

# Monitoring second-order compliance in the African human rights system

Victor O Ayeni\*

<https://orcid.org/0000-0002-2429-2269>)

Andreas von Staden\*\*

<https://orcid.org/0000-0003-3551-6384>

**ABSTRACT:** This article examines the mechanisms and instruments employed by the three main regional African human rights bodies – the African Commission and African Court on Human and Peoples’ Rights and the African Children’s Rights Committee – to monitor compliance with their decisions and judgments. Based on the assumption that second-order compliance monitoring contributes to greater effectiveness of human rights institutions and increased compliance with their pronouncements, we discuss the monitoring tools used by the institutions themselves as well as the roles of political monitoring and monitoring by civil society. Based on a stock-taking exercise we find that all three African human rights bodies still have much room for improving both the quantity and the quality of their monitoring instruments and processes. Acknowledging that the three bodies may to some extent be legally and politically constrained with respect to the use of some of these, and recognising that the AU’s political organs mostly abstain from exercising the second-order compliance monitoring functions assigned to them, the article argues that civil society plays a critical role in contributing to such monitoring, a role that should be expanded upon and researched further.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### Le contrôle de ‘second ordre’ de l’exécution des décisions et jugements dans le système africain des droits de l’homme

**RÉSUMÉ:** Cet article examine les mécanismes et les instruments utilisés par les trois principaux organes régionaux africains des droits de l’homme – la Commission et la Cour africaine des droits de l’homme et des peuples, ainsi que le Comité africain d’experts sur les droits et le bien-être de l’enfant – pour contrôler l’exécution de leurs décisions et/ou jugements. En partant de l’hypothèse que le contrôle de conformité de second ordre – celui lié aux décisions et/jugements des organes des droits de l’homme – contribue à une plus grande efficacité des institutions des droits de l’homme et à un meilleur respect de leurs décisions, nous examinons les outils de contrôle utilisés par les institutions elles-mêmes ainsi que les rôles du contrôle politique et du contrôle par la société civile. Sur la base d’un inventaire, nous constatons que les trois organes africains des droits de l’homme ont encore une marge de manœuvre importante pour améliorer à la fois la quantité et la qualité de leurs instruments et processus de suivi.

\* LLB (Akungba), LLM LLD (Pretoria); Senior Lecturer, Adekunle Ajasin University, victor.ayeni@aaau.edu.ng

\*\* PhD and MA (Princeton), MA (Yale), MA (Hamburg), Senior Researcher and Principal Investigator, Department of Social Sciences, Universität Hamburg; andreas.vonstaden@uni-hamburg.de

Tout en reconnaissant que les trois organes peuvent, dans une certaine mesure, être limités juridiquement et politiquement en ce qui concerne l'utilisation de certains d'entre ces instruments, et conscient de ce que les organes politiques de l'UA s'abstiennent la plupart du temps d'exercer les fonctions de contrôle de conformité de second ordre qui leur sont attribuées, l'article soutient que la société civile joue un rôle essentiel en contribuant à ce contrôle, un rôle qui devrait être élargi et faire l'objet de recherches supplémentaires.

**KEY WORDS:** regional African human rights bodies, African Commission, African Court on Human and Peoples' Rights, African Children's Rights Committee, monitoring, compliance, second-order compliance

**CONTENT:**

|     |  |    |
|-----|--|----|
| 1   | Introduction.....  | 4  |
| 2   | Conceptual clarifications.....   | 6  |
| 3   | Legal and institutional frameworks .....                                 | 7  |
| 3.1 | African Commission .....   | 8  |
| 3.2 | African Court .....  | 10 |
| 3.3 | African Committee of Experts on the Rights and Welfare of the Child..... | 12 |
| 4   | Judicial and quasi-judicial monitoring measures .....                    | 13 |
| 4.1 | Implementation hearings .....  | 13 |
| 4.2 | Resolutions .....  | 15 |
| 4.3 | Referral to a judicial body .....  | 16 |
| 4.4 | Advocacy visits, missions and other promotional activities .....         | 17 |
| 4.5 | State reporting process.....   | 18 |
| 4.6 | Taking stock of AHRB monitoring tools .....                              | 19 |
| 5   | Political monitoring.....  | 21 |
| 6   | Monitoring by civil society .....  | 23 |
| 7   | Conclusion .....   | 25 |

## 1 INTRODUCTION

The fact that human rights treaties do make a difference at the domestic level is no longer open to serious debate.<sup>1</sup> The focus in recent years has shifted from compliance with treaties to compliance with the output of treaty bodies and international courts.<sup>2</sup> International law compliance has become a well-established subfield of international law and international relations scholarship.<sup>3</sup> Most of the literature on 'second-order compliance' – compliance with dispute-settlement and cognate types of decisions – emphasises the importance of mobilising critical

1 See generally O Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935; E Neumayer 'Do international human rights treaties improve respect for human rights?' (2005) 49 *The Journal of Conflict Resolution* 925; B Simmons *Mobilizing for human rights: international law in domestic politics* (2009).

2 LR Helfer & A-M Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273; W Cole 'Institutionalizing shame: the effect of Human Rights Committee rulings on abuse, 1981–2007' (2012) 41 *Social Science Research* 539; C Hillebrecht *Domestic politics and international human rights tribunals: the problem of compliance* (2014); V Shikelman 'Implementing decisions of international human rights institutions – evidence from the United Nations Human Rights Committee' (2019) 30 *European Journal of International Law* 753; A von Staden 'The conditional effectiveness of soft law: compliance with the decisions of the Committee against Torture' (2022) *Human Rights Review*, available at <https://link.springer.com/article/10.1007/s12142-022-00653-5> (accessed 27 October 2022).

3 For critical positions with respect to foregrounding questions of compliance and non-compliance, see R Howse & R Teitel 'Beyond compliance: rethinking why

compliance partners at all levels, before filing a case and after a decision has been rendered, as a significant factor for improving state compliance.<sup>4</sup> Despite the relative effectiveness of some human rights institutions compared with others, the scholarly consensus is that compliance with decisions and judgments of human rights bodies (HRBs) remains a critical challenge across the three regional and the United Nations (UN) human rights systems.<sup>5</sup> Without external pressure in the form of sustained monitoring and enforcement actions, states tend to take minimalist measures, if any, to implement the decisions and judgments of international human rights tribunals.<sup>6</sup>

In the European human rights system, the procedures for the execution of judgments and monitoring have been a major focus of research.<sup>7</sup> Research has demonstrated that the effectiveness of post-judgment monitoring by the Committee of Ministers is a significant contributor to the high compliance rate and overall efficacy of the European human rights system.<sup>8</sup> The monitoring of implementation and following-up of decisions of HRBs play a major role in persuading or 'cajoling' states, thus facilitating implementation and eventual compliance.<sup>9</sup> It is only recently that scholarship on the role of key actors in the execution and monitoring of the decisions and judgments of African human rights bodies (AHRBs) has begun to emerge.<sup>10</sup>

international law really matters' (2010) 1 *Global Policy* 127; L Martin 'Against compliance' in J Dunoff & M Pollack (eds) *Interdisciplinary perspectives on international law and international relations: the state of the art* (2013) 593.

- 4 F Viljoen 'The African human rights system and domestic enforcement in social and economic rights litigation' in M Langford, C Rodriguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: making it stick* (2017) 360; VO Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five African states', unpublished LLD thesis, University of Pretoria, South Africa, 2018, 213-214.
- 5 C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: what role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71.
- 6 A von Staden *Strategies of compliance with the European Court of Human Rights: rational choice within normative constraints* (2018).
- 7 See, for example, M Marmo 'The execution of judgments of the European Court of Human Rights – a political battle' (2008) 15 *Maastricht Journal of European and Comparative Law* 235; EL Abdelgawad 'Dialogue and the implementation of the European Court of Human Rights' judgments' (2016) 34 *Netherlands Quarterly of Human Rights* 340.
- 8 B Çali & A Koch 'Foxes guarding the foxes? The peer review of human rights judgments by the Committee of Ministers of the Council of Europe' (2014) 14 *Human Rights Law Review* 301.
- 9 Sandoval, Leach & Murray (n 5) 71.
- 10 T Mutangi 'Enforcing compliance with the judgments of the African Court on Human and Peoples' Rights' in A Adeola (ed) *Compliance with international human rights law in Africa* (2022) 183; R Murray & D Long 'Monitoring the implementation of its own decisions: what role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 838; S Lungu 'An appraisal of the draft Framework for Reporting and Monitoring Execution of Judgments of the African Court on Human and Peoples' Rights' (2020) 4 *African Human Rights Yearbook* 144; R Murray, D Long, V Ayeni & A Some 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150.

In this article we examine the mechanisms and instruments employed by the AHRBs to monitor compliance with their decisions and judgments. The article is structured as follows: First, we introduce and briefly discuss the key concepts of monitoring/following-up and effectiveness. Second, we analyse the legal and institutional framework for second-order compliance monitoring in the African human rights system. In the main sections of the article, we examine the various measures and tools used by the AHRBs and by relevant political and civil society actors to monitor second-order compliance and their relative promise of success. We conclude by offering thoughts for future research.

## 2 CONCEPTUAL CLARIFICATIONS

The terms ‘monitoring’ and ‘follow-up’ are often used interchangeably.<sup>11</sup> Monitoring involves the process of following up on the status of a decision’s implementation,<sup>12</sup> with a view, ultimately, to achieving and ascertaining compliance.<sup>13</sup> It entails a range of activities, including the collection, verification and use of information relevant to the implementation of the decisions under review.<sup>14</sup> The goal is the creation of ‘an evidence-based public record of the status of implementation at a given time’.<sup>15</sup> Monitoring may also include stick-and-carrot-type activities and other enforcement measures as well as dialogue-focused processes aimed at persuading and winning over relevant state actors. Overall, monitoring aims at persuading or cajoling national actors to take action on implementation and to ‘determine whether the measures or actions taken do, in fact, satisfy the requirements of the decision or judgment’.<sup>16</sup>

There is a general assumption that mechanisms for monitoring compliance with the decisions of AHRBs are largely ineffective.<sup>17</sup> Though there is no universally accepted definition of judicial effectiveness,<sup>18</sup> there have been several attempts in existing scholarship to delineate its conceptual elements and to identify the factors that likely contribute to the effectiveness of the work of international judicial and quasi-judicial institutions.<sup>19</sup> While the frameworks and theories developed in the literature are geared towards

11 Murray, Long, Ayeni & Some (n 10) 152. Rule 125 of the Rules of Procedure of the African Commission (2020) uses the term ‘follow-up’ instead of monitoring.

12 F Viljoen *International human rights law in Africa* (2012) 340.

13 On the relationship between implementation and compliance see A von Staden ‘Implementation and compliance’ in R Murray & D Long (eds) *Research handbook on implementation of human rights in practice* (2022) 17.

14 Murray, Long, Ayeni & Some (n 10) 165.

15 A Donald, D Long & A-K Speck ‘Identifying and assessing the implementation of human rights decisions’ (2020) 12 *Journal of Human Rights Practice* 125.

16 Sandoval, Leach & Murray (n 5) 1.

17 OC Okafor *The African human rights system: activist forces and international institutions* (2007) 41; see also Murray & Long (n 10).

18 Y Shany *Assessing the effectiveness of international courts* (2014) 4.

19 Helfer & Slaughter (n 2) 282.

illuminating the effectiveness of supranational adjudication overall, its insights also apply in principle to the second-order compliance monitoring mechanisms highlighted in this article.

Helper and Slaughter define effective supranational adjudication as the ability of a court ‘to compel or cajole compliance with its judgments’.<sup>20</sup> Some scholars have criticised this use of judgment compliance as a proxy for international court effectiveness.<sup>21</sup> Addressing the methodological difficulties in earlier studies, Shany defines international court effectiveness as the attainment of mandate provider’s goals. The goal-based approach compares actual impact with desired outcomes and performance with expectation. Thus, an effective international court is one that attains within a predefined time frame the goals set for it by relevant constituencies or mandate providers.<sup>22</sup> This approach could result in the counterintuitive conclusion that institutions created as symbolic tokens and intended to achieve little by their mandate providers could be considered effective when they end up having only minor impact while those that, against intentions, turn out to be more consequential might have to be considered ineffective in light of the purpose for which they were created.

In this article, we do not address as such whether the second-order compliance mechanisms used by the AHRBs are effective or ineffective in bringing about compliance or accomplishing the goals of their mandate providers. Such an analysis would require detailed empirical analysis of the developments following the issuance of a judgment or decision and of subsequent monitoring activities for which sufficiently detailed data is currently not available. Instead, we describe the various tools currently employed by the three AHRBs under consideration and offer a check-list for examining such monitoring activities. Future research can build on this check-list to determine whether the assumption that more and better monitoring will lead to more compliance and greater improvements in human rights protection holds up in practice.

### 3 LEGAL AND INSTITUTIONAL FRAMEWORKS

The African human rights system was established formally in 1981 with the adoption of the African Charter on Human and Peoples’ Rights (African Charter).<sup>23</sup> The Charter established the African Commission on Human and Peoples’ Rights (African Commission) as its main

20 Helper & Slaughter (n 2) 278.

21 Y Shany ‘Compliance with decisions of international court as indicative of their effectiveness: a goal-based analysis’ in J Crawford & S Nouwen (eds) *Select proceedings of the European Society of International Law* (2012) 231; Shany (n 18) 5; A Guzman ‘International tribunals: a rational choice analysis’ (2008) 157 *University of Pennsylvania Law Review* 171, 178.

22 Shany (n 18) 6.

23 The African Charter was adopted on 27 June 1981 and came into force on 21 October 1986. All 54 AU member states have ratified the Charter.

oversight and monitoring body.<sup>24</sup> The Commission functioned as the sole AHRB for nearly two decades until the Protocol establishing the African Court on Human and Peoples' Rights (African Court), adopted in 1998, entered into force.<sup>25</sup> The African Court complements the protective mandate of the Commission and provides judicial supervision of state compliance with the provisions of the African Charter and other human rights instruments. The Court has the power to issue legally binding judgments.<sup>26</sup> The third AHRB is the African Committee of Experts on the Rights and Welfare of the Child (Children's Rights Committee). The Committee monitors the implementation of the African Charter on the Rights and Welfare of the Child.<sup>27</sup>

### 3.1 African Commission

The primary obligation of African states under the African Charter is to recognise the rights, duties and obligations enshrined in the Charter and to take legislative and other measures to give effect to them.<sup>28</sup> The African Charter does not set out a clear process and procedure for the monitoring and enforcement of the 'recommendations' of the Commission. In many cases, the Commission has no information regarding the implementation of its recommendations, and without such information, it is extremely difficult to measure the level of implementation. An empirical study of 44 decisions of the Commission between 1987 and 2003 revealed that there was full compliance in only six cases, representing less than 14 per cent.<sup>29</sup> At the end of 2020, the Commission had adopted 147 decisions on the merits, and only a handful of these decisions have been implemented by states.<sup>30</sup>

For many years, the African Commission had no systematic follow-up or monitoring procedure for its decisions.<sup>31</sup> This lacuna has by now been filled through the Commission's Rules of Procedure.<sup>32</sup> The Commission uses a variety of channels and a broad range of tools and

24 VO Ayeni *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 7.

25 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) adopted 10 June 1998 and entered into force on 25 November 2005.

26 As above, art 30.

27 The African Children's Charter was adopted 11 July 1990 and entered into force on 29 November 1999.

28 African Charter, art 1.

29 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994 - 2004' (2007) 101 *American Journal of International Law* 5-7.

30 Report on the status of communications & intersession report of the Working Group on Communications, August-November 2020, para 25, available at <https://www.achpr.org/sessions/sessionsp?id=354> (accessed 27 December 2021).

31 Viljoen (n 12) 340.

32 Rules of Procedure of the African Commission on Human and Peoples' Rights 2020 adopted by the Commission during its 27th Extra-Ordinary Session held in Banjul (The Gambia) 19 February to 4 March 2020.

procedures to follow up and monitor its decisions, including the state reporting procedure, resolutions, promotional visits and on-site missions.<sup>33</sup> The Commission kick-started its monitoring practice by inserting in its decisions a provision that requests states to report on the measures they have taken to implement the Commission's decision in their subsequent periodic reports.<sup>34</sup> In other cases, the Commission, in its findings, required states to notify it in writing, within six months, of the measures taken to implement the decisions.<sup>35</sup> So far, the Commission did not develop a consistent practice around either of the two approaches. In 2006, the Commission adopted a thematic resolution on the implementation of its decisions, where it congratulates states that have complied with its recommendations and urges all states to indicate the measures they have taken within a maximum period of 90 days starting from the date of notification of the decision.<sup>36</sup>

The reporting timeline therefore was different for different states depending on what the Commission stated in its decision or the resolution on implementation. This state of affairs potentially could create confusion for states as state actors may be confronted with a dilemma: whether to follow the timeline stated in the decision or the one stated in the Commission's resolution on implementation. The period within which states must report to the Commission was later extended to six months (180 days) under Rule 112 of the Commission's Rules of Procedure 2010.<sup>37</sup> Currently, Rule 125 of the 2020 Rules of Procedure of the Commission governs the procedure for the monitoring of states' implementation of the Commission's decisions. The 2020 revised Rules of Procedure adopted pursuant to article 42 of the African Charter came into force on 2 June 2020.<sup>38</sup>

Within 180 days of the transmission of the decision to them, states are mandated to report to the Commission on all actions taken to implement the Commission's decisions. The Commission must forward any information from the state to the other party for comments within 60 days.<sup>39</sup> Thereafter, the Commission may request supplementary information from the state within three months.<sup>40</sup> The Commissioner appointed as rapporteur for a communication or any other member of the Commission so authorised may 'take such action as may be appropriate' to monitor the implementation of the decision.<sup>41</sup> It has

33 Viljoen (n 12) 341.

34 See, for example, *Purohit and Moore v The Gambia*, Communication 241/2001, Sixteenth Activity report 2002-2003, Annex VII, op para 2.

35 See for example, *Lawyers for Human Rights v Swaziland*, comm no 251/2002, 18th Annual Activity Report, Annex III.

36 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, ACHPR/Res.97(XXXX)06.

37 Rules of Procedure of the African Commission 2010, Rule 112(2).

38 Activity Report of the African Commission (January-December 2020) 31.

39 Rules of Procedure of the African Commission 2020 (n 32) Rule 125(1).

40 As above, Rule 125(3).

41 As above, Rule 125(5) & (6).

been argued that this mandate is broad enough to accommodate the conduct of implementation hearings.<sup>42</sup> During its ordinary sessions, the Commission reports on the implementation of its decisions.<sup>43</sup> Where a state's conduct raises issues of non-compliance, the Commission may refer the case 'to the attention of the competent policy organs of the African Union'.<sup>44</sup> Each activity report of the Commission must indicate 'the status of the implementation of its decisions, including by highlighting any issues of possible non-compliance by a State party'.<sup>45</sup> Unfortunately, once the Commission reports or refers a case of non-compliance to the policy organ of the AU, there is really no telling what the AU will do with the report.

### 3.2 African Court

Unlike the African Charter, the Protocol setting up the African Court stipulates the procedure for the execution of judgments of the Court. As of December 2021, the Court has received over 325 cases and finalised 130.<sup>46</sup> It has rendered 106 judgments and rulings and issued 90 orders.<sup>47</sup> As the Court itself notes, '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>48</sup> Out of the over 100 judgments rendered by the Court, only Burkina Faso has complied fully with the Court's judgments. Tanzania and Côte d'Ivoire have complied partially with some of the judgments.<sup>49</sup> Some states have indicated openly that they will not comply with the Court's judgments.<sup>50</sup>

The Protocol establishing the Court places the primary obligation for monitoring the execution of the judgments of the Court on the Executive Council of the AU.<sup>51</sup> The Court is required to communicate its judgments to the parties and transmit copies to AU member states, the African Commission and the Executive Council of the AU, the body that has primary responsibility for monitoring the execution of the Court's

42 Viljoen (n 12) 342.

43 Rules of Procedure of the African Commission 2020 (n 32) Rule 125(7).

44 As above, Rule 125(8).

45 As above, Rule 125(9).

46 African Court, 'AFCHPR Cases' available at <https://www.african-court.org/cpmt/statistic> (accessed 14 December 2021).

47 Activity Report of the African Court on Human and Peoples' Rights: 1 January-31 December 2020, para 11, 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 14 December 2021). See also the Activity Report of the African Court on Human and Peoples' Rights: 1 January-31 December 2021, Annex II (Part A & B) available at <https://www.african-court.org/wpafc/report-of-the-african-court-on-human-and-peoples-rights-afchpr-1-january-31-december-2021/> (accessed 3 November 2022).

48 As above, para 37.

49 As above, para 37.

50 As above.

51 African Court Protocol (n 25) art 29(2).



judgments on behalf of the AU Assembly.<sup>52</sup> The Court is mandated to submit a report of its activities to each session of the AU Assembly, and the report must contain cases in which one or more states have refused or unwilling to comply with decisions of the Court.<sup>53</sup>

The procedure for monitoring compliance with the decisions of the Court is contained in Rule 81 of the Court's Rules of Procedure 2020.<sup>54</sup> Without providing a specific timeframe, the rule requires State Parties to submit reports on compliance with the decisions of the Court, and these reports may be transmitted to the applicants for observations.<sup>55</sup> This approach may be better than the six-month timeframe provided in the Commission's Rules. It empowers the Court to take follow-up actions as soon as a judgment is communicated to the state even before the six-month period provided for in the Commission's Rules. Also, the Court may obtain relevant information from other credible sources in order to assess compliance with its decisions. So far, the Court has been quite reluctant to do this because of its concerns for the 'integrity, independence and neutrality' of those other sources.<sup>56</sup>

Rule 81(3) states: 'in case of a dispute as to compliance with its decisions, the Court may, among others, hold a hearing to assess the status of implementation of its decisions'. This would imply that the Court could do more than hold an implementation hearing; it could, for instance, adopt a resolution or embark on promotional visits, among other means. Where a state party has failed to comply with its decision, the Court is mandated to report the non-compliance to the AU Assembly.<sup>57</sup> Each activity report of the Court since 2014 contains the status of compliance with its decisions.<sup>58</sup> Yet, neither the Executive Council nor the AU Assembly has taken any enforcement measures against non-complying states. Recently, in 2018, the Executive Council requested the Court 'to undertake an in-depth study on mechanisms and framework for the implementation of its judgments.'<sup>59</sup> As of the time of writing, the Draft Framework for the implementation of Judgments of the Court is yet to be considered or adopted by the Executive Council.<sup>60</sup>

52 African Court Protocol (n 25) art 29(1) & (2).

53 African Court Protocol (n 25) art 31.

54 In addition, Rule 59(5) enables the Court to invite the parties to provide it with information on any issue relating to the implementation of provisional measures issued by the Court.

55 Rules of Procedure of the African Court 2020, Rule 81(1).

56 Activity Report of the African Court (2020) (n 47) para 37, note 5.

57 Rules of Procedure of the African Court 2020, Rule 81(4).

58 See Activity Report of the African Court (2014) paras 26-31.

59 See Activity Report of the African Court (2020) (n 47) para 20.

60 See generally Lungu (n 10).

### 3.3 African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee considers individual communications as a necessary concomitant to its overarching mandate of monitoring the implementation of the African Children's Charter.<sup>61</sup> The mandate of the Committee under the Children's Charter is similar to the African Commission's mandate under article 45 of the African Charter. The Committee reviews state party reports, considers individual communications on violations of the rights of the child and undertakes promotional visits to states. As of October 2022, the Committee has finalised or overseen the settlement of nine cases:<sup>62</sup> the *Children in Northern Uganda* case,<sup>63</sup> the *Talibés* case,<sup>64</sup> the *Nubian Children* case,<sup>65</sup> the *Malawian Children Upper Age Limit* case,<sup>66</sup> the *Sudanese Nationality*<sup>67</sup> and *South Kordofan and Blue Nile* cases,<sup>68</sup> the *Cameroon Rape* case,<sup>69</sup> the *Mauritanian Child Enslavement* case<sup>70</sup> and, finally, the *Tanzanian Forced Pregnancy Test and School Expulsion* case.<sup>71</sup> The African Children's Charter does not include any provisions for following-up or monitoring the execution of the Committee's decisions.

61 African Children's Charter, arts 42(b) & 44.

62 African Children's Committee 'Table of Communications', available at <https://www.African-Children's-Committee.africa/table-of-communications/> (accessed 18 October 2022).

63 *Hansungule and Others on behalf of children in Northern Uganda v The Government of Uganda*, comm no 001/Com/001/2005.

64 *The Centre for Human Rights and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Senegal*, comm no 003/Com/001/2012.

65 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Kenya*, comm no 002/Com/002/2009.

66 *Institute for Human Rights and Development in Africa v Malawi*, comm no 004/Com/001/2014. See BD Mezmur 'No second chance for first impressions: the first amicable settlement under the African Children's Charter' (2019) 19 *African Human Rights Law Journal* 62.

67 *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v TSudan*, comm no 005/Com/001/2015.

68 *Project Expedite Justice et al on behalf of children in South Kordofan and Blue Nile states v Sudan*, comm no 0011/Com/001/2018.

69 *The Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*, comm no 006/Com/002/2015.

70 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*, comm no 007/Com/003/2015.

71 *Legal and Human Rights Centre and Centre for Reproductive Rights on behalf of Tanzanian girls v Tanzania*, comm no 0012/Com/001/2019.

The Guidelines for Periodic Reports of State Parties and section XXI(2)(i)–(iv) of the Revised Communications Guidelines of the African Children’s Committee make only scant reference to following-up on and monitoring the Committee’s decisions.<sup>72</sup> The Communication Guidelines require the Committee to appoint a rapporteur for each communication who shall monitor the implementation of its decisions. The rapporteur shall monitor the measures taken by states to give effect to the decisions. He or she may make such contacts as is necessary and ‘take such action as may be appropriate to ascertain the measures adopted by the state party’. At each session of the Committee, the rapporteur shall present a report on the status of implementation in the state party concerned.

## 4 JUDICIAL AND QUASI-JUDICIAL MONITORING MEASURES

AHRBs play a variety of roles in monitoring the implementation of their decisions. These include: information gathering, dialogue with parties, interpretation of their decisions, naming and shaming, reporting to the relevant AU organs and publication of lists of non-complying states, among others.<sup>73</sup> Fundamentally, dialogue and correspondence with parties is at the heart of the implementation monitoring process. The full implementation of a decision may take a long time, thus the ability to sustain dialogue over a prolonged period is crucial to implementation monitoring.<sup>74</sup> In general, AHRBs juggle a combination of dialogical processes, soft power diplomacy, sticks-and-carrots tactics as well as naming and shaming operations to bring state actors to the implementation table. Measures used include implementation hearings, the adoption of resolutions, judicial referrals and advocacy and similar visits and linking up with the state reporting process.

### 4.1 Implementation hearings

Implementation hearings are not found in the UN and the European human rights systems, but the practice is well established in the Inter-American system.<sup>75</sup> Both the Inter-American Commission and the Inter-American Court can call for an implementation hearing, and there is a clear procedure and criteria on holding a hearing on implementation.<sup>76</sup> To its credit, the African Commission has devoted some of its sessions to focusing on the implementation of its decisions. For example, as early as 1995, the Commission convened an

72 UK Mbuton ‘The Role of the African Committee of Experts on the Rights and Welfare of the Child in the follow-up of its decisions on communications’, unpublished LLM dissertation, University of Pretoria, South Africa (2017) 28.

73 Murray, Long, Ayeni & Some (n 10) 153.

74 Sandoval, Leach & Murray (n 5) 81.

75 As above.

76 Sandoval, Leach & Murray (n 5) 81.

extraordinary session to focus on the implementation of its decisions concerning Nigeria.<sup>77</sup> In at least two cases, the African Commission has used implementation hearings to bring stakeholders together to forge a way forward on implementation. The first implementation hearing by the African Commission took place on 26 April 2012 in the case of *Malawi African Association et al v Mauritania*,<sup>78</sup> where the Commission held a hearing to listen to the parties in the case, considered an ‘implementation dossier’ prepared by civil society organisations (CSOs) and followed-up on the overall implementation of its decision in the case.<sup>79</sup> In the *Endorois* case,<sup>80</sup> the Commission held an oral hearing at its 53rd Ordinary Session in April 2013, in Banjul, The Gambia, where parties updated the Commission on the implementation of the decision. The government of Kenya pledged at the oral hearing to submit within 90 days an interim report on measures it has taken to implement the decision and a comprehensive report at the Commission’s next ordinary session. The Commission even sent a *note verbale* to the Republic of Kenya as a reminder of its pledge. Notwithstanding these efforts, the government of Kenya did not honour its pledge at the 54th ordinary session of the Commission held in Banjul, The Gambia, from 22 October to 5 November 2013.

The African Court’s competence to hold hearings ‘to assess the status of implementation of its decisions’ and to ‘make a finding and where necessary, issue an order to ensure compliance with its decisions’<sup>81</sup> is provided for in its Rules of Procedure. While the Court has not held any such hearings yet, it resolved to do so for the first time in the recent reparations judgment concerning the case of the Ogiek indigenous community in Kenya.<sup>82</sup> The African Children’s Committee has held implementation hearings during its sessions. In October 2017, two member states – Kenya and Senegal – submitted their reports to the African Children’s Rights Committee on the implementation of the *Children of Nubian Descent* case and the *Talibés* case, respectively. The reports were considered during an implementation hearing at the

77 Second Extra-ordinary Session Final Communiqué, 18-19 December 1995, para 1 and Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples’ Rights, Second Extraordinary Session, Kampala, 18-19 December 1995, DOC. II/ES/ACHPR/4.

78 Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98 (2000) AHRLR 149 (ACHPR 2000).

79 J Harrington & L Bingham ‘Never-ending story: the African Commission evolving through practice in *Malawi African Association et al v Mauritania*’ (2013) 7 *Human Rights & International Legal Discourse* 53.

80 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009).

81 African Court Rules of Procedure 2020, Rule 81(3).

82 *African Commission on Human and Peoples’ Rights v Republic of Kenya (Reparations)* appl no 006/2012. judgment of 23 June 2022, op para xvi.

Committee's 29th ordinary session in Maseru, Lesotho.<sup>83</sup> During the hearing, the two states and the complainants participated and made presentations. The hearing was held in open session, but participation and engagement was limited to the states, the complainants and the authors of the communications.<sup>84</sup> CSOs, national human rights institutions (NHRIs) and other stakeholders were not permitted to contribute to the hearing.

Neither the African Commission nor the African Children's Committee has developed a consistent practice or coherent approach as to when and where to hold an implementation hearing, who should be present at such hearing and what the expectations are for the parties involved.<sup>85</sup> It is purely an ad hoc process facilitated by litigants and civil society. There is currently no established procedure for joint hearings and hearings *in situ* in any of the AHRBs. The implementation hearing procedure is still in its infancy, and there is no indication of an evolving practice or a coherent approach. While there is no direct causal link between an implementation hearing and eventual implementation, the hearing helps to maintain dialogue, keep the case on the radar and assist the HRB in understanding the implementation challenges that states face.<sup>86</sup>

## 4.2 Resolutions

Resolutions have been one of the principal tools used by the African Commission to advance human rights in Africa.<sup>87</sup> The Commission typically issues three kinds of resolutions: thematic, country-specific and administrative. In addition to the thematic resolution on the implementation of its decisions, adopted in 2006,<sup>88</sup> the Commission has issued resolutions targeted at specific countries to highlight the non-implementation of its decisions in those countries. For example, it issued Resolution 257 at the end of the 54th ordinary session, urging the government of Kenya to implement the *Endorois* decisions.<sup>89</sup> It also issued a similar resolution against Cameroon in 2018<sup>90</sup> and

83 See Centre for Human Rights 'Centre for Human Rights takes part in African Children's Rights Committee hearing on implementation' available at [www.chr.up.ac.za/index.php/centre-news-a-events-2017/1813-centre-for-human-rights-takes-part-in-african-childrens-rights-committee-hearing-on-implementation.html%3e%20](http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1813-centre-for-human-rights-takes-part-in-african-childrens-rights-committee-hearing-on-implementation.html%3e%20) (accessed 9 January 2022).

84 As above. See also Mbuton (n 72) 34.

85 Sandoval, Leach & Murray (n 5) 81.

86 As above, 81-83.

87 See generally J Biegon 'The impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2016.

88 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, ACHPR/Res.97 (XXXX)06.

89 Resolution Calling on the Republic of Kenya to Implement the Endorois Decision. ACHPR/Res.257, November 2013.

90 Resolution on the Human Rights Situation in the Republic of Cameroon. ACHPR/Res. 395 (LXII) 2018, 9 May 2018.

another calling on the government of Eritrea to implement its decision in *Zegveld and Another v Eritrea*.<sup>91</sup> It may be helpful for AHRBs to add periodic press releases to their monitoring arsenal to condemn recalcitrant states and also to celebrate those that comply.

### 4.3 Referral to a judicial body

There is a referral mechanism in both the European and the African systems. In the European system, the Committee of the Minister may, if it finds that a state refuses to comply with a judgment, refer the case back to the European Court under article 46(4) of the European Convention on Human Rights for a definitive judicial assessment.<sup>92</sup> So far this mechanism has been used only twice<sup>93</sup> and some commentators have expressed scepticism as to a judicial infringement procedure's utility when the underlying execution problems are largely of a political nature.<sup>94</sup> In the African system, only the African Commission has a mechanism for judicial referral when a state fails to comply with its decisions. Like other monitoring measures, this mechanism has been underutilised by the Commission. Under Rule 118 of its 2010 Rules of Procedure, the African Commission may refer a matter to the African Court where it finds that a state has refused or is unwilling to comply with its decisions or provisional measures.<sup>95</sup> However, the 2020 Rules of Procedure of the Commission are silent on referral to the African Court on the basis set out in Rule 118 (1) of the old Rules of Procedure. Still, the Commission may arguably continue to make judicial referrals when it deems them appropriate. The silence of the revised Rules of Procedure 2020 does not preclude the Commission from making referrals to the African Court as the jurisdiction to make such referral did not originate from its Rules of Procedure but from article 5(1)(a) of the African Court Protocol.

91 Resolution on the Human Rights Situation in Eritrea, ACHPR/Res.91(XXXVIII)05. See also *Zegveld and Another v Eritrea* Communication 250/02 (2003) AHRLR 85 (ACHPR 2003) (17th Annual Activity Report).

92 European Court of Human Rights, Guide on art 46 of the European Convention on Human Rights (31 August 2022) [https://echr.coe.int/Documents/Guide\\_Art\\_46\\_ENG.pdf](https://echr.coe.int/Documents/Guide_Art_46_ENG.pdf), para 30 (accessed 18 October 2022).

93 Proceedings under art 46(4) ECHR in the case of *Ilgar Mammadov v Azerbaijan*, appl no 15172/13, judgment of 29 May 2019, and in the case of *Kavala v Türkiye*, appl no 28749/18, judgment of 11 July 2022.

94 F de Londras & K Dzehtsiarou 'Mission impossible? Addressing non-execution through infringement proceedings in the European Court of Human Rights' (2017) 66 *International & Comparative Law Quarterly* 467.

95 Rules of Procedure of the African Commission 2010, Rules 112(2) & 118(1) & (2).

However, the judicial referral mechanism is problematic in itself. It presupposes that the Commission has up-to-date information about the measures states have taken to implement its decisions which will often not be the case.<sup>96</sup> Also, making a referral may be taken by some observers as an implicit acknowledgment of the Commission's weakness and an indirect assertion that the African Court will likely be more effective in bringing about a decision's implementation.<sup>97</sup> These problems perhaps explain why the Commission rarely refers cases to the Court. The African Commission has used the judicial referral mechanism only twice, in *African Commission v Libya*<sup>98</sup> and *African Commission v Kenya*,<sup>99</sup> to refer the non-implementation of its provisional measures to the African Court.<sup>100</sup> It has never used it for a decision on the merits of a case. Also, the Commission has not defined any criteria for referring cases to the Court, and the refusal or unwillingness of states to provide information on the status of implementation has only made matters worse for the Commission.<sup>101</sup>

#### 4.4 Advocacy visits, missions and other promotional activities

In some instances, members of the African Commission and the African Children's Committee have used the opportunity of promotional or protective missions to gather information on the status of the implementation of specific decisions of the Commission or Committee relating to the host country. The authority of the Commission to carry out promotional missions derives from Rules 7(b), 76 and 86 of the African Commission's Rules as well as the provisions of articles 30 and 45 of the African Charter. For example, during a visit to Mauritania in 2012, members of the Commission asked questions about the status of the implementation of certain decisions of the Commission concerning the state of Mauritania.<sup>102</sup> Also, during a promotional visit to Botswana in 2005, members of the Commission posed questions on the status of the implementation of *Modise v Botswana*.<sup>103</sup>

96 We do not have hard data on this information gap for the AHRBs, but figures from the related context of the follow-up procedures of the UN Treaty Bodies regarding their individual communications procedures may be indicative. There the percentages of adverse decisions with least some follow-up information on their execution ranges between 0% and 67% across eight treaty bodies, with such information missing for hundreds of cases; AJ Ullmann & A von Staden "A room full of views": introducing a new dataset to explore compliance with the UN Treaty Bodies' Individual Complaint Procedures' (2022) Table 1 (working paper, on file with authors).

97 Sandoval, Leach & Murray (n 5) 84-85.

98 *African Commission on Human and Peoples' Rights v Libya*, appl no 002/2013.

99 *African Commission on Human and Peoples' Rights v Kenya*, appl no 006/2012.

100 Sandoval, Leach & Murray (n 5) 84-85.

101 As above.

102 Report of the Promotional Mission to the Islamic Republic of Mauritania, held between 26 March and 1 April 2012 (2012) 9.

103 Report of the Promotional Mission to the Republic of Botswana, held 14-18 February 2005.

At its 19th session, the African Children's Committee designated some of its members to follow up on its decisions in Kenya, Senegal and Uganda.<sup>104</sup> The mission to Kenya took place in January 2013.<sup>105</sup> The follow-up team of the Committee was in Senegal in 2015. The follow-up mission to Uganda has yet to take place. It has been argued that the visits to Kenya and Senegal paved the way for the subsequent implementation hearings in the *Talibés* case and the *Nubian Children* case.<sup>106</sup> Promotional visits facilitate constructive dialogue and provide an opportunity for members of AHRBs to sensitise high-ranking government officials to their decisions against the state. Yet these visits happen rather infrequently and financial resources are inadequate to sponsor such visits on a regular basis.<sup>107</sup>

#### 4.5 State reporting process

The state party reporting process is a fundamental mechanism for implementation monitoring, not only of treaty provisions but also of the decisions of AHRBs. It provides an ideal opportunity for the African Commission and the African Children's Committee to get feedback on their 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>108</sup> The African Court is constrained in this regard as it has no mandate to receive, consider or review state party reports. Both the Commission and the African Children's Committee have put questions to states pertaining to the status of the implementation of their decisions during examinations of states periodic reports.<sup>109</sup> One shortcoming of this process as a monitoring measure is that very few African states are up to date with their reports, and those that submit reports provide inadequate information and make only scant references, if at all, to the decisions of the relevant AHRBs.

104 Report on the nineteenth session of the African Committee of Experts on the Rights and Welfare of the Child, 26-30 March 2012 Addis-Ababa, Ethiopia, African Children's Committee/Rpt (XIX) Original, 23.

105 Report on the twenty-first session of the African Committee of Experts on the Rights and Welfare of the Child, 15-19 April 2013 Addis-Ababa, Ethiopia, African Children's Committee/Rpt (XXI) Original: English, para 56.

106 Mbuton (n 72) 32.

107 The African Commission reported that most promotional visits could not take place due to lack of funds; 20th Activity Report of the African Commission, para 22.

108 Viljoen (n 12) 341.

109 Murray, Long, Ayeni & Some (n 10) 157; Sandoval, Leach & Murray (n 5) 77.



## 4.6 Taking stock of AHRB monitoring tools

Drawing inspiration from the checklist of 13 indicators developed by Helfer and Slaughter for evaluating the effectiveness of supranational tribunals<sup>110</sup> as well as Shany's goal-based model, we take stock of the AHRB's existing implementation monitoring mechanisms using 17 indicators: the status of the decision, whether binding of 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.

The assessments in relation to the indicators are based on our analysis of the activities of the three AHRBs. We do not claim that high values on these indicators will result in effective implementation monitoring in every case. However, we believe that a high aggregate score on the checklist will, all other things being equal, likely be indicative of a more effective monitoring regime. Out of a total of 34 points resulting from the 17 indicators with respect to which the three AHRBs have been assessed, the African Court scores 9 points (representing 27 percent of the total), the African Children's Committee scores 11 points (32 percent) and the African Commission scores 13 points (representing 38 percent). With all three AHRBs thus achieving less than half of the possible total score, it is fair to conclude that there is significant room for improvement with respect both to the number and the quality of their second-order compliance monitoring mechanisms and instruments. While not all mechanisms would necessarily result in improved compliance across the board, their absence or insufficient use will for certain not have any positive effects on implementation and compliance.

**Table 1: Implementation Monitoring Indicators<sup>111</sup>**

| #  | Indicator  | African Court | African Commission | African Children's Committee |
|----|--|---------------|--------------------|------------------------------|
| 1  | Legal status of the decision <sup>a</sup>  | 2             | 1                  | 1                            |
| 2  | Issuance of detailed periodic compliance reports <sup>b</sup>  | 1             | 0                  | 0                            |
| 3  | Dissemination of compliance report <sup>c</sup>  | 1             | 0                  | 0                            |
| 4  | Up-to-date database on the status of implementation <sup>d</sup>   | 0             | 0                  | 0                            |
| 5  | Availability of implementation database on electronic platforms <sup>e</sup>                                     | 0             | 0                  | 0                            |
| 6  | Active engagement with CSOs in implementation monitoring <sup>f</sup>  | 1             | 2                  | 2                            |
| 7  | Existence of a dedicated implementation unit within the secretariat of the AHRB <sup>g</sup>                     | 0             | 0                  | 0                            |
| 8  | Special rapporteur for follow-up of decisions <sup>h</sup>   | 0             | 1                  | 1                            |
| 9  | Regular use of implementation hearings <sup>i</sup>  | 0             | 1                  | 1                            |
| 10 | Use of innovative implementation hearing formats such as joint hearings and hearings <i>in situ</i> <sup>j</sup> | 0             | 0                  | 0                            |
| 11 | Regular use of resolutions for monitoring <sup>k</sup>   | 0             | 1                  | 0                            |
| 12 | Regular use of press releases and other media tools <sup>l</sup>   | 1             | 1                  | 1                            |
| 13 | Use of state reporting process for monitoring <sup>m</sup>   | 0             | 1                  | 1                            |
| 14 | Promotional visits to states that involve monitoring of decisions <sup>n</sup>                                   | 1             | 1                  | 1                            |

111 Note on scores: AHRBs that meet the requirements of an indicator receive 2 points; those that meet the requirements only partly receive 1 point and those that do not do so at all receive zero points.

|    |  |             |              |              |
|----|--|-------------|--------------|--------------|
| 15 | Judicial referrals or appeals to other judicial bodies <sup>o</sup>                      | 0           | 1            | 0            |
| 16 | Political referrals <sup>p</sup>   | 2           | 2            | 2            |
| 17 | Evidence of goal-related impact of monitoring activities on state behaviour <sup>q</sup> | 0           | 1            | 1            |
|    | <b>TOTAL</b>   | <b>9/34</b> | <b>13/34</b> | <b>11/34</b> |

- a. Legally binding = 2; recommendatory = 1; no clarity on status / no obligation on States to implement = 0.
- b. Detailed report = 2; pseudo-report with scanty information = 1; no periodic compliance report = 0.
- c. Dissemination of reports online, in the media and through other channels = 2; poor dissemination or reports are available in limited channels = 1; no dissemination strategy implemented = 0.
- d. Up to date database = 2; scanty and outdated database = 1; no database on implementation = 0.
- e. Database fully available online = 2; database partly available online = 1; no online database = 0.
- f. Active engagement with CSOs = 2; passive or limited engagement = 1; no engagement = 0.
- g. Implementation unit active and highly developed = 2; unit exists but not active = 1; no dedicated unit = 0.
- h. Dedicated special mechanism / rapporteur exists = 2; mandate exists under a broader mechanism or members of the AHRB are assigned to follow-up cases on *ad hoc* basis = 1; no mandate established = 0.
- i. Used most times or frequently = 2; used infrequently or rarely = 1; never used = 0.
- j. As above.
- k. As above.
- l. As above.
- m. As above.
- n. As above.
- o. Judicial referral exists and is used often = 2; judicial referral exists but is rarely used = 1; not available = 0.
- p. Political referral exists and is used often = 2; political referral exists but is rarely used = 1; not available = 0.
- q. Direct evidence exists = 2; anecdotal evidence exists = 1; no clear evidence of impact = 0.

## 5 POLITICAL MONITORING

The involvement of AU policy organs is crucial for the effective monitoring of AHRB decisions. Policy organs provide political support and the much-needed interface with states. This relationship is recognised in the treaties that set up each of the AHRBs as well as their respective Rules of Procedure. Rules 125(8) and (9) of the Rules of Procedure of the African Commission 2020 require the Commission to refer cases of non-compliance by states to competent AU organs. The Commission may also request the AU Assembly to ‘take necessary

measures to implement its decisions'.<sup>112</sup> Similarly, the African Court shall report all cases of non-compliance with its judgments to the AU Assembly.<sup>113</sup> The African Children's Committee submits annual activity reports to the AU Assembly and may request 'specific actions on the part of the Assembly in respect of implementation of any of its decisions'.<sup>114</sup> These provisions underscore the intended critical role of the competent organs of the AU in monitoring the execution of the decisions and judgments of AHRBs.

The AU Assembly, for example, monitors the implementation of the decisions of AU organs and ensures compliance by states. It may impose sanctions on states that defy the decisions of AU organs. Since 2003, the Assembly has delegated the task of considering AHRB activity reports to the Executive Council, which meets more often and has more time for debate and deliberation. Each of the three AHRBs submits its annual report to the Executive Council for consideration on behalf of the AU Assembly. The Executive Council has used its decisions on the activity reports of the African Commission to urge states to comply with the decisions of the Commission.<sup>115</sup> Some members of the Executive Council, however, have also used the opportunity of greater engagement and scrutiny to mount political barricades against decisions and resolutions of the African Commissions that they consider offensive.<sup>116</sup>

Under article 29 of the African Court Protocol, the Court must notify the Executive Council of any judgment in order for the Council to monitor its execution on behalf of the AU Assembly. The Court's Protocol and Rules of Procedure clearly vest the responsibility for monitoring the execution of the Court's judgments in the Executive Council on behalf of the AU Assembly.<sup>117</sup> So far, the Council merely discharges this function on the basis of the report submitted to it by the Court. There is no indication that the Executive Council takes any further steps subsequent to the reports by the Court.<sup>118</sup> Accordingly, a monitoring process that ought to be political in nature has remained mostly judicial and administrative.

Activity reports of the African Children's Committee suffer a similar fate before the Executive Council and are rarely discussed or debated. The Executive Council has no internal mechanism for monitoring the execution of the decisions of AHRBs and does not take any enforcement action against states based on the non-compliance reports submitted to it by the AHRBs. It has also been suggested that AHRBs should

112 Rules of Procedure of the African Commission 2010, Rule 125(1).

113 Rules of Procedure of the African Court 2020, Rule 81(4).

114 African Children's Committee Rules of Procedure, Rule 82(4).

115 M Killander 'Confidentiality versus publicity: interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 575.

116 Ayeni (n 4) 285-287.

117 African Court Rules of Procedure 2020, Rule 81(4).

118 Coalition for an Effective African Court on Human and Peoples' Rights, *Booklet on the Implementation of the Decisions of the African Court on Human and Peoples' Rights* (2021) 7.

interface more with the Permanent Representatives Committee (PRC) which does the actual work on behalf of the Executive Council.<sup>119</sup> The PRC meets at least once a month and is empowered by its Rules of Procedure to 'monitor the implementation of policies, decisions and agreements adopted by the Executive Council'. Many human rights-related decisions taken by the Executive Council or the AU Assembly are usually first debated by the PRC.

In order to be effective, political monitoring of AHRB decisions requires the existence of one or more political bodies with a clear mandate for monitoring decisions and judgments; regular placement of the decisions and judgments of AHRBs on the agenda of the relevant AU policy organs; systematic monitoring and follow-up of the directives of the political body; evidence of direct actions taken against recalcitrant states following a review by the political body; the existence of a legal framework for engaging CSOs in the process of political monitoring; and active engagement of the AHRB whose reports, decisions or judgments are being reviewed, monitored or followed up. Stakeholders have also advocated that the Executive Council of the AU should establish a sub-committee in parallel with the PRC Sub-Committee on Democracy, Governance and Human Rights with sufficient time and resources at their disposal to adequately monitor the different AU organs' programs, activities and decisions in the field of democracy, governance and human rights.<sup>120</sup>

## 6 MONITORING BY CIVIL SOCIETY

CSOs play an important role in many monitoring and dispute settlement arrangements in the human rights domain and elsewhere.<sup>121</sup> In the African context, however, CSOs appear to have often been perceived solely as interested parties in the litigation process, with monitoring functions being reserved for judicial and political actors. AHRBs are more constrained in the roles they can play in implementation monitoring as they need to maintain their neutrality and independence. Political organs of the AU, too, are practically constrained by peer pressure and diplomatic considerations. CSOs are less restricted by such considerations and could thus assume more active roles in implementation monitoring. While these roles have yet

119 Viljoen (n 12) 181.

120 International Conference on the Implementation and Impact of the decisions of the African Court on Human and Peoples' Court: Challenges and Prospects, held from 1 to 3 November 2021, Dar es Salaam, United Republic of Tanzania, available at <https://www.african-court.org/wpafc/the-dar-es-salaam-communique-conference-on-the-implementation-and-impact-of-decisions-of-the-african-court-on-human-and-peoples-rights/> (accessed 3 November 2022).

121 Council of Europe, Working with the Council of Europe: A Practical Guide for Civil Society (2022) available at <https://rm.coe.int/work-with-coe-guide-english-2022/1680a66592> (accessed 19 October 2022).

to be more fully developed,<sup>122</sup> greater involvement of civil society would doubtlessly strengthen existing monitoring mechanisms.

An empirical study of 44 decisions of the African Commission between 1987 and 2003 found that one of the most statistically significant factors predictive of state compliance in a case is the involvement of CSOs in the case from submission of the communication up to the follow-up stage.<sup>123</sup> A significant number of litigants may be disadvantaged in the implementation process without the assistance of CSOs. They ‘mobilise shame’ against states that fail to implement the decisions of AHRBs.<sup>124</sup> For example, the Coalition for an Effective African Court provides information on the implementation of judgments of the African Court.<sup>125</sup> Recently, in December 2021, the Pan African Lawyers Union (PALU) and the West African Bar Association (WABA) held a two-day symposium in Abuja on the role of the legal profession, NHRIs and CSOs in the implementation of the decisions of AHRBs. Participants at the events emphasised the role of CSOs and NHRIs in providing publicity for the decisions of AHRBs so as to facilitate implementation.<sup>126</sup>

The African Commission has a robust relationship and engagement with CSOs.<sup>127</sup> It grants observer status to CSOs that work in the field of human rights, which entitles them to address the Commission during its public sessions, and they may request that a particular issue of public interest be included in the Commission’s agenda.<sup>128</sup> Every two years, CSOs with observer status must submit an activity report to the Commission.<sup>129</sup> This, too, is an opportunity for CSOs to highlight the status of the implementation of specific decisions of the Commission. Resolutions by the Forum for the Participation of Non-Governmental Organisations (NGOs) in the Ordinary Sessions of the African Commission (NGO Forum) may be presented formally to the Commission for consideration and adoption.

122 Some recommendations with respect to enhancing the role of civil society in the African Commission’s work have been made in International Justice Resource Center, *Civil Society Access to International Oversight Bodies: Inter-American Commission on Human Rights* (2018) available at <https://ijrcenter.org/wp-content/uploads/2018/10/Civil-Society-Access-ACHPR-2018.pdf> (accessed 19 October 2022).

123 Viljoen & Louw (n 29).

124 Viljoen (n 12) 384.

125 Coalition for an Effective African Court on Human and Peoples’ Rights (n 135) 1.

126 F Olorokor ‘Obey sub-regional court decisions, tribunals, lawyers tell African govts’ *Punch Newspapers*, 15 December 2021, available at <https://punchng.com/obey-sub-regional-court-decisions-tribunals-lawyers-tell-african-govts/> (accessed 7 November 2022).

127 Sandoval, Leach & Murray (n 5) 94.

128 Activity Report of the African Commission (2020) para 40.

129 Resolution 361 on the Criteria for the Granting of and for Maintaining Observer Status with the African Commission on Human and Peoples’ Rights.

The revised Rules of Procedure of the African Commission refer to the power of the Commission and its rapporteurs not only to request information on the implementation of its decisions from ‘interested parties’ but also to take such information into account.<sup>130</sup> The provision empowers the Commission to obtain information from diverse sources, including civil society and non-state actors. At its 27th Extraordinary Session held in Banjul in March 2020, the African Commission adopted Resolution 436 on the need to develop guidelines for shadow reporting. The Resolution consolidates the position of CSOs as critical compliance and monitoring partners.

The African Children’s Committee has a strong relationship with CSOs as well, but its engagement with CSOs concerning implementation monitoring has been limited to CSOs that were authors of particular communications.<sup>131</sup> Thus, the Committee does not benefit from the input of other CSOs that could enrich its follow-up process and make it more effective. The Forum on the implementation of the African Children’s Charter which brings together member states, NHRIs, CSOs and other stakeholders in order to improve the implementation of the African Children’s Charter and reporting to the African Children’s Committee has yet to place the implementation of the decisions of the Committee on its agenda.<sup>132</sup>

Even though CSOs play a key role in facilitating implementation monitoring, their role is often overshadowed by the focus on judicial and political actors. There is no question that CSOs could do more; for example, they have not been consistent in using their monitoring toolkits and are yet to develop independent tools for monitoring AHRB decisions. It would appear that CSOs often cherry-pick cases to monitor and follow up. After landmark judgments are delivered and celebrated, the confetti is quickly swept away and CSOs move on to other issues.

## 7 CONCLUSION

This article has discussed the mechanisms for monitoring the implementation of the decisions of the AHRBs. It reviewed the legal and institutional frameworks for monitoring implementation, especially the provisions in the founding treaties and the AHRBs’ Rules of Procedure. It then reviewed select measures, such as implementation hearings, resolutions, judicial and political referrals and promotional visits, taken in order to follow up on and monitor the extent of the implementation of the various decisions of AHRBs.

A key finding emerging from the analysis is that the African Commission and the African Children’s Committee, being quasi-judicial bodies, are less constrained than the African Court in monitoring and following-up on their decisions. In addition to their primary protective mandate, the Commission and the Committee have

130 Rules of Procedure of the African Commission 2020, Rule 125(6).

131 Mbuton (n 72) 36.

132 As above, 34-35.

expansive promotional mandates which provide immense opportunity for continuous engagement and dialogue with states through state missions and country visits as well as the review of periodic state reports. These unique opportunities for triggering a transnational legal process through interaction, interpretation and internalisation<sup>133</sup> are not available in the same measure to the African Court. In the spirit of positive complementarity, both the Commission and the African Children's Committee should make it a practice to ask about the implementation of judgments of the African Court while considering relevant state parties' reports. Obligations arising from judgments of the African Court are a part of states' obligations under the African Charter. The African Commission, perhaps due to its longer lifespan, has the most sophisticated implementation monitoring toolkit of the three AHRBs and is arguably the most effective in terms of monitoring and facilitating the implementation of its decisions, having held implementation hearings, though few, and using the state reporting process quite extensively to follow up on its decisions. The African Court, however, has been more consistent and effective at preparing, updating and disseminating its compliance reports, an area in which the African Commission and the African Children's Committee have performed quite poorly.

That said, the driving force for most implementation monitoring activities of AHRBs have been CSOs, yet little attention has been given to them so far in regard to implementation monitoring. Several initiatives for monitoring the implementation of the decisions of the African Commission and the African Children's Committee have been at the behest of CSOs; AHRBs and AU policy organs have yet to take the driver's seat. Since there are limited prospects for political monitoring due to a lack of political will by members of the AU Executive Council, implementation monitoring at least in the immediate future will depend on civil society actors and the AHRBs themselves. We remain skeptical as to the prospects of effective political monitoring in Africa and are concerned about the capacity of the African Court, a judicial institution that is constrained by institutional design, to monitor the implementation of its decisions to the same extent and using a comparable range of monitoring tools as the African Commission and the African Children's Committee. Post-judgment, the African Court may need to focus primarily on developing dialogical processes with critical compliance constituencies in respondent states rather than hoping that AU political organs will enforce its decisions through sanctions and other measures.

While acknowledging the enormous challenges confronting AHRBs, among the biggest impediments to implementation monitoring in Africa is a lack of consistency and clarity in the procedures and practices of the AHRBs. Each of the three AHRBs should establish a unit within its respective secretariat dedicated exclusively to the supervision of the execution of its judgments and decisions. In addition, each AHRB should appoint a special rapporteur

133 HH Koh 'Transnational legal process' (1996) 75 *Nebraska Law Review* 181.



for follow-up, tasked among other things with the responsibility of corresponding with parties and preparing detailed implementation reports. AHRBs should also adopt guidelines for the conduct of implementation hearings, including for joint hearings and hearings *in situ*. Finally, continued active engagement and dialogue with the European and the Inter-American human rights systems – as exemplified by the recent visit of an African Court delegation to Strasbourg<sup>134</sup> – will serve not only to enrich the institutions' respective jurisprudence, but also provide useful insights into best practices in the area of monitoring (and improving) the implementation of human rights decisions.

134 African Court press release 'African and European Human Rights Courts Meet in Strasbourg' (4 October 2022) available at <https://www.african-court.org/wpafc/african-and-european-human-rights-courts-meet-in-strasbourg/> (accessed 19 October 2022).