

## COMPLEMENTARITY AND COLLABORATION AMONG HUMAN RIGHTS BODIES IN ENHANCING IMPLEMENTATION OF JUDGMENTS OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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### Abstract

*This article explores the possible areas of collaboration between the African Court on Human and Peoples' and other regional human rights bodies in Africa with regard to the process of monitoring the implementation of judgments of the Court. Non-compliance with human rights decisions is a generic problem common to all human rights bodies in Africa. While each body may develop its own unique strategies, a collective approach may have tremendous value. This article examines the practices of the African Court in monitoring the implementation of its own judgments with a view to identifying the areas where the Court may benefit from the practices of the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child. Studies have shown that the respective human rights bodies in Africa have differing strengths regarding implementation monitoring. The African Court could enhance the implementation of its judgments by leveraging on the strengths of other human rights bodies in Africa. Using a doctrinal method, this article carries out content analysis of various implementation reports of the Court in the light of primary and secondary legal sources. The paper makes pertinent recommendations for improving implementation monitoring and compliance with judgments of the Court and concludes that by referring to the African Court cases in which states have failed to comply, the African Commission too is monitoring the implementation of its own decisions through complementarity.*

**Keywords: African Court, African Human Rights Bodies, Collaboration, Complementarity, Implementation.**

### 1. Introduction

The African Court Protocol, which is the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of the African Court on Human and Peoples' Rights, was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. It took almost six years for the Protocol to come into effect, finally being enforced on 25 January 2004 after receiving the necessary 15 ratifications.<sup>1</sup> The inaugural group of 11 judges for the Court was sworn in on July 2, 2006, and the Court has been functioning since that date. As of December 31, 2023, thirty-four (34) member states of the African Union (AU) have ratified the Protocol.<sup>2</sup> This ratification scorecard implies that only about 62 percent of African states are subject to the

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<sup>1</sup> Frans Viljoen, *International Human Rights Law in Africa*, (Oxford University Press, Oxford, 2012) 413.

<sup>2</sup> Activity Report of the African Court on Human and Peoples' Rights (1 January - 31 December 2023) 1. The countries that have ratified the African Court Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Congo, Côte d'Ivoire, Comoros, Democratic Republic of Congo, Gabon, Gambia, Ghana, Guinea-Bissau, Kenya, Libya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Uganda, Rwanda, Sahrawi Arab Democratic Republic, Senegal, South Africa, Tanzania, Togo, Tunisia and Zambia.

Court's jurisdiction. The picture is even less appealing when access of individuals and nongovernmental organisation (NGOs) to the Court is considered – only seven states, representing less than 15 percent of African States provide individuals and NGOs the opportunity of direct access to the Court.<sup>3</sup>

The main objective of creating the African Court is to enhance the individual communication process of the African Commission on Human and Peoples' Rights (African Commission).<sup>4</sup> To initiate the Court's complaint procedure, Article 5 of the Court Protocol allows three entities to access the Court: the African Commission, a state party to the African Court Protocol that has filed a complaint with the Commission or against which a complaint has been made, or any state party whose citizen has been a victim of human rights violations, as well as African intergovernmental organizations.<sup>5</sup> First, interstate communications is a rarity in the African human rights landscape. The African Court received its first inter-state application only in 2024,<sup>6</sup> and the African Commission in nearly four decades of its operation has considered only three inter-state communications.<sup>7</sup> The limited application of the interstate complaint process in Africa is often linked to a widespread culture of non-interference in the internal matters of other nations, as well as a sense of camaraderie among African leaders, along with other factors.<sup>8</sup> Moreover, the African Commission's efforts to refer cases to the African Court have not been particularly effective.<sup>9</sup> The Commission has utilized the judicial referral process in just three instances.<sup>10</sup> Thirdly, it is quite uncommon or even non-existent for African intergovernmental organizations to submit complaints to the Court. The three trigger mechanisms outlined in Article 5(1) of the African Court Protocol have produced only a few cases, totaling just three, that have been brought before the African Court.

The analysis presented aims to demonstrate that, in the absence of the fourth trigger mechanism in article 5(3) that permits individuals and NGOs to directly bring cases to the African Court under article 34(6) of the Court Protocol, the African Court would significantly lack cases to handle.<sup>11</sup> Regrettably, the access rights afforded to individuals and NGOs under article 34(6)

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<sup>3</sup> See African Court 'Declarations', available at <https://www.african-court.org/wpafc/declarations/> (accessed 7 June 2024).

<sup>4</sup> Viljoen (supra)414. See also Article 2, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).

<sup>5</sup> African Court Protocol, article 5,

<sup>6</sup> See Kiara Van Hout, 'Landmark Inter-State Dispute Filed with the African Court on Human and Peoples' Rights' (7 February 2024), available at <https://ohrh.law.ox.ac.uk/landmark-inter-state-dispute-filed-with-the-african-court-on-human-and-peoples-rights/> (accessed 7 January 2025).

<sup>7</sup> Frans Viljoen, 'A Procedure Likely to Remain Rare in the African System: An Introduction to Inter-State Communications Under the African Human Rights System' (27 April 2021), available at <https://voelkerrechtsblog.org/a-procedure-likely-to-remain-rare-in-the-african-system/> (accessed 7 January 2025). The African Commission has received only three inter-state communications, namely *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (Communication 227/99); *Sudan v South Sudan* (Communication 422/12); *Djibouti v Eritrea* (Communication 478/14).

<sup>8</sup> Viljoen (supra). While non-interference or brotherly solidarity obviously can be a force for good; it could also potentially hinder progress when applied the wrong way – which is what African leaders have done in relation to pursuing legal actions against other states.

<sup>9</sup> Victor Oluwasina Ayeni & Andreas von Staden 'Monitoring second-order compliance in the African human rights system' (2022) *African Human Rights Yearbook* 16 -17.

<sup>10</sup> See *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17; *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153; *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9.

<sup>11</sup> Article 34(6) of the Court Protocol stipulates that "at the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article

have faced challenges in recent years due to disputes from states. Since the implementation of the African Court protocol, only 12 countries have submitted the article 34(6) Declaration, which permits individuals and NGOs to bring cases before the African Court.<sup>12</sup> Over a span of four years, from 2016 to 2020, four out of the 12 states that submitted the article 34(6) Declaration retracted their submissions. The cases from these four states account for about 85 percent of all litigation presented to the African Court.<sup>13</sup> These developments could potentially threaten the very operational viability of the Court,<sup>14</sup> deepen repression and jeopardise human rights protection on the African continent.<sup>15</sup>

## 2. A Court in Crisis?

Before addressing this question, it's important to recognize that the enforcement of judgments from the African Court and other human rights organizations encounters various uncertainties and resistance. These pushbacks are anchored on a variety of arguments including non-domestication, limited financial resources, unresolved legitimacy questions about how the Court interprets its mandate or how the Court's mandate is perceived by judges and state actors at the domestic level. There is also the lack of political will at the African Union (AU) level to enforce decisions of the African Court. Recent developments raise doubts about the enforcement of the Court's rulings, as well as the Court's very existence and its overall effectiveness.

It is generally agreed that the African Court is facing a series of difficult situations. There is however no agreement on whether to call the situation a crisis.<sup>16</sup> Scholars that describe the situation as an existential crisis point to flaws in the Court's institutional design problems and the Court's practices some of which exacerbate the existing design problems.<sup>17</sup> The scholars that opposed labelling the situation as a 'crisis' believe the label is not useful in understanding the individual peculiarities and domestic dynamics at play in the various state contestations. The language of crisis may also promote the construction of state behaviour in purely binary terms as either for or against the Court, a categorisation that is not particularly useful for the work of the Court.<sup>18</sup> Human rights bodies have checkered history, and their relationship with state actors is not always smooth.

Moving away from the debate about description, there is no question that the African Court faces four unique problems that threaten not so much its existence but its reach and relevance in Africa. The first problem is the non-ratification of the African Court Protocol by more than two dozen states but this is the least of the problems. The second issue is that most African countries have not made the article 34(6) Declaration, which restricts the effectiveness and

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5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State which has not made such a declaration.”

<sup>12</sup> African Court, 'Declarations', available at <https://www.african-court.org/wpafc/declarations/> (accessed 7 January 2025).

<sup>13</sup> Sègnonna Horace Adjolohoun 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights', *African Human Rights Law Journal* [2020] (20) 1.

<sup>14</sup> Adjolohoun, *supra*, p.2.

<sup>15</sup> See Japhet Biegona 'Tanzania: Withdrawal of Individual Rights to African Court will Deepen Repression', <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/> (accessed 6 January 2025) cited in Adjolohoun (*supra*).

<sup>16</sup> Michael Gyan Nyarko and Misha Ariana Plagis, 'Supporting the Mandate of the African Court' (2020) 7 <https://www.chr.up.ac.za/images/publications/ahrpp/ahrpp2/AHRPP2.pdf> (accessed 12 January 2025)

<sup>17</sup> Adjolohoun (*supra*) 1-40.

<sup>18</sup> Nyarko & Plagis (*supra*).

significance of the African Court to just the seven nations that have done so. The third issue is the unexpected retraction of the article 34(6) Declaration by at least four countries: Rwanda in 2016, Tanzania in 2019, and Benin and Côte d'Ivoire in 2020. The withdrawal is not just bad because it limits access to the Court. It sets a very dangerous precedent for other states in the future – a precedent of confrontation and contestation instead of dialogue. It undermines the Court's role on the continent,<sup>19</sup> and sends wrong signals about the Court and disincentivises other African states that are yet to make the Declaration. It creates and perpetuates an atmosphere of resistance, contestation and non-cooperation with the African Court and international judicial bodies. As if the problem of state withdrawal of article 34(6) is not enough, the fourth problem confronting the Court is the failure of states to file reports on the status of implementation of the decisions of the Court. This problem will be discussed much later in the paper.

To provide some contexts, the statistics of states ratification and adherence to the Court's Protocol does not portray the Court as one that enjoys the cooperation and unalloyed support of African states. Initially, it took almost six years for the Protocol to obtain the 15 ratifications needed for it to come into effect, starting from its adoption on June 9, 1998, until it was officially enacted on January 25, 2004. As of June 2024, more than 20 years after the Protocol entered into force, only an additional 19 states have ratified the Protocol. This assessment would imply a ratification rate of a little less than one ratification per year. At this rate, the protocol would need an additional 20 years in order to achieve universal ratification in the 54 AU member states. Additional troubling evidence of insufficient state cooperation pertains to their unwillingness to submit the article 34(6) Declaration. In the 26-year history of the Court, only 12 states have ever filed this Declaration, with four of those states subsequently retracting their Declarations, thereby restricting access to the Court for their citizens and NGOs.<sup>20</sup> Even the '12 Declarations' in 26 years is lower than one Declaration every two years. At this rate, citizens of certain African states would have to wait for more than 100 years to gain access to the African Court.

There is a good reason to argue that while the idea of an African Court may be well accepted among African leaders and states, the individual communications procedure of the Court may not be well accepted. Some scholars have even argued that the Court may be suffering from what they described as 'legitimacy deficits'.<sup>21</sup> As credence to the claim, none of the AU's 'big five' – Algeria, Egypt, Morocco, Nigeria or South Africa – is committed to the Court's individual complaint procedure by making the article 34(6) Declaration.<sup>22</sup> Researchers have linked state challenges to the African Court to various issues related to its institutional design and operational flaws. These include the lack of an appellate system, the way article 34(6) Declaration is structured, which provides protection for states, and insufficient collaboration and complementarity between the African Court and the African Commission, among other factors.<sup>23</sup> Adjolahoun attributed the political backlash and state contestations facing the Court to challenges inherent to the African Court institutional design, and to the practice of the Court.<sup>24</sup> He proposed implementing both structural modifications and changes to the Court's

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<sup>19</sup> Nicole De Silva & Misha Plagis 'A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court' (19 May 2020) available at <https://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/> (accessed 12 January 2025).

<sup>20</sup> African Court, 'Declarations', available at: <https://www.african-court.org/wpafc/declarations/> (accessed 9 January 2025).

<sup>21</sup> Adjolahoun (supra) 3.

<sup>22</sup> Adjolahoun (supra) 3.

<sup>23</sup> See generally Adjolahoun (supra) 18-31.

<sup>24</sup> Adjolahoun (supra) 39.

judicial practices to retain the seven remaining Article 34(6) Declarations, encourage the states that have withdrawn to reinstate their participation, ensure further ratification of the Court's Protocol, and rebuild the diminished legitimacy of the Court.<sup>25</sup> It is beyond disputes that how the Court addresses the *Four Big Problems* enumerated above will be critical for its future prospects. Political backlash or state contestation is inevitable in the life of a human rights tribunal. Other human rights bodies such as the African Commission, the ECOWAS Community Court of Justice (ECCJ) and the SADC Tribunal have experienced similar backlash seasons.<sup>26</sup>

The preceding analysis is important for understanding the demand for the implementation of the Court's decisions in the context of the sociopolitical dynamics surrounding the Court. The conversation about implementation monitoring is taking place in the context of a court that is facing significant pushback, political backlash and state contestations. States have primary responsibility for implementing decisions of human rights bodies.<sup>27</sup> When states are non-cooperative, it makes implementation monitoring even more difficult and challenging. The analysis of state contestation against the African Court is useful to underscore the challenges of state cooperation the Court is having to deal with and the need for collaboration with other AU human rights bodies.

### 3 Status of implementation of the Court's decisions

From its inception in 2006 until February 2024, the African Court has handled a total of 340 contentious cases and received 15 requests for Advisory Opinions.<sup>28</sup> The Court has disposed of a combined total of 205 applications and 15 requests for Advisory Opinion, with 135 applications still awaiting resolution.<sup>29</sup> The database on the Court's website on 9 June 2024 showed that that the Court has rendered a total of 398 decisions comprising 235 judgments and 163 orders.<sup>30</sup> These figures change from time to time, as the Court renders new decisions and issues new orders.

As of December 2020, among the more than 100 rulings issued by the African Court, only Burkina Faso has fully adhered to its judgment, while Tanzania has only complied partially with certain judgments and orders.<sup>31</sup> Côte d'Ivoire submitted a compliance report, but the applicants contest the details.<sup>32</sup> The 2023 Activity Report of the Court contains information about the status of implementation about 55 judgments of the Court against 9 member states of the Protocol that have made article 34(6) Declaration. None of the orders contained in the 55 judgments reported in the 2023 Activity Report have been fully complied with. Certain states

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<sup>25</sup> *ibid.*

<sup>26</sup> Karen J. Alter, James T. Gathii and Laurence R. Helfer 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *European Journal of International Law* 297-298.

<sup>27</sup> African Charter on Human and Peoples' Rights, article 1.

<sup>28</sup> African Court on Human and Peoples' Rights, 2023 Activity Report submitted to the 44th ordinary session of the Executive Council held between 15 January – 15 February 2024.

<sup>29</sup> *ibid.*

<sup>30</sup> African Court, 'ACtHPR cases', available at <https://www.african-court.org/cpmt/statistic#> (accessed 9 February 2025).

<sup>31</sup> African Court on Human and Peoples' Rights, 2020 Activity Report (2020 Activity Report of the African Court) para 37, available at: <https://www.african-court.org/wpafc/activity-report-of-the-african-court-on-human-and-peoples-rights-1-january-31-december-2020/#> (accessed 8 March 2025).

<sup>32</sup> *ibid.*

have openly expressed their intention not to adhere to the Court's orders and rulings, seemingly breaching article 30 of the Court's Protocol.

To put it simply, the African Court is grappling with both an implementation issue and a legitimacy crisis, along with insufficient cooperation from state parties. These factors are primarily responsible for the failure to implement the Court's decisions. The Court itself has alluded to the perceived lack of cooperation by states when it stated: "one of the major challenges facing the Court at the moment is the perceived lack of cooperation from the member states of the AU, in particular, in relation to the poor level of compliance with the decisions of the Court".<sup>33</sup>

#### **4. Monitoring the implementation of the Court's decisions**

Article 28 of the Court's Protocol requires the Court to render its judgment within 90 days after completing its deliberations. The Court's judgment is arrived at by a majority of its members and they are not appealable.<sup>34</sup> The Court may however review its judgment in the light of new evidence.<sup>35</sup> It also has power to interpret its decision.<sup>36</sup> Once rendered, the judgment is communicated to the parties and transmitted to the AU Commission, the Executive Council and AU member states.<sup>37</sup> It is the responsibility of the Executive Council to monitor the execution of the Court's judgments on behalf of the AU Assembly.<sup>38</sup> Under article 30 of the Protocol, all member states undertake to comply with and guarantee the execution of the Court's judgment in any cases they are parties and to do so within the time stipulated by the Court. Article 31 of the Protocol mandates the Court to specify in its Activity Report cases in which states have not complied with its decisions. The compliance status information is usually annexed to the Court's activity report. The report focuses only on the status of implementation of the Court's judgment; it does not include cases in which the Court found no violation. The cases are grouped by States in alphabetical order.

Rule 81 of the Court's Rules of Procedure 2020 contains the procedure for monitoring compliance with decisions of the Court. In addition, rule 59(5) enables the Court to invite parties to provide it with information on any issue relating to the implementation of provisional measures issued by the Court.<sup>39</sup> In terms of rule 81, the first step is for the state concerned to submit to the Court a report of compliance which shall be transmitted to the applicant for comments and observations. The Court may also obtain relevant information from other credible sources in order to assess compliance with its decisions.<sup>40</sup> Where there are disputes concerning the status of implementation, the Court may 'among others' hold a hearing which shall culminate in a finding and possibly a consequential order requiring parties to comply with the decision of the Court.<sup>41</sup> Ayeni and von Staden contend that rule 81(3) allows the Court to engage in activities beyond simply conducting an implementation hearing, including adopting resolutions and undertaking promotional visits, among other actions.<sup>42</sup>

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<sup>33</sup> 2020 Activity Report of the African Court, para 37.

<sup>34</sup> African Court Protocol. article 28(2).

<sup>35</sup> *ibid*, article 28(3)

<sup>36</sup> *ibid*, article 28(4).

<sup>37</sup> *ibid*, article 29 (1) & (2).

<sup>38</sup> *ibid*.

<sup>39</sup> Ayeni & von Staden (*supra*) 11.

<sup>40</sup> Rules of Procedure of the African Court on Human and Peoples' Rights (2020), rule 81(2),

<sup>41</sup> Rules of Procedure of the African Court on Human and Peoples' Rights (2020), rule 81(3).

<sup>42</sup> Ayeni & von Staden (*supra*) 11.

If the Court's decision is not followed, it must inform the AU Assembly about the non-compliance as outlined in article 31 of the Court's Protocol.<sup>43</sup> Rule 81(5) requires the Court to make all relevant information available to the AU Assembly. Regarding this provision, one might question why the compliance report from the Court, which is attached to the activity report, lacks a brief overview of the facts of each case to give context to the AU Assembly and the Executive Council. Furthermore, the report fails to include a detailed assessment of compliance with the Court's decisions on a case-by-case and order-by-order basis. In fact, it is not so clear what assessment model the Court adopts, whether case by case or order by order for the purpose of the implementation analysis. At the very best, it simply reports the information provided by the state (if any) or states that no information has been filed. The report in a few cases adds any other information that is available in the public domain or provided by the applicant without any assessment whether the information satisfies any of the specific reparation orders issued by the Court. Also, cases that have been fully complied with are omitted from the report. The omission provides only half of the implementation story and provides no counter narrative against which to assess or measure the noncompliance narrative contained in the report.

Human rights bodies play a variety of roles and use a wide range of tools in monitoring the implementation of their decisions. These tools or measures range from 'a combination of dialogical processes, soft power diplomacy, sticks-and-carrots tactics as well as naming and shaming operations.'<sup>44</sup> Specific tools used differ from one institution to the other but generally include implementation hearings, resolutions, state reporting process, missions, judicial or political referrals as well as advocacy or promotional visits.<sup>45</sup> Fundamentally, dialogue, documentation and continuous interactions are at the heart of the whole implementation monitoring process. In a study conducted by Ayeni and von Staden, the authors evaluated and contrasted the implementation monitoring measures of AHRBs using 17 indicators that included a total of 34 points,<sup>46</sup> They discovered that the African Court received 9 points, accounting for 27 percent of the overall score, while the African Commission earned 13 points, representing 38 percent, and the African Children's Committee achieved 11 points, which corresponds to 32 percent.<sup>47</sup> Since each AHRB scored less than 50 percent of the total possible points, there is considerable opportunity for enhancement for all AHRBs, particularly the African Court.

The areas where the Court outperformed other AHRBs according to the study by Ayeni and von Staden include the legal status of its decisions, issuance of regular compliance report with some information on the status of implementation of its decisions, and limited dissemination

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<sup>43</sup> Rules of Procedure of the African Court on Human and Peoples' Rights (2020), rule 81(4)

<sup>44</sup> Ayeni & von Staden (supra) 14.

<sup>45</sup> *ibid.*

<sup>46</sup> The 17 indicators are as follows: 'the status of the decision, whether binding or recommendatory; whether the AHRB issues detailed periodic compliance reports; whether the compliance reports are widely disseminated; the existence of an up-to-date database on the status of implementation; whether the implementation database is available on electronic platforms; active engagement with CSOs in implementation monitoring; the existence of a dedicated implementation unit within the Secretariat of the AHRB; the establishment of a dedicated special rapporteur for follow-up; the use of implementation hearings to follow up on decisions; whether or not the AHRB uses innovative implementation hearing formats such as joint hearings and hearings in situ; and whether or not the AHRB uses resolutions, press releases, state reporting process as well as promotional state visits for monitoring its decisions; whether or not the AHRB is able to refer its decisions to a judicial body for implementation review; whether or not the AHRB is mandated to refer its decisions to a political body and whether there is evidence of a direct or indirect impact of monitoring activities on state behaviour. See Ayeni & von Staden (supra) 19.

<sup>47</sup> Ayeni & von Staden (supra) 19-21.

of its compliance report.<sup>48</sup> In other cases, namely – engagement with civil society organisations (CSOs) in implementation monitoring, the existence of special rapporteur for follow-up of decisions, regular use of implementation hearings, regular use of resolutions for implementation monitoring, use of state reporting process for implementation monitoring, and evidence of goal-related impact of monitoring activities on state behaviour - both the African Commission and the African Children’s Rights Committee outperformed the African Court.<sup>49</sup>

The African Commission has used thematic, country-specific and administrative resolutions to encourage states to implement its decisions.<sup>50</sup> There is no indication that the African Court uses resolutions or used resolutions frequently for the purpose of implementation monitoring. While all AU human rights bodies have used advocacy visits, missions and other promotional activities to provide visibility for their activities, there is no indication that the African Court used this mechanism frequently for monitoring the implementation of its decisions. One mechanism that other AU human rights bodies have used which is not available to the same extent to the African Court is the state reporting process. The African Court is constrained in this regard as it has no mandate to receive, consider or review state party reports.<sup>51</sup> The state party reporting process is a fundamental mechanism for implementation monitoring, not only of treaty provisions but also of the decisions of AU human rights bodies (AHRBs). It provides an opportunity for the relevant AHRB to get feedback on its decisions, for the state to report on its implementation actions and for both parties to reflect through the process of constructive dialogue on the challenges of implementation.<sup>52</sup> Even though states have not been up to date with their reports, and those that submit reports often make only small references, if at all, to the decisions of the relevant AHRB, the mechanism is nonetheless unique and very important for implementation monitoring as state delegates and members of the relevant AHRB meet face to face during the review of state reports.

## **5. The Case for Collaboration on Implementation Monitoring**

From the above analysis, the case for collaboration on implementation monitoring is self-evident. The arguments in support of collaboration are provided below.

### **5.1 Implementation monitoring of Respective Human Rights Bodies in Africa.**

While the African Court has outperformed other AU human rights bodies in preparing and updating its compliance reports which is quite detailed and are usually embodied in Court’s annual activity reports, the African Court is severely constrained in other areas as a result of institutional design factors. The Court faces significant constraints in utilising a wide range of implementation monitoring tools which would have enhanced the implementation of its decisions. Other AU human rights bodies such as the African Commission and the African Committee of Experts – with their expansive promotional mandates which provide immense opportunity for continuous engagement and dialogue with states through the review of periodic state reports, state missions and country visits – may have an advantage here. In addition to the dialogic tools at their disposal, they have special mechanisms for follow-up of their decisions, held implementation hearings in a number of cases and have very robust engagement with civil society organisations from which the Court could potentially benefit. While the African Court may attempt these measures itself, the measures are not available in the same extent to the

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<sup>48</sup> Ayeni & von Staden (supra) 19-20.

<sup>49</sup> *ibid.*

<sup>50</sup> See Ayeni & von Staden (supra) 15.

<sup>51</sup> Ayeni & von Staden (supra) 18.

<sup>52</sup> Ayeni & von Staden (supra) 18.

African Court because of its judicial nature. I advance the argument that the African Court may enhance its implementation monitoring profile and overall state compliance with its decisions by collaborating and partnering with the other AU human rights bodies, especially the African Commission and the African Children's Rights Committee. Collaboration with other AHRBs especially in the areas where these bodies have done considerably well over the years could have some benefits for the African Court.

## 5.2 Ineffective Political Monitoring by AU Policy Organs

Collaboration is essential because political oversight in the African human rights system is ineffective. Ideally, the AU Assembly should oversee how states implement decisions made by AU bodies, including those from African Human Rights Bodies (AHRBs). However, since 2003, the Assembly has assigned the responsibility of reviewing AHRB activity reports to the Executive Council, which meets more frequently and has more opportunity for discussion. According to Rule 81(4) of the African Court's Rules of Procedure (2020), the Executive Council is tasked with monitoring the enforcement of the Court's judgments on behalf of the AU Assembly. Unfortunately, the Council does not take action against states based on non-compliance reports from AHRBs, and the activity reports it receives are seldom debated or discussed.<sup>53</sup> Ayeni and von Staden have determined that the potential for political oversight within the AU is rather restricted, at least in the near future, primarily due to the absence of political commitment from the members of the AU Assembly and the Executive Council.<sup>54</sup>

## 5.3 Failure of States to file Implementation Reports

The primary challenge to monitoring the implementation, as highlighted in the Court's activity report, is the inability of states to submit their reports on time or to submit them at all. The Court must proactively explore alternative solutions to address this issue. The Draft Framework for Reporting and Monitoring the Execution of Judgments of the African Court on Human and Peoples' Rights, once put into effect, aims to improve both judicial and political oversight of the Court's rulings.<sup>55</sup> The issue of political will—regarding whether states will act to enforce the Court's decisions and submit timely reports, as well as whether the Executive Council will hold states accountable by imposing sanctions for noncompliance—has not been fully resolved by the Draft Framework. It is uncertain how states will behave and how the Executive Council will react once the Framework is fully put into action.

*Table 1: State Reporting to the African Court (AfCHPR 2023 Activity Report)<sup>56</sup>*

States	Total No. of cases	Cases where Reports have been filed	Cases where No Reports have been filed
Benin	4	-	4
Cote D'Ivoire	4	2	2
Kenya	1	1	-
Libya	1	-	1
Mali	2	-	2
Malawi	1		1

<sup>53</sup> Ayeni & von Staden (supra) 22.

<sup>54</sup> Ayeni & von Staden (supra) 26.

<sup>55</sup> See generally Suzgo Lungu 'An Appraisal of the Draft Framework for Reporting and Monitoring Execution of Judgments of the African Court on Human and Peoples' Rights', *African Human Rights Yearbook* [(2020) (4) 144-164.

<sup>56</sup> See generally 2023 Activity Report of the African Court, Annex 2, pp. 2-28.

Rwanda	3	-	3
Tanzania	19	4	15
Tanzania <sup>57</sup>	19	-	19
Tunisia	1	1	-
9 countries	<b>55</b>	<b>8</b>	<b>47</b>
	(100%)	15%	85%

Certain countries that have not submitted implementation reports to the African Court do provide periodic reports to the African Commission. For instance, Benin, Cote D'Ivoire, Kenya, and Malawi consistently submit their periodic reports to the African Commission.<sup>58</sup> Failure to file report may be indicative of a bigger problem - that states have not taken any serious steps towards implementing the Court's decisions. Even if it is politically problematic for AU policy organs to enforce decisions of the African Court, they can at least ensure that all states comply with their reporting obligation. Reporting can be an important trigger for implementation. It is not unusual for states to implement decisions of international adjudicatory bodies in order to have something to report on. Reporting has the capacity for naming and shaming. This capacity is undermined when states do not report and no institution with the AU holds them to account.

#### 5.4 Required Collaboration as a Consequence of Complementarity

The African Court Protocol establishes complementarity as the foundational principle for the Court's interactions with the African Commission.<sup>59</sup> Complementarity is aimed at enhancing effectiveness and efficiency; promoting interdependence and cooperation; ensuring normative coherence and managing the incidence of forum shopping.<sup>60</sup> The African Court Protocol fosters complementarity in several ways. One such way is through the Rules of Procedure of the African Court, which mandates that both the Court and the Commission convene at least annually, while their Bureaus can hold meetings as frequently as needed.<sup>61</sup> The Protocol outlines procedures for referring cases from the Commission to the Court and for transferring cases from the Court back to the Commission. It has been suggested that the relationship between the Court and the Commission extends beyond protective functions due to the interrelation of protective, promotional, and interpretive roles.<sup>62</sup> The African Commission exercises its promotional mandate through advocacy visits, research, conferences, seminars, symposia and advisory opinions amongst others. The African Court, like the Commission also carries out these promotional activities. Already, the Court and the Commission and other AU human rights bodies are working together in the areas of research, conferences and judicial dialogue, among others. The Court usually sends representatives to sessions of the African Commission. The possibility of joint monitoring and follow up measures to ensure effectiveness of remedies have been mooted previously.<sup>63</sup>

<sup>57</sup> The instances where the Court recognized a right to defense and mandated equivalent actions against the government of Tanzania. See 2023 Activity Report of the African Court, Annex 2, pp. 26-27.

<sup>58</sup> African Commission, 'States Reporting Status', available at: <https://achpr.au.int/en/states-reporting-status> (accessed 10 March 2025).

<sup>59</sup> See African Court Protocol, article 2.

<sup>60</sup> Pan African lawyers Union, 'Guide to Complementarity within the African Human Rights System' (2014) 8-9, available at <https://lawyersofafrica.org/wp-content/uploads/PALU-Guide-to-Complementarity-within-the-African-Human-Rights-System.pdf> (accessed 11 February 2025).

<sup>61</sup> Rules of Procedure of the African Court (2020), rule 34.

<sup>62</sup> Pan African lawyers Union (supra) 8.

<sup>63</sup> Pan African lawyers Union (supra) 20.

In the African Commission's Strategic Framework for 2021-2025, the Commission acknowledges that achieving its article 45 mandates of promotion, protection and interpretation is dependent on enhancing synergy, coherence and complementarity among AHRBs.<sup>64</sup> The Strategic Framework outlines proposed activities for enhancing collaboration among AHRBs, which consist of joint planning and group sessions or retreats, creating a litigation unit focused on transferring and litigating cases in the African Court, and executing the guidelines for case referrals.<sup>65</sup> To formalize their distinct partnership, the African Court and the African Commission adopted a document called the 'Complementarity Road Map of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights for 2023-2025' on 14 October 2022 in Addis Ababa, Ethiopia. This Road Map emphasizes collaboration between the two institutions in enhancing procedural efficiency, facilitating amicable resolutions, and ensuring the execution of decisions. Sections 13 to 15 of the document detail how the Commission and the Court plan to collaborate to improve compliance by states with their decisions. The Road Map serves as a valuable resource for understanding the concept of complementarity between the Court and the Commission and its potential to improve monitoring of implementation. However, it is important to note that this complementarity has faced challenges, including the perception that referring cases to the Court indicates the Commission's relative weakness, which places the Commission in a difficult position as a representative for victims, as well as a lack of qualified personnel to assist the Commission in preparing litigation files for the Court.<sup>66</sup>

Although the bond between the African Court and the African Commission is the most direct, clear, and distinctive among the AU's human rights institutions, the Court still maintains a complementary relationship with other African Human Rights Bodies (AHRBs).<sup>67</sup> For instance, the African Commission approved a Resolution on collaboration between itself and the African Children's Rights Committee during its 45th session in 2009.<sup>68</sup> The Committee has requested an advisory opinion from the Court regarding its Standing before the African Court.<sup>69</sup> The Court stated in its opinion that the Committee, as an African Union (AU) entity, has the authority to seek an advisory opinion as outlined in article 4 of the Court Protocol. However, it clarified that the Committee does not qualify as an 'African Intergovernmental Organisation' according to article 5 of the Protocol. Nevertheless, the Court emphasized the importance of allowing the Committee direct access to it.<sup>70</sup>

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<sup>64</sup> African Commission on Human and Peoples' Rights, 'Strategic Framework 2021-2025' (December 2020) 12 – 13, available at <https://achpr.au.int/sites/default/files/files/2023-01/eng-strategic-plan-2021-2025.pdf> (accessed 11 March 2025).

<sup>65</sup> African Commission Strategic Framework 2021-2025 (supra) 4.

<sup>66</sup> African Commission Strategic Framework 2021-2025 (supra) 21.

<sup>67</sup> Lucy Asuagbor, 'The relationship between the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights' being a paper delivered at the Continental Sensitization Seminar on the African Court on Human and Peoples' Rights held from 24 to 26 April 2013 at Hotel Monte Febe, Yaounde, Cameroon, cited in Pan African Lawyers Union (supra) 38.

<sup>68</sup> Resolution on Cooperation between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child in Africa, ACHPR/Res.144(XXXXV)09, <https://achpr.au.int/en/adopted-resolutions/144-resolution-cooperation-between-african-commission-human-and-peoples-r> (accessed 11 March 2025).

<sup>69</sup> Advisory Opinion No.002/2013 On the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights, requested by the African Committee of Experts on the Rights and Welfare of the Child, <https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/224/240/5fd224240198d507498993.pdf> (accessed 11 March 2025).

<sup>70</sup> *ibid.*

## 6. Areas of Collaboration for implementation monitoring

The potential areas of collaboration between the African Court and other AHRBs for the purpose of implementation monitoring have already been highlighted in the preceding discussions. A few of these areas are discussed below.

*(a) State Reporting Process:* The African Court might partner with the African Commission on the process of state reporting. In this setup, the African Commission could inquire about how states are implementing the African Court's decisions while reviewing reports from state parties. Ayeni and von Staden contend that "the obligations stemming from the judgments of the African Court are included in the obligations of states under the African Charter."<sup>71</sup> The Commission has noted that its complementary relationship with the Court means it can request states to provide updates on the implementation of all human rights decisions, including those made by the African Court.<sup>72</sup> While states are experiencing delays or failures in submitting their implementation reports to the Court, the state reporting process could serve as a partial means to track the progress of implementing the Court's rulings. To enhance the effectiveness of this reporting process in monitoring both the Court's and the Commission's decisions, the African Commission may need to establish specific reporting procedures and guidelines aimed at overseeing the decisions of AHRBs.

*(b) Special Mechanisms and Missions:* The African Commission has established various special mechanisms, including special rapporteurs, committees, and working groups.<sup>73</sup> These mechanisms have functioned effectively in various areas and work more often with national actors during missions and promotional visits. These mechanisms may assist with implementation monitoring. For example, the African Commission has indicated in its Strategic Framework for 2021-2025 that its Special rapporteurs during country visits may engage national authorities 'as to reasons for non-implementation of certain decisions of the African Court and consequently and systematically transmitting that information to the Court.'<sup>74</sup> Such practice is a creative use of complementarity that should be encouraged. It has also been suggested that the African Commission and the Court could join forces during missions.<sup>75</sup> This collaboration could lead to cost savings and enhanced efficiency. The Court and the Commission might undertake joint promotional visits or missions to a state party, or during their advocacy trips, the Commission could address the issue of non-compliance with the decisions made by both the African Court and the Commission.

*(c) Joint implementation hearing:* The African Court has not yet conducted any implementation hearings, despite the fact that both the African Commission and the African Children's Rights Committee of Experts have carried out implementation hearings at different times.<sup>76</sup> The Court's authority to hold an implementation hearing is outlined in rule 81(3) of its 2020 Rules of Procedure. Importantly, the Court has shown its commitment to conducting such a hearing for the first time in the recent reparation ruling related to the Ogiek indigenous community in Kenya.<sup>77</sup> To address the issue faced by the African Commission regarding inconsistent

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<sup>71</sup> Ayeni & von Staden (supra) 26.

<sup>72</sup> African Commission Strategic Framework 2021-2025 (supra) 21.

<sup>73</sup> African Commission, 'Special mechanisms', available at <https://achpr.au.int/en/special-mechanisms> (accessed 11 March 2025).

<sup>74</sup> African Commission Strategic Framework 2021-2025 (supra) 21.

<sup>75</sup> Nyarko and Plagis (supra) 12.

<sup>76</sup> Ayeni & von Staden (supra) 14-15.

<sup>77</sup> *African Commission on Human and Peoples' Rights v Republic of Kenya* (Reparations) Application No 006/2012. judgment of 23 June 2022, op para xvi; See also Ayeni & von Staden (supra) 14.

practices in implementation hearings, it is recommended that the African Court establish a practice direction for these hearings. This direction would provide guidance on the timing and location of implementation hearings, the participants required, and the expectations for the parties involved. Joint implementation hearings could take different forms, such as those addressing multiple cases related to a single state or similar cases across several states. Moreover, during an implementation hearing, the African Commission may pose questions regarding the execution of the African Court's decisions. It should also be feasible for the African Commission, the Committee of Experts, and the African Court to conduct joint implementation hearings for cases with similar circumstances within the same country, like Kenya's Endorois, Ogiek, and Children of Nubian Descent cases.

To provide some contexts, both the Inter-American Court as well as the Inter-American Commission are able to call for implementation hearing.<sup>78</sup> The Inter-American Court on Human Rights holds different kinds of hearings.<sup>79</sup> In private hearings, two or three judges of the Inter-American Court are present with the Inter-American Commission, the victims and their legal counsels as well as the state delegation. Private hearings are used to prepare implementation plans and clear implementation roadblocks.<sup>80</sup> Public hearings are conducted when there is clear evidence that a state has not adhered to Court orders. The Inter-American Court organizes joint implementation hearings to oversee compliance with comparable orders concerning one or more states.

*(d) Joint Study on implementation of decisions of AHRBs:* In its Draft Decision on the 2023 Activity Report presented to the Executive Council, the African Court suggested conducting a joint study with the AU Commission, along with other appropriate AU bodies and institutions. This study would examine the current status of compliance with decisions from AU human rights bodies, especially focusing on the factors contributing to the low compliance rates. Additionally, it would provide specific recommendations to the Executive Council on how to improve Member States' adherence to these decisions.<sup>81</sup> This exercise is long-overdue. With support from the secretariat of the various human rights bodies, this study will raise the profile of human rights decisions compliance in AU work and could potentially lead finally to some political resolutions on taking implementation a little seriously.

*(e) Other measures:* The African Court should also engage in regular judicial dialogue with AHRBs on the implementation of their decisions to encourage knowledge and lessons sharing. Collaboration with NGOs and civil society is also significant for implementation.

## 7. Conclusion and Recommendations

This article investigated potential collaborative efforts between the African Court and other regional human rights institutions in Africa regarding the monitoring of implementation. A key premise of the analysis is that non-compliance with human rights decisions is a widespread issue affecting all human rights bodies in the region. While it is important for each institution to develop its own distinct strategies, it is also worth considering a unified approach. The article

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<sup>78</sup> Clara Sandoval, Philip Leach & Rachel Murray 'Monitoring, Cajoling and Promoting Dialogue: What Role for Supranational Human Rights Bodies in the Implementation of Individual Decisions?' *Journal of Human Rights Practice* [2020] (12) 81.

<sup>79</sup> Clara Sandoval 'The Power of Hearings: Unleashing Compliance with Judgments at the Inter-American Court of Human Rights' available at [https://www.bristol.ac.uk/media-library/sites/law/hric/2021-documents/2.%20The%20power%20of%20hearings\\_Sandoval%20ENG.pdf](https://www.bristol.ac.uk/media-library/sites/law/hric/2021-documents/2.%20The%20power%20of%20hearings_Sandoval%20ENG.pdf) (accessed 10 February 2025).

<sup>80</sup> Ibid.

<sup>81</sup> 2023 African Court, EX.CL/Draft/Dec.(XLIV) 1.

assessed the African Court's practices in monitoring implementation to determine how it might gain insights from the African Commission or the African Children's Rights Committee. Research indicates that the various human rights bodies in Africa possess different strengths in implementation monitoring. By examining how the African Court could leverage these strengths from other bodies, the overall enforcement of its judgments could potentially be improved.

The article outlined four issues that jeopardize the effectiveness of the African Court within the continent. It examined the progress regarding the implementation of several Court decisions and the Court's attempts to oversee how states adhere to these rulings. The paper argues that collaboration with the African Commission and other regional human rights bodies offers a promising solution to the Court's implementation difficulties. Although the Commission and other bodies face their own challenges, collaborating could enhance state compliance not just with the Court's decisions, but also with those of other regional human rights bodies, including the Commission.

Regarding the Court's compliance report, it is suggested that the Court should analyze both case-level and reparation order-level compliance. Specifically, the report should clearly indicate how many cases and reparation orders have been fully, partially, or not complied with. Additionally, any report on states that have failed to comply with the Court's decisions should be preceded by one on states that have successfully complied. This indicates that the Court's activity report should include two types of implementation reports: one that highlights successful compliance and fully implemented decisions, and another that details cases where states have not complied, as per Article 31 of the Court's Protocol. The initial report on successful implementations serves as a practical reference for states, the AU Assembly, and the Executive Council. Moreover, it provides a moral, political, and evidentiary foundation for representatives from compliant states, like Burkina Faso, to encourage their counterparts to adhere to the Court's decisions during discussions. A court facing a lack of cooperation certainly benefits from strengthening alliances. It is crucial for the African Court to create a strategy based on its accomplishments. The importance of the African Court forming alliances, particularly with states that have adhered to its decisions and those that have maintained their Article 34(6) Declaration, has been highlighted by numerous experts.

It is recommended that the Court collaborate with the National Bar Associations of African nations to advocate for the ratification of the Court's Protocol and the establishment of the article 34(6) Declaration. Crucially, the Court needs to enhance its relationship with the African Commission and other African human rights bodies. Given the small number of states that have submitted the article 34(6) Declaration and the recent withdrawal of this Declaration by at least four states, referrals from the African Commission may be one of the most practical solutions and possibly a temporary alternative to direct access via the article 34(6) Declaration. The African Commission's referrals may allow the African Court's protective jurisdiction to reach individuals and NGOs in states that have not yet made the article 34(6) Declaration. By referring cases that involve state non-compliance to the African Court, the African Commission is also ensuring oversight of its own decisions through a complementary approach.