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The role of the African Commission in enhancing compliance with its decisions on communications

Lydia Winyi Kembabazi*

Legal Advocacy Officer, Institute for Human Rights and Development in Africa, The Gambia

<http://orcid.org/0009-0003-0493-568X>

Summary: *The African Commission on Human and Peoples' Rights, an organ of the African Union, is tasked with promoting and protecting human rights across the African continent. A central aspect of its protective mandate is handling individual communications that allege human rights violations by states. While the African Commission has decided on the merits well over 100 individual communications, the implementation of its decisions faces significant challenges that hinder the full realisation of human rights. The primary objective of implementing recommendations arising from individual communications is not to ensure respect for human rights, but to guarantee that victims of human rights violations have access to remedies. This article provides a bird's eye view of the effectiveness of measures put in place by the African Commission and evaluates the role of the African Commission in ensuring the implementation by states of its decisions. The article relies on existing scholarship and the regional seminars on the implementation of decisions, held in 2017 in Dakar, Senegal, and in 2018 in Zanzibar, Tanzania, to identify strategies and recommendations aimed at enhancing the effectiveness of the African Commission in implementing its decisions on individual communications by states. The article argues that the measures outlined in the 2020 Rules of Procedures of the*

* LLB (Makerere) LLM (Central European University, Vienna, Austria); legalkemba@gmail.com

African Commission have not been consistently applied, leading to non-implementation of its decisions by states. As a result, the article offers a series of recommendations aimed at enabling the African Commission to more effectively leverage its procedures and enhance compliance with its decisions and recommendations by states. As an introduction to the 'Special Focus' on the implementation of the Commission's decisions, this article draws on other contributions contained in the 'Special Focus'.

Key words: *African Commission on Human and Peoples' Rights; individual communications implementation; follow-up; Rules of Procedure; implementation unit; recommendations*

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) was established on 2 November 1987,¹ with the primary mandate of advancing and safeguarding human rights across Africa. According to article 30 of the African Charter on Human and Peoples' Rights (African Charter), the African Commission serves as the primary continental body for the promotion and protection of human and peoples' rights on the continent. The African Commission is empowered to advocate, defend and provide interpretations of the various provisions of the African Charter. Additionally, the African Commission is tasked with fulfilling any other responsibilities delegated to it by the African Union (AU) Assembly of Heads of State and Government.²

This article focuses on individual communications, as the interstate procedure has been invoked only on rare occasions.³ In fact, the African Commission has noted in some of its promotional materials that the procedure governing interstate complaints has been explained only in brief terms, because of its limited use.⁴ Of the over 400 communications handled by the Commission, the majority are individual complaints, with only a limited number

¹ African Commission on Human and Peoples' Rights (African Commission) 'Establishment, composition and functioning of the Commission', <https://achpr.au.int/en/about/history> (accessed 10 October 2024).

² Arts 45(1)(a), (b), (c), 45(2), 45(3) & 45(4) African Charter on Human and Peoples' Rights.

³ The African Commission has to date addressed only four inter-state complaints. See F Viljoen 'Inter-state complaints under the African human rights system: A breeze of change?' (2024) 13 *International Human Rights Law Review* 96-129.

⁴ African Commission 'Communication procedure' 2, <https://achpr.au.int/sites/default/files/files/2021-04/achprcommunicationprocedureeng.pdf> (accessed 11 November 2024).

involving organisations and groups.⁵ It is important to note that the impact of the African Commission's decisions has been significantly limited, largely due to the lack of effective and strategic follow-up to ensure the full implementation of its decisions.⁶ This, combined with lack of political will by state parties, lack of awareness about the existence of the recommendations, and lack of clarity as to which government agency has the mandate to ensure compliance with recommendations, has inhibited the full enjoyment of human rights in general and inadvertently impeded access to justice for individuals.⁷ Implementation or compliance with its decisions enhances the legitimacy of the African Commission.⁸

This article examines the pressing need for the prompt implementation of decisions made by the African Commission. It notes, in part 2, the efforts of the African Commission to ensure implementation of its decisions, and in part 3 highlights strategies and recommendations that can be employed to enhance the efficiency of the Commission when it comes to executing its decisions regarding individual communications to be translated into justice for human rights violations.

2 Measures taken by the African Commission towards implementation of its decisions

This part of the article examines the state of implementation of the African Commission's decisions, analysing the mechanisms through which the Commission may follow up with state parties.

5 R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 151.

6 On the Commission's role on implementation, see Murray and others (n 5); C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 31; F Viljoen 'Forging a credible African system of human rights protection by overcoming state resistance and institutional weakness: Compliance at a crossroads' in R Grote, MM Antoniazzi & D Paris (eds) *Research handbook on compliance in international human rights law* (2021) 362; R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 845; VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 13.

7 R Murray 'Confidentiality and the implementation of the decisions of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 10.

8 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties ACHPR/Res.97(XXX)06, <https://achpr.au.int/en/adopted-resolutions/97-resolution-importance-implementation-recommendations> (accessed 10 October 2024).

Clearly, compliance under the African Commission remains a work in progress.

In the discharge of its mandate over the years, the African Commission has steadily evolved as an apparatus for entrenching human rights and democratisation in Africa.⁹ It has taken significant steps to ensure compliance with its decisions, and it deserves support and commendation for its efforts in this regard. It has put various mechanisms in place,¹⁰ some of which are designed specifically for follow-up purposes, and these mechanisms can be effectively used to enhance the implementation of its decisions. The adoption of its revised Rules of Procedure in 2020 has brought clarity to the follow-up procedures, as they are now explicitly outlined in Rule 125. Further, in its Strategic Framework (2021-2025),¹¹ the African Commission includes enhanced compliance and follow-up of recommendations of its decisions among its priorities. Under its strategic goals and outputs, a strategy to ensure compliance are 'enhanced monitoring, follow up and tracking of compliance by state parties'.¹² This strategy includes improved adherence to reporting obligations; systematic engagement of civil society organisations (CSOs) and national human rights institutions (NHRIs) in the state reporting procedures; an operational implementation unit; and institutionalising implementation of its recommendations by member states.¹³

2.1 Greater normative clarity in 2020 Rules of Procedure

The African Commission has taken significant steps to guide the engagement process and ensure the effective implementation of its decisions through the comprehensive provisions outlined in its 2020 Rules of Procedure. These Rules of Procedure provide a robust framework to facilitate effective engagement with state parties and to ensure the implementation of the African Commission's decisions. The designation of a rapporteur for each communication,¹⁴ the 180-day feedback requirement,¹⁵ and the mechanism to address non-compliance,¹⁶ all contribute to a more transparent and accountable process. These provisions create a forum for ongoing dialogue and

9 Okoloise (n 6) 31.

10 State Reporting; Promotion and Protection Missions; Issuance of Press Statements, Letters of Concern; Resolutions; Activity Report of the ACHPR which reports to the Assembly on the compliance with decisions.

11 African Commission 'Strategic Framework 2021-20215' 2020.

12 African Commission (n 11) 8.

13 African Commission (n 11) 28.

14 Rule 125(5) of the 2020 Rules of Procedure of the African Commission on Human and Peoples' Rights.

15 Rules of Procedure (n 14) Rule 125(1).

16 Rules of Procedure (n 14) Rules 125(8) & 9.

cooperation, ultimately enhancing the protection and promotion of human rights in Africa. The Rules serve to facilitate state reporting, enhance state participation, and keep track of the implementation of the decisions of the African Commission.

2.2 Implementation hearings

Although used sparingly, the African Commission has made use of implementation hearings as a tool to enhance state compliance with its decisions.¹⁷ These hearings provide an opportunity for the Commission to assess the progress of states in implementing its rulings and to engage directly with the parties involved.¹⁸ To date, there have been two cases in respect of which the African Commission has held implementation hearings, allowing for a closer examination of the extent to which its decisions have been carried out by the states concerned. The first implementation hearing by the African Commission took place on 26 April 2012, in the case of *Malawi African Association & Others v Mauritania*.¹⁹ The Commission held a hearing to listen to the parties in the case, considered an 'implementation dossier' prepared by CSOs, and followed up on the overall implementation of its decision in the case.²⁰

The second hearing was that of the *Endorois* case,²¹ where the African Commission held an oral hearing at its fifty-third ordinary session in April 2013. During this hearing, the parties provided updates on the progress of implementing the Commission's decision in the case. Following the hearing, the African Commission on 29 April 2013 sent a *note verbale* to the government of Kenya, reminding it of the commitment made during the oral hearing to submit an interim report within 90 days and a comprehensive report at the fifty-fourth ordinary session of the Commission.²² Subsequently, on 23 September 2013, the African Commission's Working Group on Indigenous Populations/Communities, in collaboration with the Endorois Welfare Council, organised a workshop to assess the status of implementation of the *Endorois* decision.²³ However, despite these efforts, the Kenyan government failed to participate in the

17 Viljoen (n 6) 370.

18 Ayeni & Von Staden (n 6) 13.

19 (2000) AHRLR 149 (ACHPR 2000).

20 Ayeni & Von Staden (n 6) 14.

21 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).

22 Minority Rights Group 'The *Endorois* decision' – Four years on, the Endorois still await action by the government of Kenya', <https://minorityrights.org/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/> (accessed 12 November 2024).

23 Ayeni & Von Staden (n 6) 14.

workshop and did not provide the promised feedback. As a result, on 5 November 2013, the African Commission adopted Resolution 257, urging the government of Kenya to fulfil its obligations under the African Charter and implement the *Endorois* decision.²⁴

The practice of holding implementation hearings by the African Commission has not been a consistent or systematic approach but rather an *ad hoc* process, often facilitated by litigants and CSOs.²⁵ This is because the African Commission lacks formal guidelines for conducting such hearings, which would allow it to initiate these independently. As a result, the Commission largely relies on non-governmental organisations (NGOs) to initiate these hearings, as has been the case with the two aforementioned cases. While the African Commission has used implementation hearings as a mechanism to monitor state compliance with its decisions, the overall effectiveness of this approach has been limited, likely due to inconsistencies in its application. In the *Endorois* case, despite the African Commission's efforts to engage with the government of Kenya through hearings, workshops and reminders, the state failed to fulfil its commitments, underscoring the challenges of ensuring compliance.

2.3 Periodic state reporting

The periodic state reporting process is a fundamental mechanism for monitoring implementation, not only of treaty provisions but also of the decisions of the African Commission. During the examination of periodic state reports, the Commission has asked questions about measures that states have taken to implement the African Charter or its decisions, for instance, during the Concluding Observation of Mauritania.²⁶ In its thirty-fifth Activity Report, the African Commission amended the structure of its activity reports to refer to the implementation status of decisions,²⁷ and included follow-up

24 Resolution Calling on the Republic of Kenya to Implement the Endorois Decision ACHPR/Res.257(LIV) 2013.

25 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* 20.

26 See Concluding Observations – Mauritania: 10th, 11th, 12th, 13th & 14th Periodic Reports, 2006-2014 para 10, <https://achpr.au.int/index.php/en/concluding-observation/concluding-observations-mauritania10th-11th-12th-13th-14th-perio> (accessed 18 November 2024); Concluding Observations and Recommendations – Mauritania: 8th and 9th Periodic Reports, 2002-2005, <https://achpr.au.int/en/concluding-observation/concluding-observations-and-recommendations-mauritania-8th-and-9th-periodic> (accessed 18 November 2024).

27 African Commission 35th Activity Report of the African Commission, adopted October 2013, reference to *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2011) AHRLR 90 (ACHPR 2011) para 24, to 'follow up on implementation'.

on decisions in its fact-finding missions by special procedures and its promotional missions, and it has made reference to the status of implementation of decisions in country-specific resolutions.²⁸ However, the value and effectiveness of this method have been undermined by states that are not up to date with their initial or periodic state reports. In his presentation at the eighty-first ordinary session of the African Commission, Commissioner Hatem Essaïem stated that only 10 African states are fully up to date with their periodic reports.²⁹ He further noted that five African states were in the process of catching up on their reporting obligations, while 10 states were behind by one report, three were delayed by two reports, and one was delayed by three reports.³⁰ Additionally, 19 states are more than three reports overdue, and six African countries have never submitted a single report in the history of the African Commission.³¹

Another factor that hinders state parties in effectively reporting is a lack of coordination between the various state departments that have to contribute to the report.³² An additional problem faced by the state departments responsible for the compilation of the report is the fact that they often also have to file state reports under other international human rights bodies such as the Universal Periodic Review (UPR). The pressure to meet multiple reporting obligations can strain resources and lead to delays or compromises in the quality of the reports submitted to the African Commission. During the seventy-ninth ordinary session, the Deputy Minister of Justice, Constitutional and Religious Affairs of Mozambique identified several factors hindering the ability of states to submit their periodic reports to the African Commission.³³ These factors include inadequate allocation of funds and technical human resources to the national committees responsible for reporting, limiting their ability to effectively carry out their activities. Additionally, challenges in collecting and gathering timely information further delay the submission of reports.³⁴

28 Murray and others (n 5) 157.

29 International Service for Human Rights 'ACHPR81: Situation of state reporting at the African Commission', <https://ishr.ch/latest-updates/achpr81-situation-of-state-reporting-at-the-african-commission/> (accessed 21 November 2024).

30 As above.

31 As above.

32 Open Society Justice Initiative 'Structures and strategies for implementing international human rights decisions: From rights to remedies', <https://www.justiceinitiative.org/uploads/7d34546e-dfe6-450b-82ec-77da3323d4bd/from-rights-to-remedies-20130708.pdf> (accessed 10 November 2024).

33 International Service for Human Rights 'Key stakeholders must coordinate their efforts for states to submit periodic reports', <https://ishr.ch/latest-updates/achpr79-key-stakeholders-must-coordinate-their-efforts-for-states-to-submit-periodic-reports/> (accessed 21 November 2024).

34 As above.

2.4 Adoption of resolutions

The adoption of resolutions is a key function of the African Commission, as outlined in Rule 7(d) of the 2020 Rules of Procedure, read in conjunction with article 45(1) of the African Charter. The African Commission typically issues three types of resolutions, namely, thematic, country-specific and administrative resolutions. Resolutions are directed at a range of actors, with states being the primary audience, urging them to take specific actions to comply with the standards and recommendations outlined in the resolutions.³⁵ The resolutions fall under the category of human rights soft law, specifically referred to as 'secondary soft law'. Their existence and jurisdiction are derived from a treaty, and they provide a normative interpretation of that treaty.³⁶ Thus, resolutions have been one of the principal tools used by the African Commission to advance human rights promotion and protection in Africa. In 2006 the African Commission first appealed to state parties to implement its decisions by adopting Resolution 97 on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties.³⁷ In this Resolution, the African Commission called upon state parties to respect the recommendations and to provide remedy to victims of human rights violations. Subsequent to this, the Commission has used various country and thematic resolutions issued over the years to call on states to implement its decisions.³⁸ For instance, it issued country Resolution 91 to call on the government of Eritrea to implement its decision in *Zegveld & Another v Eritrea*,³⁹ following the continuation of human rights violations, and the detention of former cabinet ministers, government officials, members of parliament, journalists and media practitioners.⁴⁰

Similarly, the African Commission issued Resolution 257 calling on the government of Kenya to implement the *Endorois* decision.⁴¹ This

35 J Biegon 'The incorporation of the thematic resolutions of the African Commission into the domestic laws of African countries' in O Shyllon (ed) *The Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa* (2018) 191.

36 Biegon (n 35) 197.

37 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties ACHPR/Res.97(XXX)06.

38 Viljoen (n 6) 373.

39 *Zegveld & Another v Eritrea* (2003) AHRLR 85 (ACHPR 2003).

40 Resolution on the Human Rights Situation in Eritrea ACHPR/Res.91(XXXVIII)05 adopted at its 38th ordinary session held in Banjul, The Gambia, from 21 November to 5 December 2005.

41 Resolution Calling on the Republic of Kenya to Implement the *Endorois* Decision ACHPR/Res.257(LIV)2013 adopted its 54th ordinary session, held in Banjul, The Gambia, from 22 October to 5 November 2013.

Resolution was adopted to remind the government of Kenya to fulfil its commitment of submitting an interim report within 90 days of the oral hearing, and a comprehensive report during the fifty-fourth ordinary session of the African Commission.⁴² The adoption of this Resolution by the Commission was necessitated by the absence of Kenyan government representatives at the Workshop on the Status of Implementation of the *Endorois* Decision of the African Commission on Human and Peoples' Rights.⁴³ This workshop, organised by the Working Group on Indigenous Populations/Communities in collaboration with the Endorois Welfare Council, took place in Nairobi, Kenya, on 23 September 2013,⁴⁴ but yielded no concrete results in terms of enhancing compliance by the government of Kenya with its decision.

2.5 Promotional missions

Under Rules 7, 76 and 86 of the 2020 Rules of Procedure, the African Commission is mandated to conduct promotional missions to state parties to the African Charter. Commissioner rapporteurs have the authority, as part of these missions, to inquire into and obtain updated information regarding the implementation status of its decisions. As can be gleaned from the promotional mission reports, the commissioners have routinely made inquiries on the implementation of its decisions on communications. In 2007 the then Special Rapporteur on Refugees, for example, visited Mauritania to follow up on the implementation of the remedial orders in *Malawi African Association & Others v Mauritania*.⁴⁵ During a visit to Mauritania in 2012, members of the African Commission also asked questions about the status of the implementation of its decisions.⁴⁶ In respect of *Modise v Botswana*, the Attorney-General of Botswana, during the thirty-first ordinary session of the African Commission in 2002, agreed to implement its recommendations upon receiving a written request from the Commission in this regard, together with specifications on implementation.⁴⁷ During

42 As above.

43 Murray and others (n 5) 160.

44 Resolution – Kenya (n 41).

45 R Murray 'How do the African Commission and Court on Human and Peoples' Rights and African Committee on the Rights and Welfare of the Child monitor implementation of their decisions and judgments?' 6, <https://www.bristol.ac.uk/media-library/sites/law/hric/2021documents/Implementation%20of%20the%20decisions%20and%20judgments%20of%20the%20African%20bodies.pptx> (accessed 10 October 2024).

46 African Commission 'Report of the promotional mission to the Islamic Republic of Mauritania held between 26 March and 1 April 2012', file:///C:/Users/Mox/Downloads/missionreportmauritaniacptaeng%20(1).pdf (accessed 22 October 2023).

47 Viljoen & Louw (n 25) 10.

a subsequent promotional visit to Botswana, in 2005, members of the African Commission posed questions to the government officials on the status of the implementation of the decisions in *Modise v Botswana*.⁴⁸ The government of Botswana has since agreed in principle to award Modise citizenship by birth, which will then also apply to his children.⁴⁹

Despite its critical role in fostering collaborative engagement with states, NHRIs and CSOs, to enhance compliance with the African Commission's decisions, promotional missions are heavily dependent on the availability of sufficient funding. Currently, the African Commission is grappling with financial shortfalls, which threaten its ability to consistently hold physical public sessions and to carry out essential promotional visits. Without immediate financial support, the Commission's ability to effectively fulfil its promotional mandate across the continent remains in jeopardy. Furthermore, promotional missions are undermined by the fact that they have to be authorised by member states before they can take place, and member states usually delay to agree to such promotional visits.⁵⁰ Another factor that should be addressed with regard to both promotional and protective missions is a time limit for the publication of a mission report. Most reports are published years after the mission had taken place. This delay in publication defeats the impact and actual goal of the missions.⁵¹ In the case of following up on the implementation of recommendations against a state party, a delay in publication could have devastating effects for the victims as well as compliance with the decisions of the African Commission.

2.6 Reporting to the Executive Council of the African Union

Policy organs of AU play a crucial role in providing political support and acting as a key interface between the African Commission and states. The involvement of the AU Executive Council, in particular, is crucial for effectively monitoring the implementation of the African Commission's decisions. Article 54 of the African Charter mandates the African Commission to submit activity reports to the ordinary

48 African Commission 'Report of the Promotional Mission to the Republic of Botswana, held 14-18 February 2005', <https://achpr.au.int/sites/default/files/files/2022-10/misreppromobotswana2005eng.pdf> (accessed 12 November 2024).

49 African Commission (n 48) 10.

50 L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' LLD thesis, University of Pretoria, 2005 151.

51 As above.

session of the Assembly.⁵² Submitting these reports provides the African Commission with the opportunity to report on instances where member states have failed to implement its decisions. A notable example is the adoption of the sixteenth Annual Activity Report of the African Commission by the Assembly of Heads of State and Government of the African Union, held in July 2003 in Maputo, Mozambique. In its decision, the Executive Council recommended that the Assembly should 'urge all member states to cooperate with the ACHPR, and the various mechanisms it has put in place, and implement its decisions in compliance with the provisions of the African Charter on Human and Peoples' Rights'.⁵³

Despite these recommendations, it is important to note that some members of the Executive Council have rejected certain decisions and resolutions issued by the African Commission, particularly those they perceive as offensive.⁵⁴ Furthermore, when the Commission submits its annual activity reports to Executive Council, there often is a lack of clarity regarding the subsequent actions or outcomes.⁵⁵ Viljoen has argued that, in many instances, the Executive Council has shied away from naming specific states, and the Assembly has failed to impose sanctions on states that do not comply with the AU human rights bodies' decisions and policies.⁵⁶ These issues raise critical questions about the effectiveness of reporting to the Executive Council in fostering state compliance with the African Commission's decisions.

2.7 Promotional activities envisaged in article 45(1)

Article 45(1)(a) of the African Charter mandates the African Commission to organise seminars, symposia and conferences. The African Commission's 2020 Rules of Procedure further stipulate in Rule 77(1) that the Commission may organise such meetings on its own initiative or in collaboration with partners. Seeking to strengthen its assessment of the status of implementation of its decisions, the African Commission also took the initiative to organise two regional seminars on implementation of the decisions of the Commission, the first in 2017 in Dakar, Senegal (Dakar Regional

52 African Commission '54th and 55th Activity Reports of the African Commission on Human and Peoples' Rights' 17, file:///C:/Users/Mox/Downloads/eng-54th-55th-activity-reportachpr%20(1).pdf (accessed 12 November 2023).

53 M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 574.

54 Ayeni & Von Staden (n 6) 10.

55 As above.

56 Viljoen (n 6) 366.

Seminar),⁵⁷ and the second, in 2018, in Zanzibar.⁵⁸ One of the pertinent recommendations made during these two seminars is that the African Commission should create a separate unit to monitor the implementation of its decisions,⁵⁹ to significantly enhance the implementation of its decisions. However, by November 2024, the recommendations of these seminars have not been implemented, which further undermines its capacity to effectively monitor state compliance with its decisions.

2.8 Referral by African Commission to African Court

While the African Commission's 2020 Rules of Procedure are silent on the referral of merits decisions containing remedial recommendations by the Commission to the African Court on Human and Peoples' Rights (African Court),⁶⁰ this silence does not preclude the African Commission from making such referrals. The authority to refer cases to the African Court stems not from its Rules of Procedure but from article 5(1)(a) of the African Court Protocol.⁶¹ Despite this clear legal foundation, the African Commission has made only three referrals to the African Court. Two of these, *African Commission v Libya*⁶² and *African Commission v Kenya*,⁶³ concern the non-implementation of provisional measures issues by the Commission.⁶⁴ This seeming reluctance to refer cases to the Court raises questions about the reasons behind the limited use of what could be a powerful tool

57 African Commission 'Press release on the regional seminar on implementation of the decisions of the Commission' 2017, <https://achpr.au.int/en/news/press-releases/2017-08-10/press-release-regional-seminar-implementationdecisions-commis> (accessed 8 October 2024).

58 African Commission 'Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights 4-6 September 2018, Zanzibar, Tanzania' 2018, <https://achpr.au.int/en/news/communiqués/2019-01-09/report-second-regional-seminar> (accessed 10 October 2023).

59 R Murray & D Long '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).

60 Contrast Rule 130(1) of the 2020 Rules with Rule 118(1) of the 2010 Rules of Procedure of the African Commission on Human and Peoples' Rights; see Viljoen (n 6) 374-375.

61 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998 art 5(1)(a) (African Court Protocol).

62 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153; in respect of the same case, see *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2013) 1 AfCLR 145; and *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures 2) (2015) 1 AfCLR 150.

63 *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9.

64 The third case is *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17; see also the African Court's scrapping from the role the merits case (*African Commission on Human and Peoples' Rights v Libya* (Order) (2013) 1 AfCLR 21).

in ensuring compliance. Scholars such as Ayeni and Von Staden have offered a possible explanation for this cautious approach. They argue that referring a case to the African Court may be seen by some as an implicit acknowledgment of the African Commission's own limitations and an indirect admission that the Court may be better equipped to enforce compliance with its decisions.⁶⁵ This perception of the African Court as a 'superior' body could contribute to the African Commission's reluctance to make referrals unless necessary.

2.9 Internal special mechanisms: Working Group on Communications

The Working Group on Communications (WGC) was established by the African Commission through Resolution 194.⁶⁶ Rule 112 of the African Commission's 2020 Rules of Procedure outlines the procedure for follow-up, which includes a range of functions such as reporting, information gathering, assessment and, arguably, enforcement.⁶⁷ The responsibility for coordinating these activities primarily lies with the WGC, which consists of commissioners and members of the Secretariat.⁶⁸ Follow-up was initially not included in the mandate of this working group.⁶⁹ It was only in October 2012 that the mandate of the WGCs was expanded to include coordination of the follow-up process and the collection of information on the status of implementation of the decisions of the African Commission.⁷⁰ However, it should be noted that reports from the WGC, which could serve as a valuable source of such information, have also been irregular and are not consistently available on the African Commission's website.⁷¹ Furthermore, the issue of implementation has only from time to time been included on the agenda, thereby causing the potential role of the WGC in enhancing the implementation of Commission's decisions not to be fully developed.

With respect to information gathering, the African Commission's efforts are often hampered by the lack of responsiveness of states, which makes it difficult to monitor the implementation of its decisions. This

65 Ayeni & Von Staden (n 6) 17.

66 Resolution 194 Establishing a Working Group on Communications and Appointment of Members ACHPR/Res.194(L) 2011, <https://achpr.au.int/en/node/772> (accessed 27 November 2024).

67 Rules of Procedure (n 14) Rule 112.

68 Resolution Establishing a Working Group on Communications and Appointment of Members (n 66).

69 As above.

70 Resolution on the Expansion of the Mandate of the Working Group on Communications and Modifying its Composition ACHPR/Res.225(LII) 2012.

71 Viljoen (n 6) 366.

ongoing difficulty in securing timely and meaningful responses from states reveals the gap between the African Commission's procedural efforts and the practical realities of holding states accountable. Given the experience of the Commission with states' general failure to provide information about implementation, it is disappointing that the African Commission has not developed the capacity to effectively gather and record this information.⁷² Moreover, effective follow-up has been hampered by the lack of human and material resources at the Secretariat and the fact that commissioners serve on a part-time basis. Viljoen and Louw's 2007 study evaluated 44 cases decided between 1987 and 2003 and found that there had been full implementation in 14 per cent; partial implementation in 32 per cent; situational compliance in 16 per cent; and no implementation in 30 per cent of cases.⁷³ The African Commission has communicated this problem to stakeholders.⁷⁴

2.10 Other special mechanisms

The 2020 Rules of Procedure empower the African Commission to establish subsidiary mechanisms, including Special Rapporteurs, committees and working groups.⁷⁵ The African Commission determines the mandate and terms of reference for each subsidiary mechanism, which is required to present a report on its work at each ordinary session. Currently, the African Commission has established 12 such mechanisms.⁷⁶ The commissioner appointed as rapporteur for a particular communication or any other member of the Commission so authorised may 'take such action as may be appropriate' to monitor the implementation of the decision.⁷⁷ For instance, the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa conducted promotion missions in Senegal, Mali and Mauritania to study the situation of refugees in order to find lasting solutions to their problems.⁷⁸ As part of these missions, the Special Rapporteur engaged government officials

⁷² As above.

⁷³ Viljoen & Louw (n 25) 15.

⁷⁴ See Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties ACHPR/Res.97(XXXX) 06.

⁷⁵ Rules of Procedure (n 14) Rule 25.

⁷⁶ African Commission 'Special mechanisms', <https://achpr.au.int/en/special-mechanisms> (accessed 19 November 2024).

⁷⁷ Rules of Procedure (n 14) Rules 125(5) & (6).

⁷⁸ Report of the Mechanism of the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons and Migrants in Africa since its creation at its 52nd ordinary session of the African Commission on Human and Peoples' Rights in Côte d'Ivoire, from 9 to 22 October 2012, <https://achpr.au.int/en/inter-session-activity-reports/maya-sahli-fadel-refugees-asylum-seekers-migrants-internally> (accessed 20 November 2024).

and national human rights institutions and civil society organisations on any measures taken to implement the decisions of the African Commission.⁷⁹ It should be noted that the effectiveness of the special mechanisms of the Commission is closely tied to the cooperation of state parties. These mechanisms rely on states to provide timely and accurate information regarding the implementation of the African Commission's decisions. Without the active cooperation and transparent reporting from states, the African Commission's decisions risk remaining without meaningful impact on the ground. Additionally, some special mechanisms, particularly the Special Rapporteur on the Protection of Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, often face refusals by states to grant permission for promotional and fact-finding missions.⁸⁰ This resistance undermines the rapporteur's ability to effectively monitor the implementation of its decisions and assess the human rights situation on the ground.

3 Strengthening the role of the African Commission in enhancing compliance with its decisions

As demonstrated above, the African Commission has utilised several mechanisms, such as promotional missions, implementation hearings, the adoption of resolutions, and many others to enhance compliance by states with its decisions and recommendations. Despite utilising these mechanisms, the African Commission still faces significant challenges in enhancing compliance with its decisions and recommendations by states. While the Commission has made strides in encouraging state compliance through various initiatives, the effectiveness of these mechanisms is often undermined by a range of systemic challenges. Thus, below, the article provides seven strategies to empower and strengthen the African Commission to enhance compliance by states with its decisions. While many strategies could be explored, this article focuses on a select few.

3.1 Creating an implementation unit and a special follow-up mechanism within the African Commission

The creation of an implementation unit within the African Commission has received widespread support, including the recommendations adopted at the two regional seminars, and acknowledgment by

⁷⁹ Murray & Long (n 6) 845.

⁸⁰ Report (n 78) para 55.

various actors in human rights protection and promotion.⁸¹ Notably, during the Dakar Seminar, then Commissioner Reine Alapini Gansou stated that the Commission should build its capacity to systematically monitor compliance and keep updated records, in addition to developing collaborative relations with NHRIs, NGOs and other actors who can assist in the collection and publication of information on decisions made by the African Commission.⁸² A promising development has been the establishment of the WGC by the African Commission, which is responsible for monitoring the implementation of decisions and collecting information on their progress.⁸³ With the mandate of collecting information on implementation and reporting on the status of implementation at each ordinary session,⁸⁴ the WGC would be best positioned to guide the establishment of an implementation unit within the African Commission. The implementation unit would formalise the follow-up process within the African Commission, ensuring that it remains a priority on its agenda. It would also provide the public with essential information to assess state compliance (or the lack thereof) and support NGOs and NHRIs in strategically planning and structuring their advocacy efforts to enhance compliance with the African Commission's decisions. Therefore, this article recommends the creation of an implementation unit within the African Commission as a crucial strategy to enhance state compliance with its decisions. In addition, as is argued elsewhere in this Special Focus section,⁸⁵ a special mechanism dedicated to following up on Commission decisions, in the broadest sense, may also be considered – but in full awareness of potential overlaps between the WGC, an implementation unit and a special mechanism.

3.2 Harnessing the role of national human rights institutions

With the African Commission cooperating with states, NGOs and other relevant stakeholders, harnessing the affiliate status of NHRIs to support the implementation agenda is strategic. The involvement of NHRIs in the state reporting procedures of regional and global human rights bodies, including the submission of alternative

81 Murray & Long (n 59).

82 African Commission 'Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights in Dakar, Senegal', <https://achpr.au.int/en/news/statements/2018-08-29/report-regional-seminar-implementation-decisions-african> (accessed 20 October 2024).

83 Resolution (n 70).

84 As above.

85 C Okoloise 'Systematising monitoring: The case for a special mechanism for following up on the implementation of decisions by the African Commission on Human and Peoples' Rights' (2024) 24 *African Human Rights Law Journal* 985.

reports, is a recognised and established practice. Specifically, the African Commission's 2020 Rules of Procedure stipulate that those institutions and organisations, or any interested party, may contribute to the assessment of state reports by submitting written input, including shadow or alternative reports.⁸⁶ These institutions are well-positioned to advocate the implementation of the African Commission's decisions in their respective countries. For instance, the Kenya National Commission on Human Rights (KNCHR) has been advising the Kenyan government on measures needed to implement the African Commission's decision in the *Endorois* case. The KNCHR has organised sensitisation meetings with the Endorois community and engaged with different state and non-state actors in a bid to catalyse implementation of the decisions.⁸⁷

To strengthen its implementation role, the African Commission could consider developing guidelines for NHRIs, building on the guidelines already established by the Network of African National Human Rights Institutions (NANHRI).⁸⁸ These are a set of principles that guide NHRIs when following up on and monitoring the recommendations and decisions of the African Commission.⁸⁹ They stipulate that NHRIs should provide reliable, accurate and regular information to the Commission on the level of implementation of and compliance by the state with its decisions.⁹⁰ They require NHRIs to provide technical assistance to the state in the implementation of decisions of the African Commission as well as to adopt a victim-centred approach to monitoring the implementation of these decisions.⁹¹ Thus, the African Commission should engage with these guidelines, make recommendations for how they may be improved, and consider working out a plan with NANHRIs for their dissemination. Additionally, the African Commission should formally acknowledge and endorse these guidelines, either through a press release or a resolution, as they are fundamental to enhancing the compliance of its decisions by states. By publicly affirming the importance of these guidelines, the Commission would not only reinforce their significance but also signal to member states its commitment to

86 Rules of Procedure (n 14) Rule 79(3).

87 Kenya National Human Rights Commission 'Latest on *Endorois* case', <https://www.knchr.org/articles/artmid/2432/articleid/1022/latest-on-endorois-case> (accessed 20 October 2023).

88 Network of African National Human Rights Institutions (NANHRI) 'The role of NHRIs in monitoring implementation of recommendations of the African Commission on Human and Peoples' Rights and judgments of the African Court on Human and Peoples' Rights', <https://www.bristol.ac.uk/medialibrary/sites/law/hric/Guidelines%20final%20English%20Version.pdf> (accessed 11 November 2024).

89 As above.

90 NANHRIs (n 88) 8.

91 As above.

strengthening compliance mechanisms. This endorsement could serve as a critical step towards ensuring that states are more accountable in implementing the African Commission's decisions, ultimately advancing the protection of human rights across the continent.

3.3 Addressing the lack of information about the existence of decisions and the status of their implementation

Addressing the lack of information⁹² about the existence of African Commission decisions and the status of their implementation is crucial for upholding human rights in Africa. Transparency, accessibility and active engagement with stakeholders are key to ensuring that these decisions are effective in promoting and protecting the rights of individuals and communities across the continent. By collaborating with a range of stakeholders, both governmental and non-governmental, the African Commission can harness the strength of collective advocacy to promote the widespread awareness and acceptance of its decisions. The African Commission has the capacity to initiate information campaigns regarding its decisions relevant to specific countries, thereby enabling local constituents to exert pressure on their representatives to adhere to these rulings. CSOs and local communities assume pivotal roles in disseminating information about these decisions and actively advocating their execution.⁹³ Through public pressure and well-organised advocacy initiatives, state parties can be compelled to take the necessary actions.

The African Commission can efficiently gather information on the implementation of its decisions without significant additional resource allocation by seamlessly integrating this data collection process into its existing activities. States could be encouraged to include updates on the status of decision implementation in their periodic state reports, as was expressly done in the case of *Legal Resources Foundation v Zambia*.⁹⁴ The African Commission expressly stated in its decision a clear recommendation to the state of Zambia to include information on the progress of implementation in its upcoming periodic report.⁹⁵ Additionally, the African Commission's missions

92 See also, in this Special Focus section, VO Ayeni 'The role of the African Commission in enhancing implementation monitoring through dialogue and documentation' (2024) 24 *African Human Rights Law Journal* 937.

93 The Institute on Human Rights and Democratisation in Africa (IHRDA) publicises decisions and conducts advocacy on their implementation, <https://www.ihrda.org/category/implementation-of-decisions/> (accessed 15 October 2024).

94 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) paras 75-76.

95 Murray & Long (n 59).

can serve as opportunities to engage with officials and complainants, conduct on-site assessments, and evaluate the measures taken in response to its decisions.⁹⁶ Further, the Commission could also collaborate with other international agencies, such as those within the United Nations (UN) and AU, by sharing information regarding the pertinent decision and inviting them to provide relevant updates on implementation progress.

3.4 Encouraging the adoption of national implementation authorities

Taking inspiration from African sub-regional mechanisms that have guides to states to establish national authorities to oversee the execution of their decisions, the African Commission can consider adopting a similar approach. The Economic Community of West African States (ECOWAS) Community Court of Justice has devised a method of implementing its decisions, which are in the form of a writ of execution. Articles 24(3) and (4) of the Supplementary Protocol provide that upon the verification by the appointed authority of the recipient member state that the writ is from the Court, the writ shall be enforced..⁹⁷ It further states that all member states shall determine the competent national authority for the purpose of recipient and processing of execution and notify the Court accordingly.⁹⁸ However, there is no information demonstrating how member states apply this article in practice. The African Commission should similarly guide state parties to the African Charter to designate a competent national authority responsible for the implementation of its decisions, a provision that is currently absent in both the African Charter and the Rules of Procedure of the African Commission.

3.5 Developing a standard guideline for conducting implementation hearings

The primary challenge hindering the effectiveness of implementation hearings in ensuring compliance with the African Commission's decisions by states is the absence of standardised guidelines within the African Commission. Neither the African Charter nor the 2020 Rules of Procedure of the African Commission establish a consistent or coherent approach regarding when and where implementation hearings should be held, who should attend, or what the expectations

⁹⁶ *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1997).

⁹⁷ Supplementary Protocol (A.SP.1/01/05) of 2005.

⁹⁸ Supplementary Protocol (n 97) art 4.

are for the parties involved.⁹⁹ As a result, the process remains largely *ad hoc*, with litigants and CSOs often taking the lead in facilitating these hearings.¹⁰⁰ The lack of standardised procedures has made it difficult for the African Commission to consistently hold implementation hearings to monitor the compliance of its decisions.¹⁰¹ To enhance compliance with its decisions, the Commission should adopt clear guidelines for conducting implementation hearings, including provisions for joint hearings and hearings *in situ*. These guidelines should specify the list of delegates to attend, with a particular emphasis on ensuring the presence of key state representatives from institutions central to the implementation of reparation measures, such as judges, prosecutors and relevant ministry officials, as well as the victims of human rights violations. Their presence is crucial, as they can assume responsibility for ensuring implementation and catalyse significant action at the domestic level, driving important dynamics across various institutions and branches of government, beyond just the executive. While there is no direct causal link between an implementation hearing and the eventual implementation of decisions, such hearings play a vital role in maintaining ongoing dialogue, keeping cases on the radar, and helping the African Commission better understand the challenges states face in implementing decisions.¹⁰² Additionally, implementation hearings foster a three-way dialogue between the African Commission, victims of human rights violations and the state party accused of violation. This dialogue is crucial for addressing implementation challenges and expediting the fulfilment of the Commission's decisions.

3.6 Establishing a procedure or guideline for determining compensation or reparations for victims

The African Commission has no separate procedure, written or oral, to determine the compensations or reparations to be made following the finding of a violation.¹⁰³ Thus, the Commission should establish a clear procedure or set of guidelines to determine the amount of compensation to be awarded to victims. In the Inter-American system, there is a procedure in place to determine the amount of compensation to be awarded to a victim.¹⁰⁴ A trend analysis on the practice of the African Commission shows that it has been referring

99 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* 81.

100 As above.

101 As above.

102 Ayeni and Von Staden (n 6) 15.

103 Murray (n 6) 12.

104 Viljoen and Louw (n 25) 22.

victims back to the domestic courts to be compensated. For instance, in *Embga Mekongo Louis v Cameroon*¹⁰⁵ the African Commission found that Cameroon had violated article 7 of the African Charter, which guarantees the right to a fair trial. The Commission concluded that Embga Mekongo Louis had suffered damages as a result of the violation. However, due to the Commission's inability to determine the exact amount of damages, it recommended that the quantum of compensation should be determined in accordance with the relevant laws of Cameroon.¹⁰⁶ The African Commission's referral to the laws of Cameroon was prompted by its lack of clear guideline to assess and determine the appropriate amount of damages for Embga Mekongo Louis.¹⁰⁷ Not surprisingly, Cameroon did not comply with the African Commission's decisions. Thus, the lack of a policy guideline to determine the quantum of damages in awarding compensation to victims is a factor that has negatively influenced state compliance with the decisions of the Commission. This article recommends that the Commission develop clear guidelines for awarding compensation, following consultations with state delegations, national human rights institutions, CSOs and other international bodies, a procedure that has been developed in the Inter-American human rights system.

3.7 Forging strong collaborative partnerships with AU policy organs

The involvement of AU policy organs¹⁰⁸ is crucial for the effective monitoring of the African Commission's decisions. These organs provide vital political support and serve as key intermediaries between the African Commission and member states. The Commission should create a strong partnership and collaboration with the Permanent Representatives Committee (PRC), which conducts the day-to-day business of the AU on behalf of the Assembly and Executive Council.¹⁰⁹ The PRC meets at least once a month and is empowered by its Rules of Procedure to monitor the implementation of policies, decisions, and agreements adopted by the Executive Council.¹¹⁰ Many human rights-related decisions made by the Executive Council

105 *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995).

106 *Embga Mekongo* (n 105) para 2.

107 Viljoen & Louw (n 25) 23.

108 See also, in this Special Focus section, NR Purmah 'Diplomatic mechanisms as a springboard to enhance the implementation of decisions by the African Commission on Human and Peoples' Rights with specific reference to persons with disabilities' (2024) 24 *African Human Rights Law Journal* 962.

109 The Permanent Representative Committee, [https://au.int/en/pages/permanent-representatives-committee-prc#:~:text=The%20Permanent%20Representatives%20Committee%20\(PRC,are%20members%20of%20the%20PRC](https://au.int/en/pages/permanent-representatives-committee-prc#:~:text=The%20Permanent%20Representatives%20Committee%20(PRC,are%20members%20of%20the%20PRC) (accessed 10 November 2024).

110 Ayeni & Von Staden (n 6) 14.

or the AU Assembly are first debated within the PRC. Therefore, the African Commission can deepen its collaboration with the PRC by inviting its representatives to participate in key sessions, such as the Pre-Session Forum of States Parties to the African Charter on Human and Peoples' Rights.¹¹¹ In addition to political support, the PRC can assist the African Commission in securing the necessary funding to fulfil its protection and promotion mandate. It can also advocate the African Commission to operate on a full-time basis to enhance its effectiveness. The PRC can play a pivotal role in encouraging the implementation of the Commission's decisions by engaging or influencing the Executive Council to establish proper procedures for follow-up on the implementation of decisions akin to the Committee of Ministers in the Council of Europe and their role in the enforcement of European Court decisions.

4 Conclusion

It is widely recognised that the work of the African Commission is indispensable to upholding human rights across Africa. The African Commission's Rules and institutional practice could potentially be effective tools in ensuring implementation of decisions, as is evident from the rare instances in which compliance has been registered. However, the rate of implementation remains regrettably low, largely as a consequence of this potential for effectiveness not having been harnessed by the African Commission. This article concludes that the African Commission stands to register higher compliance with its remedial orders by hedging the relationships it has with core stakeholders such as NHRIs, CSOs, other human rights organs in the AU as well as the policy organs in Addis Ababa. These institutions all have roles to play within the scheme of the African Charter and the Rules of the Commission. These roles require the initiative of the African Commission to be fully exploited. It is also ever more urgent for the African Commission to implement the vital recommendations that have been made by stakeholders, chief among these the establishment of an implementation unit tasked with monitoring implementation as well as the development of an implementation database. With a concerted, systemic and consistent effort, informed by taking inventory of its performance, the African Commission is more than able to enhance its existing initiatives and develop an implementation mechanism that can bolster its mandate.

¹¹¹ Invitation to the 1st Edition of the Pre-Session Forum of States Parties to the African Charter on Human and Peoples' Rights, Banjul, The Gambia, 15-16 October 2024, <https://achpr.au.int/en/news/announcements/2024-09-30/1st-edition-pre-session-forum-states-parties> (accessed 10 November 2024).

