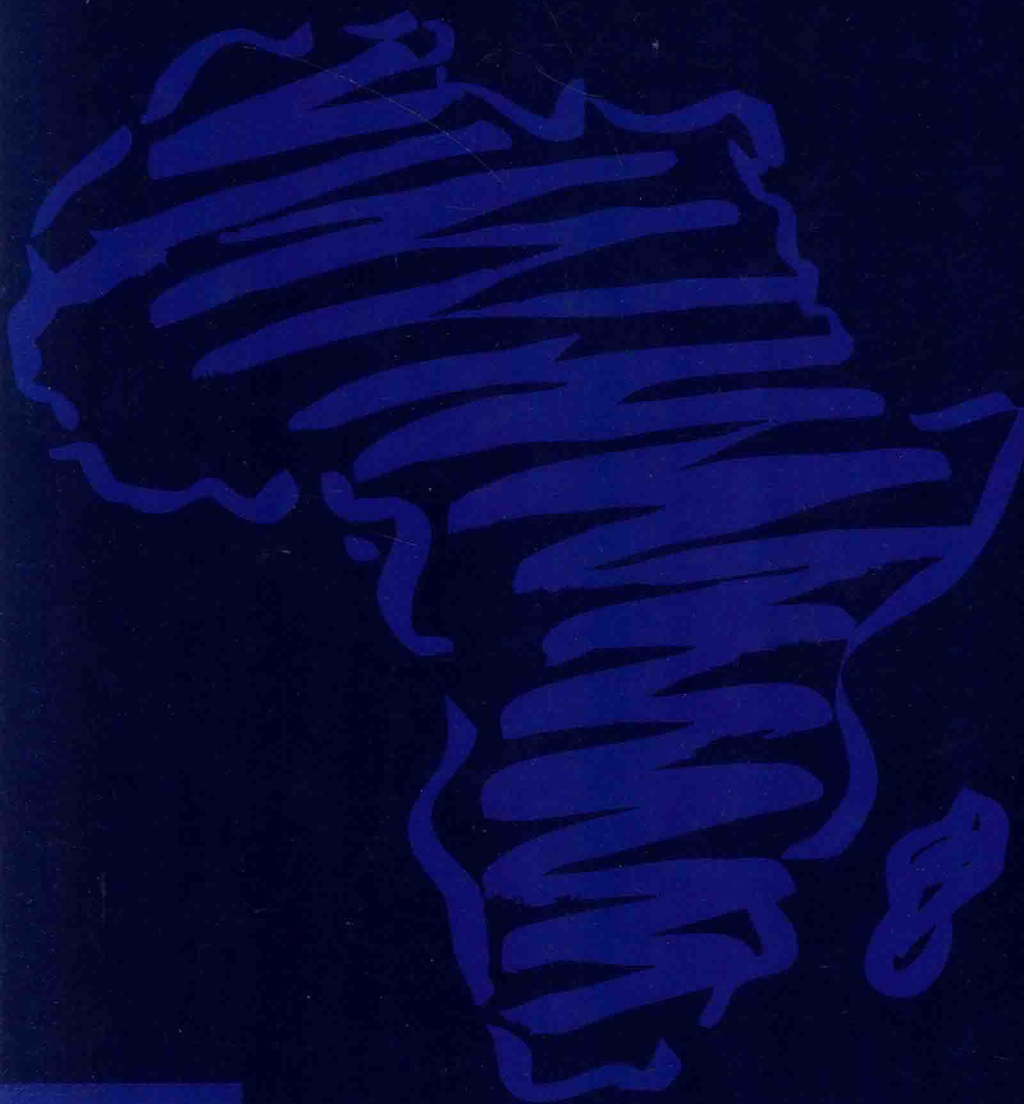


The Implementation of the Findings of the African Commission on Human and Peoples' Rights

Rachel Murray and Debra Long

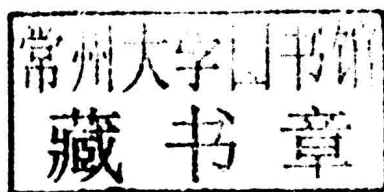


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THE IMPLEMENTATION
OF THE FINDINGS OF THE
AFRICAN COMMISSION ON
HUMAN AND PEOPLES'
RIGHTS

RACHEL MURRAY

DEBRA LONG



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THE IMPLEMENTATION OF THE FINDINGS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

An 'implementation crisis' has been identified in the enforcement of rulings of UN and regional human rights bodies and fundamental but crucial questions remain unanswered: what exactly does it mean to implement and comply with international and regional human rights decisions; and what factors influence whether a state implements and complies or not?

Much more is now known about the work of the African Commission on Human and Peoples' Rights, but a gap still exists in the literature on the implementation of the findings of the Commission. This book draws upon the data and evaluation from a four-year research project, analysing the range of pronouncements of the African Commission, including its decisions on individual communications, provisional measures, resolutions, and promotional and protective mission reports. It investigates the extent to which States implement these findings and examines how that implementation is monitored by others.

RACHEL MURRAY is Professor of International Human Rights Law and Director of the Human Rights Implementation Centre at the University of Bristol Law School. Her specialist areas are human rights in Africa, particularly the African Charter and its Commission and Court on Human and Peoples' Rights and the African Union, national human rights institutions, the Optional Protocol to the UN Convention Against Torture (OPCAT) and implementation. Her publications include *Optional Protocol to the UN Convention Against Torture* (2011), *The Role of National Human Rights Institutions at the International and Regional Levels* (2007), *Human Rights in Africa: From the OAU to the African Union* (2004), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, with Malcolm Evans (2008), *The African Commission on Human and Peoples' Rights and International Law* (2000).

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FOREWORD

The African Commission on Human and Peoples' Rights ('the Commission') was established in 1987 as a quasi-judicial body charged with the promotion and protection of human and peoples' rights in Africa pursuant to Article 30 of the African Charter on Human and Peoples' Rights ('the Charter'). In order to effectively carry out its mandate, the Commission employs a range of strategies aimed at promoting and protecting human rights in Africa: One of these strategies is its human rights complaints system, commonly referred to as its 'communication' procedure, for it is through this procedure that the Commission considers and adjudicates on charges submitted to it alleging violations of the ACHPR.

One of the major challenges facing the Commission in this regard is the absence of an effective follow-up mechanism to ensure implementation of its findings and recommendations, a factor which detracts from its effectiveness.

This book, which is based on a four-year research project carried out by the Human Rights Implementation Centre of the University of Bristol, provides an invaluable and timely examination of some of the factors that impact on the implementation and use of the Commission's findings and recommendations in practice. It challenges the assumptions and arguments that have been advanced by States Parties to avoid implementing the Commission's findings and recommendations; it is an invaluable aid to commentators on the African human rights system seeking to explain the disappointing levels of implementation to date; and it also examines some of the ways in which the findings and recommendations of the Commission are being 'used' in practice by a range of actors.

At a time when the work of the Commission, and its relationship with the African Court on Human and Peoples' Rights and Member States of the African Union (AU), is coming under increased scrutiny, the authors, through their analyses, offer practical advice and suggestions for a way forward, with a view to creating a more robust and effective means of

following up on and ensuring implementation of the Commission's findings and recommendations. The book also identifies some key roles and responsibilities for a range of stakeholders at the international, regional and national levels, to achieve the same end.

While the Commission will draw on the findings presented in this book to enhance and enrich its work, it is quite clear from this book that the Commission alone cannot instigate the change that is required. It is only through the active engagement of all stakeholders – States Parties, other AU organs, national human rights institutions, civil society organisations and a range of other actors – that the findings and recommendations of the Commission can be implemented, so that, ultimately, human rights violations can be prevented and addressed in the continent. As the Commission's motto puts it: 'Human rights – our collective responsibility'.

Med S. K. Kaggwa

*Member of the African Commission on Human and Peoples' Rights
Special Rapporteur for Prisons and Conditions of Detention in Africa
July 2014*

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ABBREVIATIONS

| | |
|---------|---|
| ACERWC | African Committee of Experts on the Rights and Welfare of the Child |
| ACHPR | African Charter on Human and Peoples' Rights |
| AHRLR | African Human Rights Law Reports |
| APCOF | African Policing Civil Oversight Forum |
| APRM | African Peer Review Mechanism |
| APT | Association for the Prevention of Torture |
| AU | African Union |
| CEN-SAD | Community of Sahel-Saharan States |
| CPTA | Committee for the Prevention of Torture in Africa |
| CSO | civil society organisation |
| DRC | Democratic Republic of Congo |
| ECHR | European Convention on Human Rights |
| ECOSOCC | Economic, Social and Cultural Council |
| ECOWAS | Economic Community of West African States |
| ECtHR | European Court of Human Rights |
| HRC | Human Rights Council |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| NEPAD | New Partnership for Africa's Development |
| NGO | non-governmental organisation |
| NHRI | national human rights institution |
| OUA | Organization of African Unity |
| OHCHR | Office of the High Commissioner for Human Rights |
| OPCAT | Optional Protocol to the Convention Against Torture |
| OSJI | Open Society Justice Initiative |
| PACE | Parliamentary Assembly of the Council of Europe |
| PAP | Pan-African Parliament |
| PRC | Permanent Representatives' Committee |
| PSC | Peace and Security Council |
| SADC | Southern African Development Community |
| UDHR | Universal Declaration of Human Rights |

| | |
|------|--------------------------------------|
| UMA | Arab Maghreb Union |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UPR | Universal Periodic Review |

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Introduction

1. The African human rights system and the implementation gap

Whilst States continue to ratify international and regional human rights treaties, the last decade has seen a proliferation in literature and studies on ‘first level compliance’ by States with their international obligations.¹ Few have examined compliance, however, with decisions of the human rights bodies.² Those that do have identified an ‘implementation crisis’ in the enforcement of findings of UN and regional human rights bodies³ and fundamental but crucial questions for human rights lawyers, victims, governments and other stakeholders remain unanswered: what exactly does it mean to implement and comply with international and regional human rights decisions; and what factors influence whether a state implements and complies or not? Answers to these questions go to the heart of

¹ L. F. Damrosch, *Enforcing International Law Through Non-Forcible Measures*, Martinus Nijhoff, Leiden, 1997; George W. Downs and Michael A. Jones, ‘Reputation, Compliance, and International Law’, 31 *Journal of Legal Studies* 2002, S95–S114; M. Hirsch, ‘Compliance with International Norms in the Age of Globalization: Two Theoretical Perspectives’, in E. Benvenisti and M. Hirsch (eds.), *The Impact of International Law on International Cooperation*, Cambridge University Press, Cambridge, 2004, 166–93; H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies’ Law and Legitimacy*, Cambridge University Press, Cambridge, 2012; H. Koh, ‘Why Do Nations Obey International Law?’, 106(8) *Yale Law Journal* (1997) 2599–659.

² M. Schmidt, ‘Follow-Up Activities by UN Human Rights Treaty Bodies and Special Procedures Mechanisms of the Human Rights Council – Recent Developments’, in G. Alfredsson (ed.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jacob Th. Möller*, Martinus Nijhoff, Leiden, 2009, 25; D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford, 2007; M. Kjærsum, *National Human Rights Institutions Implementing Human Rights*, Danish Institute for Human Rights, Martinus Nijhoff Publishers, 2003; F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press, Oxford, 2012; Open Society Justice Initiative, *From Rights to Remedies. Structures and Strategies for Implementing International Human Rights Decisions*, Open Society Foundation, New York, 2013; Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, Open Society Justice Initiative, New York, 2010.

³ Open Society Justice Initiative, *From Judgment to Justice*, *ibid.*, at 1.

the issue of the utility and relevance of human rights law in today's world. Yet they are questions which are fraught with difficulty.

In an attempt to address some of these challenges, mechanisms at the international and regional level have now been established which aim to identify the extent of State implementation of and compliance with treaty body findings. Indeed, the Treaty Body Strengthening Reform process at the UN has stressed the importance of 'the sustained strengthening of systems for the follow up of all forms of treaty body recommendations and for further harmonisation of working methods relevant to follow up as well as for facilitation of a more systematic involvement of UN and other actors at the country level'.⁴

At the regional level there has been a marked increase in the last decade in the focus on and analysis of the work of the African human rights machinery: the African Commission on Human and Peoples' Rights, the only body initially established under the African Charter on Human and Peoples' Rights (ACHPR),⁵ the African Court on Human and Peoples'

⁴ Office of the High Commissioner for Human Rights, Dublin Statement on the Process of Strengthening the United Nations Human Rights Treaty Body System, November 2009, <http://www2.ohchr.org/english/bodies/HRTD/docs/DublinStatement.pdf>, at para. 17; and Poznan Statement on the Reforms of the UN Human Rights Treaty Body System, International Seminar of Experts on the Reforms of the United Nations Human Rights Treaty Body System, Poznan, 28–29 September 2010, <http://www2.ohchr.org/english/bodies/HRTD/docs/PoznanStatement.pdf>, at paras. 25–31.

⁵ P. Amoah, 'The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights', 86, *American Journal of International Law* (1992) 226; W. Benedek, 'The African Charter and the African Commission on Human and Peoples' Rights: How to Make It More Effective', 11 *Netherlands Quarterly of Human Rights* (1993) 25; U. Essien, 'African Commission on Human and Peoples' Rights: Eleven Years After', 6 *Buffalo Human Rights Law Review* (2000) 93; C. Heyns, 'The African Human Rights System: In Need of Reform?', 1(2) *African Human Rights Law Journal* (2001) 155; E. Ankumah, *The African Commission on Human and Peoples' Rights: Practices and Procedures*, Martinus Nijhoff, The Hague, 1996; M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, 2nd edn, Cambridge University Press, Cambridge, 2008; R. Murray, *The African Commission on Human and Peoples' Rights and International Law*, Hart Publishing, Oxford, 2000; B. T. Nyanduga, 'Perspectives on the African Commission on Human and Peoples' Rights on the Occasion of the 20th Anniversary of the Entry Into Force of the African Charter on Human and Peoples' Rights', 6(2) *African Human Rights Law Journal* (2006) 255–68; J. Oloka-Onyango and S. Tamale, '“The Personal Is Political”, or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism', 17 *Human Rights Quarterly* (1995) 691; J. Oloka-Onyango, 'The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa', 24 *Denver Journal of International Law* (1996) 349; F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Dignity and Sustainable Democracy in Africa*, Brill, Leiden, 2003;

Rights which joined it later in 2004 through the adoption of an additional Protocol to the ACHPR,⁶ the lesser known African Committee on the Rights and Welfare of the Child,⁷ and the role played by the political and other organs of the Organization of African Unity (OAU), now the African Union. Literature and studies have covered various aspects of this African human rights system, including the promotional and protective mandate of the African Commission as provided for in Article 45 of the ACHPR,⁸ its creation of an individual communication procedure

U.O. Umozurike, *The African Charter on Human and Peoples' Rights*, Martinus Nijhoff, The Hague, 1998.

⁶ Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights, adopted 10 June 1998, in force 25 January 2004; K. Hopkins, 'The Effect of an African Court on the Domestic Legal Orders of African States', 2 *African Human Rights Law Journal* (2002) 234; I. Kane and A. Motala, 'The Creation of a New African Court of Justice and Human Rights', in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, 2nd edn, Cambridge University Press, Cambridge, 2008; A. O'Shea, 'A Critical Reflection on the Proposed African Court on Human and Peoples' Rights', 1(2) *African Human Rights Law Journal* (2001) 285–98; B. Pityana, 'Reflections on the African Court on Human and Peoples' Rights', 4(1) *African Human Rights Law Journal* (2004) 121–9.

⁷ A. Lloyd, 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet', 10(2) *International Journal of Children's Rights* (2002) 179–98; A. Lloyd, 'A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child', 2(1) *African Human Rights Law Journal* (2002) 11–32; B. Thompson, 'Africa's Charter on Children's Rights: A Normative Break with Cultural Tradition', 41 *International and Comparative Law Quarterly* (1992) 432; F. Viljoen, 'Why South Africa Should Ratify the African Charter on the Rights and Welfare of the Child', 11(6) *South African Law Journal* (1999) 660–4; F. Viljoen, 'Supra-National Human Rights Institutions for the Protection of Children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child', 2 *Comparative and International Law Journal of South Africa*, (1998) 199–212.

⁸ Article 45 reads: 'The functions of the Commission shall be: 1. To promote human and peoples' rights and in particular: (a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments. (b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation. (c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights. 2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter. 3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU. 4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.'

exploiting the vagueness of Article 55 of the ACHPR,⁹ and its ability to receive and examine state reports under Article 62 of the ACHPR.¹⁰ There is now analysis of the African Commission's range of special procedures, including its Special Rapporteurs, held by Commissioners (on Prisons and Conditions of Detention; Freedom of Expression and Access to Information; Human Rights Defenders; Refugees, Asylum Seekers, Migrants and Internally Displaced Persons; the Rights of Women), and Working Groups of civil society organisations (CSOs), experts and Commissioners (on Prevention of Torture in Africa; Economic, Social and Cultural Rights; Death Penalty and Extrajudicial executions; Indigenous Populations/Communities; Issues relating to the Work of the Commission; older persons and persons with disabilities; extractive industries, the environment and human rights violations; and HIV/AIDS).¹¹ Conclusions are often critical and, when compared with the other regional human rights bodies in the Americas and Europe and indeed with the UN treaty bodies, the African human rights system often does not fare well.

With the adoption of the Protocol establishing the African Court in 1998, scholars and others attempted to predict how the Court would function,¹² and, with its operationalization in 2004, there followed further analysis of its, as yet still limited, case law.¹³ The place of human rights

⁹ C. O. Odinkalu and C. Christensen, 'The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures', 20 *Human Rights Quarterly* (1998) 235.

¹⁰ G. W. Mugwanya, 'Examination of State Reports by the African Commission: A Critical Appraisal', 1(2) *African Human Rights Law Journal* (2001) 268–84.

¹¹ D. Long and R. Murray, 'Ten Years of the Robben Island Guidelines and Prevention of Torture in Africa: For What Purpose?', 12(2) *African Human Rights Law Journal* (2012) 311–47; D. Long and L. Muntingh 'The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia?', 7(13) *International Journal on Human Rights* (2012) 99–117.

¹² E.g. I. A. B. Elsheikh, 'Future Relationship Between the African Court and the African Commission', 2 *African Human Rights Law Journal* (2002) 252; R. W. Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights', 2 *African Human Rights Law Journal* (2002) 223; J. Harrington, 'The African Court on Human and Peoples' Rights', in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2000*, 1st edn, Cambridge University Press, Cambridge, 2002.

¹³ G. Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States', 51(1) *Journal of African Law* (2007) 151; D. Juma, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper', 4(2) *Essex Human Rights Review* (2007) 1; J. Oder, 'The African Court on Human and Peoples' Rights' Order in Respect of the Situation in Libya: A Watershed in the Regional

within the wider political structure of the OAU, and then, with the adoption of the Constitutive Act in 2000 and its transformation into the AU, the new architecture, has also received attention.¹⁴ The role of the AU's organs in respect of human rights such as the Peace and Security Council (PSC), Pan-African Parliament (PAP), and other mechanisms including the African Peer Review Mechanism (APRM) established under the New Partnership for Africa's Development (NEPAD)¹⁵ have all now been the subject of studies and analysis. As a result, much more is known about the practical operation of these organs and bodies, and much more analysis and critique of them exists than did a decade ago.

Yet a gap exists in the literature, certainly academically, but also at the policy level, on the implementation of the findings of the Commission. The seminal article by Viljoen and Louw in 2004¹⁶ drew upon innovative and original research which attempted to track compliance with African

Protection of Human Rights?', 11(2) *African Human Rights Law Journal* (2011) 495–510; R. Murray, 'The African Court on Human and Peoples' Rights' Order for Provisional Measures against Libya: Greater Promise for Implementation of Human Rights in Africa?', 4 *European Human Rights Law Review* (2011) 464; M. Ssenyonjo, 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non-Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008–2012', 2(1) *International Human Rights Law Review* (2013) 17–56.

¹⁴ C. F. Doebbler, 'Complex Ambiguity: The Relationship Between the African Commission on Human and Peoples' Rights and Other African Union Initiatives Affecting Respect for Human Rights', 13 *Transnational Law and Contemporary Problems* (2003) 7; R. Eno, 'The Place of the African Commission in the New African Dispensation', 11 *African Security Review* (2002) 63; E. Baimu, 'The African Union: Hope for Better Protection of Human Rights in Africa', 1(2) *African Human Rights Law Journal* (2001) 299–314; M. Killander and A. Abebe, 'Human Rights Developments in the African Union During 2010 and 2011', 12(1) *African Human Rights Law Journal* (2012) 199–222; Magliveras and G. Naldi, 'The African Union: A New Dawn for Africa?', 51(2) *International and Comparative Law Quarterly* (2002) 415–25; A. M. B. Mangu, 'The Changing Human Rights Landscape in Africa: The Organization of African Unity, the African Union, the New Partnership for Africa's Development and the African Court', 23(3) *Netherlands Quarterly of Human Rights* (2005) 379–408.

¹⁵ J. Cilliers, 'NEPAD's Peer Review Mechanism', Institute for Security Studies, Paper 64, November 2003, www.iss.co.za; R. Herbert, 'Implementing NEPAD: A Critical Assessment', Institute for Security Studies, 2002, www.iss.co.za C. Stals, 'The African Peer Review Mechanism as an Integral Part of the New Partnership for Africa's Development', 4(1) *African Human Rights Law Journal* (2004) 130–8.

¹⁶ F. Viljoen and L. Louw, 'The Status and Findings of the African Commission: From Moral Persuasion to Legal Obligation', 48(1) *Journal of African Law* (2004) 1–22; F. Viljoen and L. Louw, 'An Assessment of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights between 1993 and 2004', 101(1) *American Journal of International Law* (2007) 1–34.