

## **RESEARCH BRIEF**

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# **Compliance with (Quasi-) Judicial Decisions within the Regional African Human Rights System. Challenges and Opportunities**

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## ABSTRACT

The ‘Achilles’ heel’ of international and regional human rights monitoring bodies could be identified in the lack, or poor levels, of implementation of their findings at national levels. Even when these bodies’ decisions are judicially binding, national states still show a certain reluctance to fully implement their outcomes. This research brief focuses in particular on the African human rights system. It briefly overviews its principal human rights monitoring bodies, i.e. the African Court and Commission, and seeks to decipher the reasons behind the poor implementation of their findings. The challenges and opportunities arising from its advanced institutional and normative architecture are highlighted, together with potential recommendations that could further advance and increase compliance at the national level.

## KEY WORDS

**Human Rights - African System - African Court - African Commission - Judicial Decision – Compliance - Enforcement**

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## INTRODUCTION

The African System for human rights protection stands today as an innovative and advanced regulatory framework, building primarily on the African Charter on Human and People's Rights ("the African Charter"). Its implementation is assigned to the three main African human rights bodies – the African Commission on Human and Peoples' Rights ("the African Commission" or "ACHPR"), the African Court on Human and Peoples' Rights ("the African Court" or "ACtHPR"), and the future African Court of Justice and Human Rights ("the future Court" or "ACJHR"). The decisions of the current Commission and Court are largely unenforced for lack of concrete coercive powers. This situation does not seem to have been ameliorated with the introduction of the new Court of Justice. This research brief aims at unveiling potential systemic shortcomings by means of critically analyzing the institutional structure and normative framework that regulate the implementation of these bodies' findings and consequently States' obligation to comply with them. Finally, some recommendations will be introduced that could eventually strengthen the level of enforcement and compliance of (quasi-)judicial decisions within the regional African system.

## THE AFRICAN HUMAN RIGHTS ARCHITECTURE. CHALLENGES AND OPPORTUNITIES

When States ratify human rights instruments, they commit to respect human rights, promote their realization, and comply with the decisions of the judicial bodies empowered to adjudicate human rights violations. The African Charter is not an exception. The level of protection it offers puts the Charter in the forefront of regional developments, championing the cause of human rights at the same level as the European or the American human rights conventions. However, the level of protection is far from being effective. Partial compliance or no compliance of the African Commission's and Court's decisions appears to be the rule. In fact, the rate of compliance of African States is quite poor, with only 14% of them complying fully and in timely fashion with ACHPR's recommendations in 2004.<sup>1</sup> This factor has been seen as indicative of a "culture of impunity",<sup>2</sup> which could be reinforced by the lack of reliable statistical data and of an effective follow-up mechanism or policy to monitor State compliance.

### The African Commission on Human and Peoples' Rights (ACHPR)

The Commission examines complaints within the communication procedure under its human and peoples' rights protection mandate (Article 45 African Charter). Findings of violations lead to final decisions on merits, or "recommendations", that are not legally binding on State Parties due to the Commission's quasi-judicial mandate. Consequently, a non-compliant State is reminded by means of institutional letters to abide by its Article 1 obligations "... to recognize the rights, duties and freedoms enshrined in this Charter and (...) adopt legislative and other measures to give effect to them". Additionally, it has to inform the Commission on the measures taken to implement its decision within several deadlines (Rule 112 of the Commission's Rules of Procedure).<sup>3</sup> Further, situations of non-compliance

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- 1 F. Viljoen, L. Louw, 'State Compliance With the Recommendations of the African Commission on Human And Peoples' Rights, 1993-2004' in 7 *Int'l Journal of Civil Society Law* 2 (2009), 25-29 available at [http://www.iccsr.org/pubs/09-04\\_IJCSL.pdf](http://www.iccsr.org/pubs/09-04_IJCSL.pdf).
  - 2 J. Sarkin, 'The Role of Regional Systems in Enforcing State HR Compliance: Evaluating the ACHPR and the New ACJHR with Comparative Lessons from the Council of Europe and the OAS' in 1 *I-A and Eur Human Rights Law Journal* 2 (2008) 214.
  - 3 Rules of Procedure of the African Commission (2010) at [http://www.achpr.org/files/instruments/rules-of-procedure-re-2010/rules\\_of\\_procedure\\_2010\\_en.pdf](http://www.achpr.org/files/instruments/rules-of-procedure-re-2010/rules_of_procedure_2010_en.pdf).

are brought to the attention of the Executive Council on the Implementation of the Decisions of the African Union (“AU”) – Rule 112(8) – and the AU Assembly by way of the Commission’s Annual Activity Report (Article 54 African Charter), which is “adopted” and then published. Even then, States are only urged to implement the recommendations.<sup>4</sup> This act of adoption by the AU Assembly, together with the text of the African Charter and the Commission’s practice, have led scholars to argue for the existence of an emerging customary international law regarding the legally binding nature of ACHPR’s findings, which has been seen as the body most appropriate to deal with ensuring State compliance.<sup>5</sup> Regardless of the potential truth of such claim, the problem of non-compliance remains unresolved.

### ***Lack of compliance with ACHPR’s recommendations***

Reflecting on State Parties’ attitude to “generally ignore its recommendations”, ACHPR designated the “lack of compliance” as “one of the major factors of the erosion of its credibility”.<sup>6</sup> Despite gradually taking a stronger stance at demanding State Parties to report on the form and measures of compliance under Rule 112 of its Rules of Procedure – by including cases of compliance under the section “positive developments” in its Annual Report – the challenges stay the same: insufficient political commitment at regional level and the lack of a follow-up system. Indeed, the latter was found to be linked with improved compliance, thus highlighting the need for a fully effective and functional follow-up mechanism and the appointment of a special rapporteur on follow-up.<sup>7</sup>

It is important to mention that several other factors could influence compliance. For instance, the architectural and systemic features of the African system might dissuade States from complying; the way the ACHPR executes its mandate might influence the persuasive force of its findings;<sup>8</sup> the nature of the rights at stake – i.e. civil and political rights are easier to implement as States respect rights more easily than protect and fulfil them; the status of the complainant(s); the involvement of NGOs in the follow-up; and the mobilization of shame, which is largely underused since the ACHPR’s reports lack wide dissemination.<sup>9</sup>

### **The African Court on Human and Peoples’ Rights (ACtHPR)**

The Court complements and enhances ACHPR’s protective mandate (Article 2 Court Protocol). It was created in 1998 and has been in operation since 2004.<sup>10</sup> Its aim is to fill ACHPR’s gaps – institutional weakness, lack of resources, non-binding effects of decisions and lack of implementation.<sup>11</sup>

4 The Assembly itself does not have a legislative framework by which it can demand compliance from Member States; see NB Pityana, ‘Reflections on the African Court on Human and Peoples’ Rights’ in 4 *African Human Rights Law Journal* 1 (2004) 6 at <http://www.ahrj.up.ac.za/pityana-n-b>.

5 F. Viljoen, L. Louw, ‘The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation’ in 48 *Journal of African Law* 1 (2004) 10, 18, notes 89, 92.

6 “Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach”, DOC/OS/50B (XXIV), para 2 (1998) at <http://hrlibrary.umn.edu/africa/non-compliance.html>.

7 See F. Viljoen, L. Louw, ‘State Compliance With the Recommendations of the African Commission on Human And Peoples’ Rights, 1993-2004’ in 7 *Int’l Journal of Civil Society Law* 2 (2009), 49-50, available at [http://www.iccs.org/pubs/09-04\\_IJCSL.pdf](http://www.iccs.org/pubs/09-04_IJCSL.pdf).

8 Initiatives like letters, promotional or protective visits, and direct questions to State delegates improved compliance as opposed to sanctions; *ibid.* notes 66, 68.

9 *Ibid.* note 91; and 42-45.

10 OAU-adopted Protocol to the African Charter on Human and People’s Rights on the Establishment of the ACtHPR, 9 June 1998, at <http://www.achpr.org/instruments/court-establishment/>.

11 R.-C. Liwanga, ‘From Commitment to Compliance: Enforceability of Remedial Orders of African HR Bodies’ in 41 *Brooklyn Journal of Int’l Law* 1 (2015) 115, 116 (on the Court’s powers and jurisdiction).

The creation of a regional court introduced relevant changes within the African System. First, the procedure is judicial, with legally binding decisions for the responding States as an outcome. Under Article 30 of the Court Protocol, States take primary responsibility for the execution of the judgments "...within the time stipulated by the Court and to *guarantee its execution*". Failure to do so triggers other persuasive and perhaps even coercive means. In fact, the AU receives in its regular session reports from the Court indicating non-compliance cases (Article 31 of the Court Protocol). Secondly, a monitoring mechanism was instituted under Article 29(2) of the Court Protocol, whereby judgments of the Court are notified not only to the parties in dispute, but also to the Executive Council, which has the institutional competence to "monitor its execution on behalf of the Assembly".

The introduction of the above changes undoubtedly strengthened the regional system by reinforcing the legally binding nature of the judgments; the recognition of specific remedies; and the enhancement in the legal interpretation contained within the Court's judgments. Moreover, an additional indication of the general systemic improvement could be found on the increasing information and statistics emanating from the Court and the AU's organs. Indeed, the Court's reports include lists of finalized cases, that is, cases where a final judgment were delivered; enforcement does not appear to be part of the defining criteria for this category though. It is also important to highlight that on its website, the Court published just a single Report notifying the Executive Council of State (Libya) non-compliance according to Article 31 of its Protocol.<sup>12</sup>

Notwithstanding the clear advancement in the right direction, the question of State compliance is still pending. As some authors have pointed out, enforcement is directly connected with stronger domestic and regional political commitment, increased publicity, and greater involvement of the civil society.<sup>13</sup> In this sense, the Executive Council in its 2013 Report on the activities of the ACtHPR, expressed concern that "the effective discharge of the mandate of the Court is seriously compromised" due to the lack of its individual jurisdiction and low rate of ratification of the Protocol and of making the declaration recognizing the Court's competence to receive cases from individuals and NGOs.<sup>14</sup> In addition, it urged Member States "to commit unconditionally to and comply with judgments rendered by the Court." Concerned by the unsatisfactory nature of this mechanism, the Court undertook studies on "the implementation of a concrete mechanism for reporting and follow up."<sup>15</sup>

In sum, the Court does not appear to have advanced more than the ACHPR on the realm of compliance. Therefore, the question remains whether or not the creation of another judicial body would eventually bring the needed improvements.

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12 Interim Report notifying the Executive Council of Non-Compliance by a State according to Article 31 of the Protocol (undated), at [http://en.african-court.org/images/Other%20Reports/AFCHPR\\_Interim\\_Report\\_Non\\_compliance\\_by\\_a\\_State\\_-\\_Libya.pdf](http://en.african-court.org/images/Other%20Reports/AFCHPR_Interim_Report_Non_compliance_by_a_State_-_Libya.pdf).

13 Viljoen and Louw (2009), 50.

14 Executive Council, 22nd Ordinary Session, 21-25 January 2013, EX.CL/783(XXII), "Report on the Activities of the ACtHPR", para 116 at <http://en.african-court.org/images/Activity%20Reports/EXECUTIVE%20COUNCIL%20Twenty-Second%20Ordinary%20Session%2021%20%2025%20January%202013%20Addis%20Ababa%20ETHIOPIA%20>.

15 AU Executive Council 26th Ordinary Session, 23-27 January 2015, Decision EX.CL/Dec. 865 (XXVI) page 1, "Decision on the 2014 Activity Report of the ACtHPR", Doc. Ex.CL/888(XXVI), points 1, 4 at [http://www.au.int/en/sites/default/files/decisions/9666-ex\\_cl\\_dec\\_851\\_-\\_872\\_xxvi\\_e.pdf](http://www.au.int/en/sites/default/files/decisions/9666-ex_cl_dec_851_-_872_xxvi_e.pdf).

## **The African Court of Justice and Human Rights (ACJHR)**

The establishment of a permanent, regional and criminal judicial body in Africa is a revolutionary step within the African justice system. It is the result of a merger of the ACtHPR and the African Court of Justice through the adoption of the 2008 Protocol on the Statute of the African Court of Justice and Human Rights ("the merger Protocol").<sup>16</sup> This Protocol will come into force thirty days after its ratification by 15 countries (Article 9 of the merger Protocol). With only 5 States having done so,<sup>17</sup> the Court is not yet operational.

The Court's procedure is judicial, and all States Parties should comply with its judgments (Article 43(6) of the merger Protocol). Execution of the judgments by the concerned States will be monitored by AU's Executive Council with decisions final and binding on States Parties (Article 46). The AU Assembly is mandated to punish the defaulting party – including by imposition of the sanctions provided in Article 23(2) of the Constitutive Act (Article 46(4)-(5)). The future Court also is obliged to submit an Annual Activity Report to the AU Assembly each year (Article 47).

Theoretically, the creation of the new Court is a step forward that will reinforce the capacity of the African system to tackle human rights violations. Unfortunately, the lower level of ratification of the merger Protocol could point to the persistence of States' political unwillingness to deal with the problem of non-compliance. Hence, this new judicial organ would eventually be faced with the same systemic deficits as its predecessor.

## **INHIBITORY BARRIERS FOR THE ENFORCEMENT OF REGIONAL (QUASI-) JUDICIAL DECISIONS**

Based on the observations introduced above and on the extensive work made by Liwanga,<sup>18</sup> four reasons of a practical and legal nature appear to prevent enforcement of the decisions of the African Court on Human and Peoples' Rights, and more in general, of other judicial or quasi-judicial bodies at the regional African level: (a) politicization of the post adjudicative phase and the lack of sanctions against defaulting States; (b) non-existence of a judicial enforcement mechanism at regional and domestic levels; (c) lack of participation of domestic courts in the enforcement of international or regional courts' judgments; and (d) misuse of the notion of sovereignty on judicial issues.

As of recently, the Court itself appears to be concerned with these major challenges it is confronted with. A general lack of awareness of the very existence of the Court among judicial operators has prompted it to embark on a sensitization program to improve its visibility and accessibility to all relevant stakeholders.<sup>19</sup>

It becomes evident that the obstacles noted above need more profound measures to increase the likelihood of enforceability of the court's' remedial orders among States parties. Paying attention to the best practices and development undertaken within sister regional

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16 Protocol on the Statute of the ACJHR, 1 July 2008, at <http://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>.

17 As of 1 April 2016; see [http://au.int/en/sites/default/files/treaties/7792-sl-protocol\\_on\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_hr\\_0.pdf](http://au.int/en/sites/default/files/treaties/7792-sl-protocol_on_statute_of_the_african_court_of_justice_and_hr_0.pdf).

18 Liwanga, *op.cit.*, 135-48.

19 Justice S.A.B. Akuffo, "Report of the ACtHPR on the Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa", November 2012, Mexico City, pp. 8-9. [20]

systems in relation to the increment of levels of compliance could be useful. Future studies could, for example, look into the Inter-American system, which appears to be characterized by the same reluctance towards the Court, with ambiguous mandates and limited legal authority, lack of meaningful or practical incentives to induce State compliance and insufficient institutional legitimacy to promote voluntary compliance.<sup>20</sup>

## RECOMMENDATIONS AND CONCLUDING REMARKS

The brief examination of the African Human Rights Systems has highlighted some systemic problems regarding the limited level of compliance with the regional (quasi-)judicial bodies' decisions and judgments.

As mentioned above, one reason would be the lack of participation of domestic courts in the enforcement of international and regional courts' judgments. In this sense, the adoption of legislative reforms at regional and national level could help to create a *special judicial enforcement regime* through which domestic courts and national human rights institutions could play a crucial role in enforcing such judgments.<sup>21</sup> However, the involvement of the domestic courts must comprise the introduction of capacity building programs aiming at the enhancement of their own understanding of the role of the regional courts and their interaction with national jurisdictions. Nevertheless, empowering domestic courts requires fostering of better institutional relationships both at the regional and domestic level. To this effect, the Court could limit and direct its current sensitization programs toward national courts, fostering a proactive interaction and judicial dialogue between national and regional judges, and leave the broader and more general dissemination programs to the ACHPR, generally better suited for divulgation and promotional activities.

As a quasi-judicial institution with a mandate to promote human and peoples' rights, the African Commission could better engage in dialogue with political entities, State officials and right bearers in order to address structural or systemic barriers and to dialogically design strategies for cooperation and institutional capacity building. Given its bold and innovative interpretation of its institutional mandate and the African Charter, its increasingly better-argued and better-written decisions,<sup>22</sup> the submission of State reports under Article 62 could be used as a tool - in the hands of the Commission - to foster better compliance. In this sense, reforms of the current reporting system could be introduced under the light of comparative regional examples.<sup>23</sup>

Additionally, the ACTHPR could enhance State compliance with its findings by introducing a more effective mechanism for reporting and follow up by effectively using AU's coercive force. The latter could use its political powers to adopt time frames for States' compliance together with explicit procedural steps in order to render the consequences of non-compliance more visible.<sup>24</sup> Indeed, the Executive Council could take on these issues and effectively

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20 Sarkin, *op.cit.*, 211-12.

21 Liwanga, *op.cit.*, 103, 148-51.

22 Sarkin, *op.cit.*, 225.

23 The Inter-American Commission on Human Rights has introduced in its annual report a chapter (Chapter IV) in which it deals with States Parties of the OAS that show structural or systemic levels of human rights violations. In this manner, the I-ACHR maintains a close scrutiny of the human rights situation within a given country, together with high levels of regional visibility.

24 M. Hansungule, 'African courts and the African Commission on Human and Peoples' Rights' in *Human Rights in Africa. Legal Perspectives on their Protection and Promotion*, A. Bösl, J. Diescho (eds), Macmillan Education Namibia 2009, 226, at <http://www.kas.de/namibia/en/publications/16347/>.

sanction defaulting States given its express mandate to ensure compliance with judgments under Article 29(2) of the Court Protocol.

So far, the Court Protocol does not provide any sanction against non-compliant States, whereas the Protocol to the Statute of the future ACJHR provides the possibility of applying political and economic sanctions, according to the AU Constitutive Act. Unfortunately, these sanctions are vague (Article 23(2)), optional, and provided for a not yet operational court.

In short, these concluding remarks further suggest that empowering domestic judicial institutions to ensure better compliance with the findings rendered by the African (quasi-)judicial bodies should be seen as a key factor, not least because human rights effective protection primarily starts at the domestic level.