leeway it should be providing to states in repairing the harm done; whether and how it will assess whether states have done enough; how visible these processes should be; and when it will increase pressure by referring to judicial or political bodies. If the African Commission were clearer in its role, this could ensure greater consistency and coherence in its approach, thereby increasing the likelihood of implementation.

6 G Downs 'Enforcement and the evolution of cooperation' (1998) 19 *Michigan Journal of International Law* 319.

7 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* 468; L Oette 'Bridging the enforcement gap' in C Hillebrecht, *Domestic politics and international human rights tribunals. The problem of compliance* (2014) 19.

8 OC Okafor *The African human rights system, activist forces and international institutions* (2007) 83-86; C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: What role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71.

9 [www.bristol.ac.uk/law/hrlip](http://www.bristol.ac.uk/law/hrlip) (accessed 14 November 2021).

10 Sandoval et al (n 8).

## 2 Setting the scene: The importance of implementation

There is no consistent approach to the application of the terms 'implementation' and 'compliance'. They are used inconsistently and sometimes interchangeably by human rights bodies, states, civil society organisations (CSOs), scholars and other stakeholders. The African Commission is no exception and there is no coherent policy on the terms used, when and in what context.

In this article we apply the term 'implementation' to the process by which states take measures at the national level to address issues of concern raised by the human rights treaty bodies. Typically, this is a legal process to incorporate them in 'domestic law through legislation, judicial decision, executive decree, or other process'.<sup>11</sup>

The implementation of decisions is important for numerous reasons. First, states have an obligation under international law to repair any harm done to victims of human rights violations. This right is enshrined in numerous treaties and instruments, and the African Commission has reiterated that '[s]tate parties to the African Charter on Human and Peoples' Rights (the African Charter) are obliged to ensure both in law and practice that victims of violations of the human rights enshrined in the African Charter have access to and obtain redress'.<sup>12</sup>

In addition to identifying individual measures that need to be addressed, decisions on individual communications can assist states to identify areas in need of reform. Implementation processes can form part of ongoing efforts to develop strategies that support institutional or legislative reform; capacity building and training of state officials and agents, or anti-corruption initiatives, to strengthen the professionalism of public services and build trust in state institutions.<sup>13</sup> As the Office of the United Nations High Commissioner for Human Rights (OHCHR) has noted, it is through

the adjudication of individual cases, that international norms that may otherwise seem general and abstract are put into practical effect. When

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11 D Shelton 'Law, "non-law" and the problem of soft law' in D Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (2003) 5.

12 Art 5(1) General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment.

13 D Long & R Murray *Providing reparation for human rights cases: A practical guide for African states* (2019), <https://www.bristol.ac.uk/media-library/sites/law/documents/Guide.pdf> (accessed 29 November 2021).

applied to a person's real-life situation, the standards contained in international human rights treaties find their most direct application.<sup>14</sup>

Within this implementation dynamic between states and complainants and victims, it is recognised that supranational bodies such as the African Commission have a key part to play to incentivise, facilitate and trigger implementation.<sup>15</sup> In this context, the Commission can, and does, undertake a range of roles in the monitoring its own decisions, whether this is gathering information; reporting on the measures taken; engaging in dialogue with the parties; interpretation and technical assistance; assessment; coordination; or enforcement,<sup>16</sup> although, as this article argues, our research found that the African Commission is not using these approaches systematically or fully.

Softer forms of interaction, such as 'deliberation, cooperation and continuous exchange'<sup>17</sup> (a managerial approach to compliance),<sup>18</sup> may in certain circumstances be more effective. Full implementation can take time and, therefore, the ability to maintain this dialogue over a sustained period, if necessary, is also important.<sup>19</sup> However, dialogue may run its course or not be effective for certain situations and, therefore, the ability to move to less persuasive measures, what Heyns refers to as turning 'the international enforcement screws tighter',<sup>20</sup> may be required.

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- 14 Office of High Commissioner for Human Rights *Procedure for complaints by individuals under the human rights treaties* (2019), <https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx> (accessed 29 November 2021).
  - 15 A Donald, D Long & A-K Speck 'Identifying and assessing the implementation of human rights decisions' (2020) 12 *Journal of Human Rights Practice* 126; Murray & Long (n 2) 119, 135, 136, 139; D Long & R Murray 'The role and use of soft law instruments in the African human rights system' in S Lagoutte, T Gammeltoft-Hansen & J Cerone (eds) *Tracing the roles of soft law in human rights* (2016) 99.
  - 16 R Murray et al 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150.
  - 17 B Çali, & A Koch 'Lessons learnt from the implementation of civil and political rights judgments' (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1858663](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1858663) (accessed 29 November 2021).
  - 18 A Chayes & A Chayes *The new sovereignty: Compliance with international regulatory agreements* (1995).
  - 19 C Sandoval et al Practice Note 'The European system of human rights protection: no Rolls-Royce, but a solid engine fit for the future?' (2020) 12 *Journal of Human Rights Practice*.
  - 20 C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483.

### 3 Overview of African Commission and its procedures to monitor implementation

The African Commission has been willing to take on a monitoring role, as illustrated not only by mechanisms it has set up specifically to follow up on its decisions, but also through the use of its other procedures. Prior to the adoption of revised Rules of Procedure in 2010 there was no institutionalised procedure to follow up on decisions, although the Commission had used its broad range of procedures and mechanisms to follow up on its decisions, albeit on an *ad hoc* basis.<sup>21</sup> The procedure for follow-up on decisions is now set out under Rule 125 of the newly-revised Rules of Procedure, adopted in 2020.<sup>22</sup> This Rule requires the state concerned to inform the African Commission, within 180 days, of the measures that are being taken to implement a decision, where there is a finding of a violation.<sup>23</sup> The Rule also prescribes a role for the commissioner, who is the Rapporteur for the Communication, to be a focal point for monitoring implementation.<sup>24</sup> In accordance, with this Rule the African Commission can also raise issues of 'non-compliance' with its decisions, and refer the matter to the attention of the competent policy organs of the African Union (AU).<sup>25</sup>

However, as discussed below, despite the requirement for the state concerned to reply, and the creation of focal points at the African Commission on specific communications, in practice the time limits for replies are typically ignored, and the Commission struggles to obtain information from the state on its actions post-decision.<sup>26</sup> Furthermore, the Commission has appeared reluctant to inform and engage the AU organs, when a state is apparently failing to implement.<sup>27</sup>

In 2011 the African Commission established a Working Group on Communications, and although initially this Working Group was not given the express mandate to follow-up on decisions,<sup>28</sup> this was

21 Murray & Long (n 2) 120-121.

22 African Commission on Human and Peoples' Rights 'Rules of Procedure of the African Commission on Human and Peoples' Rights', <https://www.achpr.org/rulesofprocedure#ch3.3> (accessed 29 November 2021).

23 Rule 125(1) (n 22).

24 Rule 125(5) & (6).

25 Rule 125(8).

26 African Commission on Human and Peoples' Rights 'Report on the Status of Communications and Intersession Report of the Working Group on Communications'(2020) 25-27.

27 Murray & Long (n 2) 119-139.

28 African Commission on Human and Peoples' Rights 'Resolution Establishing a Working Group on Communications and Appointment of Members' (2011).

rectified in 2012 when a resolution was passed which expanded the mandate of this Working Group, entrusting it to:<sup>29</sup>

- (1) coordinate follow-up on decisions of the Commission on Communications, by concerned Rapporteurs;
- (2) collect information on the status of implementation of the Commission's decisions;
- (3) present a consolidated report on the status of implementation of the Commission's decisions on Communications at each ordinary session, in line with Rule 112(7) of its Rules of Procedure.

This mandate has been renewed in subsequent resolutions, most recently in 2020.<sup>30</sup> The Working Group, therefore, has an explicit power and duty to coordinate follow-up activity. However, although the Working Group does submit an activity report with a specific section devoted to implementation of its decisions, these reports nevertheless contain little by way of useful data. The Working Group has highlighted that as a result of a lack of information, 'it is extremely difficult to measure the level of implementation and to assess the impact of the Commission's decisions'.<sup>31</sup>

In recent years the African Commission has reflected on its role in monitoring the implementation of decisions. In 2017 and 2018 it held two regional seminars on this issue, the first in Dakar in August 2017<sup>32</sup> and the other in Zanzibar in September 2018.<sup>33</sup> These consultations brought together Commission members with representatives from states, national human rights institutions, and civil society to take stock and discuss ways in which to strengthen the African human rights system, through the Commission's human rights promotion and protection mandate. The outcomes of these discussions provide some useful and practical ideas, although to date very few have been actioned. For example, one of the recommendations was to establish

29 African Commission on Human and Peoples' Rights 'Resolution on the Expansion of the Mandate of the Working Group on Communications and Modifying its Composition' (2012) 1.

30 African Commission on Human and Peoples' Rights 'Resolution 462 on the Renewal of the Mandate, Appointment of the Chairperson and Reconstitution of the Working Group on Communications' (2020).

31 African Commission on Human and Peoples' Rights 'Report on the Status of Communications and Intersession Report of the Working Group on Communications' (2020) para 25, <https://www.achpr.org/sessions/sessionsp?id=354> (accessed 29 November 2021).

32 African Commission on Human and Peoples' Rights 'Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (August 2017) Dakar, Senegal, <https://www.achpr.org/news/viewdetail?id=13> (accessed 29 November 2021).

33 African Commission on Human and Peoples' Rights 'Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (September 2018), <https://www.achpr.org/news/viewdetail?id=3> (accessed 29 November 2021).



an implementation unit in the Secretariat,<sup>34</sup> which would provide necessary support to the Working Group on Communications and a vital focal point to request information from states, complainants and other stakeholders on measures taken to implement decisions. Similarly, a recommendation was made to develop a database with up-to-date information on the status of implementation of decisions by state parties.<sup>35</sup> Other recommendations from these consultations were also aimed at increasing visibility by, *inter alia*, developing a communication strategy taking into account the special relationships between the Commission, state parties, national human rights institutions and civil society organisations and to collaborate with all stakeholders, including national human rights institutions, in disseminating recommendations and decisions of the Commission.<sup>36</sup>

Second, the African Commission has used its other mechanisms to seek information on the measures taken by states to implement the decisions, to monitor that and to persuade states to implement.

The state reporting mechanism under article 62 has been used to follow up on decisions, albeit not systematically. Some states have used their periodic state party reports to inform the African Commission on the measures they have taken. For example, the Republic of Kenya included specific information on the *Endorois* case in its combined 13th and 14th periodic reports submitted in March 2021. This provides information on the task force established in 2014 to facilitate implementation, and highlights those measures on which it has taken action, as well as those that are outstanding. It also indicates some challenges for implementation.<sup>37</sup>

Although by no means typical, the African Commission has sometimes included in its decisions an express recommendation for the state to provide information on implementation in its next periodic report. For example, in the case of *LRF v Zambia* the Commission requested 'the Republic of Zambia to report back to the Commission when it submits its next country report in terms of Article 62 on measures taken to comply with this recommendation'.<sup>38</sup> The revised Rules of Procedure, as mentioned above, include a series of deadlines for a violator-state to provide information on implementation, and

34 African Commission on Human and Peoples' Rights (n 33) 9.

35 African Commission on Human and Peoples' Rights (n 33).

36 African Commission on Human and Peoples' Rights (n 33) 9.

37 Republic of Kenya combined 12th and 13th Periodic Reports 2015-2020 paras 144-146.

38 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

these could be reinforced by a standard recommendation in decisions requiring information on implementation in the next periodic report.

In accordance with Rules 7, 76 and 86 of the Rules of Procedure, the African Commission is mandated to undertake promotional and protection missions to states. In a few instances these missions have been used by commissioners as an opportunity to gather information on any measures taken to implement its decisions, and to engage not only with the parties concerned but also other stakeholders such as national human rights institutions and CSOs. For example, during a promotional visit to Mauritania in 2012, questions were asked in relation to a number of related communications.<sup>39</sup> Similarly, in a mission to Botswana in 2005 the visiting delegation requested information on the steps taken to implement recommendations on the decision on the *Modise v Botswana* communication.<sup>40</sup>

The African Commission has also been receptive to developing and using other measures to focus on the implementation of its decisions, although such measures are exceptional. For example, back in 1995, even before follow up on decisions was expressly provided in the Rules of Procedure, the Commission used an extraordinary session to focus principally on follow-up on a number of communications involving the government of Nigeria.<sup>41</sup>

More recently, mirroring the approach of the Inter-American Court of Human Rights,<sup>42</sup> the African Commission has held two 'implementation hearings', at the request of the complainants, as a means to gather information and foster dialogue to encourage action by the state to provide the requisite reparations measures, one in respect of a series of cases against Mauritania, the other for a case against Kenya.<sup>43</sup>

39 African Commission on Human and Peoples' Rights Report of the Promotional Mission to the Islamic Republic of Mauritania (2012) 9.

40 African Commission on Human and Peoples' Rights Report of the Promotional Mission to the Republic of Botswana (2005) 13.

41 African Commission on Human and Peoples' Rights 'Second Extra-Ordinary Session Final Communiqué' 1995) para 1; African Commission on Human and Peoples' Rights 'Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights' (18-19 December 1995).

42 Art 69(3) Inter-American Court Rules of Procedure (2009), <https://www.cidh.oas.org/basicos/english/basic20.rules%20of%20procedure%20of%20the%20court.htm> (accessed 29 November 2021); C Sandoval 'The power of hearings: Unleashing compliance with judgments at the Inter-American Court of Human Rights' 19 February 2021, <https://hrcessex.wordpress.com/2021/02/19/the-power-of-hearings-unleashing-compliance-with-judgments-at-the-inter-american-court-of-human-rights/> (accessed 29 November 2021).

43 African Commission on Human and Peoples' Rights 'Thirty-Fourth Activity Report' (2013) 5; Minority Rights Group International 'The Endorois decision – Four years on, the Endorois still await action by the government of Kenya', <http://minorityrights.org/2014/09/23/the-endorois-decision-four-years-on->

In respect of the *Endorois* decision, the implementation hearing was followed by a workshop held on 23 September 2013 on the status of implementation of the *Endorois* decision, organised by the Commission's Working Group on Indigenous Populations/Communities in collaboration with the Endorois Welfare Council.<sup>44</sup> Unfortunately, the government of Kenya failed to participate in the implementation workshop and to report back as promised during the oral hearing; consequently the Commission adopted Resolution 257 on 5 November 2013 urging the government of Kenya to implement the decision. Such resolutions, in response to the state's failure to implement its decision, have been typically used, albeit rarely, following consistent pressure from the complainants, or as a result of concern over a deteriorating situation in the country concerned.<sup>45</sup> These resolutions urge compliance by reminding states of the action they should be taking,<sup>46</sup> and noting the need for dialogue, including a decision to undertake a promotional mission to the country concerned.<sup>47</sup>

Finally, the former Rules of Procedure of the African Commission enabled the Commission to refer cases to the African Court on the basis of a state's failure or unwillingness to comply with its decisions.<sup>48</sup> The objective of this procedure was to provide a further avenue to apply pressure on a state to implement, and arguably was founded on the mistaken assumption that states are more likely to implement judgments from a regional court than the decisions of the African Commission. Yet, the Commission used this only twice with respect to failure to comply with its provisional measures,<sup>49</sup> and never for a decision. The revised 2020 Rules of Procedure make no explicit reference to the ability to refer a decision to the African Court on the basis of failure to implement.

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the-endorois-still-await-action-by-the-government-of-kenya/ (accessed 12 July 2017).

44 Minority Rights Group International (n 43).

45 African Commission on Human and Peoples' Rights 'Resolution on the Human Rights Situation in the Republic of Cameroon' ACHPR/Res. 395 (LXII) (2018); Resolution on the Human Rights Situation on Eritrea (21 November-5 December 2005).

46 African Commission on Human and Peoples' Rights 'Resolution Calling on the Republic of Kenya to Implement the Endorois Decision' ACHPR/Res.257 (2013).

47 African Commission on Human and Peoples' Rights 'Resolution on the Human Rights Situation in the Republic of Cameroon' ACHPR/Res. 395 (LXII) (2018).

48 Rule 118 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2011).

49 Application 2/2013, *African Commission on Human and Peoples' Rights v Libya*; Application 6/2012, *African Commission on Human and Peoples' Rights v Kenya*.

## 4 Observations on the African Commission's approach post-decision?

Through these various rules and mechanisms, the African Commission has tried to articulate and apply an approach to monitoring implementation post-decision. Principally, it has focused on gathering information, mostly kept internally, and reporting sporadically on the measures taken by the state to implement the decision.

In a few instances it has gone further to offer a space for dialogue between the parties, a role favoured by the Inter-American Court, although not one with which the Commission is particularly comfortable. For example, although the government of Kenya failed to engage fully with the implementation hearing, and other discussions, in respect of the *Endorois* decision, the hearing enabled the Commission to offer its 'good offices' to the parties to facilitate implementation, to 'forge dialogue and strategise with the government and civil society'.<sup>50</sup>

Yet, when states have not implemented the decision, or not provided sufficient detail to enable the African Commission to conclude otherwise, subject to a few exceptions, the Commission has been largely unwilling to push it further. Where it has taken on the role of 'enforcer', this has involved, as noted above, publishing limited information on decisions that have not been implemented. Similarly, where it could refer cases of non-implementation to the Court or political organs of the AU, these processes have rarely, if ever, been utilised.

### 4.1 Degree of discretion to states

The reluctance of the African Commission to take stronger measures in the event of non-implementation, for example, to refer the matter to the AU political organs or the African Court, is reflected in the greater discretion and leeway given to states. For example, it is not uncommon for states to fail to adhere to the deadlines in the Rules of Procedure to reply to the Commission on the measures they have taken to implement the decision. Yet, it is not at all clear what the African Commission does to address this, other than issuing further requests for information.

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<sup>50</sup> <https://achpr.org/news/viewdetail?id=139> (accessed 29 November 2021).

In addition, while its decisions show increasing sophistication and specificity in terms of the content of the reparations,<sup>51</sup> the decisions do not show the same level of nuance, for example, with respect to deadlines or identifying relevant actors.

Specificity can mean different things, from the content of the reparation, to deadlines set, and determining the state actors who are responsible for implementation.<sup>52</sup> However, the African Commission has again been inconsistent in the approach it has adopted, and the degree of discretion given to states, to interpret and elaborate on measures required to implement a decision, has varied from case to case.

## 4.2 Whether it will assess implementation

Determining whether implementation or compliance has taken place is not a straightforward task. As Hillebrecht notes, '[i]nternational relations and international legal scholars have long struggled with measuring compliance, and part of this challenge comes from the problem of endogeneity'.<sup>53</sup> There may not necessarily be a causal link between the behaviour of the state and the particular rule or finding.<sup>54</sup> Therefore, the 'influence' that the finding of a human rights body may have on state behaviour is an ambiguous concept,<sup>55</sup> and low statistics on implementation 'can partly be explained by some of the challenges of the follow-up procedure'.<sup>56</sup> Others have also cautioned against the use of 'judgment-compliance' as a means to assess the effectiveness of international courts.<sup>57</sup>

With these caveats in mind, while the African Commission has been willing to gather information, including from other sources, on the measures taken by the state to implement the decision, it appears to find it much more difficult to make any assessment on the extent to which these measures are appropriate and fulfil what is required. It has not, for instance, made visible any detailed information on what

51 Communication 426/12 *Agnes Uwimana-Nkusi & Saidati Mukakibibi v Rwanda* (2021).

52 R Murray & C Sandoval 'Balancing specificity of reparation measures and states' discretion to enhance implementation' (2020) 12 *Journal of Human Rights Practice* 101-124. GL Neuman 'Bi-level remedies for human rights violations' (2014) 55 *Harvard International Law Journal* 323.

53 Hillebrecht (n 7) 42.

54 Murray & Long (n 2) 28; F Viljoen 'Exploring the theory and practice of the relationship between international human rights law and domestic actors' (2009) 22 *Leiden Journal of International Law* 177, 180; Viljoen & Louw (n 5) 1.

55 Murray & Long (n 2) 28-29.

56 As above.

57 Y Shany 'Assessing the effectiveness of international courts: A goal-based approach' (2012) 106 *American Journal of International Law* 225.

measures states may have taken to implement a decision, neither has it identified any criteria for how it may determine whether or not those measures are sufficient.

### 4.3 How much visibility

Writing in 2001, Heyns and Viljoen argue that ‘the widespread ignorance of the treaty system in government circles, among lawyers and in civil societies around the world, effectively blocks any impact that the treaties may otherwise have had’,<sup>58</sup> a criticism also applicable to the African Commission. Thus, increased visibility of the measures that states have or have not taken to implement decisions may ‘heighten the incentive to comply by publicising non-compliance, and giving discursive tools to civil society and other states interested in pressuring for compliance’.<sup>59</sup> Supranational bodies, and the African Commission among them, have used what Heyns calls ‘the shame factor’ as a ‘potentially powerful tool to influence the behaviour of states’.<sup>60</sup>

The African Commission Working Group on Communications presents an activity report during the public sessions of the Commission that can include any information received on the status of implementation of its decisions. However, reports are not always presented, and even when they are, these reports typically include no information on implementation of specific decisions; rather they have merely bemoaned the lack of information on implementation.<sup>61</sup> Accordingly, although the process for following up on its decisions now is codified in the Rules of Procedure, to date there is still limited data on implementation that is made public.

Part of the problem is that there is an apparent lack of information being submitted to the African Commission by the state concerned or sometimes the complainant. This is compounded by the limited publicity by the Commission of the information it receives. For example, in its Activity Report for November 2016-May 2017 the Working Group noted that ‘[t]o date, it is not in the remit of the

58 Heyns & Viljoen (n 20) 483.

59 AV Huneus et al *Compliance with international court judgments and decisions* 17, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2198595](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198595) (accessed 29 November 2021).

60 C Heyns & F Viljoen ‘The regional protection of human rights in Africa: An overview and evaluation’ in PT Zeleza & PJ McConnaughay (eds) *Human rights, the rule of law, and development in Africa* (2011) 129.

61 African Commission on Human and Peoples’ Rights ‘Report on the Status of Communications and Intersession Report of the Working Group on Communications’ (2020) paras 25-27.

Commission to provide an exhaustive and comprehensive report on the status of implementation of its decisions/recommendations pertaining to Communications'.<sup>62</sup>

#### 4.4 How and when it will bring other actors in

Heyns's 'holistic view of human rights protection' highlights the need to engage with other actors to facilitate implementation.<sup>63</sup> Knowing when to refer to judicial bodies or policy organs can be useful when the mandate of the African Commission proves ineffective or to have reached its limit.

As noted above, the previous Rules of Procedure of the Commission provided that it could refer cases of non-compliance to the African Court. This is inherently problematic. First, it requires the African Commission to have a good sense of what the state has done to implement the decision which, as we have seen, can be difficult to obtain and can be very resource intensive. Second, the reparations need to be implementable but also measurable. Finally, it indirectly asks the African Court to add its weight to a matter where the reputation of the Commission has been insufficient to generate action by the state. In effect, by referral, the African Commission is acknowledging its own weaknesses. It therefore is not surprising that no cases were referred for failure to implement a decision.

Referral to policy organs can also facilitate implementation, as the European experience shows, where monitoring of implementation takes place largely in the hands of political actors and not by the European Court of Human Rights itself.<sup>64</sup> The African Commission has held on to monitoring its own decisions, despite the potential that could be played by the AU policy organs and in particular its ability to refer matters of 'non-compliance' to the AU organs with a request that they 'take the necessary measures for the implementation of its decisions'.<sup>65</sup> Conversely, the development of these relationships is also dependant on the response of the AU, and here the African Commission has noted that the AU and its policy organs should 'engage more actively'.<sup>66</sup> Interaction with other AU organs in

62 African Commission on Human and Peoples' Rights 'Inter-sessional Activity Report' (2017) 6.

63 Heyns & Viljoen (n 60) 129-143; Sandoval et al (n 8).

64 Sandoval et al (n 8).

65 Rules 125(8) and (9), Rule 138 Rules of Procedure of the African Commission on Human and Peoples' Rights (2020).

66 African Commission on Human and Peoples' Rights 'Report on the Status of Communications and Intersession Report of the Working Group on Communications' (2020) paras 27 & 32.

monitoring the implementation of decisions, such as the African Peer Review Mechanism (APRM),<sup>67</sup> the Peace and Security Council<sup>68</sup> and the Pan-African Parliament (PAP) has been largely forgotten.

The African Commission's revised Rules of Procedure now expressly enable it to seek information on implementation from 'interested parties',<sup>69</sup> and explicitly for national or specialised human rights institutions to inform it of any action it has taken to monitor or facilitate the implementation of the Commission's decisions.<sup>70</sup> These provisions have the potential to directly address an ongoing issue for the Commission of a lack of information on measures taken by the state in respect of decisions, and yet, '[g]leaning information from diverse sources about the actions – or omissions – of states is ... a prerequisite for effective follow-up'.<sup>71</sup> Again, however, despite some innovations by national human rights institutions, such as with the adoption of the Guidelines on the Role of National Human Rights Institutions in Monitoring Implementation of Decisions of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples' Rights, and CSOs, such as the production of an implementation dossier,<sup>72</sup> these have been at the latter's initiative rather than that of the African Commission.

## 5 Conclusions

The African Commission has clearly done a great deal to focus on implementation over the last few years. Looked at in the round, it has used all aspects of its mandate to try to monitor what states are doing post-decision, and it has attempted to think more strategically, in particular through its seminars devoted to the issues which concluded with practical recommendations. Yet, these approaches have been inconsistent and the momentum gained through various important initiatives has not been sustained. Some of the very useful proposals made from the Dakar and Zanzibar seminars, such as that the African Commission develop a 'communication strategy', organise 'training sessions and implementation seminars' and develop 'guidelines ... with indicators to assist ... in monitoring implementation of

67 African Commission on Human and Peoples' Rights 'Activities as Special Rapporteur on Freedom of Expression and Access to Information' (2010).

68 Wachira & Ayinla (n 7) 465.

69 Rule 125(6) of the Rules of Procedure (n 65).

70 Rule 125(2) of the Rules of Procedure (n 65).

71 Donald et al (n 15).

72 IHRDA 'Communication Nos 54/91-61/91, 98-93-164/97, 196/97, 210/98, *Malawi Africa Association et al v Mauritania, Implementation Dossier*' (2011).



its decisions',<sup>73</sup> have not yet all been implemented. Similarly, the African Commission has yet to action publishing decisions 'as soon as possible', including a 'specific clause in each decision according to which the state is responsible for publicising the decision at the national level', and it is not clear whether it has yet created a database 'with periodic updates on the status of implementation' of decisions.<sup>74</sup>

This sporadic approach, we have argued, is the result of the African Commission lacking clarity about what its role should be and, subsequently, what strategy and mechanisms to use and when. This has resulted in a 'patchwork' approach. While it has indicated a willingness to provide a discretion for states in responding to requests for information, and timeframes within which to implement, and although it has stepped into the role of enforcer, on occasion, it is much more reluctant to do so. The Commission has appeared uncomfortable with the use of the more forceful end of the spectrum, and has been unwilling to draw upon the resources of others who might be best placed to do so.

Effective monitoring requires a strategic consideration of various tools of monitoring implementation, persuasive and more forceful, and a nuanced comprehension to appreciate at what stages they might be best utilised. The African Commission does not lack the tools or relationships to do so, but so far has not settled on a clear strategic role.

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73 African Commission on Human and Peoples' Rights 'Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2018).

74 African Commission on Human and Peoples' Rights 'Recommendations from Dakar, General Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2017).