

Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights

*Rachel Murray**, *Debra Long***, *Victor Ayeni**** and *Augustin Somé*****

ABSTRACT: It is only relatively recently that attention has been paid to what happens after the African Commission and Court on Human and Peoples' Rights have issued decisions or judgments, and to the question whether these decisions or judgments actually result in any meaningful change on the ground. Results of a collaborative research project involving desk-based research and interviews with role players on the implementation of the decisions and judgments show that the body monitoring implementation is expected to play various roles. While there has been some movement to establish processes and mechanisms at the regional level to monitor implementation of the Commission and Court's decisions and judgments, the role that they adopt in monitoring implementation is confused and does not necessarily play to their respective strengths. Perhaps because of this confused state of play, there is an impasse, certainly at the level of the African Commission, in developing further the monitoring of implementation. This article therefore concludes by proposing some pragmatic, low-cost solutions to move monitoring implementation forward on the continent.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Suivi de la mise en œuvre des décisions et jugements de la Commission africaine et de la Cour africaine des droits de l'homme et des peuples

RÉSUMÉ: L'intérêt accordé au sort des décisions ou arrêts rendus par la Commission africaine et la Cour africaine des droits de l'homme et des peuples est récent. Il en est de même en ce qui concerne la question de savoir si ces décisions ou arrêts ont un impact réel. Les résultats d'un projet de recherche collaboratif impliquant une recherche documentaire et des entretiens avec des acteurs sur la mise en œuvre des décisions et des arrêts montrent que l'organe en charge du suivi de la mise en œuvre devrait jouer différents rôles. Bien qu'il y ait eu un certain engouement pour établir au niveau régional des processus et des mécanismes de suivi des décisions et arrêts de la Commission et de la Cour, le rôle que les deux organes jouent dans le suivi est confus et ne milite pas nécessairement en faveur de leur renforcement respectif. Sans doute du fait de cette situation confuse, il y a une impasse, certainement davantage au niveau de la Commission africaine, de faire avancer le suivi de la mise en œuvre. Cet article conclut par conséquent en proposant des solutions pragmatiques et peu coûteuses pour aller de l'avant dans le suivi de l'exécution des décisions concernées sur le continent.

* LLB (Leicester), LLM (Bristol), PhD (West of England); Professor of International Human Rights Law and Director of the Human Rights Implementation Centre, University of Bristol Law School; Rachel.Murray@bristol.ac.uk

** MA (Glasgow), MA (London); Research Fellow, Human Rights Implementation Centre, University of Bristol; Debra.Long@bristol.ac.uk

*** LLM (Human Rights and Democratisation in Africa) (Pretoria); Doctoral candidate, Universities of Pretoria; victorayeni7@gmail.com

**** LLM (Human Rights and Democratisation in Africa) (Pretoria); Coordinator, Centre for Civic Information & Documentation, Ouagadougou, Burkina Faso; asomes@yahoo.fr

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1 INTRODUCTION

When the African Charter on Human and Peoples’ Rights (African Charter) was adopted 30 years ago, scholarly debate on the new African human rights system focused on its provisions and on the question whether, what on paper appeared to be a toothless African Commission on Human and Peoples’ Rights (African Commission), would have any effect on promoting and protecting the broad range of rights contained in the African Charter. Over the years, the African Commission developed standards on the various provisions of the African Charter through the adoption of resolutions or general comments, and through the various activities of its special procedures. It has received well over 400 communications, nearly all from individuals, organisations or groups alleging violations of the rights in the African Charter.¹ In 2006 it was joined by the African Court on Human and Peoples’ Rights (African Court), which has since then received numerous cases and adopted a handful of judgments in which it found human rights violations.²

It is only relatively recently, however, perhaps in line with shifts at the international level and among human rights funders, that attention has been paid to what happens post-decision or judgment,³ and to the question whether many of these documents and standards elaborated by the African Commission and decisions and judgments adopted by the African Commission and African Court actually result in any meaningful change on the ground. This article draws upon preliminary findings from a collaborative research project examining the

¹ See <http://www.achpr.org/communications/>; and the Institute for Human Rights and Development in Africa (IHRDA)’s Case Law Analyser: <http://caselaw.ihrda.org> (accessed 10 October 2017).

² See eg *Konaté v Burkina Faso*, Application 4/13 (Judgment of 5 December 2014); *Zongo v Burkina Faso*, Application 13/11 (Judgment of 21 June 2013); *Jonas v Tanzania*, Application 11/2015 (Judgment of 28 September 2017); *Onyachi and Others v Tanzania*, Application 3/2015 (Judgment of 28 September 2017); *African Commission on Human and Peoples’ Rights v Kenya*, Application 6/2012 (Judgment of 26 May 2017); *Actions pour la protection des droits de l’homme (APDH) v Côte d’Ivoire*, Application 1/2014 (Judgment of 18 November 2016).

³ See Open Society Justice Initiative (OSJI) *From judgment to justice: implementing international and regional human rights decisions* (2010) 12; OSJI *From rights to remedies: structures and strategies for implementing international human rights decisions* (2013) 26; C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 1.

implementation of cases from the African Court and Commission, as well as the regional treaty bodies in Europe and the Americas and some of the treaty bodies in the UN. It has taken a handful of cases from nine States, three in each of the regions (Africa, the Americas and Europe), and examined the extent to which the recommendations or reparations ordered have been implemented by the State. Desk-based research, and interviews with government officials, the victims, litigants, parliamentarians, the judiciary, national human rights institutions (NHRIs), civil society and others, as well as representatives from the respective treaty bodies, have enabled us to identify factors that impact on the implementation of these decisions and judgments.⁴

This article focuses on the monitoring of implementation of decisions and judgments of the African Commission and African Court, and not on other findings such as Concluding Observations or resolutions issued by the African Commission. We use the term 'implementation' to refer to the *process* by which individual or collective measures are taken (through legislation, judicial decision, administrative action, executive decree, or other steps) to give effect to an adverse judgment or decision.⁵ This is distinguished from 'compliance', which is a *status* that is attained if and when a State's law and practice are in line with the requirements of the judgment or decision, as interpreted by the responsible international body.⁶ Thus, compliance is understood as the outcome of implementation: a state implements a judgment or decision in order to ensure that it is in compliance with its obligations under this ruling. African human rights bodies use the terms 'monitoring' or 'following-up' decisions and judgments that we consider broader terms to cover the formal and informal processes of oversight of the human rights bodies, and it is these which this article examines. While acknowledging that the monitoring of implementation cannot be the sole responsibility of the respective treaty bodies, this article concentrates specifically on the role of two human rights treaty body mechanisms (the Commission and the Court) established within the AU. The contribution of the other AU organs, including the Assembly of the Union (AU Assembly), Executive Council, Peace and Security Council (PSC), Permanent Representatives

⁴ For information on the project, see <http://www.bristol.ac.uk/law/research/centres-themes/hric/projects/implementationandcompliance/#d.en.278672> (accessed 10 October 2017). This is an independent research project funded by the Economic and Social Research Council (ESRC) of the United Kingdom. Interviews have been conducted under the University of Bristol's rules on ethical research. This has required that interviewee consent be obtained to attribute them in publications arising from the research and anonymity, if requested, will be respected at all times. Therefore, quotations cited in this article do not identify their authors. All interviews are held on file with the research team, which includes the co-authors of this article.

⁵ See M Burgstaller *Theories of compliance with international law* (2004) 4; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 28; VO Ayeni 'Introduction' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 9.

⁶ K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 388-391; B Kingsbury 'The concept of compliance as a function of competing conceptions of international law' (1998) 19 *Michigan Journal of International Law* 345.

Committee (PRC), the AU Commission (AUC), and the Pan-African Parliament (PAP), will be touched upon but not be dealt with fully here.

2 WHAT ROLE SHOULD THESE BODIES PLAY?

It is first worth reiterating that it is clear from our research that the African Commission and African Court should themselves play some role in monitoring implementation of their own decisions and judgments. Firstly, it gives them a sense of ownership, as interviewees told us: the African Court ‘still need(s) to know if the decision has been implemented or not in case [it needs] to issue other orders, or draw parties to other cases’;⁷ further: ‘it is good to see that your decisions are implemented and monitored’.⁸ In addition, the bodies are then able to assess their own impact and consequently amend their practices accordingly. The ability to indicate examples of where states have implemented also contributes to enhancing the legitimacy and credibility of the body itself. This will then ‘build confidence in the institution’,⁹ so that

the Court should work towards the ideal position, where compliance with its decisions impacts on the Respondent State’s legitimacy among its peers, in other words, non-compliance with the Court’s decisions will have adverse consequences to States which they cannot afford to ignore. The Court should continue undertaking its work with independence and integrity without fear of repercussions from Member States. It should avoid self-censoring, which could arise from a fear of non-compliance with its decisions or a fear of active backlash against it.¹⁰

From our research we would suggest grouping monitoring and implementation into two categories: (i) monitoring and implementation that can be viewed as *reactive* (for example, receiving information on the extent to which the State has implemented any recommendations or orders); and (ii) monitoring and implementation that is *proactive* (for example, going out and seeking information where it is lacking; cross-checking that evidence and validating what has been said; and then also making assessments on whether this is sufficient or not, based on some clear criteria of what is satisfactory implementation).

Our research has found that the African Commission and African Court play, or are considered to play, a variety of different roles when it comes to ‘monitoring’ implementation. These roles include: information-gathering; reporting; dialogue with the parties; interpretation and technical assistance; assessment; coordination; and enforcement. Our terminology recognises, but does not necessarily

⁷ Interview D6, held May 2017. See also Interview D1, May 2017; Interview D3, April 2017.

⁸ Interview D8, held May 2017.

⁹ Interview D5, held May 2017.

¹⁰ Communiqué/Outcome of the International Symposium on the 10th Anniversary of the African Court on Human and Peoples’ Rights, A Decade of Human Rights Protection in Africa, 21-22 November 2016, Arusha, United Republic of Tanzania 5.

equate with, proposals made by the African Court itself in consideration of articles 29 and 30 of the Protocol.¹¹

‘Information-gathering’ is understood to mean receiving or seeking evidence from the parties to the case as well as other actors on what measures States have undertaken to implement the decision or judgment. This may take the form of direct questions to the State delegation during consideration of State reports, holding implementation hearings, correspondence to parties and visits to relevant stakeholders at the domestic level.

‘Reporting’ encompasses informing others, including organs of the AU and other national and international actors, of the measures taken by the State.

‘Dialogue with the parties’ entails that the monitoring body works with the two parties to the communication either through offering ‘good offices’ or facilitating meetings to discuss the implementation of the measures.

‘Interpretation and technical assistance’ is provided when the monitoring body provides further clarification on what the specifics of its recommendations and orders mean.

‘Assessment’ is the evaluation of the extent to which the State has implemented the recommendations or orders.

‘Coordination’ has been used to note that the bodies can also play a role in coordinating efforts to monitor implementation with other bodies at the national or regional level.

Examples of ‘enforcement’ tools are: the ‘naming and shaming’ through the publication of lists of States that have failed to implement decisions; Rules 118(1) and (2) of the African Commission’s Rules of Procedure which enable it to refer cases to the African Court when the state has failed to comply;¹² or ultimately the ability of the AU organs to impose sanctions on states.¹³ Here, consequences may flow from the failure to implement. These various forms of monitoring are not always distinct, neither are they mutually exclusive in that they can be undertaken together and at the same time. In addition, for example, undertaking ‘interpretation and technical assistance’ does not

¹¹ See below; and GW Kakai ‘Compliance with supranational human rights judgements and decisions in Sub-Saharan Africa: successes, challenges and opportunities. African Court on Human and Peoples’ Rights Experience’, Presentation, Raoul Wallenberg Institute, Closing The Implementation Gap – Strengthening Compliance with Regional Human Rights Decisions Regional Symposium, 27–28 September 2016, Hotel Intercontinental, Nairobi, Kenya, on file with authors.

¹² *African Commission on Human and Peoples’ Rights v Great Socialist Peoples’ Arab Jamahiriya*, Application 2/2013 para 27.

¹³ Article 23(2) of the AU Constitutive Act. See African Court Coalition *Booklet on the implementation of decisions of the African Court on Human and Peoples’ Rights* (2017) para 2.3.1. See also Rule 33(2) of the Assembly Rules of Procedure (Rules of the Assembly). However, see Rule 36 of the Rules of the Assembly, and counter-argument by GM Wachira & A Ayinla ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: a possible remedy’ (2006) 6 *African Human Rights Law Journal* 465 484.

necessarily mean that the body will not also take some steps to, for instance, assess implementation as well.

A related issue is that whatever role these bodies play must not impact on their neutrality and independence. This applies equally to the African Commission as to the African Court. The legitimacy and credibility of the bodies come in part from the perception of them as independent and their ability to be resolute in the face of pressures from States or other actors.¹⁴ Some of the tasks employed in monitoring implementation potentially could compromise this neutrality. So, for example, on the one hand one might see the benefits for a Commissioner who lived in the State against which a decision was adopted to be a source of expertise for the State authorities when determining how to implement that decision. On the other hand, his or her lack of engagement with the case prior to its adoption, in accordance with the Rules of Procedure to ensure neutrality,¹⁵ does not make this a straightforward proposition.

Bearing in mind the importance of independence, the question then becomes: What roles do the treaty provisions and rules presume?

3 TREATY PROVISIONS AND RULES OF PROCEDURE/RULES OF COURT

Article 1 of the African Charter requires States Parties to ‘recognise the rights, duties and freedoms enshrined in the Charter’ and to ‘undertake to adopt legislative or other measures to give effect to them’. The African Commission has a broad mandate in article 45 to promote, protect and interpret the African Charter. Article 46 further enables it to ‘resort to any appropriate method of investigation’; it may hear from the Chairperson of the AU Commission or any other person capable of enlightening it.¹⁶ Rule 98(4) of the African Commission’s Rules of Procedure requires the State to report to the African Commission on measures taken to implement provisional measures. Rule 112 has further detail on ‘follow-up’ on the recommendations of the Commission. This Rule provides as follows:

1. After the consideration of the Commission’s Activity Report by the Assembly, the Secretary shall notify the parties within thirty (30) days that they may disseminate the decision.
2. In the event of a decision against a State Party, the parties shall inform the Commission in writing, within one hundred and eighty (180) days of being informed of the decision in accordance with paragraph one, of all measures, if any, taken or being taken by the State Party to implement the decision of the Commission.

¹⁴ Open Society Justice Initiative (n 3 above) 11; H Koh ‘Review essay: why do nations obey international law?’ (1997) 106 *Yale Law Journal* 2599 2602.

¹⁵ Rule 101 of the African Commission’s Rules of Procedure.

¹⁶ Article 46 of the African Charter.

3. Within ninety (90) days of receipt of the State's written response, the Commission may invite the State concerned to submit further information on the measures it has taken in response to its decision. If no response is received from the State, the Commission may send a reminder to the State Party concerned to submit its information within ninety (90) days from the date of the reminder.
4. The Rapporteur for the Communication, or any other member of the Commission designated for this purpose, shall monitor the measures taken by the State Party to give effect to the Commission's recommendations on each Communication.
5. The Rapporteur may make such contacts and take such action as may be appropriate to fulfill his/her assignment including recommendations for further action by the Commission as may be necessary.
6. At each Ordinary Session, the Rapporteur shall present the report during the Public Session on the implementation of the Commission's recommendations.
7. The Commission shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to any situations of non-compliance with the Commission's decisions.
8. The Commission shall include information on any follow-up activities in its Activity Report.

In setting out when the African Commission is able to submit a case to the African Court, Rules 118(1) and (2) provide that this can be done where the African Commission 'considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 112(2)' and where it 'considers that the State has not complied with the Provisional Measures requested'. Rule 125 enables the African Commission to request the AU Assembly, when it submits its activity report, 'to take necessary measures to implement its decisions' and for the African Commission to 'bring all its recommendations to the attention of the Sub-Committee on the Implementation of the Decisions of the African Union of the Permanent Representatives Committee'.

Article 29(2) of the African Court Protocol states that the Executive Council of the AU 'shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly'. Under article 30 of the Protocol, States parties are required to 'comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution' and in compliance with article 31 the Court shall submit a report to each regular session of the AU Assembly which should include 'the cases in which a State has not complied with the Court's judgment'.

Rule 51 of the Rules of Court notes that the article 31 report shall also include reference to the interim measures ordered by the Court and '[i]n the event of non-compliance with these measures by the State concerned, the Court shall make all such recommendations as it deems appropriate' and it can also 'invite the parties to provide it with

information on any issue relating to implementation of the interim measures adopted by it'.¹⁷ Rule 54(5) of Rules of Court enables the Court to 'invite the parties to provide it with information on any issue relating to implementation of the interim measures adopted by it'.

4 MECHANISMS

The challenge with monitoring implementation of the judgments of the African Court and decisions of the African Commission does not appear to be due to the lack of available mechanisms to do so. In addition to any specific procedure or mechanism to deal with monitoring, these bodies have also used the more generic procedures established under their mandates to monitor implementation of their judgments and decisions. So, the African Commission has asked questions of States during the examination of their article 62 reports about what measures have been taken to implement decisions;¹⁸ it has amended the structure of its activity reports to refer to the implementation status of decisions;¹⁹ it has included follow-up on decisions in its fact-finding missions by special procedures,²⁰ and its promotional missions;²¹ and it has made reference to the status of implementation of decisions in country-specific resolutions.²²

The African Court has enabled States to use the application for interpretation of a judgment procedure as set out in Rule 66 of the Rules of Court to request clarity on what is expected from them in the implementation of judgments and orders ruled by the Court. The African Court can and does offer technical assistance to States on how to implement its decision. At least two States have requested the Court to clarify aspects of its orders in order for them to be able to implement

¹⁷ Rule 51(4) of the Rules of the African Court

¹⁸ Eg the Concluding Observations on Mauritania's report, 16 February 2012.

¹⁹ Eg African Commission, 35th Activity Report of the African Commission, adopted October 2013, reference to *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Communication 323/2006, to 'follow-up on implementation' 7, see also para 27: 'With regards to Communication 419/2012 - *The Indigenous Peoples of the Lower Omo (Represented by Survival International Charitable Trust) v Ethiopia*, the Commission issued an Order against the State, requesting the latter to adopt Provisional Measures to prevent irreparable harm being caused to the victim of alleged human rights violations; the State has not respected that Order'.

²⁰ Eg OSJI (n 3 above) 107; Report of the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa, presented at the 52nd Ordinary Session of the African Commission, 9-22 October 2012 para 44.

²¹ Eg a decision on a number of related communications against Mauritania was discussed in a promotional visit by the CPTA Chairperson in 2012, Report of the Promotional Mission to the Islamic Republic of Mauritania, 26 March – 1 April 2012 9. Similarly, in a mission to Botswana in 2005, the visiting delegation requested information on the steps taken to implement recommendations on the decision on *Modise v Botswana* communication, Report of the Promotional Mission to the Republic of Botswana, 14-18 February 2005 13.

²² See African Commission, Resolution 91 on the human rights situation on Eritrea, adopted December 2005.

the ruling.²³ The procedure is in effect a new application, for interpretation of a judgment, as set out in Rule 66 of the Rules of Court. Here, however, the roles are reversed: the State then becoming the applicant, and the previous applicant, the respondent.

Are such processes insufficient or simply not properly used? Why, given the above tools, has the African Commission, for example, not produced publicly available information on the status of implementation of at least some of its decisions? In part, the processes do not appear to have been exploited to their full potential due to limited information from States, and insufficient staffing resources, among other factors. In addition, there are also key processes or tools behind the scenes that are missing, such as efficient and comprehensive case management systems or databases which, if in place, would help the monitoring overall. The task of follow-up and monitoring implementation has been added on to already existing processes but with limited if any additional resources.

Specific mechanisms have also been established to enable the bodies themselves to monitor implementation of their decisions and judgments. These, as will be seen, encompass many of the types of monitoring that are listed above. Rule 112 of the African Commission's Rules of Procedure sets out the procedure for 'follow-up' to be used by the African Commission. Here its role includes reporting, information-gathering, assessment and arguably enforcement and is not only reactive but also proactive. These roles have principally been coordinated by the African Commission's Working Group on Communications, composed of Commissioners and members of the secretariat, which is tasked with considering communications.²⁴ Its mandate was expanded in October 2012 to include the coordination of follow-up of decisions and collection of 'information on the status of implementation of the Commission's decisions' that it should then present in a report at each session.²⁵

Article 29 of the Court Protocol gives the task of *monitoring* to the AU's Executive Council although its ability to do so is dependent on the African Court providing it with the information on 'non-compliance' in its activity report.²⁶ In a 2014 Decision, the Executive Council called on the African Court to 'propose, for consideration by the PRC, a concrete reporting mechanism that will enable it to bring to the attention of relevant policy organs, situations of non-compliance and/or any other issues within its mandate, at any time, when the interests of justice so

²³ See for instance, *Mkandawire v Malawi*, Application 3/2011 <http://en.african-court.org/images/Cases/Judgment/Ruling%20Appl.%20003-2011%20Urban%20Mkandawire%20v%20Malawi%20-%20English.pdf> (accessed 12 July 2017); and *Interpretation of Judgment of 20 November 2015 Thomas v Tanzania*, Application 1/2017 (Judgment 28 September 2017).

²⁴ African Commission, Resolution 212 on the mandate of the Working Group on Communications of the African Commission on Human and Peoples' Rights, adopted March 2012.

²⁵ African Commission, Resolution 255 on the expansion of the mandate of the Working Group on Communications and Modifying its Composition, adopted October 2012.

²⁶ Article 31 of the Court Protocol.

require'.²⁷ It has been suggested that 'reporting' should be considered as separate from 'monitoring' and 'enforcement'.²⁸ 'Reporting' includes those reports on non-compliance submitted by the African Court to the Executive Council through article 31 of the Protocol. 'Monitoring' should be undertaken by the Executive Council in accordance with article 29; and include the ability of the Executive Council, through working groups or a group specifically for 'ongoing supervision of the state of execution of judicial decisions of the Court', to issue regulations or directions or appropriate action.²⁹ 'Enforcement' will then be carried out by the AU Assembly, with information on the measures taken by the State being maintained by a register at the AU Commission.³⁰

The practice of the African Commission and the African Court reveals that they employ a range of different tasks to monitor implementation. With respect to information gathering, the African Commission has received information from one or both parties to the communication,³¹ and on occasion others,³² on the extent to which its recommendations have been implemented. It has also been more active in gathering evidence of implementation, for example, by sending *notes verbales* and letters to the States and parties requesting information, although the responses are not always provided.³³ Despite it not being expressly mentioned in Rule 112, it has also held hearings on

²⁷ AU Executive Council, Decision on the 2013 Activity Report of the African Court on Human and Peoples' Rights, adopted January 2014 para 9.

²⁸ African Court Coalition (n 13 above) para 2.2. See also GW Kakai 'Compliance with supranational human rights judgements and decisions in Sub-Saharan Africa: successes, challenges and opportunities. African Court on Human and Peoples' Rights experience', Presentation, Raoul Wallenberg Institute, Closing The Implementation Gap – Strengthening Compliance with Regional Human Rights Decisions Regional Symposium, 27-28 September 2016, Hotel Intercontinental, Nairobi, Kenya, on file with authors.

²⁹ African Court Coalition (n 13 above). See also Kakai (n 11 above).

³⁰ As above.

³¹ 'In Communication 365/08, the Complainant informed the Commission that the decision of the Commission has been partially implemented, and the Commission has requested the State to implement the outstanding part of the decision. In Communication 323/06, the Respondent State indicated that efforts have been made to protect the rights of women in the country in general, and the Commission has requested the State for information regarding the concrete measures (being) taken to implement the specific decision of the Commission in the Communication in identified areas', African Commission, Thirty-Sixth Activity Report, November 2013-May 2014 paras 24-27.

³² *Malawi Africa Association et al v Mauritania*, Communications 54/91-61/91, 98-93-164/97, 196/97, 210/98, Implementation Dossier. For presentation to the African Commission on the occasion of the 50th Ordinary Session, October 2011. IHRDA were not the original complainants. See also statements made during sessions of the African Commission, eg IHRDA, Statement of IHRDA on implementation of the African Commission's decision in Communication 292/04, *IHRDA v Angola*, 58th Ordinary Session, 12 April 2016.

³³ Eg African Commission, Thirty-Seventh Activity Report, June – December 2014 para 50: 'The Commission did not receive any information on this during the reporting period'.

implementation³⁴ and held a panel on implementation as part of its plenary sessions.³⁵

For example, at the 53rd ordinary session of the African Commission in April 2013, the Commission held an implementation hearing in respect of the *Endorois* case. During the hearing, the parties updated the Commission on the implementation of its decision in the *Endorois* case.³⁶ Thereafter, the Commission sent a *note verbale* dated 29 April 2013 to the government of Kenya reminding the government of its pledge during the oral hearing to submit an interim report within 90 days of the hearing and a comprehensive report at the next session (54th ordinary session) of the Commission.³⁷ The oral hearing on implementation was followed by a workshop held on 23 September 2013 on the status of implementation of the *Endorois* decision, organised by the African Commission's Working Group on Indigenous Populations/Communities in collaboration with the Endorois Welfare Council.³⁸ Due to the failure of the government of Kenya to participate in the implementation workshop and provide feedback as promised during the oral hearing, the Commission adopted Resolution 257 on 5 November 2013 urging the government of Kenya to comply with its obligations under the African Charter by implementing the *Endorois* decision.

With respect to reporting as a tool for monitoring implementation, the African Commission's annual report, which includes the annexes of the decisions on communications, has for a number of years included a section outlining 'the situation of the compliance with its recommendations by the State Parties'.³⁹ This is consolidated by requests from the Executive Council that 'Parties to Communications to provide the [African Commission] with information regarding implementation of decisions and recommendations of the [African Commission]'.⁴⁰ The African Court publishes in its activity report a list of States and increasingly detailed information on implementation.⁴¹ The information lists the particular reparation ordered by the Court

³⁴ Eg in relation to the *Endorois* case, African Commission, Resolution 257 Calling on the Republic of Kenya to implement the *Endorois* decision, adopted November 2013.

³⁵ As a panel at its session in November 2015. See also Meeting between African Commission, African Court, African Committee on Rights and Welfare of the Child and AU, September 2012, Addis Ababa.

³⁶ See African Commission, Thirty-Fourth Annual Activity Report, November 2012 – April 2013 5; Minority Rights Group International 'The *Endorois* decision – four years on, the *Endorois* still await action by the Government of Kenya' <http://minorityrights.org/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/> (accessed 12 July 2017).

³⁷ African Commission (n 23 above).

³⁸ As above.

³⁹ African Commission, Resolution 97 on the importance of the implementation of the recommendations of the African Commission on Human and Peoples' Rights by States Parties, adopted November 2006 para 3.

⁴⁰ AU Executive Council, Decision on the Thirty-Sixth Activity Report of the African Commission, 28 April 2014 para 5.

⁴¹ See eg Executive Council, Report on the Activities of the African Court on Human and Peoples' Rights, 22-27 January 2017, para 21; African Court, Mid-Term Activity Report, 1 January – 30 June 2017 section 21(d).

and then provides detail on what the State has done, if anything, to implement that measure. In one situation, with respect to Libya, it adopted an Interim Report noting that ‘Libya has failed to comply with a judgment of the Court’.⁴² It submitted this report to the AU Assembly in accordance with article 31 of the Protocol and Rule 51(4) of the Rules of Court, urging

the Assembly to express itself on Libya’s non-compliance with the Court Order and to call upon Libya to comply forthwith and, also for Libya to report to the Court within 14 days on what measures Libya has taken to comply with the Court Order; the Assembly to adopt a decision calling upon all Member States of the African Union to comply with and implement Judgments and Orders of the Court, in accordance with Article 30 of the Protocol; the Assembly to take such other measures as it deems appropriate to ensure that Libya fully complies with the Court Order.⁴³

The African Commission can offer its good offices to parties to a communication and facilitate dialogue between them in the implementation of its decisions.⁴⁴ Whether the parties make use of this potential as often as they might is a question to be considered in further research.⁴⁵

In carrying out its role under the Protocol and the Rules of Court, the African Court has required, as part of the judgment or ruling in reparations, for States to report back to it within a period of time on the measures they have taken to implement the judgment.⁴⁶ The African Court, we were informed,⁴⁷ also writes to States to request information and regularly updates this information. Neither the African Commission nor African Court appears to have an electronic case management database that incorporates data on the implementation of the decisions and rulings.

Both the African Court and the African Commission have then used any information they have collated to make an assessment on the extent to which the State has implemented the judgment or decision. For the African Commission this is not done consistently. For example, there are only a handful of cases where the African Commission has made more detailed analysis and statements on a State’s failure to implement, prompted, it would appear, by sustained campaigns from the litigants or interested civil society organisations.⁴⁸

⁴² African Court, Interim Report of the African Court notifying the Executive Council of non-compliance by a State (Interim Report on Libya), 17 May 2013 para 8.

⁴³ African Court (n 42 above) paras 9-10; AU Executive Council (n 41 above) para 56.

⁴⁴ African Commission, Final communiqué of the Workshop on the Status of Implementation of the Endorois Decision of the African Commission, 23 September 2013 para 4.

⁴⁵ NJ Udombana ‘Towards the African Court on Human and Peoples’ Rights: better later than never’ (2000) 3 *Yale Human Rights and Development Law Journal* 45; ST Eboobrah, ‘Towards a positive application of complementarity in the African human rights system: issues of functions and relations’ (2011) 22 *European Journal of International Law* 663-688.

⁴⁶ Ruling on Reparations in *Mtikila v Tanzania*, Application 11/2011,

⁴⁷ Interview D5, May 2017; Interview D8, May 2017.

⁴⁸ African Commission (n 34 above).

The African Court has not published any criteria on what amounts to 'full' or 'partial' implementation, although it has used these terms. For example:

While welcoming the efforts made by Burkina Faso and Tanzania to implement the Court's judgments, the Court notes that the two countries are yet to fully comply with the orders of the Court in those judgments, and further notes Tanzania's unwillingness to comply with the Court's Orders for Provisional Measures.⁴⁹

This terminology could, however, be read as relating to the number of specific orders in the judgment, rather than an assessment of the nature of the measures taken with respect to each particular order.

There is no information that is consistently publicly available on how the African Commission or African Court assess the accuracy or test the veracity of information given to them on the extent to which the State has implemented the decision or judgment. In the end it may come down to whether the complainant or applicant accepts and is content with what the State claims it has done.

5 CONCLUSIONS

Our research asserts the following conclusions. It reveals that although the bodies monitoring implementation, in our context, the African Commission or the African Court, are expected to play various roles, there appears to be no coherent or strategic approach. The consequences of this insight are far-reaching. First, there are times at which none of these tasks are being carried out because the bodies do not consider it their responsibility to do so. Second, many of these tasks are being carried out but not well or consistently well. Third, there is no coherent picture from those within or outside the bodies as to whether these roles are appropriate or not, whether they themselves are best placed to play them, play them on some occasions and not others, or whether others should be doing these tasks instead. Finally, one of the reasons why the African Court and African Commission appear to be carrying out the variety of monitoring activities is because they are doing so instead of putting a more holistic and coherent system in place, particularly at the AU level. The sub-committee envisaged by Rule 112(8) of the African Commission's Rules of Procedure has not become operational and any real monitoring or enforcement from the AU level, beyond simply calling on states to implement decisions of the two bodies,⁵⁰ is therefore limited and in many respects absent.

⁴⁹ AU Executive Council, Report on the Activities of the African Court to the Executive Council, 22-27 January 2017 para 57.

⁵⁰ Eg AU Executive Council (n 40 above) para 4, where it 'call[ed] on states to implement the decisions and recommendations' of the African Commission as well as to 'respond to the ACHPR's Urgent Appeals and comply with Orders for Provisional Measures issued by the ACHPR'; AU Executive Council, Decision on the Thirty-Fifth Activity Report of The African Commission, 21-28 January 2014 para 4: 'Calls upon Member States to implement decisions and recommendations of the ACHPR, respond to Urgent Appeals from the ACHPR, and to comply with Provisional Measures issued by the ACHPR'; AU Executive Council, Decision on the Thirty-Fourth Activity Report of the African Commission, 19-23 May 2013 para 4: 'Exhorts State Parties to take concerted action to address the human rights issues that the ACHPR has identified as being

The inter-relationship between the African Court and African Commission is also dependant on clarifying what their respective roles should be. The African Court has a specific role under Rule 118(1) and (2) of the African Commission's Rules of Procedure arguably to 'enforce' decisions of the African Commission where the State has failed to implement. Given the lack of clarity on the African Commission's role with respect to monitoring its own decisions, the execution of Rule 118 and which cases it should refer to the African Court is problematic. This is not least because in order to refer cases of non-implementation to the African Court, the African Commission has to have sufficient information on implementation of its own decisions and should have used this to make an assessment on whether the recommendations have been fulfilled. Even if it can select which of the cases the State has failed to implement it would like to refer to the Court, the African Commission's reluctance has been compounded by the perception that the African Court can examine the case *de novo*.

Further, one has to ask what precisely the role of the African Court is with respect to Rule 118 referrals. Is it to 'enforce' the African Commission's decision by in effect giving it binding status? If so, does this potentially, and paradoxically, weaken the African Commission's own view that its decisions are binding,⁵¹ and thereby undermine its own legitimacy? Could it, arguably, imply that States are not obliged to react to the African Commission's decision until there is a confirmation

continuing concerns on the continent and to comply with the decisions and recommendations of the ACHPR'; see also AU Executive Council, Decision on the Twenty-Second Activity Report of the African Commission, 25 – 29 June 2007 para xi: '[U]rge[d] Member States to commit unconditionally to, and comply with judgements rendered by the Court'; AU Executive Council, Decision on the 2014 Activity Report of The African Court On Human And Peoples' Rights, 23 – 27 January 2015 para 3: 'Welcomes the response of Libya to the Court's Order of Provisional Measures in relation to a matter filed against the State Party before the Court, but NOTES that the response does not indicate the measures Libya has taken to implement the said Order, with regard to allowing "...the accused access to a lawyer of his choosing, family visits and to refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health..."; AU Executive Council, Decision on the Mid-Term Activity Report of the African Court On Human And Peoples' Rights para 3; AU Executive Council, Decision On The Mid-Term Activity Report of the African Court, para 3: 'Welcomes the response of Libya to the Court's Order of Provisional Measures in relation to a matter filed against the State Party before the Court, but NOTES that the response does not indicate the measures Libya has taken to implement the said Order, with regard to allowing "the accused access to a lawyer of his choosing, family visits and to refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health"'.

⁵¹ *Jawara v Gambia*, Communications 147/95-149/96, (2000) AHRLR 107 (ACHPR 2000); *Legal Resources Foundation v Zambia*, Communication 211/98, (2001) AHRLR 84 (ACHPR 2001) paras 61-62; 'Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights' 6; *International Pen, Constitutional Rights Project, Civil Liberties Organisations and Interights (on behalf of Ken Saro-Wira) v Nigeria*, Communications 137/94, 139/94, 154/96, 161/97, (2000) AHRLR 212 (ACHPR 1998) paras 113 and 116. See also R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 54-55; F Viljoen *International human rights law in Africa* (2007) 339; *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v Nigeria*, Communication 87/93, (2000) AHRLR 183 (ACHPR 1995); African Commission, Resolution 97 on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, adopted November 2006.

of such a decision by the Court? This is clearly not a desirable solution. The African Court has had no real opportunity to explore this relationship and its role in monitoring non-implementation of African Commission decisions. Therefore, a more positive approach is possible: it does have the potential, given the chance, to bolster the African Commission's reputation and status through upholding and strengthening its decisions. Indeed, the African Court's judgments so far indicate that far from challenging the jurisprudence of the African Commission, it has drawn heavily on it in its own interpretation of the African Charter. Furthermore, the concern that States may not be implementing the decisions of the African Commission because they are not binding has not so far been borne out in the research we have conducted: in the majority of situations that we have been examining the State has not at all questioned the legal status of the African Commission's decision.⁵²

Rather, our research concludes that the reasons why the decision or judgment will be implemented are more complex. They include the nature of the current political context, such as whether there has been a change in government; the particularly sensitivity of the issues in the decision or judgment in the light of what is happening in the State at the time; what kind of particular remedies the decision or judgment requires; and the practical feasibility of carrying them out. Sometimes States may well have implemented, at least in part, a decision or judgment but this is not information that is known publicly. Other factors impeding implementation include consideration of the specificity of the recommendations or orders made by the African Commission and Court, and whether a correct balance was made between providing clarity to the State on what precisely was required of it to implement the decision, as against giving it the discretion to determine what was the most appropriate way of implementing within the context of the State.⁵³

We recognise that detailed consideration of all of these issues relies on some structural reform not only at the levels of the bodies themselves but also at the AU. Equally, clarity on the respective roles impacts on basic procedural issues. For example, research elsewhere, supported by our preliminary findings, indicates that the visibility of the decision and judgment as well as what the State may or may not have done to implement it, is crucial to successful implementation.⁵⁴ Yet, it is not always clear whose responsibility it is to publicise the decision, inform others beyond the parties, and make national, regional and international actors aware of what the State has done to implement. As noted above, the African Court is providing some detail

⁵² There is one notable historical exception, *Good v Botswana*, Communication 313/05, Combined 32nd and 33rd Activity Report: 'the Government has made its position clear; that it is not bound by the decision of the Commission' para 24.

⁵³ See also S Cardenas *Conflict and compliance: State responses to international human rights pressure* (2007); C Hillebrecht *Domestic politics and international human rights tribunals: the problem of compliance* (2014); B Simmons *Mobilizing for human rights: international law in domestic politics* (2009); Open Society Justice Initiative (n 1 above).

⁵⁴ See eg Open Society Justice Initiative (n 3 above) 52, 77, 80, 83, 88, 92.

in its activity reports on the measures taken by the States to implement its judgments. The African Commission, in contrast, has been more hesitant in taking an active role in disseminating, beyond the parties to the case, information on the decision or judgment and the level of its implementation. Relatedly, decisions are now not attached to the African Commission's activity reports, as they had been in the past. The African Commission may also delay the process of finalising the final text of the decision, thus introducing further uncertainty and lack of clarity about when the State and parties have been 'informed' of the Commission's decision.

There is clear acknowledgment by those within and outside the African Court and African Commission that monitoring implementation is not working as well as it could be. For the African Court the information provided in its reports suggests that it is undertaking some forms of the monitoring, although the results of the extent to which the judgments are being implemented are unsatisfactory. The Court noted in its 2017 mid-term report listed among its challenges the non-implementation of its decisions, including refusals to implement, failure to inform the Court of what measures have been taken, and the slow-pace' or 'reluctance' to comply.⁵⁵ Similarly, the African Commission has recently 'lamented the low compliance rate' of States with its decisions.⁵⁶ Yet, there is also an impasse, certainly at the level of the African Commission, in terms of what steps should now be taken to put in place a coherent and effective system. While it is admirable that time is being taken to consider these issues, this is also frustrating. Even if a cohesive approach can be found, it will not be quick. In the meantime, victims are still awaiting justice on the remedies already recommended and ordered. We therefore consider that there are various practical and immediate steps that can be taken to enhance the monitoring process.

Leaving aside proper consideration of what roles these bodies should undertake, our research concludes, in the first place, that at the very least the African Commission and the African Court should gather information about implementation. Both the Commission and Court have the competence to do so within their existing Rules of Procedure. A reactive role requires no immediate additional resources and indeed, the bodies appear already to be carrying this out, albeit not consistently or comprehensively. However, a proactive information-gathering role requires a little more thought and necessitates actively seeking out information, on a regular basis, from the parties but also other actors at the national, regional and international levels.

Second, an internal case management system which includes information on the measures taken by the State to implement the decision or judgment could assist the African Commission and African Court in keeping track on the sources of evidence, the timeframe in which any measures may have been taken, and enable this data to be cross-referenced with other records that they may hold on that State.

⁵⁵ See African Court, Mid-Term Activity Report, 1 January - 30 June 2017, paras 45-46.

⁵⁶ African Commission, 42nd Activity Report, February 2017 - May 2017 para 35(a).

Finally, one of the challenges, certainly for the African Commission, which has many more decisions than the Court, appears to have been the difficulty in prioritising which communications it should focus its efforts in monitoring implementation. It is suggested that the African Commission could use a 'pilot' approach, starting with a handful of communications around which it could develop a strategy and which it could use to consider what role or roles it is best placed to play. In due course, the African Commission may also consider the need to establish a dedicated rapporteur or working group specifically on monitoring implementation of its decisions. This may be preferable to having the Working Group on Communications also oversee implementation.

These suggestions are very modest, and are certainly not sufficient, but could be part of broader and more ambitious moves to take monitoring of implementation forward.