Developing quasi-criminal review in Africa: lessons from the Inter-American Court of Human Rights

*Ropafadzo Maphosa**
https://orcid.org/0000-0002-5375-555X

ABSTRACT: This article aims to address the pervasive implementation crisis in global human rights systems through an analysis of the measures regional courts take to ensure state compliance with their rulings. Utilising a comparative methodology, this study examines the post-judgment phase efforts of the Inter-American Court of Human Rights (Inter-American Court) and the African Court on Human and Peoples' Rights (African Court) to enforce compliance through innovative remedies. The article begins by exploring the concept of compliance within the context of regional human rights systems, drawing on the effective adjudication framework developed by Helfer and Slaughter and Roach and Budlender's typology of governmental responses to non-compliance. The article then examines the development and procedural elements of quasi-criminal jurisdiction by the Inter-American Court, which includes orders for states to investigate, prosecute, and penalise perpetrators of gross human rights violations, followed by court-monitored compliance. Comparative analysis reveals that both the Inter-American Court and African Court have adopted similar quasi-criminal measures, suggesting a trend towards more robust enforcement mechanisms in response to persistent non-compliance. The findings indicate that while declaratory orders are effective for negligent governments, more assertive remedies are necessary for addressing incompetence and obstinacy. This study concludes that while the African Court has adopted most elements of quasi-criminal review, more still needs to be done for this practice to be as successful as it has been in the Inter-American Court. More specifically, the African Court needs to develop its monitoring practices and the Draft Framework for Reporting and Monitoring Execution of Judgments and other Decisions of the African Court represents a step in the direction for this purpose.

TITRE ET RÉSUMÉ EN FRANÇAIS

Renforcer le contrôle quasi-pénal en Afrique : enseignements de la Cour interaméricaine des droits de l'homme

RÉSUMÉ: Cet article analyse les réponses des juridictions régionales des droits de l'homme face à la crise persistante de mise en œuvre de leurs décisions par les États, en se concentrant sur les mécanismes développés pour garantir leur exécution. À travers une approche comparative, il examine les pratiques de la Cour interaméricaine des droits de l'homme (Cour interaméricaine) et de la Cour africaine des droits de l'homme et des peuples (Cour africaine), particulièrement dans le cadre des mesures quasi-pénales prises après le prononcé des arrêts. L'étude débute par une exploration du concept de conformité dans les systèmes régionaux de protection des droits de l'homme, en mobilisant le cadre d'adjudication efficace proposé par Helfer et Slaughter, ainsi que la typologie des réponses gouvernementales à la non-conformité établie par Roach et Budlender. Elle s'attarde ensuite sur l'évolution de la compétence quasi-pénale de la Cour interaméricaine, qui englobe des injonctions

* LLB, LLM (Unersity of Johannesburg) Researcher, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a centre of the University of Johannesburg; ropafadzom@saifac.org.za

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adressées aux États en vue d'enquêter, de poursuivre et de sanctionner les auteurs de violations graves des droits humains, sous le contrôle direct de la Cour. L'analyse comparative met en lumière les similitudes entre les mesures quasi-pénales adoptées par la Cour interaméricaine et celles de la Cour africaine, signalant une tendance générale vers des mécanismes de mise en œuvre plus robustes pour faire face au non-respect persistant. Les résultats indiquent que si des ordonnances déclaratives suffisent pour traiter les cas de négligence étatique, des mesures plus contraignantes sont indispensables pour lutter contre l'obstination ou l'incompétence des gouvernements. L'étude conclut que, bien que la Cour africaine ait incorporé plusieurs éléments du contrôle quasi-pénal, des efforts supplémentaires sont nécessaires pour atteindre un niveau d'efficacité comparable à celui de la Cour interaméricaine. En particulier, la Cour africaine doit renforcer ses pratiques de suivi et son projet de cadre pour l'établissement de rapports et le contrôle de l'exécution des arrêts représente une avancée significative dans cette direction.

KEY WORDS: non-compliance; Inter-American Court of Human Rights; African Court; quasi-criminal review; Africa

CONTENT:

1 INTRODUCTION

A growing body of scholarship has identified an 'implementation crisis' affecting human rights systems across the globe.[1] Researchers provide detailed accounts on the different manifestations of this crisis in response to rulings delivered in Europe, America, and Africa.[2] These courts are not blind to the ongoing challenge and, as a result, regional courts and commissions are increasingly focused on the post-judgment phase in which they scrutinise how effectively states implement their decisions and probe the reasons for non-implementation.

The persistent non-compliance by states raises fundamental concerns. First, the legitimacy of any court, whether domestic, regional, or international, hinges on the effectiveness of its orders. According to Helfer and Slaughter, effective adjudication involves not only a court's authority to compel a response from defendants, but also its ability to enforce compliance with judgments.[3] In short, a court is not effective if it fails to enforce its judgments.

1 VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 3; 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; AV Huneeus 'Compliance with judgments and decisions' in CP Romano, KJ Alter & Y Shany (eds) *Oxford handbook of international adjudication* (2014) 438-59.

2 As above.

3 LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 283.

Confronted with this ongoing challenge, regional courts have intensified efforts to fortify mechanisms aimed at redressing human rights violations promptly and effectively. Scholars have noted significant amendments to the Rules of Procedure by the African Commission, the adoption of monitoring and reporting processes by the African Court on Human and Peoples' Rights (African Court), judicial monitoring initiatives at the Inter-American Court of Human Rights (Inter-American Court), and the establishment of a compliance follow-up unit within this Court.[4]

The adoption of these rather intensive, and, arguably invasive, measures can be explained through the framework developed by Roach and Budlender, which justifies escalating responses to non-compliance where governments exhibit inattentiveness, incompetence, or intransigence.[5] While this typology was developed with reference to compliance with domestic judgments, this framework proves pertinent within the realm of regional human rights systems. Contrary to the managerial theory posited by Chayes and Chayes, which suggests that states have a general propensity to comply with international law,[6] regional contexts underscore the relevance of Roach and Budlender's typology. According to these authors, while declaratory orders may suffice for negligent governments, more robust remedies such as mandatory relief and mandated government reporting to courts become necessary when governments display incompetence or obstinacy in implementing judgments.[7]

This typology helps explain innovative remedies such as the practice of quasi-criminal review which was crafted by the Inter-American Court. Quasi-criminal review allows regional bodies to make orders instructing states to initiate investigations, undertake prosecutions, and impose penalties upon those responsible for gross human rights violations.[8] Thereafter, the courts can monitor compliance through various follow-up mechanisms.[9] A similar trend is observable in Africa, suggesting that quasi-criminal jurisdiction of supranational courts emerges as a remedial response to states' non-compliance with court rulings.

This article provides an in-depth analysis of this innovative remedy, juxtaposing its application by the Inter-American Court and the African Court. The first section explores the concept of quasi-criminal review and how it facilitates compliance with regional court judgments. This is followed by an examination of the development of quasi-criminal

4 R Murray 'Addressing the implementation crisis: securing reparation and righting wrongs' (2020) 12 *Journal of Human Rights Practice* 2.

5 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?' (2005) 122 *South African Law Journal* 325.

6 A Chayes & AH Chayes *The new sovereignty: compliance with international regulatory agreements* (1995) 3.

7 Roach & Budlender (n 5) 327.

8 AV Huneeus 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts' (2013) 107 *American Journal of International Law* 2.

9 As above.

jurisdiction by the Inter-American Court, with a focus on specific procedural elements. Subsequently, the article investigates whether recent practices within the African human rights system can be classified as quasi-criminal review, with reference to the African Court's jurisprudence.

2 THE ROLE OF QUASI-CRIMINAL REVIEW IN ENSURING COMPLIANCE

The handing down of rulings by supranational bodies can significantly impact human rights practices by drawing attention to alleged human rights violations, honouring victims, and advancing human rights jurisprudence.[10] However, the most tangible effect of these rulings is seen in states' compliance. By adhering to court decisions, states offer remedies to individual victims and implement structural and systemic changes to prevent future violations. Full compliance with these rulings exemplifies international human rights law at its most effective.[11]

What constitutes compliance varies on a case-by-case basis. Although there is no universal definition for 'compliance', and most international law instruments do not provide a concise definition, the UN Charter makes reference to 'non-compliance' which is defined as a state party's failure to perform the obligations assigned to it through the International Court of Justice's (ICJ) orders.[12] Leading voices in international law scholarship have offered more or less the same definition for the term 'compliance'. Raustiala and Slaughter define compliance as 'a state of conformity or identity between an actor's behaviour and a specified rule'.[13] Similarly, Huneeus views compliance as a relational concept referring to a correspondence between a ruling's demands and the behaviour of the parties subject to the ruling.[14] Andreas von Staden views compliance as the conformity of behaviour with what is required or prohibited based on an obligation rooted in a norm, a decision or another normative pronouncement.[15]

It is easy to confuse compliance with 'implementation' and sometimes, the terms are used synonymously. However, implementation refers to the process of taking individual or collective measures – such as legislation, judicial decisions, administrative actions, executive decrees, or other steps – to enforce an adverse

10 C Hillebrecht *Domestic politics and international human rights tribunals* (2013) 11.

11 As above.

12 Art 94(2), United Nations Charter.

13 K Raustiala and AM Slaughter 'International law, international relations and compliance' in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of international relations* (2002) 539.

14 AV Huneeus 'Compliance with judgments and decisions' in Romano, Alter & Shany (n 1) 443.

15 A von Staden 'Implementation and compliance' in R Murray & D Long (eds) *Research handbook on implementation of human rights in practice* (2022) 22.

decision or judgment.[16] Thus, implementing the decisions of courts or tribunals typically involves a blend of actions.

Navarro argues that more focus should be placed on implementation rather than compliance as the latter simply indicates that the state's laws and practices align with the requirements of a judgment, while implementation involves domestic actors recognising, incorporating, and taking ownership of the judgment.[17] In Navarro's view, compliance does not adequately capture all the aspects related to a judgment's effectiveness, such as delayed or partial compliance as well as any innovative measures adopted by courts and their reasons for doing so.[18]

In my view, it would be prudent not to create a hierarchy between implementation and compliance for two reasons. On the one hand, as von Staden argues, implementation is not necessarily an absolute condition for compliance, as compliance may occur without the implementation of any new measures.[19] On the other hand, implementation can be viewed as a process entailing a series of steps taken to achieve an outcome (compliance). Monitoring bodies examine whether the measures implemented constitute partial compliance, full compliance or non-compliance.[20] The distinction ultimately lies on the degree of compliance by a state: partial compliance refers to a situation where a state complies with some but not all of a court's orders, if a state complies with all of the orders then that qualifies as full compliance, while non-compliance refers to cases where a state does not comply with any of the court's orders.

It is argued that a court's authority to compel litigants to adhere to its judgments partly derives from its capacity to leverage the state's coercive power.[21] For international courts and tribunals, leveraging state power to directly enforce compliance is challenging because their jurisdiction is limited to determining whether a state is internationally responsible for certain violations.[22] As a result, they can only implement their decisions through member states. In contrast, supranational bodies, such as regional human rights courts, have the authority to issue decisions that are directly binding on member states, as well as on public and private enterprises and individuals within those states.[23]

16 Von Staden (n 15) 18.

17 GCB Navarro 'Effectiveness of international courts: the impact of the Inter-American human rights system' in A von Bogdandy and others (eds) *The Impact of the Inter-American human rights system: transformations on the ground* (2024) 140.

18 As above.

19 Von Staden (n 15) 22.

20 RC Liwanga 'From commitment to compliance: enforceability of remedial orders of African human rights bodies' (2015) 41 *Brooklyn Journal of International Law* 99, 133.

21 Helfer & Slaughter (n 3) 284.

22 Huneeus (n 8) 2.

23 Helfer & Slaughter (n 3) 288.

Since supranationalism recognises that states are composed of governments interacting with a wide array of non-state entities, corporations, individuals and organizations, there is a direct connection between supranational institutions and private parties which allows these tribunals to form direct or indirect relationships with various branches of domestic governments.[24] Through these relationships, a supranational tribunal can leverage the power of domestic governments to enforce its rulings, similar to how domestic court orders are enforced. Hillebrecht argues that state compliance with international human rights tribunals' rulings is fundamentally a domestic affair.[25] Even human rights tribunals with extensive oversight and enforcement capacities rely entirely on state actors and domestic political forces for compliance.

In handing down a judgment, the government of the state in question, usually the executive, is addressed. Therefore, the executive is the branch that is ultimately responsible for compliance.[26] Once a ruling has been issued, the executive typically delegates the tasks necessary for compliance to various state entities.[27] Using Niger as an illustration, the *Koraou* judgment issued by the ECOWAS Community Court of Justice (ECCJ) provides a clear example of executive involvement in the implementation of a regional court decision. Despite the fact that Niger had criminalised slavery in its penal code before the *Koraou* case, an estimated 43,000 people were still believed to be enslaved in Niger as of 2010.[28]

In response to the ECCJ's finding that the Government of Niger failed to prevent violations committed by third parties, the Ministry of Justice issued a circular instructing judges to handle cases – particularly those related to slavery – with greater diligence.[29] It has been argued that this approach alone was insufficient. A more comprehensive strategy was required, involving policy measures to ensure coordinated efforts across various state institutions in the enforcement of anti-slavery provisions.[30]

In the absence of full compliance with its judgments, the effectiveness of a supranational tribunal is questionable. This is because the success of an institution of this nature is based on its ability to ensure compliance with its judgments by persuading domestic government institutions, both directly and through pressure from private litigants, to use their authority in its favour.[31]

24 As above.

25 Hillebrecht (n 10) 3.

26 Hillebrecht (n 10) 22.

27 E Asaala 'Assessing the mechanisms and framework of implementation of decisions of the African Court on Human and Peoples' Rights fifteen years later' (2021) *De Jure Law Journal* 449.

28 HS Adjolohoun 'The ECOWAS Court as a human rights promoter – assessing five years' impact of the Koraou slavery judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 352.

29 As above.

30 Adjolohoun (n 28) 353.

31 Helfer & Slaughter (n 3) 290.

Non-compliance fuels remedial innovation. Taylor explains that where positive action is required to implement court decisions, non-compliance erodes respect for the rule of law and constitutes a systemic threat to human rights.[32] Furthermore, non-compliance weakens the legitimacy of the supranational body in question. To avoid this, court orders have become more precise and prescriptive, eventually leading to the implementation of novel remedial methods to achieve full compliance.[33]

Supranational bodies have started to realise the extent to which other government institutions can play a role in integrating international law, including rulings from international human rights tribunals, into domestic jurisprudence through investigations, litigation, and the establishment of legal precedents. For instance, an independent judiciary capable of administering reparations, conducting investigations, and issuing rulings is arguably the most valuable asset for ensuring compliance with international human rights law.

Bearing in mind that judiciaries can expedite the compliance process by offering the necessary legal channels and expertise to interpret and implement their rulings,[34] human rights courts are increasingly relying on quasi-criminal review.[35] This practice enables regional courts to address challenges in assessing state compliance. By retaining jurisdiction after issuing a judgment, the courts can identify the measures states have implemented regarding specific proclamations. This is facilitated by the courts' ability to request follow-up information and reports from various actors, including civil society. Additionally, as the required scope and depth of compliance may change over time,[36] quasi-criminal review allows the courts to maintain an ongoing dialogue with the involved parties, thereby ensuring continuous assessment and adaptation.

3 COMPLIANCE AT THE INTER-AMERICAN COURT

The Inter-American Court blazed a new trail with its innovative response to persistent non-compliance by states. To date, it has overseen domestic prosecutions in more than fifty instances. In 1979, the American Convention on Human Rights came into force,[37] and through it, the Inter-American Court, which has the jurisdiction to hear all cases concerning the interpretation and application of the provisions

32 H Taylor 'Forcing the Court's remedial hand: non-compliance as a catalyst for remedial innovation' (2019) 9 *Constitutional Court Review* 250.

33 As above.

34 Hillebrecht (n 10) 22.

35 Huneeus (n 8) 5.

36 Von Staden (n 15) 27.

37 Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969.

of this Convention was created.[38] The Court has advisory as well as contentious jurisdiction. However, individual petitions must first go via the Inter-American Commission before being submitted to the Court.[39]

In addition, the Inter-American Commission can refer cases to the Court if 'the State has not complied with the recommendations of the report approved in accordance with article 50 of the American Convention.'[40] The Commission regularly refers cases to the Court, even where it has given a state various opportunities to implement its recommendations.

At the time that the Court was established, the American region was plagued by a culture of impunity, which was described in the *White Van* case as a 'the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention'.[41] It is this culture of impunity, the dynamics of human rights violations in America, and the role of the state in the commission of such violations, that has shaped the remedial practices of the Inter-American Court.[42]

Tasked with overseeing a body of authoritarian states, the Inter-American Court has taken a more activist stand and forged closer relations with civil society groups and the victims. Around 1996, the Inter-American Court started issuing orders for states to prosecute individuals for specific human rights violations.[43] Subsequently, it intensified its oversight of these prosecutions to ensure they met human rights standards. The Court also initiated ongoing dialogues involving the state, victims, and the Commission to address obstacles encountered in prosecuting particular cases.[44]

The Court has developed its quasi-criminal jurisdiction in such a way that it often retains supervisory jurisdiction over its orders. Since the American Convention does not contain explicit rules instructing the Inter-American Court on how to monitor implementation, the Court has taken advantage of this legal lacuna to set up various procedures such as ongoing communication with victims, states and the Commission.[45] Jurisdiction over a case is retained until the Court is

38 Art 62(3) of the American Convention on Human Rights, 1969.

39 Art 46 of the American Convention states that 'admission by the Commission of a petition or communication lodged in accordance with arts 44 or 45 shall be a necessary requisite for its examination by the Court, except in cases where the provisions of Article 61 are applicable'. This means before an individual or their representatives can bring a case before the Inter-American Court of Human Rights, they must first submit a petition to the Inter-American Commission on Human Rights, and the Commission must admit the petition for it to be examined by the Court.

40 Art 44 of the American Convention.

41 *White Van (Paniagua Morales et. al.) Case (Guatemala)* (1998), Merits, Inter-Am. Ct. H.R. (Ser. C) No 37, at para 173.

42 Huneeus (n 8) 11.

43 V*elásquez Rodríguez* C=case, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988.

44 Huneeus (n 8) 12.

45 Sandoval, Leach & Murray (n 1) 74.

satisfied that all its various demands have been met. Sometimes the Court's judgments highlight the steps that must be taken to comply with its orders. Other tools used by the Court include implementation hearings (both private and public), in-country visits and provisional measures.[46]

The application of the Inter-American Court's quasi-criminal review first became evident in the landmark *Velásquez-Rodríguez* case.[47] The facts concerned the arrest and unresolved disappearance of a Honduran student activist. The circumstances surrounding the disappearance of the individual in question were not definitively determined. Therefore, it was not clear whether the disappearance was caused directly by state officials or with their implicit consent. However, it was acknowledged that the act occurred within the context of the then-common state practice of enforced disappearances. In a complaint submitted by the Inter-American Commission to the Court, it was argued that the state had violated numerous rights including the right to life, the right to humane treatment (in relation to allegations of torture), and personal liberty.[48] The Court confirmed these violations and asserted that Article 1 of the American Convention places a duty on states parties to

> organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. [...] The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.[49]

In short, the Court translated article 1(1) of the American Convention as an obligation on states to prevent, investigate and punish any violation of the rights in the Convention.[50] In the *Velásquez-Rodríguez* case, the Court required Honduras to punish the offenders to ensure that Manfredo Velásquez could exercise his human rights freely and fully. This approach was confirmed in the *Bámaca Velásquez* case, where the Court held that if a state party fails to punish those responsible for

46 Sandoval, Leach & Murray (n 1) 77.

47 *Velásquez Rodríguez* Case (n 43).

48 *Velásquez Rodríguez* case (n 43) para 2.

49 *Velásquez Rodríguez* case (n 43) para 166.

50 According to the Court (194) 'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can leadto international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'

human rights abuses, it violates its obligation to respect the victim's rights under the Convention.[51]

The Court regards punishment as a form of retrospective protection that is owed in each individual case. It is considered a means to secure the victim's right to life and liberty, and it is not limited to prevention. In the *Velásquez-Rodríguez* case, the Court found a violation of Manfredo Velásquez's rights, not because of the failure to prosecute prior cases and prevent his disappearance, but because of the failure to investigate and punish his abusers.[52] Therefore, the Court considers punishment an essential measure for protecting the rights of individual victims of human rights abuses.

Following the precedent established in the *Velasquez Rodriguez* case, the Inter-American Court has solidified its quasi-criminal jurisdiction in subsequent cases, by expanding its remedial powers beyond monetary compensation and mandating states to initiate investigations and prosecutions for certain violations through a progressive interpretation of the American Convention.[53] In *Vargas Areco v Paraguay*,[54] the case involved the murder of 15-year-old Gerardo Vargas Areco following his arrest for failing to return to his military post. The Court ordered the state to conduct a thorough and effective investigation through civilian authorities, rather than military ones, in order to identify, prosecute, and punish all those responsible for Vargas Areco's death, including perpetrators, instigators, and others involved, with the goal of combating impunity. In *Garibaldi v Brazil*, Resolution Monitoring Compliance, IACtHR (20 February 2012),[55] the case concerned the state's failure to investigate the murder of land rights activists during an extrajudicial eviction of landless workers in 1998. While the Court acknowledged that the state had complied with its 2009 order to provide compensation, it noted that Brazil had not fulfilled its obligation to conduct an investigation or initiate criminal proceedings against those responsible for the violations.

Consequently, the jurisprudence of the Inter-American Court has become the common foundation for promoting and safeguarding human rights in the region.[56]

However, this means the Court is entangled with a particular state for years while extensive investigations are conducted and the Inter-American Court has acknowledged the limited scope of its authority in reviewing domestic criminal proceedings. It recognises that it is the

51 *Bámaca Velásquez v Guatemala*, 2000 Inter-Am. Ct. H.R. (ser. C) No 70, (25 November 2000) para 197.

52 V*elásquez Rodríguez* case (n 43) para 176.

53 Huneeus (n 8) 12.

54 I/A Court H.R., *Case of Vargas-Areco v Paraguay*, Merits, Reparations, and Costs, Judgment of 26 September 2006. Series C No. 155, at paras 111–134.

55 *Garibaldi v Brazil*, Resolution Monitoring Compliance, IACtHR (20 February 2012),

56 SH Carrasco 'The Inter-American Court of Human Rights and the state response to the prosecution of crimes against humanity in the Americas: a critical assessment' LLM Dissertation, University of Ottawa, 2010 13.

responsibility of national courts to ensure that criminal proceedings are conducted in a manner that is consistent with international human rights standards. In the case of *Nogueira de Carvalho et al v Brazil*,[57] the Court emphasised that its role is not to dictate specific methods or procedures for investigating and adjudicating a particular case. Instead, the Court's function is to evaluate whether the actions taken by the state to comply with its obligations under articles 8 and 25 of the American Convention. Therefore, the Court's role is not to replace national jurisdictions, but to ensure that states comply with their international obligations.

To carry out this duty effectively, the Inter-American Court enables dialogue by holding hearings with involved parties.[58] This is imperative for states to be successful in implementing court orders. Dialogue should be understood as a reviewing process employed by human rights bodies to monitor the implementation of their decisions. This process involves the use of mechanisms that encourage parties to search for ways of moving implementation forward, either between themselves or with the direct help of the monitoring body.

Ayeni and Von Staden highlight that human rights courts can achieve better compliance by engaging in dialogic monitoring, such as setting deadlines, holding public hearings with various actors, and issuing follow-up decisions based on what they learn on the ground.[59] The idea is that these practices promote dialogue among public authorities and civil society actors, leading to positive outcomes like improving coordination among disconnected state agencies. The use of dialogic tools is encouraged in the monitoring phase because they allow the Court to learn more details of the prosecution through supervision, and thus become more specific and realistic about what the state must do to satisfy its orders and meet the needs of the victims.[60]

Both the Court and the Commission have the authority to call implementation hearings, however the Court more frequently relies on this mechanism in cases with long delays. Parties to a case may also ask for such a hearing and during these proceedings the Court will entertain submissions, ask relevant questions and make suggestions, often with compliance schedules.[61] For instance, in the *Awas Tingni* case,[62] the Court held a hearing where a work plan was drafted and carried out within six months. This is one of many instances where the Court's creative dialogue resulted in successful implementation.

In cases of non-compliance, the Inter-American Court can either issue recommendations,[63] or refer to the General Assembly of the

57 *Case of Nogueira de Carvalho et al. v. Brazil*, Preliminary Objections and Merits, 2006 Inter-Am. Ct. H.R. (ser. C) No. 161, (28 November 2006) para. 80.

58 Huneeus (n 8) 1.

59 Ayeni & Von Staden (n 1) 6-7.

60 Huneeus (n 8) 12

61 Sandoval, Leach & Murray (n 1) 81.

62 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, 3 April 2009.

63 Art 65 of the American Convention

OAS.[64] The referral measure has thus far been employed where state parties were obstinate, such as in the cases of Venezuela and Trinidad and Tobago.[65] Venezuela's obstinance was brought up in the case of *El Amparo v Venezuela*,[66] which concerned the 1988 killing of 14 fishermen by military and police forces during an operation. The Court emphasised that Venezuela was not fulfilling its duty to inform the Court about the actions taken to comply with the 1995 judgment, highlighting the state's failure to provide sufficient updates on its efforts to address the violations. In these instances, the Court considered it necessary to 'name and shame' intractable states within a political context involving other states.[67] Nevertheless, the OAS General Assembly has not taken additional steps beyond this, perhaps because, as a political body, it does not have the benefit of neutrality that technical bodies such as the European Department for the Execution of Judgments carry.[68]

4 THE AFRICAN HUMAN RIGHTS SYSTEM

The African region's long struggle with human rights can be traced back to its history of oppression and exploitation at the hands of colonialists.[69] Following the demise of the colonial system, there was an increased push to establish a regional human rights regime in Africa. For instance, the architects of the African Charter did so in response to the United Nations General Assembly's call for the establishment of a regional human rights mechanism.[70]

As a relatively young court, the African Court faces implementation challenges similar to those of other supranational bodies. The reluctance of state leaders to abide by the Court's orders can be traced to its establishment which took decades due to insufficient political will.[71] There was insufficient support for a human rights court due to the claim that such a mechanism was 'alien' to African justice, which emphasises restorative over retributive forms of justice.[72] At the time of the Charter's adoption, adversarial and adjudicative procedures were perceived as 'Western' methods and precluded in favour of the

64 As above.

65 Sandoval, Leach & Murray (n 1) 86. It is worth noting that Venezuela presented an instrument of denunciation of the American Convention on Human Rights in 2012 and Trinidad & Tobago presented a denunciation in 1998.

66 *Case of El Amparo v Venezuela*, Resolution Monitoring Compliance, IACtHR (20 February 2012).

67 As above.

68 As above.

69 M Ssenyonjo *The African regional human rights system: 30 years after the African Charter on Human and People's Rights* (2012) 5.

70 G Bekker 'The African Court on Human and Peoples' Rights: safeguarding the interests of African states' (2007) 51 *Journal of African Law* 152.

71 NJ Udombana 'Toward the African Court on Human and Peoples' Rights: better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 75.

72 Ssenyonjo (n 69) 9.

diplomatic and bilateral settlement of disputes.[73] As a result, the architects of the African Charter left out a provision for the creation of a human rights court because they were of the view that state leaders would be reluctant to ratify the Charter if it included a provision for compulsory judicial settlement.[74]

Scholars argue that African states were, in fact, not prepared to accept judicial scrutiny for human rights violations as this would likely interfere in their internal affairs at a time where state sovereignty was highly prioritised.[75] The absence of a human rights court to hand down legally binding judgments made the African system diverge from the approach taken in other regional human rights conventions.

Unlike the European and American Conventions, the African Charter opted for a quasi-judicial instead of judicial enforcement system when it solely established an African Commission on Human and Peoples' Rights (African Commission). The African Commission is tasked with advancing, safeguarding, and interpreting the provisions of the African Charter, albeit with structural and normative inefficiencies.[76]

The Commission is only empowered to make non-binding recommendations to the relevant parties.[77] Hence, some academic commentators have described this body as 'toothless' as far as the protection and promotion of fundamental rights is concerned.[78] Cognisant of this perception, the Commission goes the extra mile in monitoring the implementation of its decisions. Using an established state reporting process, it has been able to follow up with states on individual orders.[79] Thus, other authors recognise that through the exercise of quasi-criminal review, the Commission has been able to establish when a state is responsible for Charter violations that amount to international crimes, and accordingly call for investigations and/or prosecutions by way of communications.[80]

After years of relying on the African Commission, state leaders finally came together in 1998 and adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[81] However, the African Court only became operational in 2006 because states recognised that it would not be viable for the AU to operate two judicial organs, namely

73 Udombana (n 71) 74.

74 MA Plagis & L Riemer 'From context to content of human rights: the drafting history of the African Charter on Human and Peoples' Rights and the enigma of article 7' (2020) 23 *Journal of the History of International Law* 556.

75 As above.

76 See art 45 of the African Charter.

77 Art 53 of the African Charter.

78 R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 151.

79 Murray and others (n 78) 77.

80 Huneeus (n 8) 1-2.

81 The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and People's Rights, 10 June 1998.

the African Court and the African Court of Justice (ACJ) as envisaged by article 5 and 8 of the AU Constitutive Act.[82] According to these provisions, the ACJ was to be the principal judicial organ of the AU with the power to, amongst other things, interpret and apply all of the AU's treaties and other subsidiary instruments, and all agreements entered into by state parties. Although there were suggestions to merge the two judicial institutions, it was decided that the African Court would be in operation until the merger.[83]

4.1 First step of quasi-criminal review: ordering specific measures

To strengthen the enforcement mechanisms within the African Human Rights system, the African Court's decisions are final and not subject to appeal or political confirmation by any AU body.[84] The binding nature of the Court's decisions is confirmed under article 30 of the Protocol, which provides that states parties must guarantee the execution of the Court's judgments within the stipulated time frame. Rule 72(2) of the Court's Rules also makes it clear that court orders are enforceable against state parties.[85]

The Protocol of the Court provides a clear legal basis for the provision of remedies, allowing the Court to issue appropriate orders to remedy violations. According to article 27(1), once the Court finds that a human rights violation has taken place, it has the authority to order suitable remedial actions, including the payment of just compensation or reparations. I argue that this provision can be interpreted to make orders very specific, for example that the Court can request the state to institute a prosecution or an investigation where it has failed to do so. To this end, article 27(1) can be read in line with article 7 of the African Charter which enshrines the right to a fair trial. State parties to the African Charter are required to guarantee, both legally and practically, that victims of human rights violations enshrined in the African Charter have access to and receive redress.[86]

This approach was followed by the Court in 2015, when the African Court ordered an investigation into crimes committed against journalists in *Norbert Zongo and Others v Burkina Faso* (*Zongo*

82 R Murray 'The human rights jurisdiction of the African Court of Justice and Human and Peoples' Rights' in CC Jalloh, KM Clarke & CO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: development and challenges* (2022) 965.

83 As above.

84 See art 1 of the Protocol on the Statute of the African Court of Justice and Human Rights.

85 African Court on Human and Peoples' Rights, *Rules of the Court*, https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf (accessed 25 October 2024).

86 African Commission on Human and Peoples' Rights General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5).

case).[87] The Court declared that, under article 7 of the African Charter, Burkina Faso was obligated to make every necessary effort to search for, prosecute, and bring to trial the perpetrators of crimes such as murder. According to the facts, Norbert Zongo, an investigative journalist in Burkina Faso, his two collaborators and his younger brother were assassinated in 1998.[88] Their burnt bodies were later found in their car. The Burkinabe judicial system launched an investigation into the assassination, which was believed to be connected to Zongo's investigations into political, economic, and social scandals.[89] Although an Independent Commission of Enquiry was established and a suspect charged in 2001, the case was dismissed in July 2006 due to lack of evidence. Subsequent appeals by the Zongo family were unsuccessful, leading to the abandonment of the case.[90]

In this case, the African Court determined that the Burkina Faso government failed to uphold its duty of due diligence because no trial had been held in more than fifteen years due to a lack of evidence, and ordered that the investigation be reopened.[91] Relying on existing African Charter rights, specifically the right to a fair trial, the African Court ordered the re-opening of the investigation and publication of the final judgment.[92] The Burkina Faso government was also ordered to compensate the victims and make amendments to its defamation laws. Burkina Faso was quick to implement these measures: compensation was paid within the six-month time limit; legislation was amended; and the responsible individuals were prosecuted following extensive investigations; finally, the judgment was published in the official gazette and national newspaper.[93]

In *Lohé Issa Konaté v Burkina Faso*,[94] the Court delivered a watershed judgment pertaining to the freedom of the press. Here, the Court overturned the conviction of a journalist who faced harsh criminal penalties levied by Burkina Faso after a conviction on defamation charges. The charges in question emanated from several newspaper articles penned by the applicant, Lohé Issa Konaté, in which he exposed alleged corruption by a state prosecutor.[95] The African Court held that the conviction was a disproportionate interference with the applicant's guaranteed rights to freedom of expression.[96]

87 *Beneficiaries of late Norbert Zongo and others v Burkina Faso*, Admissibility and merits, Application No 013/2011, IHRL 4117 (ACtHPR 2014), 28 March 2014, African Court on Human and Peoples' Rights (*Zongo*).

88 *Beneficiaries of Late Norbert Zongo and others v Burkina Faso* Application 013/2011 Ruling (Preliminary Objections) paras 2-6.

89 *Zongo* (n 87) para 16.

90 As above.

91 *Zongo* (n 87) at paras 152-156.

92 *Zongo* (n 87) para 199.

93 R Murray 'Implementation of the judgments of the African Court on Human and Peoples' Rights' (2019) *The ACtHPR Monitor* https://www.acthprmonitor.org/implementation-of-the-judgments-of-the-african-court-on-human-and-peoples-rights/ (accessed 25 October 2024).

94 *Lohé Issa Konaté v Burkina Faso* App 4/2013.

95 *Konaté* (n 94) para 3.

96 *Konaté* (n 94) paras 163-164.

Furthermore, the Court ordered Burkina Faso to amend its defamation laws in line with international standards by removing criminal penalties for acts of defamation.[97] The state was also ordered to adapt its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality.[98]

In *Alex Thomas v Tanzania* (*Thomas* case),[99] Alex Thomas, a Tanzanian national, claimed that his trial and subsequent conviction for armed robbery were marred by procedural irregularities and human rights violations.[100] The African Court found several violations of Thomas's rights and ordered the Tanzanian government to take all necessary measures to rectify the injustices, precluding 'the reopening of the defence case and retrial of the applicant'.[101] The exception was intended to prevent any further prejudice to the Applicant who had already served a significant portion of his 30-year sentence.[102] Therefore, the Court clarified that one of the necessary measures would be his release from prison.

In *Association pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (APDH* case*)*,[103] an Ivorian human rights organisation brought a case against the government of Côte d'Ivoire, contending that certain candidates, particularly the President of Côte d'Ivoire, were disproportionately represented on the Independent Electoral Commission (IEC). This over-representation came at the expense of independent candidates and those from the opposition, contravening the state's obligation to protect the right of its citizens to equality and equal protection of the law.[104] The African Court ordered Côte d'Ivoire to amend the legal framework governing the IEC to ensure its independence and impartiality and to investigate any electoral irregularities and human rights abuses.[105]

What becomes clear from these cases is that the African Court embraces a creative interpretation of its mandate. Similar to the Inter-American Court, the African Court is increasingly requiring specific actions from states. In several instances, the Court has also mandated prosecutorial action as a remedy. Just as the Inter-American Court bases its orders to investigate and punish on the right to a fair trial enshrined in the American Convention, the African Court is doing the same by invoking article 7 of the African Charter.

97 *Konaté* (n 94) paras 176 (8).
98 As above.
99 *Alex Thomas v Tanzania* App 5/2013.
100 *Thomas* case (n 99) para 4.
101 *Thomas* case (n 99) para 4, order ix.
102 *Alex Thomas v Tanzania* App 1 2017 – Interpretation of Judgment of 20 November 2015 par 42.
103 *Association pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*, App 1/2014.
104 Art 3 of the African Charter.
105 *APDH* (n 103) Order 7 of the Judgment.

4.2 Second step of quasi-criminal review: supervision of court orders

From the above discussion, it is evident that quasi-criminal review is not a novel concept within the African human rights system. Despite making a number of direct orders as highlighted in the preceding paragraphs, the African Court has elected a 'light-touch approach' in monitoring states' compliance with its judgments.[106] It is my view that much more needs to be done when it comes to the subsequent step – supervision of court orders. To illustrate, I refer to the three features of this phase that Huneeus considers integral as applied by the Inter-American Court.[107] First, the Court occasionally engages deeply with the criminal process – it offers detailed opinions and directs the state on specific lines of investigation to pursue, names individuals who should be investigated, and suggests analytical connections between cases.[108] It further imposes both substantive and procedural requirements.[109]

While it is possible for states to apply to the Court for the interpretation of a judgment procedure so that they receive clarification where necessary,[110] the African Court leaves the manner of implementation to the state. This was confirmed in *APDH v Côte d'Ivoire*, where the Respondent state was ordered to submit a report on the implementation of the Court's decision within a reasonable time (not exceeding one year).[111] The Ivorian Parliament passed an executive bill designed to comply with the *APDH* judgment by changing the composition of the IEC.[112] However, on 10 September 2019, the African Court received a new application in *Suy Bi Gohore & 8 Others v Côte d'Ivoire* (*Suy Bi Gohore* case),[113] contending that the new Electoral Commission law did not meet the standards set by the *APDH* judgment and relevant international instruments. In its judgment, the Court made it clear that it was the state's responsibility to determine how to make legislation governing the electoral body compliant with human rights instruments.[114] The Court's duty was simply to interpret the said instruments and determine whether the legislation is in violation of them. In *Suy Bi Gohore*, the Court held that applicants failed to sufficiently demonstrate that impugned law falls short of the relevant human rights standards.[115]

106 Murray (n 93).
107 Huneeus (n 8) 23.
108 Huneeus (n 8) 27.
109 Huneeus (n 8) 23.
110 Art 41(2) of the Protocol to the African Charter on Human and Peoples' Rights.
111 *ADPH* (n 103) Order 8 of the Judgment.
112 Adjolohoun 'A crisis of design and judicial practice? curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 17.
113 *Suy Bi Gohore & Others v Côte d'Ivoire*, AfCHPR (Order, 28 November 2019).
114 *Suy Bi Gohore & Others v Côte d'Ivoire* (n 113) para 261.
115 *Suy Bi Gohore* case (n 113) para 261.

Secondly, the Inter-American Court reviews ongoing prosecutions with the assistance of the parties involved and the Commission who monitors and reports on the state's prosecution efforts.[116] In short, the monitoring process of the Court runs parallel to the domestic prosecution. This is not the case at the African Court where an assessment of compliance generally takes place *after* the state has implemented the relevant measures. The Protocol provides only for the mechanism by which the Court can specify where a state has not complied with its judgment in a report submitted to the AU Assembly in its regular sessions.[117] While the publication of activity reports provides information on the measures employed by states in compliance with its judgment, the reports do not comment on whether such measures are satisfactory.[118] For instance, in response to the orders of the African Court in the *Zondo* and *Konaté* cases, Burkina Faso promptly and fully implemented the specific orders,[119] therefore, the Activity Report indicates full compliance with the Court's orders. On the other hand, in *Alex Thomas v Tanzania*, the state was ordered to inform the Court within 6 months of measures taken. The Tanzanian government has taken steps to review some cases following the Court's judgments, although full compliance and systemic reforms are ongoing issues.[120]

Thirdly, the supervision phase at the Inter-American Court is dialogic, meaning the Court receives and responds to inputs from all parties. The information received about the prosecution through this supervision influences the Court's directives which become more specific regarding the exact measures that must be done for the state to fulfil the Court's order and for the victims to be satisfied.[121]

Rule 81 of the Court's Rules of Procedure, 2020 outlines the process for overseeing compliance with the Court's decisions,[122] and mandates that state parties submit reports, which may be shared with the applicants for their input.[123] This approach enables the Court to take follow-up actions as soon as a judgment is communicated to the state. Furthermore, the Court may gather relevant information from trustworthy sources to evaluate compliance with its decisions. However, the Court has been hesitant to do so in the past due to concerns about the integrity, independence, and impartiality of these sources.[124]

116 Huneeus (n 8) 27.

117 Art 31 of the Protocol on the Statute of the African Court of Justice and Human Rights.

118 Murray (n 93).

119 As above.

120 As above.

121 Huneeus (n 8) 28.

122 African Court on Human and Peoples' Rights, Rules of the Court, available at: https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf (accessed 25 October 2024).

123 Rules Court Rules of Procedure, 2020, Rule 81(1)1.

124 Activity Report of the African Court (2020) (n 104) para 37.

Another shortcoming of the reporting process is that most African states are not up to date with their reports. Of the few states that do hand in their reports, most submit reports with incomplete or inadequate information and make only scant references, if at all, to the decisions of the Commission or the Court.[125] In response to these issues, and for purposes of implementing the Court's decisions, the Protocol of the Court created a number of organs that monitor state compliance. The Court relies heavily on the involvement of AU policy organs as they provide critical political support and a necessary interface with the states. This symbiotic relationship is acknowledged in the Protocol of the Court and the corresponding Rules of Procedure.[126]

Article 29(2) of the Protocol of the African Court and Rule 64(2) of the Interim Rules of the Court mandate the Executive Council to monitor the execution of judgments on behalf of the Assembly. Article 29 also requires the Court to inform the Executive Council of any judgment to enable the Council to oversee its implementation on behalf of the AU Assembly. Currently, it appears that the Council solely performs this function based on the Court's reports submitted to it, and there is no evidence that the Executive Council takes any additional steps following the Court's reports.[127]

Secondly, the AU Assembly, which serves as the supreme organ of the African Union has monitoring duties as well. Its members include the Heads of State and Government of member states or their representatives, and it receives, considers and takes decisions on reports and recommendations from other Union organs.[128] The Assembly is mandated to monitor the implementation of policies and decisions of the Union and ensure compliance by all member states.[129] In turn, the African Court is mandated to report any cases of non-compliance to the AU Assembly.[130] Although state parties to the Protocol of the Court undertake to comply with its orders and guarantee execution in any case to which they are parties, there is no specific recourse provided in the Protocol against a state that deliberately refuses to comply with the Court's judgment.

Each activity report of the Court since 2014 outlines the status of compliance with its decisions; however neither the Executive Council nor the AU Assembly has taken any enforcement measures against non-complying states.[131] The Assembly has been criticised as ineffective since the African Charter does not specify what action is to be taken

125 Ayeni & Von Staden (n 1) 18.

126 Art 29 of the African Court Protocol; Rules of Procedure of the African Court 2020, Rule 81(4).

127 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.

128 See art 9(1)(b) of the AU Constitutive Act.

129 See art 9(1)(e) of the AU Constitutive Act.

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

131 Ayeni & Von Staden (n 1) 11.

once it receives reports from the Commission and the Court.[132] Furthermore, due to the principle of non-interference, it cannot interfere with the internal affairs of state parties.[133]

The lack of a mechanism for compelling states to comply with the African Court's judgments is the principal reason why compliance is dire. To support this claim, the African Court's Activity Report presented to the AU Assembly for the 2019 period indicates that most judgments of the African Court have either been partially complied with, or not complied with at all.[134] In response to this ongoing challenge, the African Court has produced the Draft Framework for Reporting and Monitoring Execution of Judgments and other Decisions of the African Court (Draft Framework) which proposes the implementation of a hybrid model on monitoring state compliance through the combination of both judicial and political mechanisms.[135]

In my view, this Draft Framework will bring the African Court on par with its American counterpart in as far as the supervision of national prosecutions is concerned. In terms of the framework, the African Court will establish a Monitoring and Reporting Unit. States will be required to submit 'execution reports' to the Unit and these reports will be used by the Court, together with information from other sources such as non-governmental organisations, the United Nations, and institutions/organs of the African Union, to assess the level of compliance by the state.[136] The Draft Framework teases the possibility of holding compliance hearings in cases of non-compliance with the Court's orders.[137] This is already an established mechanism under Rule 81(3) of the Court's internal rules, which gives the Court authority to hold hearings, amongst other things, to assess the status of implementation of its decisions' in cases of non-compliance. However, the Court has not conducted any such hearings yet, although this was proposed for the recent reparations ruling in the case of the Ogiek indigenous community in Kenya.[138]

Under the Draft Framework, compliance hearings will be held under two circumstances, either based on a request from any party to the case or pursuant to a decision arrived at by the African Court based on its '*suo motu*' powers.[139] The African Court may only hold

132 Olukayode (n 1) 50.

133 As above.

134 African Union 'Assembly of the Union Thirty Second Ordinary Session 10-11 February 2019, Addis Ababa, Ethiopia' available at: https://au.int/sites/default/files/decisions/36461-assembly_au_dec_713_-_748_xxxii_e.pdf (accessed 25 October 2024).

135 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* 146.

136 Draft Framework for Reporting and Monitoring Execution of Judgments and Other Decisions of the African Court on Human and Peoples' Rights, para 11.

137 Draft Framework, para 13.

138 *African Commission on Human and Peoples' Rights v Kenya* (Reparations) app. no 006/2012. judgment of 23 June 2022, at para xvi.

139 Draft Framework, para 13(b).

compliance hearings using its *suo motu* powers in four specific circumstances. First, when there is a dispute between parties regarding the implementation of a decision.[140] Second, when a Respondent state fails to submit a compliance report to the African Court.[141] Third, when a state's compliance report is not responded to by the Court.[142] Fourth, when the Court is provided with information indicating that a respondent state is in violation of its order or has failed to comply with the African Court's judgment.[143]

The Draft Framework authorises the Court to issue compliance judgments that are then sent to AU policy organs such as the Council and the Assembly for further monitoring. At the compliance stage, the African Court may undertake fact-finding missions on-site to assess the implementation progress of its judgment, or it may approve consensual compliance agreements.[144] A compliance judgment must not only 'refer to the original judgment as to which aspects of the order have or have not been implemented' but expressly 'underscore the outstanding elements necessary to attain full compliance by the state'.[145]

Instances in which a state fails to comply will be classified as 'non-compliant'.[146] Such classification will occur when either party neglects to respond,[147] or when a report is not submitted within the designated time frame.[148] The Assembly possesses the authority to levy sanctions against non-compliant states, as specified in article 23 of the Constitutive Act. However, sanctions may only be imposed in deserving cases. The definition of what constitutes 'deserving cases' remains unspecified in both the Constitutive Act and the proposed Draft Framework.

From the above discussion on the role of the Court in monitoring judgments, the judicial approach of the hybrid model proposed under the Draft Framework is evident. This is quite similar to the remedial practice of the Inter-American Court. However, the Draft Framework diverges from the quasi-criminal review of the Inter-American Court in that the latter is more active in ensuring that states comply with its orders, and the American Convention does not establish a body that is designed to monitor the orders of the Court. Although the OAS Assembly is tasked with receiving compliance reports, it does not have monitoring duties.[149]

The more political angle of the Draft Framework becomes evident when we discuss the involvement of political structures in the supervision of the African Court's orders. It remains to be seen whether

140 Draft Framework, para 13(i).
141 Draft Framework, para 13(ii).
142 Draft Framework, para 13(iii).
143 Draft Framework, para 13(iv).
144 Draft Framework, para 13(c).
145 Draft Framework, para 15.
146 Draft Framework, para 18.
147 As above.
148 As above.
149 Lungu (n 135) 152.

the second leg of the Draft Framework's hybrid model will be successful as it is dependent on respect for the independence of the Court by the political organs, which has been largely absent in the African region.[150] Furthermore, political organs are generally constrained by their diplomatic duties as indicated by the failure of the AU to cooperate with the ICC in the arrest of Sudanese President Omar al-Bashir.[151]

This raises concerns that the domestic judicial systems may not be willing to hold Heads of States accountable for international crimes and the inclusion of a clause in Article 46Abis of the Malabo Protocol that reiterates the immunity of sitting presidents, deputy presidents, and other senior government officials from prosecution, can be interpreted as an intention to exclude real accountability. In the words of Olukayode, 'effective enforcement is sacrificed at the altar of political solidarity'.[152] While the Draft Framework promises to be successful in future, at present, the African system has no coherent approach for monitoring implementation with the Court's decisions.[153]

5 LESSONS FROM THE INTER-AMERICAN COURT

The preceding sections examining the African Court and Inter-American Court's practices highlight the growing importance of human rights courts as oversight bodies. It is clear that regional human rights tribunals now prioritise implementation within their judicial processes. Two key factors explain this evolving judicial approach in the human rights arena. First, as mentioned in the introduction of this paper, the previously accepted managerial theory of compliance, which assumed that states generally adhere to court decisions, has been discredited.[154] By acknowledging that state non-compliance can also be attributed to recalcitrance, courts have seen the need for stronger remedies.

Second, there is a growing recognition that courts are disconnected from reality if they rely solely on the executives of offending states to ensure compliance. National judiciaries have consistently shown their effectiveness in encouraging states to comply with regional court orders. Consequently, supranational bodies, particularly human rights tribunals, have recognised the value of leveraging this effectiveness to promote justice. Article 29(2) of the African Court Protocol and Rule 64(2) of the Interim Rules of the Court, which require the Executive Council to oversee the execution of judgments on behalf of the Assembly, reflect the drafters' foresight in recognising the need for

150 Murray (n 93).

151 D Akande 'Is the Rift between Africa and the ICC Deepening? Heads of States Decide Not to Cooperate with ICC on the Bashir Case' 2009 https://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/ (accessed 25 October 2024).

152 Olukayode (n 1) 50.

153 Sandoval, Leach & Murray (n 1) 14.

154 Chayes & Chayes (n 6).

monitoring court decisions. However, these provisions alone are insufficient, as the Court depends on other entities to perform a role it should fulfil itself.

The Inter-American Court of Human Rights, without explicitly citing specific provisions of its statute or procedural rules, has adopted a flexible approach by instructing domestic courts to implement its orders and then monitoring these courts. While compliance with the Inter-American Court's rulings could improve, the main lesson for the African Court is that flexible and innovative application of rules, particularly in human rights promotion and protection, achieves far better outcomes than a rigid approach. Therefore, one of the initial steps the African Court should consider is the adoption of its Draft Framework which will promote dialogue between the parties and the Court and allow the Court to actively monitor compliance with its decisions during the process rather than after implementation is complete.

6 CONCLUSION

This paper underscores how the Inter-American Court has significantly advanced its implementation mechanisms through the practice of quasi-criminal review. Notably, following the Court's directives, states have initiated new criminal investigations, overturned amnesties, circumvented statutes of limitations, and established new institutions and procedures to facilitate the prosecution of such crimes. Given its historical context, the African Court would benefit from adopting similar approaches to strengthen its ability to enforce compliance. An examination of the Court's jurisprudence highlighted that it is willing to expand its mandate such that it can order national prosecutions, investigations and other specific measures.

Although the second phase of quasi-criminal review needs to be developed at the African Court, the Draft Framework signals the Court's readiness to enhance its monitoring mechanisms to support domestic investigations and prosecutions. Its design, which integrates flexibility in both judicial and political avenues to ensure state adherence to judgments, demonstrates that the African Court is actively learning from the practices of other regional human rights tribunals.