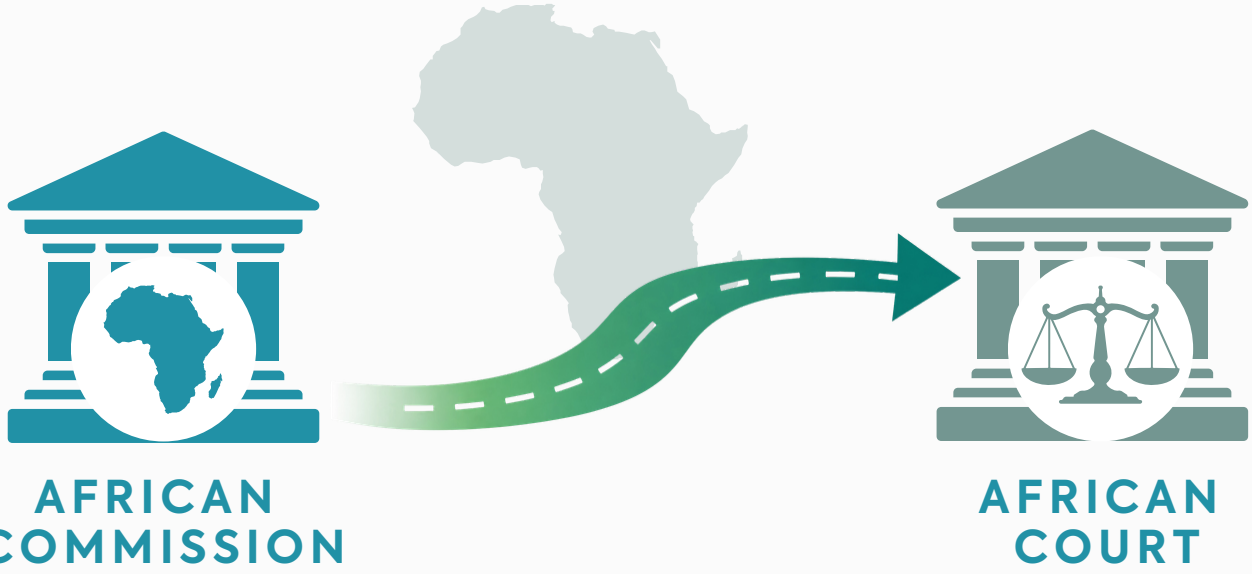
IHRDA
INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA

LEGAL BRIEF

An Underutilised Lifeline

THE REFERRAL PROCEDURE OF THE AFRICAN COMMISSION AS A ROUTE TO ENHANCED ACCESS TO THE AFRICAN COURT



Dr. Abdumalik Bello

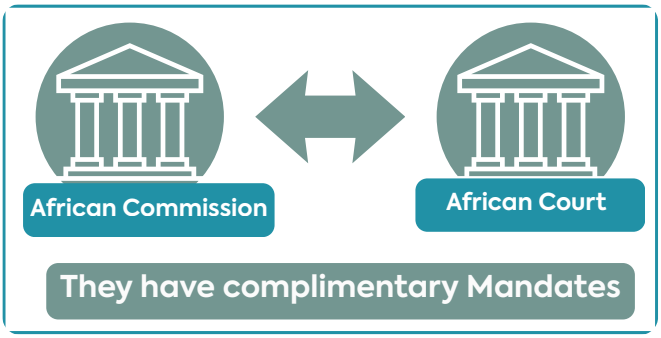
2026

1.INTRODUCTION

The African Commission on Human and Peoples' Rights (the Commission) was established by Article 30 of the African Charter on Human and Peoples' Rights (the Charter) as its gatekeeper, mandated to "promote" and ensure the "protection" of the human and peoples' rights guaranteed in the Charter, as well as to "interpret" its provisions.[1] Under its protection mandate, the Commission may receive complaints, also known as communications, from States or individuals and non-State actors alleging human rights violations by States party to the Charter.[2] If the Commission determines a complaint on the merits, it issues a decision containing recommendations. Although such recommendations are not legally binding like a court judgment, States are expected to implement them in good faith, consistent with their obligations under the African Charter and with due regard for State sovereignty.[3] However, the Commission in particular and other human rights mechanisms have faced persistent difficulties in securing states' compliance with their decisions and recommendations.[4]



States must implement decisions in good faith, in line with their obligations under the African Charter.



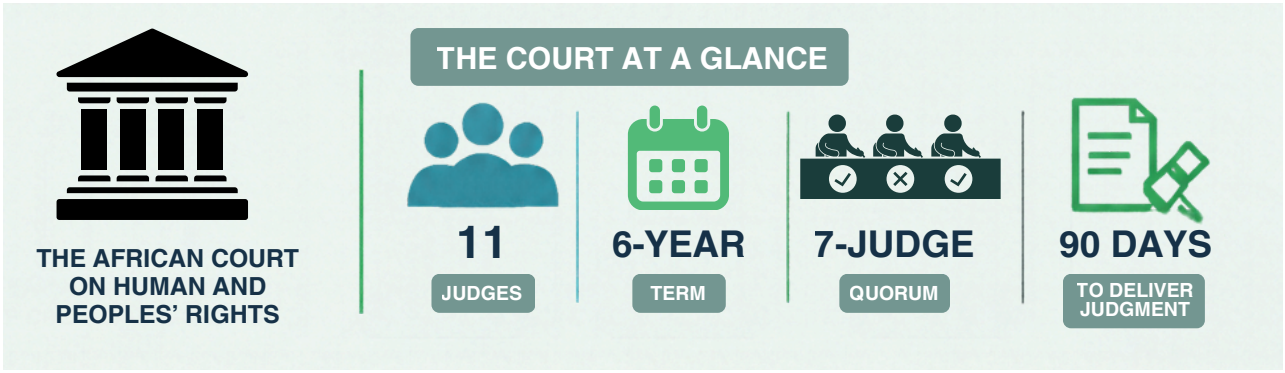
To enhance the efficiency of the Commission, [5] the African Court on Human and Peoples' Rights (the Court) was established under Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court (the Protocol), to "complement the protective mandate of the African Commission on Human and Peoples' Rights".[6] This defines the relationship between the African Commission and the African Court. Access to the Court by individuals and non-governmental organisations (NGOs) seeking justice requires not only state ratification of the Protocol but a second-level optional declaration under article 34(6) of the Protocol "accepting the competence of the Court to receive cases under article 5(3) of [the] Protocol". Few African states made the declaration, and only very few have retained it to date. The optional declaration has continued to constitute a significant constraint on direct access to the Court for individuals and NGOs, limiting its reach and constraining its capacity to fulfil its mandate effectively. This legal brief examines the Article 34(6) declaration vis-à-vis the referral procedure of the African Commission that would have seriously cushioned the lack of access effect, save for its gross underutilisation.

The next part briefly introduces the African Court and its mode of operation. The third part examines the requirement under Article 34(6) of the Protocol governing direct access by individuals and NGOs to the Court and its continued debilitating effect on the Court's effective operation. The fourth part explores the crucial role of the African Commission's referral pathway as an underutilised lifeline for the Court. The fifth part examines the rationale behind the Commission's reluctance to refer cases to the Court, which largely turns on the poor implementation of the Court's decisions despite their binding nature. The sixth part looks at the Court's efforts to ensure greater compliance with its decisions, and the final part offers concluding reflections.

1. Article 45 of the Charter.
2. Articles 49, 55 and 56 of the Charter.
3. See Article 59 read together with Articles 45(1) and 1 of the Charter.
4. See Obwogi OO and Kremte H, 'Decoding Implementation of African Commission on Human and Peoples' Rights Decisions on Communications in Botswana, Kenya and Ethiopia' (2024) African Human Rights Law Journal.
5. See the preamble of the African Court's Protocol.
6. Article 2 of the African Court's Protocol.

2.A Glimpse of the Court Through the Lens of the Protocol

The Protocol was adopted on 9 June 1998 and came into force on 25 January 2004.[7] It established the Court strictly as a regional judicial body competent to determine all disputes relating to the interpretation and application of "the Charter, [the] Protocol and any other relevant human rights instrument ratified by the State Concerned".[8] These constitute the Court's sources of law,[9] and the Court may also render advisory opinions on them, upon request from competent authorities.[10] As a judicial body, the Court is made up of eleven judges who must be competent and experienced African nationals, elected for a term of six years, subject to one-time possible re-election.[11] Seven judges constitute the quorum to hear any case before the Court.[12] The proceedings of the Court are conducted publicly, unless in exceptional circumstances, and only legal practitioners may conduct such proceedings on behalf of parties before the Court.[13] In determining a case, the Court listens to parties' submissions and relies on the written and oral evidence submitted by parties.[14] It may, where it deems necessary, hold an inquiry in the State concerned.[15]



The Court is mandated to render its judgment within 90 days of completing its deliberations. [16] Where it finds a State in violation of human rights as alleged, the judgment will include "appropriate orders to remedy the violations including the payment of fair compensation or reparation".[18] The Court may also adopt necessary provisional measures in cases of "extreme gravity and urgency" to avoid irreparable harms to victims.[19] The Court's majority decision constitutes a final judgment that is not subject to appeal, but open to review by the same Court where new evidence emerges upon fulfilling necessary conditions.[20] The Court's judgment has a binding force, and States parties "undertake to comply with the [Court's] judgment…within the time stipulated by the Court and to guarantee its execution".[21]

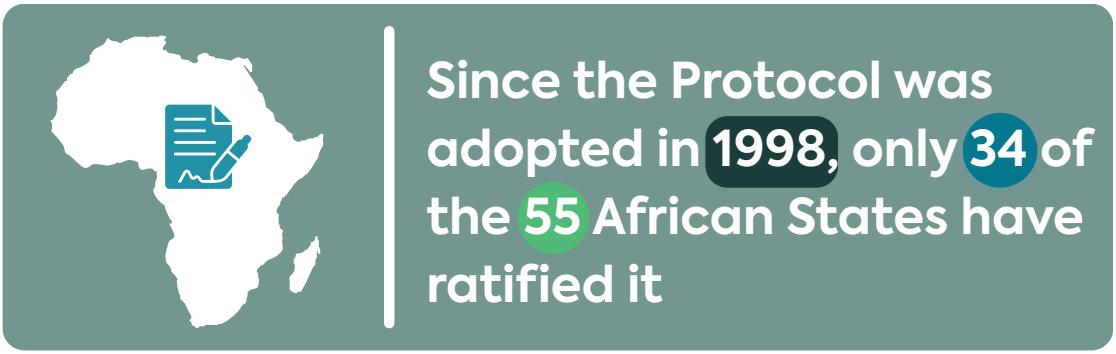
[7] African Court 'Basic Information: Establishment of the Court' available at https://www.african-court.org/afchpr/basic-information-2/ (accessed 23 September 2026).
[8] Article 3.
[9] Article 7.
[10] Article 4.
[11] Articles 11, 14 and 15, respectively.
[12] Article 23.
[13] Article 10.
[14] Article 26.
[15] As above.
[16] Article 28(1).
[17] Article 28(5).
[18] Article 27(1).
[19] Article 27(2).
[20] Article 28(2) & (3).
[21] Article 30.

THE PROTOCOL: KEY MILESTONES



For more than 28 years since the Protocol was adopted in 1998, only 34 of the 55 African States have ratified it.[22] This low level of ratification, nearly three decades after its adoption, is particularly telling of the apparent reluctance of African States to subject themselves to regional human rights accountability mechanisms, especially in respect of their human rights obligations. Recently, in July 2026, it was widely reported[23] that the House of Parliament of the Republic of Sierra Leone has approved the ratification of the Protocol. As of November 2026, when this legal brief was written, the records of the African Court[24] and the African Union[25] continue to list Sierra Leone among the States that have not ratified the Protocol. This suggests that Sierra Leone has not officially communicated its decision to ratify the Protocol to the African Union and the African Court by depositing its instrument of ratification with the Chairperson of the African Union Commission (AUC), in terms of Article 34(2) of the Protocol. This position is, in fact, confirmed by the African Climate Platform (ACP).[26] Until it deposits its instrument of ratification with the Chairperson of the AUC, Sierra Leone cannot be regarded as a State Party to the Protocol.

In terms of Article 33 of the Protocol, the Court first adopted its interim Rules in 2010 to guide its procedure. In September 2020, the Court adopted revised Rules that remain in force to date. The Court also adopted new Practice Directions in March 2024 to replace its 2012 Practice Directions to align the Court's practice with the 2020 Rules.



[22] African Court 'Basic Information' available at https://www.african-court.org/afchpr/basic-information-2/ (accessed 18 November 2026).
[23] The Calabash Newspaper 'Attorney General Secures Parliamentary Approval for African Human Rights Court Protocol' (July 20 2026) available at https://thecalabashnewspaper.com/archives/62536; Vanguard New 'ACP hails Sierra Leone's ratification of Protocol on Establishment of African Court on Human and Peoples' Rights' (July 17 2026) available at https://www.vanguardngr.com/2026/07/acp-hails-sierra-leones-ratification-of-protocol-on-establishment-of-african-court-on-human-and-peoples-rights/ (accessed 18 November 2026).
[24] African Court 'Basic Information' available at https://www.african-court.org/afchpr/basic-information-2/ (accessed 18 November 2026).
[25] African Union 'List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights' available here (accessed 18 November 2026).
[26] African Climate Platform 'Signature is not Ratification, and Why that Gap Matters' available at https://africaclimateplatform.com/signature-is-not-ratification-and-why-that-gap-matters/ (accessed 18 November 2026).

3. Direct Access to the Court: Why the Article 34(6) declaration requirement?

The international law principle of 'pacta sunt servanda' dictates that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".[27] By implication, individuals and NGOs from the 34 out of the 55 African countries that have ratified the African Court's Protocol would have been able to access the Court to seek relief against those states except for two reasons tied to two provisions in the Protocol: First, the provision of Article 5(1) that deals with access to the Court provides a list of those that may access the Court directly, including the Commission, the State Party that has lodged a complaint before the Commission; the State Party against whom a complaint has been lodged before the Commission; the State Party whose citizen is a victim of a human rights violation; and African Intergovernmental Organisations. Article 5(2) allows the Court, upon request, to permit a State Party with an interest in a case to join the case. These are the entities allowed to submit complaints directly to the Court. The list excludes all others, including individuals and NGOs, from directly accessing the Court, as it is a trite principle of legal interpretation that where a statute expressly identifies the persons or circumstances to which a power applies, those not included are excluded.[28] Second and most importantly, Article 34(6) provides that a State ratifying the Protocol shall make a declaration empowering the Court to receive complaints against it directly from individuals and NGOs with observer status before the Commission. The Court cannot exercise such power in the absence of the declaration.

Two well-founded but intertwined questions that naturally come to mind are: why were individuals and NGOs excluded from the list in Article 5(1), and why the optional declaration requirement under Article 34(6)?



In **Hossou and Another v Republic of Benin** (Application No 016/2020), the Court declared Benin's withdrawal of its Article 34(6) declaration valid and emphasized "*that the optional nature of the declaration and its unilateral character derive from a basic principle of international law, that is, the principle of sovereignty of the States*".[29] The reference to state sovereignty is relevant, as that historically lay at the heart of the debate during the negotiation of the Protocol, eventually prompting amendments to the initial Cape Town Draft, including the introduction of the Article 34(6) declaration in the subsequent Nouakchott Draft[30] to make the Protocol acceptable to the majority of African heads of state and pave the way for its adoption and the establishment of the African Court. From the list in Article 5(1), it could be gleaned that aside from the African Commission, which



the Court was meant to complement anyway, the other parties that can approach the Court directly are States and intergovernmental organisations. This may suggest that most States agreed to support the Court's establishment to settle disputes between States and retain the option of denying individuals and NGOs access to the Court, which many have gone on to exercise.

27. Article 26 of the Vienna Convention on the Law of Treaties.

28. i.e. the principle of expressio unius est exclusio alterius. See Colorado General Assembly 'Commonly Applied Rules of Statutory Construction' available at https://content.leg.colorado.gov/agencies/office-legislative-legal-services/how-to-interpret-a-statute (accessed 21 September 2026).

29. Para 33.

30. See South African Litigation Centre 'Justice for all: Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights' (2014) SALC Handbook Series 6.

From the entry into force of the Protocol in 2001 to date, only twelve States have made the declaration. Five out of the 12 States have withdrawn their declarations, including Rwanda (2016), Tanzania (2019), Côte d'Ivoire (2020), Benin (2020) and Tunisia (2025). The timing of these withdrawals is particularly telling. Rwanda started the trend in February 2016 and withdrew mainly because the Court decided to entertain and determine a complaint submitted by "a fugitive from - the Tutsi genocide – justice",[31] referring to the Applicant in *Victoire Ingabire Umuhoza v. Rwanda*.[32] Tanzania, where the Court is seated, followed suit in 2019 based on 'litigation fatigue'[33]; then Benin in 2020; Côte d'Ivoire in 2020; and Tunisia in 2025.[34] One fact common to almost all the withdrawing countries is that they did so while they were involved in significant litigation before the Court. As of September 2026, only seven African States continued to maintain their Article 34(6) declaration, including Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi and Niger.[35]



Two key points deserve particular emphasis: First, Tanzania's withdrawal of its Article 34(6) declaration particularly impacted the Court mainly because the country, being the seat of the Court, supplied the bulk of the Court's individual complaints. More specifically, 138 out of the 255 cases before the Court, at the time, were against Tanzania.[36] This represents 54.1% of all cases received by the Court at that point. With its withdrawal, the Court's case docket was heavily depleted. Tanzania's withdrawal, in particular, alongside those of other States mentioned above, significantly accounted for the sharp and sustained reduction in individual applications received by the Court, from 66 in 2019 to 46 in 2020; 17 in 2021; 7 in 2022; 10 in 2023; 15 in 2024; 8 in 2025; and 12 in 2026.[37] Second, Mali,

31. Adjolohoun SH 'A Crisis of Design and Judicial Practice? Curbing State disengagement from the African Court on Human and Peoples' Rights' (2020) African Human Rights Law Journal 6.
32. (Withdrawal Procedure) (2016) 1 AfCLR 562.
33. See Adjolohoun (n 31 above) 10.
34. African Court Coalition 'Tunisia withdraws Article 34(6) Declaration Limiting Direct Access for Individuals & NGOs to the African Court' available at https://africancourtcoalition.org/tunisia-withdraws-article-346-declaration-limiting-direct-access-for-individuals-ngos-to-the-african-court/ (accessed 22 September 2026).
35. The African Court 'Introduction to the Court' available at https://www.african-court.org/afchpr/welcome-to-the-african-court-2/ (accessed 21 September 2026).
36. Adjolohun (n 31) 10.
37. African Court 'Statistics Graph' AJUDATA African Jurisprudence Datat available at https://www.african-court.org/ajudata/statistic (accessed 18 November 2026).

Burkina Faso, and Niger underwent military takeovers in 2020,[38] 2022,[39] and 2023,[40] respectively, and have remained under military rule to date. The three countries withdrew their membership of the Economic Community of West African States (ECOWAS) in 2024 and jointly constituted the Alliance of Sahel States (AES).[41] While they continue to retain their Article 34(6) declaration, the practical effect of those declarations remains a major concern, as a 2026 study[42] reveals that despite credible reports of human rights violations under the military regimes in the three states, including arbitrary arrests, incommunicado detentions, politically motivated prosecutions, abductions, and enforced disappearances, among others,[43] there have been very few cases filed against them by individuals or non- governmental organisations (NGOs) before the African Court.[44] This is explained, "*in part or wholly, by a repressive domestic context where critics of the regime(s) face reprisals*".[45]

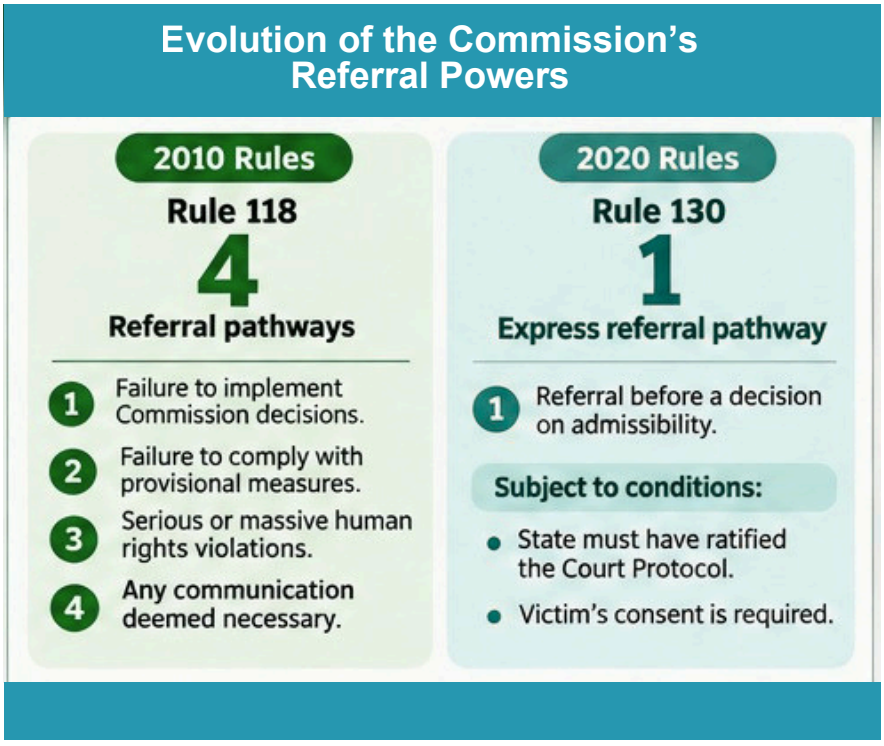
The Article 34(6) declaration has infamously become the singular most important access-defining element of the Court, as it seems to have sealed the fate of the Court even before its establishment and continues to remain unwanted yet unavoidable baggage weighing heavily on the Court's powers, efficiency, potential and ultimately its survival with each passing day. The topic unavoidably features in most discussions concerning the Court, much to the annoyance and helplessness of victims, human rights lawyers, civil society organisations and the Court, alike. In fact, the Court was quite blunt about the crushing effect of the Article 34(6) declaration requirement in paragraphs 80-84 of its 2014 Activity Report while recommending that "[t]he African Union should manifest its commitment to the ideals of human rights by repealing the requirement of a declaration under Article 34(6)".[46] In January 2015, in its decision on the Court's 2014 Activity Report, the Executive Council of the African Union (the Council) accepted and endorsed almost all other recommendations, excluding this. The Council, instead, urged member States who have not ratified the Protocol to do so and *"requests them to make a declaration in accordance with article 34(6) of the Protocol before 1 January 2016*".[47] Between 2015 and 2016, Cameroon and Chad submitted their instrument of ratification/accession - not Article 34(6) declarations - bringing the total number of states parties to the Protocol to 30. On 8th February 2016, Benin deposited its Article 34(6) declaration, bringing the total number of declarations, as of the time, to eight (8). Ironically, later that same year, Rwanda withdrew its declaration. The point is that the January deadline passed without much difference, and there were no non-compliance consequences for States. Most importantly, the AU has, for over a decade thereafter, not shifted its position and approach on the Article 34(6) declaration, and there is no indication of any shift towards repealing that requirement in the near or far future. Hence, the recourse is to the most viable alternative pathway to accessing the Court - the African Commission's referral pathway.

38. Diallo T 'Mali president resigns after detention by military, deepening crisis' (19 August 2020) Reuters available at https://www.reuters.com/article/world/mali-president-resigns-after-detention-by-military-deepening-crisis-idUSKCN25E1AD/ (accessed 14 November 2026).
39. Ndiaga T 'Burkina Faso army deposes president in West Africa's latest coup' (24 January 2022) available at https://www.reuters.com/world/africa/burkina-faso-president-kabore-detained-military-camp-sources-tell-reuters-2022-01-24/ (accessed 14 November 2026).
40. Africanews 'Mutinous soldiers claim to have overthrown Niger's president' (26 July 2023) available at https://www.africanews.com/2023/07/27/mutinous-soldiers-claim-to-have-overthrown-nigers-president/ (accessed 14 November 2026).
41. Balima B 'Junta-led Sahel states rule out return to West African economic bloc' (6 July 2024) Reuters available at https://www.reuters.com/world/africa/junta-led-sahel-states-rule-out-return-west-african-economic-bloc-2024-07-06/ (accessed 14 November 2026).
42. Murimi EK 'The exhaustion of local remedies rule before the African Court: Recalibrating the evidentiary approach in cases against military regimes' (2026)26 African Human Rights Law Journal 311-337.
43. See Murimi (above) pages 320 – 325.
44. Since the start of the military regimes, only one application by an individual has been submitted against Niger, one against Burkina Faso relating to an employment dispute predating the coup, and eleven cases against Mali, two of which directly relate to human rights violations under the military regime. See Murimi (above)321, 322, 324, and 326, respectively.
45. Murimi (n 42) 322.
46. See para 93 (ii) of the 2014 Activity Report of the Court.
47. Para 3 of the Decision on the 2014 Activity Report of the Court (Doc.EX.CL/888(XXVI).

4. Indirect Access: The Commission's Referral Pathway as the Court's Lifeline

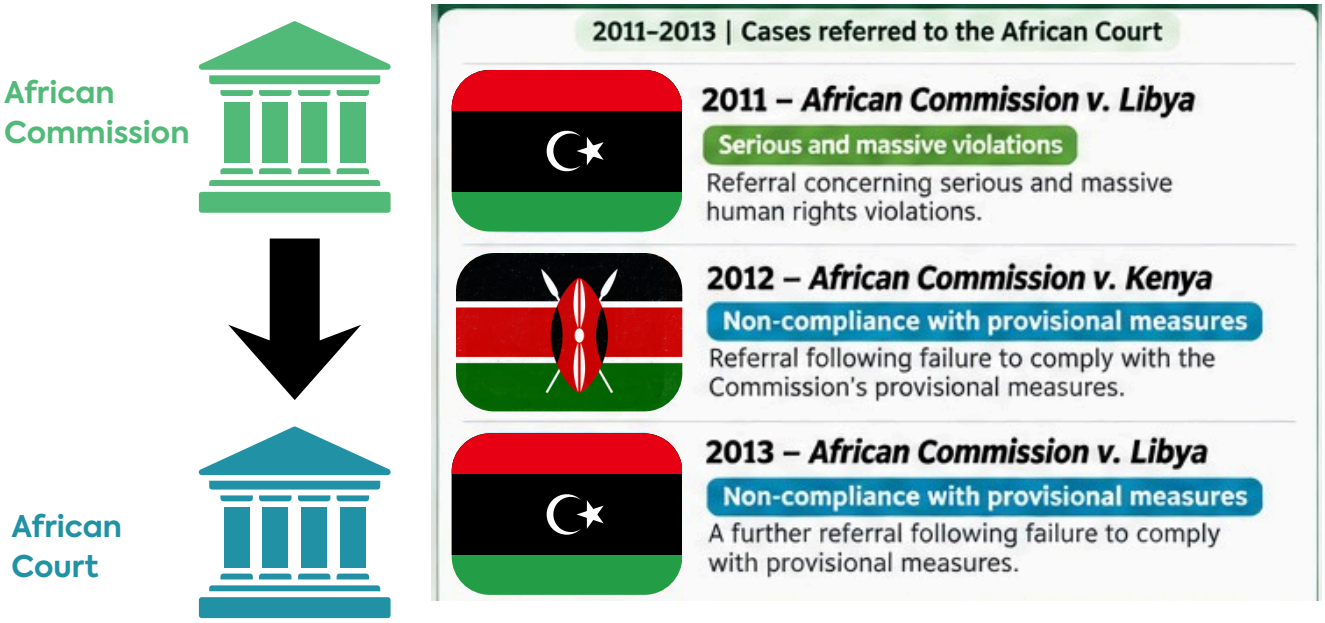
The relationship between the Commission and the Court is symbiotic as both can refer cases to the other for determination. The drafters of the Court's Protocol and the Rules of Procedure of both the Commission and the Court were, in my view, very careful not to project the Court as being superior to the Commission in any shape or form, despite its judicial character, but rather as a complementary body working hand-in-glove with the Commission to ultimately realise the promise of the African Charter. Article 5(1)(a) of the Protocol listed the Commission first among a few other bodies that are allowed to directly access the Court. Similarly, Article 6(3) of the Protocol also empowers the Court to either consider cases submitted to it or transfer them to the Commission. Meanwhile, the Court may, in terms of Article 6(1), refer a case to the Commission solely for the purpose of obtaining its opinion on the admissibility of the communication. Such a referral does not transfer the substantive determination of the case to the Commission.

From the Commission's end, Rule 130 of the African Commission's Rules of Procedure concerning seizure empowers the Commission to, subject to obtaining a victim's consent, refer a complaint to the Court *"before deciding on the admissibility of a communication...provided that the respondent State has ratified the African Court Protocol"*. In such cases, Rule 130(3) of the Commission's Rules provides that the Commission assumes the position of an Applicant before the Court. The reverse is not true, as the Court's Protocol and Rules that allow referral of a case to the Commission do not have any similar provision. Rule 132(1) requires one or more Commissioners to be designated to represent the Commission before the Court, supported by one or more Legal Officers of the Commission. Meanwhile, Rule 131 allows the Commission to provide an opinion on the admissibility of any case before the Court upon receiving any such request from the Court and to also examine and determine a case referred to it by the Court for determination in terms of Article 6(3) of the Court's Protocol.



The Commission's referral pathways outlined in its 2010 Rules are more detailed and richer compared to the corresponding provision in its 2020 revised Rules discussed above. Rule 118 of the 2010 Rules of Procedure of the Commission provides for about four different circumstances under which the Commission may refer cases to the Court, including decided cases of the Commission where a state fails to implement the Commission's recommendations within the allocated time; situations where a state refuses to comply with the provisional measures request of the Commission; cases involving serious or massive violations of human rights; and lastly, any communication that the Commission deems necessary to refer to the Court regardless of its stage of examination before the Commission.[48] It is this Rule 118 of the 2010 Rules that was significantly revised to Rule 130 of the 2020 Rules of Procedure of the Commission, which drastically reduced the referral pathways to only the last one in Rule 118(4) of the 2010 Rules, but in an even narrower form.

The distinction between Rule 118(4) of the 2010 Rules and Rule 130 of the 2020 Rules deserves a closer look. The former provides that "*the Commission may seize the Court at any stage of the examination of a communication if it deems necessary*". This is quite broad and deliberately so, in my view, because by implication the Commission can, at any stage - whether seizure, admissibility, or merit - refer any case concerning any State to the Court, especially where the State has ratified the Court's Protocol but has not made the declaration under Article 34(6). In such cases, the Commission's referral effectively overrides the provision of Article 34(6), which prohibits the Court from receiving any petition involving individuals and NGOs against a State if such a State has not made the declaration thereunder. This scenario played out in three cases that the Commission referred to the Court in 2011, 2012, and 2013, namely: *African Commission v. Libya*;[49] *African Commission v. Kenya*;[50] and *African Commission v. Libya*.[51] Libya and Kenya ratified the African Court's Protocol on 19 November 2003 and 4 February 2004, respectively. As of 2011, 2012 and 2013, when the African Commission referred the three cases respectively involving both countries, they had not made the declaration under Article 34(6) of the Protocol, and that remains their status to date. The Court nevertheless assumed jurisdiction and determined the cases, as appropriate, effectively demonstrating that the Commission's referral trumps the application of Article 34(6) declaration. The same reasoning may, by analogy, ground the argument that the Court may assume jurisdiction in cases referred by the Commission even where the State concerned has not ratified/acceded to the Protocol.



48. Rule 118 (1)(2)(3) & (4) respectively.
49. Application No. 004/2011.
50. Application No 006/2012.
51. Application No 002/2013.

Comparatively, Rule 130 of the Commission's 2020 Rules of Procedure provides that "[t]he Commission may,before deciding on the admissibility of a Communication…decide that the Communication should be referred to the Court, provided that the respondent State has ratified the African Court Protocol". By implication, this provision, after cutting out the three other important referral pathways under Rule 118(1)(2) and (3) of the 2010 Rules, goes further to narrow down the last window it decides to retain by expressly attaching the condition and proviso, in bold. Effectively, it takes away the flexibility of stages at which a matter may be referred by the Commission to the Court, the possible argument in favour of the Court's jurisdiction if such referral concerns a State that has not ratified the Court's Protocol, and, in addition, makes the Commission's referral powers preconditioned upon a victim's consent.[52] Experts have argued that the silence of Rule 130 of the 2020 Rules does not preclude the African Commission from making referrals where a state refuses to comply with its decisions and provisional measures and in cases involving serious and widespread human rights violations, as the Commission's referral power is not derived from its Rules of procedure but from Article 5(1)(a) of the Court's Protocol. [53] However, such an argument might not really matter, in my view, as the Commission, in favour of which the argument was made, decided of its own volition to downsize its referral capabilities through the revision of its own Rules of Procedure for reasons best known to it, and that speaks volumes about its perception and valuation of the referral pathways.

The revision of Rule 118 of the 2010 Rules to Rule 130 of the 2020 Rules is, in my view, regressive as it technically takes away the complementary role of the Court to the Commission, while effectively redefining the relationship between the Commission and the Court in a manner that only worsens the already fragile and precarious condition of the Court. The very distinctive feature of the Court, especially from the Commission, is that it is a judicial human rights body that issues binding judgments, a feature that the Commission lacks and accounts for the foreseeable non-compliance tendencies exhibited by States towards decisions emanating from the Commission. It makes sense, therefore, that most referral pathways provided under Rule 118 of the 2010 Rules of the Commission lie in the post-decision stage - where there is failure to comply with the merit decision or provisional measures request of the Commission within the set time limit and in situations involving serious and massive violations.

For over 20 years since the Court became operational, the Commission has only referred the three cases earlier mentioned in 2011, 2012 and 2013 to the Court. [54] The three referrals were made pursuant to the second and third referral routes provided under Rules 118(2) and 118(3) of the African Court's 2010 Rules of Procedure, respectively. The 2011 case concerned serious and massive violations of human rights in Libya, and the 2012 and 2013 referrals involved the failure of Kenya and Libya to respectively comply with provisional measures issued by the Commission. These referral routes are no longer available under Rule 130 of the 2020 Rules of the Commission.

52. Rule 130(2) of the 2020 Rules of Procedure of the Commission.

53. Kembabazi LW 'The role of the African Commission in Enhancing Compliance with its Decisions on Communications' (2024) African Human Rights Law Journal.

54. Amnesty International '20 years of the African Court' (2020) Amnesty International Ltd available at https://www.ecoi.net/en/file/local/2143414/IOR6011322026ENGLISH.pdf (accessed 16 November 2026) 17; also see Kembabazi (n 53) 792.

5. Rationale Behind Commission's Reluctance to Refer Cases to the Court

> Making such referrals might be taken as the Commission indirectly acknowledging its weakness and admitting that the African Court "will likely be more effective in bringing about a decision's implementation

While it is clear that the Commission has been reluctant to refer cases to the Court, the real reason remains unclear, as no official statement from the Commission has clarified its position. Academics and human rights experts have tried to unpack this mystery. Sandova, Leach and Murray;[55] and Ayeni and Von Staden[56] have suggested that making such referrals might be taken as the Commission indirectly acknowledging its weakness and admitting that the African Court "will likely be more effective in bringing about a decision's implementation".[57] Kembabazi capped this proposition by affirming that this perception projects the African Court as superior to the African Commission, and that such might have contributed to the Commission's reluctance to make referrals to the Court unless necessary.[58] They capture the silent thoughts going on in the minds of many human rights practitioners and researchers, often discussed quietly among themselves when talks drift to the relationship between the Court and the Commission, the potential of the Commission to immensely help the Court in getting around the Article 34(6) declaration bottlenecks, and its unexplained reluctance to do so. The suggestion therefore merits serious consideration and should not be readily dismissed. This warrants examining the following questions: If the Commission refers cases to the Court and becomes an Applicant in such matters, with its commissioners effectively standing as prosecutors before the Court, does that make the Commission inferior to the Court? And is the Court more effective in bringing about a decision's implementation than the Commission?

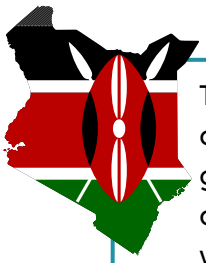
Indeed, the Court's judgement has a binding force, and should ideally have a better enforcement mechanism and, by implication, a better prospect of implementation than the Commission's 'recommendations' that, in a literal and technical sense of the word, are non- binding on States even though they are expected to comply in good faith. In fact, the main reason for establishing the Court is to 'complement' the Commission and somewhat contribute that 'binding' flavour that the Commission's recommendations and provisional measures technically lack, especially where there is perceived or actual non-compliance. In that sense, the Court is meant to be stronger than, but not superior to, the Commission .

n terms of enforcing the protection of human rights generally. The Court was neither meant nor contemplated to be compared with the Commission in terms of which is superior or inferior to the other. The Commission is the mother-protector, solely established to gate- keep the African Charter and, as such, saddled with promotion, protection and interpretative mandates. The Commission has continuously developed African human rights jurisprudence, expanded thematic human rights standards through resolutions, general comments, guidelines, and principles, and progressively elaborated the provisions of the African Charter; developed an extensive system of Special Mechanisms; and achieved other commendable strides.

55. Sandova C, Leach P & Murray R '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.
56. Ayeni VO & Staden AV 'Monitoring Second-Order Compliance in the African Human Rights System' (2022)6 African Human Rights Yearbook.
57. As above.
58. Kembabazi (n 53).

The Court is the African regional judicial mechanism in its own right, capable of not only determining human rights-related matters concerning the African Charter and other human rights instruments but also rendering an advisory *"opinion on any legal matter relating to the Charter or any other relevant human rights instruments"*.[59] The Protocol and the Rules of Procedure of the Court allow it to refer cases to the Commission and vice versa. The point is that neither the Commission nor the Court is or meant to be superior or inferior to the other. It would be myopic, if not unreasonable, therefore, to allow unfounded comparative tendencies to negatively shape the carefully forged complementarity and symbiotic relationship between the Commission and the Court. That would, no doubt, negatively impact the ultimate goal of ensuring the realisation of the hard-earned human rights promises and commitments made in the African Charter and other human rights instruments by extension.

Another worthy angle of unpacking the issue of non-referral, which rarely comes to mind, is from the point of legal bindingness and non-bindingness of the Court's judgments and the Commission's recommendations, respectively, versus compliance reality. The three cases the Commission referred to the Court ironically tested and exposed the Court's capacity, might, and limits in ways that did not escape the Commission's vigilance. Because the Court eventually struck out the 2011 case for want of diligent prosecution, I will focus on the 2012 and 2013 cases to explain this point.



The former– *African Commission v. Kenya* (**Application No. 006/2012**) – (the Ogiek case) concerned the intended eviction of the Ogiek indigenous minority ethnic group from the Mau Forest complex in Kenya.[60] The Kenyan Government had issued a 30-day eviction notice in October 2009 ostensibly to protect the forest as a water catchment area. The Commission received a complaint from the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRGI), on behalf of the Ogiek Community of the Mau Forest, on 14 November 2009.[61] The Commission issued an Order for Provisional Measures requesting the government of Kenya to suspend implementation of the eviction notice on 23 November 2009. Following the lack of response from Kenya, the Commission referred the matter to the African Court, alleging violation of the Ogiek's rights to non- discrimination, life and personal integrity, freedom of conscience and religion, property, and cultural participation and traditional values under Articles 2, 4, 8, 14, 17(2) and (3), 21 and 22 of the African Charter.[62]

59. Article 4 of the Protocol.
60. See the judgment of the African Court in African Commission v. Kenya' (Application 006/2012) para 6-9, available at https://ajudata.african-court.org/ (accessed 16 November 2026).
61. As above (para 3 & 4).
62. As above (para 10).



The latter – *African Commission v. Libya* (**Application No. 002/2013**) – (The Saif-al-Islam case) concerned the arbitrary and incommunicado detention of Saif-al-Islam Gaddafi, following his arrest by the National Transitional Council in November 2011.[63] The Commission received a complaint from Ms. Mishana Hosseinioun, on behalf of Saif-al-Islam Gaddafi, in April 2012 alleging violation of his right to personal liberty and fair trial under Articles 6 and 7 of the African Charter.[64] The Commission subsequently issued provisional measures on 18 April 2012, to which Libya failed to respond.[65] Hence, the Commission referred the case to the African Court.

The Court, upon taking over the two cases, granted provisional measures orders. The Court reported in paragraph 24 of its *2013 Activity Report* that Kenya complied with its provisional measures in the Ogiek case and, in paragraphs 27-33, it reported that Libya refused to comply with its orders in the Saif-al-Islam case despite several reminders and the necessary steps it has taken in that regard.[66] While the 2013 Report was followed by developments, including the ignored decisions of the Executive Council urging Libya to comply with the Court's orders, and Libya's reaction to a 2014 interlocutory application regarding its failure to implement the Court's provisional measures, what is pertinent is that Libya ultimately failed to comply with the Court's order of provisional measures, at least in the Court's view.[67] The Court issued a second provisional measures order on 10 August 2015 and its merits judgment in default on 3 June 2016. Most importantly, "[u]ntil the end of 2021, the Court reported that the Respondent state [Libya] had not filed any reports and the time limit for Libya to file its report elapsed since 22 November 2016".[68] The Court also determined the Ogiek case on the merits in 2017 and rendered its decision on reparations in 2022. Following the compliance hearing of 4 June 2025, the Court delivered a decision on 4 December 2025 recognising that Kenya failed to comply with its orders contained in the 2017 and 2022 merit and reparations judgments, respectively.[69] It therefore urged Kenya to immediately take necessary steps to comply with all its orders .

left unimplemented. These are not isolated cases. As of 2020, the AU Conference on the Implementation and Impact of the Decisions of the Court revealed that only 7% of the Court's judgments were fully complied with.[70] Partial compliance stood at 18% and *"in 75% of the Applications, there was non-compliance with the Court's judgments. Furthermore, there has been 10% compliance with the Court's rulings on provisional measures"*[71]

7% of the Courts Judgements were fully complied with

18% showed partial compliance

75% of the Application had non-compliance with the Courts Judgements

63. Judgment of the African Court in African Commission v. Libya (Application 002/2013) para 4 available at https://ajudata.african-court.org/ (accessed 16 November 2026).
64. As above.
65. As above (para 6(i)).
66. See particularly para 31 of the 2013 Activity Report.
67. Windridge O 'In default: African Commission on Human and Peoples' Rights v. Libya' (2018) 18 African Human Rights Law Journal 764.
68. Chogero P 'Enforcement of the Orders of the African Court for Payment of Fair Compensation to the Victims of Human Rights Violations: A Comparative View' Raoul Wallenberg Institute of Human Rights and Humanitarian Law available at https://rwi.lu.se/wp-content/uploads/2023/04/FNL-Prisca-Chogero1.pdf (accessed 24 September 2026).
69. African Court 'African Court on Human and Peoples' Rights issues new orders to Kenya over non-compliance in the Ogiek case' (2025) available at https://www.african-court.org/afchpr/african-court-on-human-and-peoples-rights-issues-new-orders-to-kenya-over-non-compliance-in-the-ogiek-case/ (accessed 24 September 2026).
70. African Union 'The Dar Es Salaam Communique: Conference on the Implementation and Impact of Decisions of the African Court on Human and Peoples' Rights' (2021) available at https://www.african-court.org/afchpr/the-dar-es-salaam-communique-conference-on-the-implementation-and-impact-of-decisions-of-the-african-court-on-human-and-peoples-rights/ (accessed 24 September 2026).
71. As above, para 9.

While the length of time the cases against Kenya and Libya discussed above have remained before the Court before determination warrants a separate inquiry, the persistent failure or refusal of States to comply with the Court's provisional measures and its judgments on the merits and reparations, often without any discernible consequences, raises a more pertinent question about the practical significance of what is conventionally regarded as the defining distinction between the Court and the Commission: the binding nature of the Court's judgments. The difficulty lies not in the formal legal status of the Court's decisions, which is, of course, binding and distinct from the recommendations of the Commission, but in the apparent gap between bindingness in law and enforceability in practice. Against this backdrop, several difficult questions naturally come to mind: How meaningful is the proposition that the Court's judgments are binding and must be complied with where persistent non-compliance attracts no effective consequence, and the Court possesses no direct means of compelling execution? What, in practical terms, distinguishes a binding judgment of the Court from a recommendation of the Commission beyond their formally differentiated legal status under the relevant instruments? Why should the Commission refer matters to the Court based on non-compliance with its decisions or provisional measures, if the Court's orders and judgments may be similarly disregarded with comparable impunity? More fundamentally, if both institutions ultimately depend upon State cooperation, engagement with States, reporting to AU political organs, and advocacy to secure implementation, does referral to the Court necessarily represent a meaningful escalation, or a mere relocation of the problem of non-compliance from one African human rights institution to another? These questions point to the result-oriented approach, and the answers might, in my view, more rationally explain the Commission's continued reluctance than the superiority/inferiority theory.

The point is not to say that non-compliance makes the Court's judgment legally non- binding nor to justify the Commission's reluctance to refer cases to the Court for over a decade now.[72] Far from that, the Protocol is clear on the binding nature of the Court's

judgment, and the Commission is supposed to refer cases to the Court, even if not for the worthy cause of giving life to the relevant provisions in its Rules and the Court's Protocol and lessening its caseload, but at least in the spirit of cushioning the life-crushing and unnerving effects of the low ratification of the Protocol and the worryingly low number of Article 34(6) declarations. The questions rather hinge on the gap between normative authority and enforcement capacity, largely because of weaknesses in the Executive Council's monitoring approach and the lack of effective enforcement mechanisms. These problems and limitations are not of the Court's own making, and the solutions are unfortunately far from the Court's reach. This is because "*[b]ased on the legal instrument that establish [sic] it, the African Court does not seem to have any role in the implementation of its decisions. However, it can play a facilitating role in the process*".[73] To the Court's credit, it has a compliance architecture embedded within the Protocol, and even though it has limited to no role to play in the implementation process, it has been very active in exploring and maximizing the use of its compliance architecture while also exploring innovative ideas in that regard.

72. Based on my knowledge and available public records, the last case referred to the Court was the 2013 case against Libya.

73. Coalition for an Effective African Court 'Booklet on the Implementation of Decisions of the African Court on Human and Peoples' Rights' (2021) available at https://africancourtcoalition.org/wp-content/uploads/2023/08/ACC-Implementation-Booklet_ENG2021.pdf (accessed 27 September 2026) 7.

Article 29(2) appointed the then OAU Council of Ministers (now the AU Executive Council) as the main body responsible for monitoring the execution of the Court's judgment on behalf of the AU Assembly. State parties to the Protocol undertake under Article 30 to comply with the Court's judgment and guarantee its execution within the stipulated time. Where any state fails to comply with the Court's judgment in any case, the Court is obliged under Article 31 to specifically highlight that in its annual activity report to the AU Assembly, which then assumes the ultimate responsibility of reviewing the reported state's failure and determining the political response. The Court has religiously discharged its annual reporting obligation, and as demonstrated by the Saif al Islam case against Libya, it has continuously flagged the issue of non-compliance not only in such reports but also through "follow-up letters and statements during various meetings held with AU officials".[74] Unfortunately, "there is no information published by the AU policy organs indicating that they have taken any step subsequent to the non-compliance reports by the Court".[75] It is worthy of mention that the Assembly, in the event of adopting a decision directing a State to comply with the Court's decisions and the State fails, could explore its sanction powers under 23(2) of the AU Constitutive Act, including 'denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly'.[76] Consistently adopting a subtle yet unproductive approach of simply calling on states to comply with the Court's judgments without sanctions or any form of coercion and expecting them to voluntarily comply has been characterized as a "folly",[77] and accurately so, as time and available records have shown.

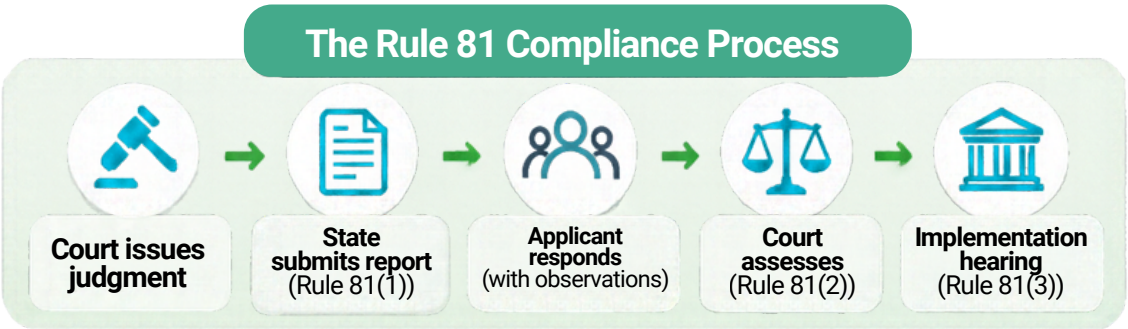
In the Saif-al-Islam case against Libya, the Court, after issuing its provisional measures orders, requested Libya to file a report on compliance and, on its own, extended the compliance period by 15 days.[78] When the country failed to respond, the Court was forced to report Libya's non-compliance to the Assembly through the Executive Council pursuant to article 52(4) of the Court's Rules. "*The Executive Council in turn issued several decisions, urging Libya to work with the African Court and to comply with its orders. Despite getting the Executive Council involved, Libya continued to ignore both the African Court's orders and the Executive Council's decisions*" with impunity, as the Assembly refuses to impose any sanctions. That dangerous precedent has been followed by many other states against whom the Court has rendered judgments, and the same circle continues to play out: the Court reports non-compliance to the Executive Council and the AU Assembly, the Executive Council and the Assembly urge states to voluntarily comply with the Court's decisions; and states refuse to comply with no reasonable consequences. Victims and their legal representatives, who are judgment creditors before the Court, after waiting for years, would eventually activate the Court's implementation hearing procedure, as in the Ogiek case against Kenya. The end result would be for the Court to find that the state has not fully or partly complied with its decisions and orders in the substantive case and make further orders directing the state to immediately comply, as demonstrated by the 2025 Ogiek implementation hearing decision. This effectively returns the case to the first stage of the vicious implementation circle, as the state is likely not to comply with the Court's subsequent decision, which the Court would eventually report to the Assembly, and the Assembly might issue another decision that is very likely not to be complied with. This challenge is quite systemic and re-echoes the point earlier made that the problems and limitations are not of the Court's own making, and the solutions are unfortunately far from the Court's reach.

74. As above 8.
75. As above.
76. See article 23(2) of the AU Constitutive Act.
77. Tardzenyuy AD 'The Folly of asking states to voluntarily submit to a higher power without coercion: a commentary on article 34(6) of the African Court Protocol through the lens of realpolitik' (2026) available at https://www.ahrlj.up.ac.za/tardzenyuy-a-d (accessed 27 September 2026).
78. See Windridge O 'In default: African Commission on Human and Peoples' Rights v. Libya' (2018) 18 African Human Rights Law Journal 763.

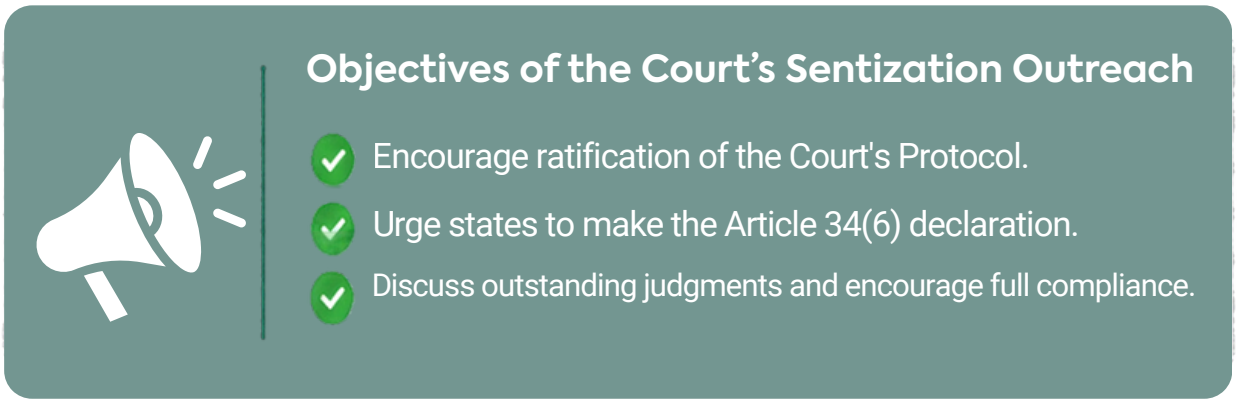
6. The Court's Efforts Towards Ensuring Greater Compliance with its Decisions

Despite these challenges, experience has demonstrated the Court's commitment to ensuring compliance with its decisions and its refusal to accept the passive role the Protocol has assigned to it in the implementation process.

Firstly, the Court, while drafting its Rules of Procedure, carefully established its legal power to monitor compliance with its judgment under Rule 81. Rule 81(1) obliges state parties against whom judgments have been issued to submit reports on compliance to the Court within the time limit stipulated by the Court, which shall be transmitted to concerned Applicants for observation, based on which the Court may assess the level of compliance with its decisions. Rule 81(2) empowers the Court to, where necessary, "obtain relevant information from other credible sources" to help it to make such assessment, and Rule 81(3) allows concerned Applicants to challenge the content of the said compliance report, which then constitutes a 'dispute' that might trigger the Court's implementation hearing procedure. Time, records and experience have demonstrated that concerned States, on their own, are very likely not to report within the time limit and further extensions that might be granted, as in the Saif-al-Islam provisional measure decisions, earlier discussed. In my view, it might be more prudent and strategic for an Applicant who is a judgment creditor in a case not to wait endlessly for the concerned State to file a compliance report. The Applicant may instead readily trigger the process through a request for a compliance update addressed to the Court upon the expiration of the time set for the State to report on its status of compliance, while also using the opportunity to supply all the information he/she may have on implementation of the judgment. Although this is not provided for in the Court's Rules, it is similar to the Commission's practice captured under Rule 125(1) of its Rules of Procedure, which requires 'parties' (not a concerned State alone) to "inform the Commission in writing within one hundred and eighty days from the date when the decision was transmitted to them, of all actions taken or being taken by the State Party to implement the decisions of the Commission". Rule 81(1) of the Court's Rules only obliged states to submit reports and doesn't speak to who can initiate the proceeding. As such, there is nothing stopping the Applicants from initiating the process. Such a request, accompanied by the Applicant's self-imposed but strategic compliance report, might trigger the State's reluctant response carrying the needed compliance report. The State's response might contradict the position of the Applicants on implementation, thereby creating the 'dispute' contemplated under Rule 81(3) that may warrant an implementation hearing. Compliance hearings allow the Court to refresh, update, and follow up on the report it has submitted to the Executive Council and the Assembly by submitting a fresh report on either the partial or full compliance with its decisions. This allows both victims and the Court alike to retain currency and momentum concerning the cases' implementation. The Ogiek judgement implementation hearing was the first of its kind that puts Rule 81(3) to a test and application, and many more are due to follow suit.



Secondly, though devoid of a promotion mandate, the Court has been conducting targeted high-level sensitization and public outreach missions to AU member states, which creates a good platform for officials of the Court to diplomatically encourage states that have not ratified the Protocol to ratify it; urge those that have ratified the Protocol but are yet to make the declaration under Article 34(6) to do so; and, most importantly, to directly discuss outstanding judgments of the Court relating to the host country while urging defaulting states to comply fully with the Court's decisions. This innovative step of the Court corresponds with the practice of the Commission and the African Committee of Experts on the Rights and Welfare of the Child, both of which frequently undertake such promotional visits and engage in other relevant activities in fulfilment of their formally assigned promotion mandate.



Thirdly, the Commission and the Court adopted Guidelines on Submission and Transfer of Cases (Guidelines on Cases) on 3 June 2025 which "*record[ed] the mutual agreements of the two institutions, and streamline[d] the procedures concerning the submission and transfer of cases between the Commission and the Court, as applicable*".[79] The first and second parts of the Guidelines reaffirm the symbiotic relationship between the Commission and the Court by confirming that both institutions may transfer cases to the other, detailing the procedure to that effect in line with the Rules of both institutions and the Court's Protocol. Most importantly, the third part emphasised that the protection of human rights in Africa is a shared responsibility and interestingly provides that "*the Commission may promote the implementation of the Court's decisions through its respective mechanisms, including country rapporteurs, special mechanism, state reporting procedures, letters of urgent appeal, letters of concern, meetings and missions*".[80] This is particularly significant because the Commission's well-established promotional framework could also serve as a platform for advancing the implementation of the Court's judgments, thereby helping to address the Court's limited promotional mandate, much in the same way that the binding nature of the Court's decisions complements the non-binding character of the Commission's recommendations. The adoption of the Guidelines is therefore a welcome development, as it strengthens the institutional relationship between the two bodies and reaffirms their shared responsibility for advancing and ensuring the effective protection of human rights.

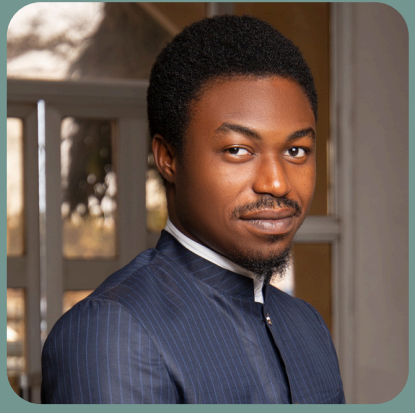
79. See the preamble of the Guidelines on Cases.
80. Para 16 of the Guidelines on Cases.

7. Concluding Reflections

The considerably low amount of ratification/accession of the Protocol, the alarmingly low rate of Article 34(6) declarations and the regressive yet steady record of state withdrawals have, without exaggeration, continuously weakened the Court's effectiveness, essence, and continental impact while slowly but steadily dragging the Court into the abyss. The African Commission's referral procedure is a significant mechanism for overcoming the obstacle posed by Article 34(6) declarations, even if it remains less effective in addressing the more fundamental challenge of ratification or accession to the Protocol. The African Commission is expected, in terms of its Rules of Procedure, the Rules of Court and the Protocol, to make referrals to the Court, not only to give life to the relevant provisions on referral, reduce its caseloads, and ensure timely determination of cases and administration of justice but also to, at least, sustain the Court as it struggles through these enormous and unnerving challenges.

The binding nature of the Court's judgments has, admittedly, not translated into significant compliance with its decisions and, as such, the expectation that the Court's judgment might have implementation leverage over the Commission's recommendation and the perception that the Court will likely be more effective in bringing about a decision's implementation are sound theoretically but untrue in reality. This result-based assessment crumbles the superiority/inferiority theory that rests solely on conjecture, as neither the Commission nor the Court is or meant to be superior or inferior to the other. However, the Court has actively explored its implementation architecture, while exploring innovative approaches such as creating diplomatic avenues through its promotional engagements to urge host states to ratify its Protocol, make the Article 34(6) declaration, or comply with its decisions.

The recent agreement executed between the Commission and the Court in the form of Guidelines on the Submission and Transfer of Cases represents an important and commendable development, but its practical impact on the Commission's referral practice remains to be seen, as there is no record of any new referrals from the Commission to the African Court recently. The African human rights system would be better served if the Commission maximises the use of the referral procedure at least to support the Court in the face of these enormous limitations. The Court is encouraged to reciprocate the same gesture in line with the Protocol and its Rules when it becomes better placed to do so. In the end, the ultimate solution lies in states ratifying/acceding to the Protocol and making the declaration under Article 34(6) to allow individuals and NGOs access to the Court and for those who have withdrawn to take back their withdrawals.



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