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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

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Summary: *This article examines the role of diplomatic mechanisms in enhancing the implementation of decisions by the African Commission on Human and Peoples' Rights, with a specific focus on the rights of persons with disabilities. With the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa in 2024, it is anticipated that more communications dealing with the rights of persons with disabilities will be submitted to and decided by the African Commission. Diplomatic and political mechanisms are identified as pragmatic and effective avenues for ensuring compliance with African Commission decisions, especially given the complex interplay between human rights norms, state sovereignty and political considerations. These diplomatic mechanisms facilitate constructive engagement and the formulation*

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of tailored recommendations that align with the internal dynamics of states. Notwithstanding these benefits, many African states continue to struggle with fulfilling their obligations, particularly regarding the rights of persons with disabilities. This non-compliance weakens the Commission's effectiveness. The article highlights the detrimental impact of non-compliance relating to persons with disabilities, who face persistent attitudinal, environmental and systemic barriers. It argues that the failure to implement the Commission's decisions undermines the Commission's credibility and hampers the development of a robust human rights culture for persons with disabilities. To address these deficiencies, the article advocates the use of diplomatic mechanisms, such as negotiations, dialogue and cooperation, as catalysts for change. Through sustained engagement and dialogue, diplomatic efforts can encourage states to ensure that disability rights and inclusive policies are placed at the forefront of national policies, thereby strengthening implementation mechanisms. Ultimately, it is hoped that the African Commission and other stakeholders can play a more active role in advancing the rights and well-being of persons with disabilities across Africa.

Key words: *implementation; diplomacy; negotiations; dialogue; cooperation; persons with disabilities; African Commission; Working Group on the Rights of Older Persons and Persons with Disabilities in Africa*

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) has made large and innovative strides in the promotion and protection of human rights across the African continent.¹ Nonetheless, the lack of effective implementation of its decisions has seriously undermined its ability to deliver justice overall and, in particular, to persons with disabilities. This article explores the lack of domestic implementation of decisions by the African Commission in relation to persons with disabilities. It explores this lack of compliance by highlighting the pressing need to address the challenges that are hindering the realisation of the rights for persons with disabilities in Africa. 'Decisions' by the African Commission are understood in this article as encompassing a range of findings, recommendations and resolutions, including individual communications and Concluding Observations emanating from state reports. While all these decisions

¹ See eg F Viljoen *International human rights law in Africa* (2012) 289-390.

carry significant weight, their true impact lies in their effective implementation at the domestic level. Many actors play various roles in carrying out this implementation process. This article considers the role of the African Commission in tandem with the role of other actors, such as states and civil society organisations.

While the African Commission has a communications procedure that allows for individuals or states to lodge complaints for human rights adjudication, this article only briefly mentions this procedure to illustrate the issue of non-compliance. It is difficult to precisely assess the impact of diplomatic mechanisms to ensure compliance with the African Commission's communications insofar as there already are various mechanisms that elicit responses from the state to comply. For instance, the African Union (AU) Executive Council has repeatedly exhorted states to implement the recommendations made in individual communications against them.²

This article deliberately adopts a narrow focus on two specific mechanisms related to the African Commission itself in order to underscore the pressing need to prioritise diplomatic mechanisms as catalysts for change in implementing decisions by the Commission relating to persons with disabilities. The two mechanisms are the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa (Working Group), the state reporting process and, particularly, the resulting Concluding Observations. The central argument of the article is that these two mechanisms can be used as springboards to enhance compliance with decisions of the African Commission, generally, and communications relating to persons with disabilities, specifically.

It is argued that by leveraging negotiations, dialogue and cooperation, the African Commission can collaborate with African states and relevant stakeholders to strengthen their commitment to human rights and uphold the rights of persons with disabilities. Diplomatic efforts offer an avenue for sustained engagement and dialogue, leading to the development of tailored action

2 Decision on the 44th Activity Report of the African Commission on Human and Peoples' Rights. Decision on the Activity Report of the African Commission on Human and Peoples' Rights Doc EX.CL/1205(XXXVI), Decisions of the 36th ordinary session of the Executive Council 6-7 February 2020, Addis Ababa, Ethiopia EX.CL/Dec.1073-1096(XXXVI), <https://au.int/en/decisions/decisions-thirty-sixth-ordinary-session-executive-council>; Decision on the Activity Report of the African Commission on Human and Peoples' Rights Doc EX.CL/1259(XXXVIII), Decisions of the 38th ordinary session of the Executive Council 3-4 February 2021, Addis Ababa, Ethiopia EX.CL/Dec.1107-1125(XXXVIII), <https://au.int/en/decisions/decisions-thirty-eighthordinary-session-executive-council> (accessed 12 November 2024).

plans, capacity-building initiatives as well as technical assistance programmes that support effective implementation. The selected issues that are discussed accordingly highlight the relevance and importance of compliance with ‘remedial recommendations’ and ‘remedial orders’,³ as both an analytical framework and a set of guiding principles for improving disability rights and, ultimately, the lived experiences of persons with disabilities on the African continent.

The article first describes the role of the African Commission in the context of the promotion and protection of the rights of persons with disabilities. It highlights its various functions as well as its Rules of Procedure relating to the implementation of its decisions. The next part examines the problems of non-compliance or non-implementation with the decisions of the African Commission. As will be seen, a myriad operational and other factors exert a significant gravitational field on the implementation – or lack thereof – of these decisions. Third, the article sketches the outlines of the Working Group, followed by the state reporting procedure. Finally, the article provides insights on how diplomatic means should be used as a springboard to enhance the implementation of the African Commission’s decisions, zooming in on the theory of compliance through dialogue and persuasion. Diplomatic means accentuate the potential for positive change in the African human rights landscape, where the African Commission can work concomitantly and collaboratively with African states and other stakeholders to strengthen their commitment to human rights, generally, and uphold the rights of persons with disabilities.

2 Role of the African Commission

The African Commission is the principal monitoring body on matters relating to human rights at the African regional level.⁴ The African Charter on Human and Peoples’ Rights (African Charter) is the regional instrument that establishes the African Commission as an autonomous and quasi-judicial body tasked with the promotion and protection of individual human rights and collective rights of peoples.⁵ The Commission is also mandated to monitor and evaluate compliance with human rights norms as enshrined under the African Charter. Within this mandate, the African Commission has a wide array of responsibilities encompassing the review of state reports,

3 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, M Morales Antoniazzi & D Paris (eds) *Research handbook on compliance in international human rights law* (2021) 362.

4 Viljoen (n 1) 293.

5 Arts 45 & 46 African Charter.

the consideration of individual and inter-state communications, the issuing of advisory opinions, and engagement in promotional activities aimed at increasing awareness and understanding of human rights principles across the African continent.⁶

It could be argued that one of the most important mechanisms through which the African Commission fulfils its role is through the consideration of individual communications. Individuals and groups can submit complaints to the African Commission alleging violations of their rights. The Commission has the power to receive, examine and make recommendations on these communications.⁷ It should be noted that in recent years, it has taken steps to enhance its monitoring of the implementation of its decisions on individual communications by organising panels and seminars, amending its Rules of Procedure, and by extending the mandate of its Working Group on Communications.⁸ The African Commission's decisions on individual communications can accordingly have a significant impact on the protection and promotion of the rights of persons with disabilities. These decisions can serve as precedents and guide the actions of states in implementing and enforcing human rights and, more specifically, disability rights.

The African human rights system has not always been effectively used to advance disability rights, as evidenced by the very limited number of cases brought before the African Commission to vindicate the rights of persons with disabilities. This underutilisation is partly due to the perception of individuals with disabilities as objects of charity rather than as holders of human rights.⁹ *Purohit* is the only communication decided by the African Commission that specifically addressed the rights of persons with disabilities.¹⁰ *Purohit* deals with the violation of the right to dignity and health under The Gambia's Mental Health Law. In its communication, the African Commission laid emphasis on the importance of non-discriminatory access to healthcare services of persons with disabilities and the need

6 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 629-653.

7 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* 836.

8 As above.

9 D Msipa & P Juma 'The African Disability Protocol: Towards a social and human rights approach to disability in the African human rights system' in MH Rioux and others (eds) *Handbook of disability: Critical thought and social change in a globalising world* (2023) 7.

10 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit*). On implementation of this decision, see F Viljoen 'The African human rights system and domestic enforcement' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 376-379.

for equitable resource allocation.¹¹ The case thus set a significant precedent by affirming the rights of persons with disabilities to equal protection and non-discrimination, although the overall recognition of these rights remains limited in Africa.

Moreover, other mechanisms of the African Commission can supply various roadmaps to contribute to the effective implementation of its decisions and the promotion and protection of human rights in Africa. For instance, in the context of promoting the rights of persons with disabilities, the state reporting procedure through its Concluding Observations can be a valuable tool for assessing progress, identifying challenges and advocating the rights and needs of persons with disabilities. Before this state reporting procedure is considered in more details below, it is important to contextualise the discussion by providing an overview of the Rules of Procedure of the African Commission.

The African Commission promulgated its revised Rules of Procedure in 2020, which is a significant development stemming from the Commission's ongoing commitment to enhancing the efficacy and accountability of its operations.¹² However, it has been reported that 'due to a faltering application of the Rules, the Commission has not succeeded in putting a credible follow-up procedure in place'.¹³ Yet, it should be noted that in contrast to the earlier 2010 Rules of Procedure, the 2020 version demonstrates a heightened focus on compliance and implementation.¹⁴ The 2020 Rules of Procedure present innovations in terms of access to the Commission and the expeditious processing of cases, in particular on the implementation of the Commission's decisions.¹⁵ This is manifest in the provisions that strengthen the Commission's authority to monitor and ensure the execution of its decisions by state parties. Rule 125 now provides for a specific procedure for follow up on decisions.

Rule 125(1) provides an effective follow-up mechanism by requiring a state to inform the African Commission in writing of any action taken by the state in question to implement the decision of the Commission within 180 days from the date the decision was communicated to it. Rule 125(2) further allows the Commission to request a national or specialised human rights institution with affiliate status to inform it of any action it has taken to monitor or

11 *Purohit* (n 10) paras 80-83.

12 Rules of Procedure of the African Commission on Human and Peoples' Rights 2020.

13 Viljoen (n 3) 364.

14 As above.

15 As above.

facilitate the implementation of the Commission's decision. Rule 125(5) further allows the rapporteur for the communication, or any other member of the Commission designated for this purpose, to monitor the measures taken by the state party to give effect to the Commission's decision. The follow-up measures under Rule 125 may be regarded as a seismic shift, which is instrumental in not only enhancing the Commission's accessibility but also in fostering a culture of compliance as a greater engagement of stakeholders often engenders higher levels of compliance.

Comparatively, and as noted earlier, the previous version of the 2010 Rules of Procedure exhibited a more rudimentary approach to compliance.¹⁶ By now explicitly granting the Commission the authority to request information from states regarding their implementation efforts, the 2020 Rules of Procedure bolster the accountability of state parties with respect to their human rights obligations. This proactive engagement is a departure from the earlier Rules, which lacked such a comprehensive mechanism for monitoring implementation.¹⁷ The mechanisms for monitoring the execution of the Commission's decisions were less structured and lacked the depth and specificity that are now reflected in the 2020 Rules of Procedure.¹⁸

While the African Commission's commitment to compliance was inherent in its mandate, the procedural framework had not adequately evolved to address the complexities of ensuring state parties' adherence to its decisions. Some have even gone so far as to state that '[i]n the area of protection of human rights, the Commission stands as a toothless bulldog' and that it 'can bark – it is, in fact, barking' but it 'was not, however, created to bite'.¹⁹ In its latest 2023 Activity Report, the African Commission itself has yet again highlighted that the level of compliance by state parties with the Commission's decisions 'is still low'.²⁰ A more detailed account of lack of compliance with the decisions of the African Commission is given in the following part.

16 As above.

17 Murray & Long (n 7).

18 Murray (n 6).

19 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.

20 52nd and 53rd Combined Activity Reports, African Commission on Human and Peoples' Rights 8 June 2023 para 41.

3 Non-compliance with the decisions of the African Commission

The terms 'compliance' and 'implementation' are often used interchangeably, but it must be noted that they have different meanings. Compliance is 'the alignment between the factual situation at the domestic level and a decision of a regional body' insofar as it 'connotes conformity with a regional decision'.²¹ Implementation is 'the action of putting in place measures to give effect to a regional decision'.²² Compliance, therefore, is outcome-based, while implementation is process-based.²³ What should be noted at this juncture is that implementation of decisions in the African human rights protection system is 'in its infancy' and 'still a work in progress'.²⁴

In an oft-cited empirical study analysing 44 cases decided on the merits, Viljoen and Louw found that there was an overall lack of state compliance with the recommendations of the African Commission.²⁵ Full compliance was recorded in 14 per cent of cases, non-compliance accounted for 30 per cent, while there was partial compliance in 32 per cent of cases. The study also examined situational compliance on the basis of other factors such as a change in government, which accounted for 16 per cent of the cases. A more recent study conducted an examination of the implementation of two specific decisions involving Kenya and the Democratic Republic of the Congo (DRC).²⁶ The findings of this study exhibit but an illusory promise of compliance. It can therefore be inferred that the African Commission saw very little state compliance with its recommendations since its founding in 1987. Viljoen and Ayeni have also analysed whether three countries – Nigeria, The Gambia and Zimbabwe – have complied with 12 decisions that were rendered by the African Commission during the study period of 2000 to 2015.²⁷ The authors introduced

21 J Biegon 'Compliance studies and the African human rights system: Reflections on the state of the field' in A Adeola (ed) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022) 13.

22 As above.

23 A von Staden 'Implementation and compliance' in R Murray and D Long (eds) *Research handbook on implementation of human rights in practice* (2022) 17.

24 Viljoen (n 3) 367.

25 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1993-2004' (2007) 101 *American Journal of International Law* 1; L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005.

26 D Inman and others 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: Revisiting the *Endorois* and the *Mamboleo* decisions' (2018) 2 *African Human Rights Yearbook* 400.

27 F Viljoen & V Ayeni 'A comparison of state compliance with reparation orders by regional and sub-regional human rights tribunals in Africa: Case studies of

the innovative concept of aggregate compliance, 'a concept that accords weight to both full and partial compliance' and 'avoid the rigid juxtaposition of full and partial compliance, which suggests that nothing has *really* been accomplished until *everything* has been achieved'.²⁸ The findings of the study revealed that there was an aggregate compliance of 61 per cent for Nigeria, 38 per cent for The Gambia, and 18 per cent for Zimbabwe. The differing levels of compliance among these three states can be explained by a range of factors. These include characteristics unique to each state; the clarity and detail of the reparation orders issued by the human rights tribunals; the level of follow up by domestic entities supporting compliance; the volume of cases handled by each tribunal; the development stage of the tribunals involved; and variations in the time elapsed since the decisions were made.²⁹

While the assessment of how well the African Commission's recommendations have been put into action might be a topic of debate, there is widespread agreement that the overall implementation rate is unsatisfactory.³⁰ Ayinla and Wachira offer various reasons for this poor implementation rate.³¹ These include a lack of political will on the part of state parties, and good governance. They also mention outdated concepts of sovereignty and the absence of an institutionalised follow-up mechanism for ensuring the implementation of recommendations. In addition, they highlight the Commission's weak powers of investigation and enforcement and the non-binding character of the its recommendations. The non-binding character in fact is one of the most frequently-cited reasons for the reluctance of states to enforce its recommendations.

Scholars such as Murray and Long have explained how the African Commission has over the years evolved from making brief decisions to issuing more detailed ones that included reparations to address findings on violations.³² However, they argue that there has been limited focus on how states actually implement the decisions of supranational human rights bodies such as the African Commission. They highlight how the past decades have thus seen growing

Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe' (2022) 26 *International Journal of Human Rights* 1651, 1654.

28 Viljoen & Ayeni (n 27) 1658.

29 Viljoen & Ayeni (n 27) 1662.

30 DC Baluarte *From judgment to justice: Implementing international and regional human rights decisions* (2010), <https://www.justiceinitiative.org/uploads/62da1d98-699f-407e-86ac-75294725a539/from-judgment-to-justice-20101122.pdf> (accessed 17 August 2023).

31 A Ayinla & GM Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 456.

32 Murray & Long (n 7).

interest in this area due to concerns about an 'implementation crisis' that impacts the legitimacy of such bodies.³³ While the African Commission operates with a broad mandate and limited resources, it possesses various means to monitor and facilitate the implementation of its decisions. Yet, it has struggled to systematically employ these methods in order to establish a coherent implementation role. There indeed are contrasting views on enforcement mechanisms for achieving implementation.

Some authors argue for clear consequences and processes, for instance, in terms of increasing the role of civil society as a complementary domestic source of pressure with the aim of raising domestic costs in pressuring member states towards compliance.³⁴ It should be noted that Rule 125(8) of the 2020 Rules of Procedure provides for a more forceful approach to the extent that if the Commission finds that the state party's conduct may raise issues of non-compliance with its decision, it may refer the matter to the attention of the competent policy organs of the AU for more concrete steps to be taken.³⁵

Other authors advocate persuasion, dialogue and cooperation.³⁶ Murray and Long suggest that the African Commission can enhance the likelihood of implementation by clarifying its role and strategically using both soft and forceful approaches at different stages after decisions are made.³⁷ This approach is in line with Rule 125(9) of the 2020 Rules of Procedure, which provides that the 'Commission shall indicate in its Activity Report the status of implementation of its decisions, including by highlighting any issues of possible non-compliance by a state party'. Rule 125(9) provides for a hybrid approach whereby the Commission can use at the same time a soft and forceful approach where non-compliant states are publicly named and strongly encouraged to comply for fear of blemish to their international reputation. It nonetheless is submitted that soft approaches should take primacy over forceful ones insofar as the former are more likely to cajole states to comply with the decisions

33 Murray & Long (n 7) 838.

34 AE Etuvoata 'Towards improved compliance with human rights decisions in the African human rights system: Enhancing the role of civil society' (2020) 21 *Human Rights Review* 415.

35 M Jimoh 'Investigating the responses of the African Commission on Human and Peoples' Rights to the criticisms of the African Charter' (2023) 4 *Rutgers International Law and Human Rights Journal* 1, 34.

36 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.

37 As above.

of the African Commission, particularly when viewed from a human rights perspective in an African context.

There is no doubt that the African Commission should play a more active role in engaging with all stakeholders, including political actors, in view of implementing its own decision. Sandoval, Leach and Murray contend that dialogue encompasses the use of tools by supranational bodies to incite all stakeholders 'to explore ways of moving implementation forward, either between themselves or with the direct help of the monitoring body'.³⁸ These scholars also advance that supranational human rights bodies, including the African Commission, make use of myriad tools that best foster or cajole implementation.³⁹ What can be gleaned from their study is that dialogue between different stakeholders should be the first port of call in ensuring the effective implementation of the decisions of these human rights bodies. Stronger measures would eventually be warranted for recalcitrant states that fail to implement or comply with decisions of treaty bodies. By contrast, it can be argued that diplomatic means, including dialogue, discussion and deliberation, play a critical and effective role in 'cajoling',⁴⁰ inducing or influencing states and other stakeholders to tackle implementation and compliance imaginatively and effectively.

The African Commission has certainly devised a wide array of tools that it can use to 'cajole' implementation. This implementation is effectively carried out by diplomacy or dialogue rather than forceful measures upon which states usually frown. Ayeni and Von Staden argue that the African Commission as a quasi-judicial body is less constrained and has more leeway in monitoring and following up on its decisions.⁴¹ Their study found that the promotional mandate of a human rights body such as the African Commission provides 'immense opportunity for continuous engagement and dialogue with states through state missions and country visits as well as the review of periodic state reports'.⁴²

The following part of this article describes in greater detail the use of some of these tools that can be used to cajole implementation of decisions of the African Commission in the context of the rights of persons with disabilities in Africa.

38 Sandoval and others (n 36) 78.

39 As above.

40 As above.

41 VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 3.

42 As above.

4 Working Group on the Rights of Older Persons and Persons with Disabilities

Article 18(4) of the African Charter provides that the ‘aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs’. Criticism has been levelled at clustering together disability with age under this provision of the Charter, as this conflation curtailed the development of a complete, nuanced and comprehensive understanding of disability.⁴³ According to Msipa and Juma, disability has historically, especially in Africa, been associated with harmful beliefs about disease, sin and shame, which they categorise as the deficient approach to disability.⁴⁴ The rights of persons with disabilities in Africa were scattered across various general and group-specific human rights instruments within the African human rights framework.⁴⁵ These instruments primarily reflected outdated and limited perspectives on disability, rooted in the medical and welfare models. These shortcomings eventually led to calls for the adoption of an instrument specifically providing for the promotion and protection of the rights of persons with disabilities in the African context, in line with international standards such as the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD).⁴⁶ The result was the adoption by the African Union Assembly of Heads of State and Government of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) on 29 January 2018 – in large part a product of the Working Group, discussed below.⁴⁷ According to article 2 of this Protocol, its objective is to ‘promote, protect and ensure the full and equal enjoyment of all human and people’s rights by all persons with disabilities’ in Africa.

The African Disability Protocol entered into force on 3 May 2024, after it had been ratified by 15 of the 54 state parties to the

43 Murray (n 5) 476, citing SAD Kamga ‘A call for a protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa’ (2013) 21 *African Journal of International and Comparative Law* 219; J Biegion ‘The promotion and protection of disability rights in the African human rights system’ in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 63.

44 Msipa & Juma (n 9) 5.

45 As above.

46 F Viljoen & J Biegion ‘The feasibility and desirability of an African disability rights treaty: Further norm elaboration or firmer norm implementation?’ (2014) 30 *South African Journal on Human Rights* 348-352.

47 E Guematcha ‘The need for a comprehensive overhaul of disability rights in the African Union’ in O Quirico (ed) *Inclusive sustainability* (2022) 223; Y Basson ‘The right to an adequate standard of living in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa’ (2019) 7 *African Disability Rights Yearbook* 258.

African Charter.⁴⁸ The African Disability Protocol can be described as a unique instrument that 'addresses gaps in the approach to disability found in the African human rights system by abandoning the medical and welfare approaches and employing the social and human rights models of disability'.⁴⁹ The African Disability Protocol espouses a human rights model similar to that found under CRPD. There are many CRPD rights that have been directly transposed into the African Disability Protocol. For instance, articles 5 and 6 of the Disability Protocol largely replicate article 5 of CRPD on the right to equality and discrimination.⁵⁰ However, even if CRPD is the most comprehensive international instrument providing for the respect, protection and fulfilment of the rights of persons with disabilities, it does not adequately capture the lived experiences of persons with disabilities in Africa.⁵¹ The African Disability Protocol has redressed this balance by offering a better window into the reality of Africans with disabilities. It includes issues and rights that are specific to the African context, such as ritual killings (article 1); harmful practices (article 11(1)); youths with disabilities (article 29); older persons with disabilities (article 30); persons with disabilities as duty bearers (article 31); definition of deaf culture (article 1); and the role of the family, care givers and community (article 25). The Disability Protocol also includes marginalised groups such as persons with albinism.⁵² It is argued that the Working Group can leverage the African Disability Protocol to prompt states into ratifying and complying with their obligations under the African Disability Protocol, as well as promoting dialogue and cooperation in implementing decisions relating to persons with disabilities. It is anticipated that the entry into force of the African Disability Protocol would inspire the submission of more communications dealing with then rights of persons with disabilities to the African Commission.

The Working Group is a special mechanism, established by the African Commission in 2007 as a focal point on the rights of older

48 See Centre for Human Rights 'Centre for Human Rights welcomes the coming into force of the African Disability Protocol' 3 October 2024, https://www.chr.up.ac.za/images/centrenews/2022/Press_Statement_-_Ratification_status_of_the_African_Disability_Protocol.pdf (accessed 15 November 2024). Regrettably, at the time of writing, the official information on the AU website was not updated to reflect the updated status of ratification and the fact that the treaty has entered into force. See Status List of Countries which have Signed, Ratified/ Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_PERSONS_WITH_DISABILITIES_IN_AFRICA_0.pdf (accessed 8 November 2024).

49 Msipa & Juma (n 9) 13.

50 Msipa & Juma (n 9) 14.

51 Viljoen & Biegona (n 46) 352-354.

52 Msipa & Juma (n 9); Viljoen & Biegona (n 46); Kamga (n 43).

persons in Africa.⁵³ The purpose of setting up this unique mechanism was to work with the Commission in convening a group of experts and take the lead in formulating a protocol on the rights of older persons. The focal point then became a working group, which had the additional responsibility of looking at disability rights in conjunction with the African Commission.⁵⁴ With this added responsibility came new tasks for the Working Group, including convening meetings, doing research on various groups of peoples' rights, and establishing best practices.⁵⁵ The Working Group was originally tasked with the duties to draft legal instruments on the rights of older and disabled persons in Africa, which culminated in the Disabilities Protocol, as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.⁵⁶ It can safely be assumed that the Working Group can play a vital role in enhancing the implementation of African Commission decisions relating to persons with disabilities through their expertise, advocacy and collaboration as the current Chairperson of the Working Group, Commissioner Marie-Louise Abomo, implicitly recognised in her latest Intersession Activity Report.⁵⁷

With their knowledge and expertise, the Working Group members can provide valuable insights through webinars, awareness-raising campaigns and engagement with member states. As such, it can raise awareness and advocate the ratification and domestic implementation of the African Disability Protocol. Further, the Working Group's technical assistance and capacity-building support can help member states align their national frameworks with international standards. By collaborating with stakeholders, such as member states, civil society organisations and international partners, the Working Group can foster knowledge-sharing and coordinated actions. Additionally, its reporting and engagement in dialogue can stimulate ongoing discussions, accountability and transparency. Overall, the Working Group's involvement in diplomatic mechanisms can strengthen the

53 Resolution on the Establishment and Appointment of a Focal Point on the Rights of Older Persons in Africa, African Commission /Res.118 (28 November 2007).

54 Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, African Commission /Res.143 (27 May 2009).

55 Murray (n 6) 482.

56 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (31 January 2016); DM Chirwa & RI Chipo 'Guarding the guardians: A critical appraisal of the Protocol to the African Charter on the Rights of Older Persons in Africa' (2019) 19 *Human Rights Law Review* 53.

57 Working Group on the Rights of Older Persons and Persons with Disabilities in Africa, Intersession Activity Report 20 May 2023, <https://achpr.au.int/en/intersession-activity-reports/working-group-rights-older-persons-and-persons-disabilities-af> (accessed 20 August 2023).

implementation of African Commission decisions. It can also promote the rights and well-being of persons with disabilities across Africa.

The Working Group presents an avenue through which the African Commission can amplify compliance with its decisions across various forms of communication and recommendations. The establishment of the Working Group in and of itself signifies the African Commission's commitment to addressing the specific rights concerning older persons and persons with disabilities, a recognition that was somewhat limited in earlier iterations of its human rights discourse.⁵⁸ By focusing on these marginalised groups, the Working Group effectively supplements the Commission's broader efforts to engender a human rights culture on the African continent. Such targeted mechanisms facilitate the elaboration of context-sensitive recommendations that can spur states towards compliance with human rights obligations.

The collaboration between the African Commission and the Working Group offers a potential springboard for increasing compliance with the Commission's decisions in multiple ways.

First, the Working Group's engagement in researching and formulating recommendations for older persons and persons with disabilities can catalyse an enhanced awareness of their rights among states. When incorporated into the African Commission's Concluding Observations on state reports or in other thematic reports, these recommendations can serve as a touchstone for states to align their policies with international human rights standards. For instance, if the Working Group highlights gaps in the right to accessibility of persons with disabilities, and the African Commission subsequently incorporates these concerns in its recommendations to states, this interconnected approach can stimulate targeted policy changes, thereby fostering compliance.

Second, the commissioners of the African Commission who are members of the Working Group⁵⁹ can use their mandate to foster collaboration between the African Commission and other stakeholders such as civil society organisations that advocate the rights of persons with disabilities, thus engendering a more holistic approach to human rights promotion. It should be noted that the Working Group also comprises experts from civil society

⁵⁸ Murray (n 6) 482-483.

⁵⁹ Resolution on the Reconstitution of the Working Group on the Rights of Older Persons and People with Disabilities in Africa, African Commission /Res 506 (LXIX)2021 5 December 2021.

organisations.⁶⁰ Civil society organisations often play a pivotal role in monitoring state compliance and advocating rights fulfilment.⁶¹ The expert members are well placed to coordinate with civil society organisations and other stakeholders to facilitate the dissemination of African Commission decisions and recommendations at the grassroots level, which in turn can create a groundswell of pressure for compliance. For example, the Working Group can collaborate with disabled persons' organisations to promote the implementation of African Commission decisions on inclusive education for children with disabilities. This joint advocacy can augment the visibility of the Commission's decisions and expedite compliance efforts.

However, it is essential to acknowledge the potential challenges inherent in leveraging the Working Group as a springboard for compliance. The voluntary nature of compliance mechanisms in the African human rights system, as elucidated by many scholars, underscores the importance of political will and cooperation from state parties.⁶² The recommendations put forth by the Working Group must be underpinned by a conducive environment that encourages states to incorporate these suggestions into their domestic legal frameworks. Nonetheless, the African Commission should remain the driving force behind the Working Group's involvement in ensuring this effective collaboration with persons with disabilities and their representative organisations.

So far, this article has focused on a mechanism that tangentially involves the role of the African Commission to ensure compliance with its decisions. The following part will discuss how the African Commission can take centre stage in the implementation process by using mechanisms at the political or diplomatic end of the compliance spectrum as opposed to putative formal legal processes.

5 Concluding Observations on state reports

Among the various roles of the African Commission highlighted in the preceding part, its responsibility in the examination of state reports, where it conducts thorough evaluations of member states' compliance with their obligations under the African Charter, is of particular significance. The Commission derives this responsibility to examine state reports and issue its Concluding Observations under

60 Resolution on the Renewal of the Mandate of the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa and on the Appointment of its Chair and Members ACHPR/Res.589 (LXXX) 2024.

61 Etuvoata (n 34) 415.

62 Viljoen (n 3).

article 62 of the African Charter. Under this provision, state parties are required to submit periodic reports that should provide an indication of the legislative and other measures that they have undertaken in view of giving effect to the rights enshrined under the Charter.⁶³ The Commission is then tasked to evaluate these reports with a view to assessing the extent to which state parties have made progress in aligning their laws and policies with the human rights standards set out under the African Charter. This assessment is informed by the Charter's principles and provisions as well as relevant international human rights norms.

Upon receipt and examination of the state periodic reports, the African Commission formulates Concluding Observations, which constitute a comprehensive analysis and evaluation of the human rights situation in the respective state party. These Concluding Observations are directed towards highlighting achievements, identifying challenges as well as providing recommendations to enhance the state party's human rights obligations. These observations serve as a tool for holding states accountable and guiding them in improving their human rights record. They also provide guidance to civil society organisations and human rights advocates in their efforts to promote and protect human rights.⁶⁴ The African Commission's monitoring role thus is of crucial significance in ensuring that its decisions and Concluding Observations are effectively implemented. It allows for the identification of challenges and obstacles to implementation as well as provides an opportunity for dialogue and cooperation between the Commission and state parties.

To enhance the effectiveness of this procedure, the African Commission has employed promotional missions – a proactive approach aimed at facilitating a deeper understanding of the human rights landscape within member states.⁶⁵ These missions serve to supplement the information provided in state reports, identify issues that may require further attention and engage in a constructive dialogue with state authorities and relevant stakeholders. Promotional missions organised by the African Commission thus are characterised by their multifaceted nature, incorporating both information

63 Murray (n 6) ch 38 'Article 62: State reporting'.

64 R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015).

65 See eg Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the United Republic of Tanzania, 23-28 January 2023, <https://achpr.au.int/en/news/press-releases/2023-02-24/press-statement-promotion-mission-united-republic-tanzania> (accessed 21 August 2023).

gathering and interactive engagement. The missions typically entail visits to member states by representatives of the African Commission, including commissioners or Special Rapporteurs, who have specialised knowledge in various human rights domains. The missions thus afford commissioners the opportunity to engage directly with state officials, civil society organisations and other stakeholders, thereby fostering an open and comprehensive dialogue on the human rights situation in the country under review.

During these missions, the African Commission representatives engage in a rigorous examination of the legislative, institutional and policy frameworks that underpin the protection and promotion of human rights. This examination extends to the identification of challenges and gaps that may hinder the full realisation of human rights in the state. By conducting meetings, interviews and site visits, the African Commission aims to gather first-hand information that complements the state reports submitted. This approach not only enriches the Commission's understanding of the context, but also enables a holistic assessment of the human rights situation on the ground. It is suggested that the interactive nature of promotional missions is a hallmark of the African Commission's commitment to fostering collaboration and cooperation with member states. Through face-to-face dialogues, stakeholders are afforded the opportunity to express their concerns, share perspectives and propose solutions to the challenges they face. Such engagement is instrumental in establishing a collaborative framework for addressing human rights issues and promoting positive change. It is submitted that these approaches have more chances of success than adopting forceful measures.⁶⁶

Furthermore, the insights garnered during these missions enable the African Commission to provide tailored recommendations and technical assistance to member states, thereby fostering a more effective implementation of human rights standards. In relation to the promotion of the rights of persons with disabilities, the African Commission's state reporting procedure can be a valuable tool. For instance, in its promotional mission to Namibia, the Commission noted the challenges related to unequal access and lack of inclusiveness in healthcare services, education, public buildings, and transportation for persons with disabilities.⁶⁷ As such, by requiring

66 M Jimoh 'Investigating the responses of the African Commission on Human and Peoples' Rights to the criticisms of the African Charter' (2023) 4 *Rutgers International Law and Human Rights Journal* 1; Murray (n 5) 805.

67 Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the Republic of Namibia 12-16 June 2023, <https://achpr.au.int/en/news/press-releases/2023-06-17/press-statement-conclusion->

state parties to report on the measures they have taken to implement the rights of persons with disabilities, the Commission can assess the progress made and identify areas where further action is needed. The promotional missions in tandem with the state reporting procedure can also provide an opportunity for civil society organisations and disabled persons' organisations to engage with the Commission and raise awareness about the rights and needs of persons with disabilities.

Diplomatic mechanisms can ultimately bridge the gap between African Commission decisions and state compliance through the Concluding Observations. For instance, while the Commission has provided recommendations on inclusive policies relating to persons with disabilities in its Concluding Observations on The Gambia, the country has encountered challenges in effectively implementing these.⁶⁸ In its Concluding Observations, the Commission acknowledges how The Gambia, in general, is largely compliant with its obligations, but also made specific recommendations in relation to prison conditions and detention centres.⁶⁹ Some of these areas of concerns and ensuing recommendations have been highlighted in the Report of the Human Rights Promotion Mission to the Republic of The Gambia from 19 to 24 April 2017.⁷⁰ Diplomatic means, such as sustained dialogue and cooperation through the promotion mission to The Gambia in 2017,⁷¹ can therefore facilitate constructive exchanges between the African Commission and states, identify feasible solutions and develop tailored action plans, capacity-building initiatives as well as technical assistance programmes. In its 2017 promotional mission to The Gambia, the Commission also noted the efforts 'to sustain and support the social and rehabilitation facilities existing in the country for vulnerable persons, including vulnerable children, older persons, and persons with disabilities'.⁷² It can therefore be argued that states, through diplomatic efforts, can be supported to implement the Commission's recommendations, thereby improving the lives of persons with disabilities, specifically.

promotion-mission-african#:~:text=The%20Delegation%20commends%20the%20Government,regional%20and%20international%20human%20rights (accessed 21 August 2023).

68 African Commission Concluding Observations and Recommendations on the First Periodic Report of The Gambia 3 November 1994, <https://achpr.au.int/index.php/en/state-reports/concluding-observations-and-recommendations-gambia-1st-periodic-report-199> (accessed 11 November 2024).

69 Report of the Special Rapporteur EVO Dankwa 'Prison conditions and detention centres in Africa' DOC/05 (XXVI) 123 Mission to The Gambia 21-26 June 1999 31.

70 African Commission Report of the Human Rights Promotion Mission to the Republic of The Gambia 19-24 April 2017, 6 September 2019 50, <https://achpr.au.int/en/node/549> (accessed 11 November 2024).

71 As above.

72 African Commission Report (n 70) 2.

This is not to say that the African Commission should not use other mechanisms to ensure compliance with its recommendations. Even while there are legitimate reasons to criticise the article 62 procedure, there are some advantages that can be ascribed to this particular mechanism. In their roles as Special Rapporteurs and participants in working groups of the African Commission, each commissioner has used it to question states about the actions they have taken to address particular challenges.⁷³ As noted in its Concluding Observations, the Commission has also questioned states about the implementation of their decisions on specific communications.⁷⁴ Through these different ‘follow-up’ mechanisms, the Commission has essentially been able to request the state party to provide information on the steps taken to implement the recommendations, with the possibility to engage further in a dialogue in order to assess progress in subsequent reporting cycles. It is contended that dialogue can and has, to a large extent, become a swift and mighty sword in the hands of the Commission to cajole and induce member states into complying with its decisions. This dialogue should remain as the first port of call before considering other means of implementation.

6 Diplomatic mechanisms to improve implementation and compliance

What emerges from the foregoing discussion is that diplomatic mechanisms stand out as a more viable means to foster compliance with the decisions of the African Commission due to the intricate interplay between state sovereignty, political will and the implementation of human rights norms. It has been noted earlier in this article that the compliance landscape within the African human rights system is often influenced by complex diplomatic considerations that underlie states’ engagement with international human rights mechanisms. This is in line with Terman’s thesis, which postulates that human rights norms are deeply intertwined with geopolitics and national interests.⁷⁵ The international community’s response to state violations of citizens’ rights, through moral pressure and urging state reform, is influenced by complex geopolitical relationships.⁷⁶ Terman thus postulates that while shaming tactics are commonly employed to induce compliance and improve human rights conditions, the outcomes of these efforts are deeply political.

73 Murray (n 5).

74 Murray (n 5), citing, eg, Concluding Observations on Mauritania’s Report (16 February 2012).

75 R Terman *The geopolitics of shaming: When human rights pressure works – and when it backfires* (2023).

76 As above.

It follows that particular attention should be paid to how diplomatic mechanisms – as opposed to purely legal or sanctioning mechanisms – can be used to encourage and cajole states to engage in constructive dialogues in working towards aligning their domestic priorities with the observations and recommendations of the African Commission. Such dialogues can potentially enhance the likelihood of compliance by creating an environment that fosters cooperation rather than confrontation. Scholars such as Murray and Long have argued that ‘effective monitoring requires a strategic consideration of various tools of monitoring implementation, persuasive and more forceful’.⁷⁷ However, they do agree that there needs to be a more nuanced understanding to appreciate at what stages they might be best used. Political mechanisms, different from these forceful measures, tap into the intrinsic link between state governance and human rights compliance. Scholars such as Kittichaisaree argue that human rights implementation often hinges on states’ political systems and the alignment of policies with public sentiments.⁷⁸ Political mechanisms offer an avenue for states to internalise human rights values through domestic legislation and policies, thereby making compliance a holistic endeavour rather than a mere external obligation.

Examples from the practices of the African Commission as discussed previously in this article underscore the efficacy of diplomatic and political approaches. For example, when the African Commission issues Concluding Observations, it provides recommendations that are contextualised within each state’s specific circumstances. These recommendations often take into account the state’s socio-economic and political context. It follows that a diplomatic approach has a greater chance of ensuring that the state will be willing to implement these measures. Nonetheless, it is important to acknowledge potential limitations in relying solely on diplomatic and political mechanisms. The voluntary nature of compliance mechanisms and varying state commitments can and do pose challenges in ensuring uniform and effective implementation. Moreover, the slow pace of diplomatic negotiations and political changes can hinder timely human rights improvements.

It follows that the African Commission can create a more conducive atmosphere for diplomatic mechanisms to be used as a springboard for states to comply with its decisions. It is submitted that diplomatic mechanisms of the Commission through the Working Group and

⁷⁷ Murray & Long (n 7) 852.

⁷⁸ K Kittichaisaree *International human rights law and diplomacy* (2020).

the state reporting process emerge as vital tools in improving the implementation and compliance with African Commission decisions. This is applicable to all decisions of the Commission, but the focus of this article has been on persons with disabilities. As discussed previously, the Working Group provides a specialised forum in which states can engage with experts and stakeholders to receive targeted advice and support. Meanwhile, the state reporting process facilitates the process of a structured dialogue, whereby states can evaluate their human rights records and receive constructive feedback tailored to their specific socio-economic and political contexts.

What is abundantly clear is that by emphasising negotiations, dialogue and cooperation, these mechanisms can cultivate a sense of ownership and commitment among states, encouraging them to integrate human rights norms into their domestic policies and practices. This approach not only enhances the likelihood of compliance but also promotes a cooperative rather than confrontational environment. In view of maximising the effectiveness of these diplomatic efforts, it is crucial to complement them with strategies that address their inherent limitations, such as the voluntary nature of compliance and the varying levels of state commitment. Combining diplomatic mechanisms with capacity-building initiatives, robust monitoring and, where necessary, persuasive and forceful measures, it is hoped that we can collectively create a more comprehensive and effective framework for upholding the rights of persons with disabilities across Africa.

7 Conclusion

Diplomatic and political mechanisms offer a more pragmatic and effective path to compliance with the decisions of the African Commission. Recognising the intricate interplay between human rights norms, state sovereignty and political considerations, these mechanisms create space for constructive engagement and tailored recommendations that resonate with states' internal dynamics. While challenges remain, the application of these mechanisms acknowledges the complexities of human rights implementation and fosters an environment conducive to compliance. Regrettably, many African states struggle to fulfil their obligations, in particular with regard to the rights of persons with disabilities, thereby weakening the effectiveness of the treaty body system and other instruments such as the African Disability Protocol.

By examining the implications of non-compliance with African Commission decisions, this article sheds light on two potential

mechanisms to counteract the myriad ways in which persons with disabilities continue to face attitudinal, environmental and systemic barriers. It underlines how the lack of implementation to a certain extent undercuts the Commission's credibility, thereby hampering the development of a culture of human rights for persons with disabilities. With the entry into force of the African Disability Protocol, it is anticipated that more communications dealing with the rights of persons with disabilities will be submitted to and decided by the African Commission. In order to address these chronic deficiencies, diplomatic mechanisms such as negotiations, dialogue and cooperation can serve as catalysts for change in respecting, protecting and fulfilling the rights of persons with disabilities. Particular attention should thus be paid in fostering diplomatic relations between the African Commission, African states and relevant stakeholders, such as disability rights and civil society organisations. In particular, the Working Group and the state reporting process can be used to enhance compliance with the various decisions of the African Commission. Through sustained engagement and dialogue, diplomatic efforts can eventually encourage states to prioritise disability rights, mainstream disability inclusion into national policies, and strengthen implementation mechanisms.