



FACULTY OF LAW

LLM IN HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA

Module 8 (**MND 802**)

Mini-Dissertation

**Implementation of Decisions by the African Court and African Commission on
Human and Peoples' Rights on Indigenous Peoples in Kenya**

Submitted to

Prof Frans Viljoen (Supervisor)

Dr Gladys Mirugi-Mukundi (Co-supervisor)

Submitted by

Kipkoech Nicholas Cheruiyot

Student number

u24094332

Acknowledgements

I am deeply grateful to God for bringing me this far and for granting me the strength to complete my LLM studies. His blessings are truly beyond measure, always good, and add no sorrow.

To my beloved family (both nuclear and extended), and my friends, your constant presence and unwavering support have been my pillar of strength throughout this journey. To my wonderful siblings- Zeddy, Victor, Sharon, Cyrus, and Faith- your steadfast encouragement has meant the world to me. And to my loving parents, Mr and Mrs Chelogoi, I am immeasurably blessed by your love and guidance. May God continue to bless you abundantly.

A special thank you to my Uncle and Aunt, Mr and Mrs Paul Tanui. Your belief in me and your generous investment in my future have been invaluable. May God's blessings continue to follow you always.

I am sincerely grateful to the University of Pretoria for the golden opportunity to pursue this prestigious programme. I also extend my deepest appreciation to the European Union, through the Global Campus of Human Rights, and the Royal Norwegian Embassy in Pretoria, South Africa, for their financial support, which made this journey possible.

My heartfelt thanks go to my supervisors, Prof Frans Viljoen and Dr Gladys Mirugi-Mukundi, for their invaluable guidance and support throughout the process of writing this dissertation. I am deeply indebted to them for their wisdom, encouragement, and dedication.

To my HRDA friends and colleagues, thank you for making this journey so memorable and worthwhile. I also extend my sincere gratitude to all the HRDA tutors and coordinators for their unwavering moral and academic support, with special thanks to Jared, Henok, Clement, Shyrene, Rotondwa, Dr. Michelle, and Prof. Magnus.

To my esteemed seniors and friends- Alvin Keverenge, Joshua Malidzo, Chrispin Bosire, and Vincent Cheruiyot—thank you for your invaluable moral and professional support.

Finally, a special thanks to Dr. Josephat Kilonzo, Dr. Francis Kariuki, and Mwalimu Walter Khobe for your unwavering guidance and encouragement. May God bless you all abundantly!

Dedication

I dedicate this dissertation to all the indigenous peoples in Kenya, Africa and the entire world, who continue to fight for their fundamental rights. May this work contribute, in one way or the other, to advancing their cause and aiding them in realising their aspirations.

Table of abbreviations and acronyms

ACHR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
APRM	African Peer Review Mechanism
AU	African Union
CSOs	Civil Society Organisations
IACHR	Inter-American Court of Human Rights
IACtHR	Inter-American Court of Human Rights
NGOs	Non-Governmental Organisations
NHRIs	National Human Rights Institutions
OAS	Organization of American States
PAP	Pan-African Parliament
PSC	Peace and Security Council
UN	United Nations

Table of Contents

Acknowledgements	I
Dedication.....	II
Table of abbreviations and acronyms	III
Chapter 1: Introduction.....	1
1.1 Background and context.....	1
1.2 Problem statement	3
1.3 Research questions.....	4
1.4 Theoretical framework	4
1.5 Literature review	6
1.5.1 Progressive decisions of the Court and the Commission in relation to indigenous peoples.....	6
1.6 Methodology	9
1.7 Scope and limitations of research.....	10
1.8 Structure.....	10
Chapter 2: Follow-up mechanisms adopted by the African Court and Commission to ensure implementation of their decisions	11
2.1 Introduction	11
2.2 Follow-up mechanisms adopted by the African Commission and the African Court	11
2.2.1 Information-gathering on implementation.....	11
2.2.2 Monitoring and reporting	13
2.2.3 Implementation dossiers and hearings	15
2.2.4 Resolutions on implementation	16
2.2.5 Referral to the African Court.....	16
2.2.6 Use of judicial and political processes as monitoring mechanisms by the African Court	17
2.2.7 The use of the Peace and Security Council, the African Peer Review Mechanism and the Pan-African Parliament.....	18
2.3 Challenges experienced	19

2.3.1	Relationship between the African Commission and the African Court: The fear of the African Commission losing legitimacy?	20
2.3.2	Lack of political will.....	21
2.3.3	Lack of the Commission and the Court’s presence and visibility in member States 21	
2.3.4	Resource constraints	23
2.3.5	Lack of support from the AU policy organs	24
2.4	Conclusion.....	25
Chapter 3: Follow-up measures by African Court and Commission to implement		
<i>Ogiek and Endorois decisions</i>		
		26
3.1	Introduction	26
3.2	Follow-up mechanisms adopted by the African Court to follow up on implementation of the <i>Ogiek</i> decision	26
3.2.1	State reporting on implementation.....	26
3.2.2	Information-gathering	27
3.2.3	Letters to the State.....	28
3.2.4	Sensitisation visit to Kenya.....	28
3.3	Follow-up mechanisms adopted by the African Commission to follow up on implementation of the <i>Endorois</i> decision	28
3.3.1	Information-gathering	28
3.3.2	State reporting on implementation status	29
3.3.3	Implementation hearing.....	30
3.3.4	Implementation workshops	30
3.4	Challenges experienced	31
3.4.1	Lack of political will.....	31
3.4.2	Unhealthy relationship and lack of cooperation between the Court and the Commission 32	
3.4.3	Lack of presence and visibility of the Commission and Court in Kenya.....	32
3.4.4	Resource constraints	33
3.5	Conclusion.....	33
Chapter 4: Implementation follow-up mechanisms adopted by the inter-American		
<i>Court and Commission on Human Rights</i>		
		34
4.1	Introduction	34

4.2	Follow-up mechanisms adopted by the inter-American Court and Commission of Human Rights to ensure implementation of their decisions	35
4.2.1	Implementation hearings	35
4.2.2	Referral to a judicial organ.....	37
4.2.3	Increasing presence, visibility and publicity	37
4.2.4	Active involvement of CSOs and NHRIs in the implementation process	40
4.2.5	Joint compliance monitoring processes	41
4.2.6	Institutionalisation of the monitoring function and categorising implementation	41
4.2.7	State reporting	43
4.2.8	Information gathering on implementation	43
4.2.9	Facilitation of constructive dialogue	44
4.2.10	Resolutions, declarations and press releases	44
4.2.11	Cooperation from the states and civil society organisations.....	45
4.2.12	Referral to a political organ	45
4.2.13	Inter-American SIMORE	45
4.3	Effectiveness of the mechanisms adopted.....	46
4.4	Conclusion.....	46
	<i>Chapter 5: Conclusion and recommendations.....</i>	<i>48</i>
5.1	Conclusion.....	48
5.2	Recommendations	48
5.2.1	Recommendations to the African Court and Commission.....	48
5.2.2	Recommendations to the AU.....	50
5.2.3	Recommendations to the African states.....	50
5.2.4	Recommendations to Kenya	51
	<i>Bibliography</i>	<i>52</i>
	International legal instruments and official documents	52
	Case law	54
	Books and book chapters	55
	Journal articles	56
	Internet sources.....	57

Chapter 1: Introduction

1.1 Background and context

The African Commission on Human and Peoples' Rights (Commission) and the African Court on Human and Peoples' Rights (Court), working in a complementary relationship, have a unique mandate of protecting human and peoples' rights.¹ Their decisions have far-reaching consequences for norm development and the effective protection and realisation of human and peoples' rights.² In the landmark *Endorois*³ and *Ogiek*⁴ cases, the Commission and the Court have issued decisions recognising the Endorois and the Ogiek as indigenous peoples and directing the government of Kenya to facilitate their return to their ancestral lands, pay them monetary compensation for their lost land and heritage, and consult them in their resettlement plans.⁵

The *Endorois* case concerns the forceful eviction of the Endorois from their ancestral lands around the area of Lake Bogoria, Nakuru and Laikipia, and the re-gazettement of Lake Bogoria as a game reserve without their prior consultation and compensation.⁶ The Commission ruled that the forceful eviction of the Endorois violated their rights to practise their religion,⁷ their right to property through expropriation and denial of ownership of their land⁸ without consultation and fair compensation,⁹ their cultural rights,¹⁰ and their right to development.¹¹ The Commission made several recommendations aimed at reclaiming the rights of the Endorois.¹²

¹ Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (African Court Protocol) art 2.

² African Charter on Human and Peoples' Rights (African Charter) art 45.

³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

⁴ *African Commission on Human and Peoples' Rights v Kenya*, Application 6/2012, African Court on Human and Peoples' Rights, ruling on reparations (2022) (*Ogiek* case).

⁵ Cultural Survival 'Endorois and Ogiek to take over attorney general's office over Kenyan government's refusal to make reparations | cultural survival' (2 February 2024) <<https://www.culturalsurvival.org/news/endorois-and-ogiek-take-over-attorney-generals-office-over-kenyan-governments-refusal-make>> (accessed 20 August 2024).

⁶ *Endorois* case paras 2 & 3.

⁷ *Endorois* case para 173.

⁸ *Endorois* case para 199.

⁹ *Endorois* case paras 236-238 & 268.

¹⁰ *Endorois* case para 251.

¹¹ *Endorois* case para 297.

¹² *Endorois* case para 298(1).

The *Ogiek* case concerns the eviction notice issued by the Kenya Forestry Service (KFS) officials in 2009 and the forceful eviction of the Ogiek community from the Mau Forest,¹³ without any consultation. The Court ruled that Kenya violated the Ogiek's rights to own and dispose of their property,¹⁴ specifically the right to land under article 14 of the African Charter by forcefully evicting them without their consultation.¹⁵ Kenya also violated the Ogiek people's rights to non-discrimination,¹⁶ the right to life and integrity of their person,¹⁷ the right to freely practice their religion and culture,¹⁸ the right to development,¹⁹ which together violate article 1 of the African Charter.²⁰ Kenya was tasked to take all reasonable measures within a reasonable timeframe to remedy all the violations of Ogiek's rights and report to the Court on the measures taken within six months from the date of the judgment.²¹

Kenya has however largely failed to abide by these decisions.²² As recent as 2023, Kenya had not filed any report on the measures it had taken to implement the decision of the Court in the *Ogiek* case, and did not abide by the Court's decision.²³ Additionally, the Commission has noted that Kenya has only to a small extent implemented its recommendations in the *Endorois* case.²⁴ Kenya's non-implementation of the Commission's decision has resulted in negative implications on the Endorois' livelihoods, leading to severe poverty, illiteracy, poor health and making them live a life of destitution.²⁵

Due to this, the rights and welfare of the indigenous peoples are at risk, and in some instances, there have been forced evictions which have resulted in the death²⁶ of some members. There have also been continued incidences of forced eviction of the indigenous peoples from their ancestral lands, including destruction and burning of their schools and

¹³ *Ogiek* case para 3.

¹⁴ African Charter art 21 & *Ogiek* case paras 195-201.

¹⁵ *Ogiek* case para 131.

¹⁶ *Ogiek* case para 146.

¹⁷ African Charter, art 4 and *Ogiek* case paras 151-156.

¹⁸ African Charter, art 17 & *Ogiek* case paras 176-190.

¹⁹ African Charter, art 22 & *Ogiek* case paras 207-211.

²⁰ African Charter, art 22 & *Ogiek* case paras 214-217.

²¹ *Ogiek* case para 227.

²² Activity report of the African Court on Human and Peoples' Rights (ACHPR) as of 1 January- 31 December 2018 para 49. See also Activity report of the African Court on Human and Peoples' Rights: Report on the implementation of judgments of the court as of 7 November 2022 18.

²³ Activity report of the African Court on Human and Peoples' Rights (AFCHPR) – 1 January – 31 December 2023 (African Court 2023 activity report) Annex 2 10.

²⁴ The 52nd and 53rd Combined activity reports of the African Commission on Human and Peoples' Rights for the period 6 December 2021 to 9 November 2022 (2021-2022 Combined African Commission activity reports) paras 43-44.

²⁵ 2021-2022 Combined African Commission activity report (n 24) para 44.

²⁶ Amnesty International 'Kenya: Indigenous peoples targeted as forced evictions continue despite government promises' (Amnesty International, 9 August 2018) <<https://www.amnesty.org/en/latest/news/2018/08/kenya-indigenous-peoples-targeted-as-forced-evictions-continue-despite-government-promises/>> (accessed 1 May 2024).

homes.²⁷ This is a direct violation of the rights of indigenous peoples, and is against Kenya's state obligations on the realisation of the rights of all persons including indigenous peoples under the African Charter.²⁸

1.2 Problem statement

Kenya has not fully complied with the decisions of the Commission and the Court in the *Ogiek* and *Endorois* cases. Despite these decisions barring the eviction of the indigenous peoples and calling for compensation because of previous evictions, challenges faced by the indigenous people in Kenya still abound.²⁹ As recent as 2023, indigenous peoples continue to be evicted, specifically the Ogiek in the Mau Forest where more than 700 households were evicted in November 2023.³⁰

Whereas the Court, the Commission and the government of Kenya have taken some actions to implement these decisions,³¹ these measures have been insufficient. The actions which have been taken so far, including the formation of a working group on the implementation of the Court's judgment,³² have not been efficient. With the persistent risk of continued evictions,³³ the indigenous peoples in Kenya face a great risk of violation of their fundamental human rights. This goes against Kenya's regional and international human rights obligations geared towards the protection of all including the indigenous peoples.

Amidst all this, the presence of the Court and the Commission and their active follow-up in the implementation process of their decisions seem to be negligible. Follow-up mechanisms by the Court and Commission are important for two main reasons. First, the success of the Court and the Commission is not predicated on the number of decisions that it has rendered, but on

²⁷ C Kimeu "We are living in absolute fear": Call to stop indigenous evictions in Rift Valley' *The Guardian* (8 November 2023) <<https://www.theguardian.com/global-development/2023/nov/08/we-are-living-in-absolute-fear-call-to-stop-indigenous-evictions-in-rift-valley>> (accessed 1 May 2024).

²⁸ See for example art 1 of the African Charter requiring Kenya to take all the relevant steps to recognise and fulfil the rights under the Charter, and to do so without any discrimination on any ground as provided for under art 2 of the same Charter.

²⁹ K Borona, S Johnson & P Kipalu 'In Kenya, violations of African Court's ruling lead to illegal evictions of the Ogiek - rights + resources - supporting forest tenure, policy, and market reforms' (22 December 2020) <<https://rightsandresources.org/blog/in-kenya-violations-of-african-courts-ruling-lead-to-illegal-evictions-of-the-ogiek/>> (accessed 1 May 2024).

³⁰ A Langat 'Violent evictions are latest ordeal for Kenya's Ogiek seeking land rights' (*Mongabay Environmental News*, 20 December 2023) <<https://news.mongabay.com/2023/12/violent-evictions-are-latest-ordeal-for-kenyas-ogiek-seeking-land-rights/>> (accessed 1 May 2024).

³¹ See for example 2021-2022 Combined activity reports of the African Commission, activity report of the African Court on Human and Peoples' Rights: Report on the implementation of judgments of the Court as of 7 November 2022 and activity report of the African Court on Human and Peoples' Rights (AFCHPR) – 1 January – 31 December 2023.

³² African Court 2023 activity report (n 23) Annex 2 10.

³³ C Marshall 'Kenya's Ogiek people being evicted for carbon credits - lawyers' (9 November 2023) <<https://www.bbc.com/news/world-africa-67352067>> (accessed 20 August 2024).

their impact on a State party's behaviour.³⁴ Second, history has shown that follow-up and specifically a visit by the African Commission to Kenya to encourage implementation of the *Endorois* case has resulted in some activities by the government geared towards implementing the Commission's recommendation.³⁵ As will be further discussed in the fourth chapter of this research, the inter-American human rights system has successfully used follow-up and active pursuit of implementation mechanisms by coming up with implementation guidelines, facilitating dialogue and conducting implementation hearings.³⁶

1.3 Research questions

This research aims to address the following main research question: What implementation and follow-up mechanisms have the African Commission and the Court on Human and Peoples' Rights put in place to ensure effective implementation of their orders on provisional measures and decisions on merits, and how effective have they been?

To support the main question, this research aims to address the following sub-questions:

- What follow-up mechanisms have the Court and the Commission put in place to ensure effective implementation of their decisions in general, and what challenges have been experienced?
- What steps have the Commission and the Court taken to ensure effective implementation of the *Ogiek* and *Endorois* decisions, and what factors have enhanced or impeded their progress?
- What measures have states within the inter-American system put in place, how effective have they been in ensuring implementation of the decisions of the inter-American Court and Commission of Human Rights, and to what extent can these measures be applied by the African Court and Commission?

1.4 Theoretical framework

This section contains theories which have been developed over time in relation to the roles played by supranational bodies in the protection of human rights generally and enforcing compliance with human rights legal instruments and decisions specifically. Different theories have been developed, and the following subsection looks at two theories which are considered relevant to this research.

³⁴ E Asaala 'Assessing the mechanisms and framework of implementation of decisions of the African Court on Human and Peoples' Rights fifteen years later' (2021) 54 *De Jure Law Journal* 430 at 439.

³⁵ 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 at 78.

³⁶ Sandoval, Leach & Murray (n 35) at 81-82.

1.4.1 Domestic mobilisation theory

1.4.2 Boomerang theory

The boomerang theory uses a ‘top-down’ approach, whereby supranational bodies and other external actors provide information and draw attention to human rights issues and mobilising, shaming and pressuring states into honouring their human rights obligations under international human rights treaties.³⁷ According to the boomerang theory, this kind of pressure is necessary to pressure the recalcitrant states and compel them to fulfil their human rights obligations.³⁸ This theory is relevant to this research since, as contained in chapter 2, African Court³⁹ and Commission⁴⁰ play crucial roles in ensuring that states not only honour their human rights obligations under the African Charter but also implement their orders and recommendations.

1.4.3 Experimentalist governance theory

Experimentalist governance theory (EGT) within the international human rights framework suggests that human rights law only becomes effective due to the long-term, continued and dynamic engagements between domestic and international actors to hear claims of human rights violations, amplify voices and pile pressure on the states in question to stop the violations and fulfil their human rights obligations.⁴¹ EGT emphasises joint mobilisation done by supranational bodies and other actors, including civil society actors, NGOs, NHRIs, and victims whose rights have been violated.⁴² This leads to a system of continued stakeholder engagement and calls for accountability through regular provision of information and a continued review.⁴³ EGT ensures that there is collaboration between the local actors and international players including supranational bodies, and that they do not operate in isolation. This creates what has been termed as a ‘sandwich’ effect, leading to improvement of the human rights protection of the marginalised and the vulnerable groups.⁴⁴ As contained in chapters 2 and 3 of this research, the inputs of such players as CSOs, NHRIs and representatives of vulnerable groups including

³⁷ G de Búrca *Reframing human rights in a turbulent era* (Oxford University Press 2021) De Búrca (n 37) at 18.

³⁸ MG Allendoerfer, A Murdie & RM Welch ‘The path of the boomerang: Human rights campaigns, third party pressure, and human rights’ (2020) *64 International Studies Quarterly* 111 at 116.

³⁹ See for example the African Court Protocol art 3.

⁴⁰ See generally the promotion and protective mandates of the ACmHPR under the African Charter.

⁴¹ De Búrca (n 39) at 46.

⁴² G de Búrca ‘Human rights experimentalism’ (2016) *111 The American Journal of International Law* 277 at 285.

⁴³ De Búrca (n 44) at 282-283.

⁴⁴ K Tsutsui & J Smith ‘Human rights and social movements: From the boomerang pattern to a sandwich effect’ in *The Wiley Blackwell companion to social movements* (2018) at 586.

indigenous peoples have been instrumental in the follow-up on recommendations steps which the African Court and Commission have adopted so far.

1.5 Literature review

1.5.1 Progressive decisions of the Court and the Commission in relation to indigenous peoples

Different scholars have written widely on and applauded the progressive decisions of the Commission and the Court on the *Endorois* and *Ogiek* cases in terms of the protection of the rights of indigenous peoples in Kenya. Lynch appreciates the fact that the Commission's decision in the *Endorois* case has far-reaching positive implications in terms of both regional and international jurisprudence,⁴⁵ and in terms of providing incentives for the Kenyan and African people to use ethnic and cultural differences and their traditional homelands to strengthen their claims to land ownership.⁴⁶ Rösch notes that the *Ogiek* decision is a great success for indigenous rights in so far as it shows that the rights of the disenfranchised communities are recognised and accommodated under the African Charter and within the African human rights system.⁴⁷ These are clear and progressive manifestations of a new regime for the protection of the right to land, since it assumes a threshold of applicability below the criterion for indigenesness, potentially improving land rights protection for the indigenous peoples and other marginalised communities.⁴⁸

Lynch and Rösch however do not analyse the steps which have been taken at the national level and at the supranational level to ensure implementation of these decisions. This research aims to look at what has been done to ensure full implementation of these decisions both by Kenya, the Court and the Commission, in comparison with what has been done within the inter-American human rights system.

1.5.2 Implementation mechanisms and the place of the Court and the Commission in the protection of human and peoples' rights in Africa

Nasirumbi has written on the unique role that the Commission and the Court have in relation to indigenous peoples through among others the adjudication of the *Ogiek* and *Endorois* cases.⁴⁹

⁴⁵ G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the *Endorois*' (2012) 111 *African Affairs Journal* 24 at 40.

⁴⁶ Lynch (n 47) at 42.

⁴⁷ R Rösch 'Indigenesness and peoples' rights in the African human rights system: Situating the *Ogiek* judgement of the African Court on Human and Peoples' Rights' (2017) 50 *Law and Politics in Africa, Asia and Latin America* 242 at 257.

⁴⁸ As above.

⁴⁹ S Nasirumbi 'Revisiting the *Endorois* and *Ogiek* cases: Is the African human rights mechanism a toothless bulldog?' (2020) 4 *Africa Human Rights Yearbook* 497 at 503.

While acknowledging this important role, she decries the fact that the Kenyan government has lacked political will and has failed to implement the *Endorois*⁵⁰ and the *Ogiek*⁵¹ decisions. While there are steps which have been taken to implement this decision, it is not directly attributable to the government but the mobilisation and demands mounted on the government to demand compliance.⁵²

What is missing in Nasirumbi's analysis is the unique promotional mandate of the Commission and the Court and their roles in ensuring implementation of their decisions. The closest that Nasirumbi goes in identifying the key issue plaguing the Commission and the Court albeit in passing is recognising that the Commission lacks monitoring mechanisms for its decisions.⁵³ She however misses the opportunity to offer tangible clarity on this issue, and suggests that the Court cures this inadequacy by handing down binding decisions.⁵⁴ This research seeks to fill this gap. It aims to investigate the actions that the Commission and the Court have taken to ensure that the decisions on indigenous peoples are implemented, occasioning an actual impact on indigenous peoples.

1.5.3 Implementation mechanisms and framework of the Court's decisions since its establishment

Some scholars have gone further ahead to assess the implementation framework of the Court since its establishment.⁵⁵ Asaala traces the implementation mechanisms and framework of the African Court fifteen years after its establishment.⁵⁶ These include the normative framework for implementation,⁵⁷ the various powers, tools and practice of various mechanisms and their potential partnership⁵⁸ to ensure effective implementation of the Court's decisions. She notes that there are four main weaknesses which are inherent in the system which have hampered effective implementation of the Court's decisions,⁵⁹ and proposes tangible solutions to address them. These are lack of proper establishment, understanding and documentation of implementation mechanisms,⁶⁰ lack of clarity on the role of the Court in the implementation of

⁵⁰ Nasirumbi (n 51) at 510-511.

⁵¹ Nasirumbi (n 51) at 512.

⁵² As above.

⁵³ Nasirumbi (n 51) at 515.

⁵⁴ As above.

⁵⁵ These include the frameworks on monitoring and implementation of the Court's judgments. For more, see 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 at 144-145.

⁵⁶ Asaala (n 34) at 430.

⁵⁷ Asaala (n 34) at 433-435.

⁵⁸ Asaala (n 34) at 435-451.

⁵⁹ Asaala (n 34) at 451.

⁶⁰ As above.

its decisions,⁶¹ institutional and political challenges affecting the relationship between the Court and the AU policy organs,⁶² and the poor relationship between the Court and State parties.⁶³

Asaala also notes that through the Court's state-reporting mechanism the Court has been taking a backseat, waiting for a State party's report on implementation.⁶⁴ As such the Court has not devised any mechanisms internally to do follow-up and assist states in the implementation process especially in instances where states might be experiencing challenges.⁶⁵

While the appraisal of the progress made so far and identification of the challenges is fruitful especially to this research, the research aims to expand the analysis to include the Commission and focus mainly on the role that it has played in following up on implementation of its decisions in relation to indigenous peoples in Kenya.

1.5.4 Beyond decisions: Follow-up mechanisms of their decisions by the Court and the Commission

Murray and others draw the link between the recent move by the African supranational institutions to the international standards which are now more than ever looking at not only the decisions but also their actual impact on the ground.⁶⁶ In their view, the Commission and the Court should play a role in monitoring the implementation of their decisions, which will give them a sense of ownership and be able to issue further orders in cases of non-implementation.⁶⁷ They have classified monitoring and implementation into two main categories. First is monitoring and implementation which is reactive in nature, where the Court and the Commission receive information on the extent of implementation of their decisions by a state⁶⁸ and then draw conclusions. Secondly is monitoring and implementation that is proactive, where the Court and the Commission go out and seek information where they are lacking any, cross-checking the evidence obtained and subsequently deciding on whether that is a sufficient form of implementation or not.⁶⁹

This research builds on previous studies by Murray and other scholars, focusing on indigenous peoples' rights in Kenya. It acknowledges that while there are progressive suggestions and analyses of the Court and Commission's roles in decision implementation, they are not

⁶¹ Asaala (n 34) at 452.

⁶² As above.

⁶³ As above.

⁶⁴ Asaala (n 34) at 436.

⁶⁵ As above.

⁶⁶ Sandoval, Leach & Murray (n 35) at 151.

⁶⁷ Sandoval, Leach & Murray (n 35) at 153.

⁶⁸ As above.

⁶⁹ As above.

specific to indigenous peoples. The authors also highlight that monitoring and implementation of the African Court and Commission's decisions are not functioning as effectively as they should.⁷⁰ This research seeks to seal this loophole, and in that sense look at the inter-American system to see what has been done within that system.

1.5.5 The role of the inter-American Court and Commission of Human Rights in the implementation of individual decisions

Sandoval, Leach and Murray have written on the roles that the three regional systems (the African, the European and the American) play in promoting the implementation of their decisions.⁷¹ They discuss several aspects, including the drawbacks and attributes of the judicial, quasi-judicial and political bodies in carrying out monitoring, and the range of tools which have been adopted to foster alliances at the national and international levels in order to enhance implementation.⁷²

The authors discuss the roles of African and inter-American Commissions in monitoring implementation, highlighting the African Union's limited role. They emphasize the inter-American Court of Human Rights' comprehensive tools and successful public and private hearings.⁷³

This research analyses the tools used by African supranational bodies to monitor the implementation of Court and Commission decisions, drawing parallels between the inter-American system's implementation follow-up tools and the African system's current approach. It tracks progress and identifies potential lessons for the African system.

1.6 Methodology

The research employs desktop research. It looks at the available literature including journal articles, books, constitutions, legislation and case law on the topic at hand. This information is computed to paint a clear picture of what the position is in as far as follow-up mechanisms for implementation, status of implementation of the African Commission and Court decisions on indigenous peoples and the impact that it has had on the rights of the indigenous peoples in Kenya.

⁷⁰ Sandoval, Leach & Murray (n 35) at 165.

⁷¹ Sandoval, Leach & Murray (n 35) at 72.

⁷² Sandoval, Leach & Murray (n 35) at 73.

⁷³ Sandoval, Leach & Murray (n 35) at 74-82.

1.7 Scope and limitations of research

While it draws parallels with the inter-American system, this research is largely limited to the implementation and follow-up mechanisms of the African Court and Commission. The research acknowledges that there are some follow-up mechanisms which have been employed by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). However, due to the limited space available and the fact that most of these mechanisms are still under development even at the ACERWC, this research chooses to rely on the inter-American human rights system.

This research is limited by the failure to get an ethical clearance on time due to administrative protocols. The empirical research would have aided in getting direct insights through interviews and getting access to the available records on the topic from the Kenyan government, the Commission and the Court. Despite this, the author ensured the accuracy of the information obtained, acknowledged all sources, and conducted an objective analysis to produce a balanced conclusion.

1.8 Structure

This research contains five chapters. Chapter 1 is the proposal, and gives the introduction and background of the topic, theoretical framework, discusses the available literature on the topic, identifies the loopholes and how the research fills them and highlights the research questions that the research aims to address. Chapter 2 discusses the follow-up mechanisms that the Court and the Commission have put in place to ensure implementation of their decisions in general, highlighting the challenges that have been experienced. Chapter 3 discusses the follow-up mechanisms that the African Court and Commission have put in place to ensure effective implementation of the *Ogiek* and the *Endorois* decisions, and the challenges which have impeded the Court and Commission's progress. Chapter 4 looks at the best practices from the inter-American Commission and Court of Human Rights in relation to the follow-up mechanisms which have been adopted to ensure effective implementation of their decisions, and how effective they have been. Chapter 5 contains the conclusion which is a summary of the findings and recommendations on how best implementation can be improved.

Chapter 2: Follow-up mechanisms adopted by the African Court and Commission to ensure implementation of their decisions

2.1 Introduction

The hope of individuals to find redress for their human rights violations is imperilled by the fear of implementation crisis.⁷⁴ It is relatively recently that attention has shifted from mere rendering of decisions by the Court and the Commission to what happens after the decisions.⁷⁵ This has therefore led the Commission and the Court to adopt follow-up mechanisms aimed at ensuring effective implementation of their decisions. This chapter looks at monitoring and follow-up mechanisms that the Commission and the Court have adopted to ensure implementation of their decisions. It looks at the follow-up mechanisms generally, tracing how the Court and the Commission have over time monitored implementation of decisions post-judgment, how effective or otherwise they have been and the attendant challenges.

2.2 Follow-up mechanisms adopted by the African Commission and the African Court

Both the Court and the Commission have adopted various follow-up mechanisms to ensure implementation of their decisions. These mechanisms include information-gathering, state reporting, dialogue with parties, coordination with other AU organs and enforcement.

2.2.1 Information-gathering on implementation

Information-gathering denotes the process of gathering evidence from parties to the case and other players on the steps that the state has taken to implement the decision.⁷⁶ Under the African Charter, African States are devoted to recognising the rights and duties enshrined therein, and to taking all the necessary steps including adopting legislative measures to implement the African Charter.⁷⁷

The Commission is mandated to collect and share documents and information on human and peoples' rights issues through various means such as conferences, seminars, and symposia.⁷⁸ It may conduct investigations and hear from individuals with knowledge on any issues at hand.⁷⁹ The Commission has received information from parties involved in

⁷⁴ CM De Vos *From judgment to justice: Implementing international and regional human rights decisions* (2010) 1.

⁷⁵ R Murray & 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* 150 at 151.

⁷⁶ De Vos (n 76) at 154.

⁷⁷ African Charter art 1.

⁷⁸ African Charter art 45.

⁷⁹ African Charter art 46.

communications and occasionally from others regarding the implementation of recommendations. It has also received communications from member States on the status of implementation.⁸⁰ In the 2021-2022 reporting period, the Commission received communications on the status of implementation of its recommendations in cases such as *Njawe Noumeni v Cameroon*⁸¹ and the *Endorois* case,⁸² where the State parties informed the Commission about the progress of implementation and the steps taken.⁸³

The Commission has also received information from Civil Society Organisations (CSOs) and victims, which has aided in creating greater awareness as to the states' attitude with regards to implementation of certain decisions.⁸⁴ This was seen when the Commission received information on the *Endorois* case from partner institutions, which indicated that while Kenya claimed to have taken steps to implement the Commission's recommendations, only one recommendation had been implemented, painting a picture of how that has negatively affected the rights of the indigenous communities.⁸⁵

States and other interested parties have however not been consistent in reporting on the implementation of its final decisions on Communications or provisional measures.⁸⁶ The Commission faces challenges in assessing the implementation of its final decisions on Communications but has been aided by the continuous engagement of CSOs over time. This constant monitoring and implementation process has proven effective, with key steps taken by the Commission and the Court being largely due to the engagement and creative measures brought on board by CSOs, NGOs, and litigants, rather than the Commission.⁸⁷

The Court also receives information from State parties on the extent of implementation of its decisions, whether final or its provisional measures. The Court will then compile the reports and upon making the necessary follow-ups compile a report which will be submitted to the Assembly of Heads of States.⁸⁸ Such a report ought to include instances of non-implementation

⁸⁰ As above.

⁸¹ *Open Society Justice Initiative (au nom de Puis Njawe Noumeni) v Cameroon*, Communication 290/04, African Commission on Human and Peoples' Rights 52nd & 53rd activity reports (2022) (*Njawe Noumeni* case).

⁸² *Endorois* case (n 3).

⁸³ 52nd and 53rd activity reports of the African Commission on Human and Peoples' Rights (6 December 2021 to 9 November 2022) (ACHPR 52nd and 53rd activity reports) paras 42 and 43.

⁸⁴ Sandoval, Leach & Murray (n 35) at 85.

⁸⁵ ACHPR 52nd and 53rd activity reports para 44.

⁸⁶ 54th and 55th Activity reports of the African Commission on Human and Peoples' Rights (ACHPR 54th and 55th activity reports) paras 45-46.

⁸⁷ R Murray & E Mottershaw 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 349 at 361.

⁸⁸ African Court Protocol art 31.

of the Court's judgments.⁸⁹ The Court has over time had a section on the status of implementation of its judgements, where it details the submissions from States. In the 2019 activity report for example, the Report notes that the United Republic of Tanzania in *Tanganyika Law Society and the Legal and Human Rights Centre and Rev. Christopher R. Mtikila v United Republic of Tanzania* reported that the constitutional and legislative measures required to be taken are pegged on its holding of a referendum which the State did not indicate when it planned to hold it.⁹⁰ This section however lacks any in-depth analysis, including any step taken by the Court to either interrogate reasons for State's non-implementation or the steps taken by the Court to follow up on implementation.

Additionally, the Court's reports contain columns on status, where the Court either marks an action taken by the State as partial compliance or full compliance.⁹¹ While the Court's track record of judgments and implementation status is good, but there is no objective criterion for measuring effective implementation. Some states report inconsistently, while others comply but do not meet international human rights standards. This is due to a lack of specificity in the standards to be achieved, state steps, and the role of the Court in monitoring and implementation.⁹²

2.2.2 Monitoring and reporting

The Commission and the Court use two reporting mechanisms. States report to the Commission and the Court on the implementation of the African Charter, recommendations, decisions, and actions taken. The Commission and the Court after receiving such information also write activity reports noting instances of non-compliance. State parties submit reports on measures taken to implement the African Charter, including challenges experienced.⁹³ Institutions, organisations, and interested parties can submit contributions and shadow reports on the human rights situation in a country,⁹⁴ which may be published on the Commission's website.⁹⁵ These reports help the Commission pose questions to the State party⁹⁶ about human rights situations and the extent of implementation of the Court and Commission's decisions.⁹⁷ However, the main

⁸⁹ As above.

⁹⁰ African Court 'Activity report of the African Court on Human and Peoples' Rights' (1 January – 31 December 2019) Annex II on cases in which states have not complied with the Court's judgments on the merits 18 item 1.

⁹¹ As above.

⁹² African Union 'Conference on the implementation and impact of decisions of the African Court on Human and Peoples' Rights: The Dar Es Salaam communiqué' (3 November 2021 Dar Es Salaam, Tanzania) para 17.

⁹³ African Charter art 62, and African Commission's Rules of Procedure, 2020 rule 78.

⁹⁴ African Commission's Rules of Procedure, 2020 (ACHPR Rules of Procedure) rule 80(3).

⁹⁵ ACHPR Rules of Procedure rule 80(5).

⁹⁶ ACHPR Rules of Procedure rule 80(2).

⁹⁷ ACHPR Rules of Procedure rule 80(4).

challenge that has been experienced is the lack of publication of questions posed to State parties and their responses, making it difficult to assess the responses and account for non-implementation issues. Additionally, states have shown a low level of reporting and a lack of transparency.⁹⁸

States are equally required to report to the Commission on the measures taken to implement the decisions of the Commission,⁹⁹ and the Commission can still make follow-up on the same.¹⁰⁰ The state will be required to regularly update the Commission on the steps that it has taken to implement the Commission's recommendations,¹⁰¹ and the Commission through the Special Rapporteur on Communications will do follow-up on the state's measures put in place to implement the decision including sending reminders.¹⁰² The Special Rapporteur on Communications will make all the necessary contacts and take actions to monitor the progress of implementation,¹⁰³ and shall report on the progress during the Commission's each Ordinary Session,¹⁰⁴ whereupon the Commission shall draw the attention of the Executive Council and other relevant policy organs¹⁰⁵ to any situations of non-compliance.¹⁰⁶ The Commission shall then include information on any follow-up activities in its bi-annual activity report.¹⁰⁷

The uptake of this procedure by states has however neither been so appealing nor consistent. For instance, in its 54th and 55th combined activity report, the Commission noted that it received no communication on the status of implementation of its decisions on Communications¹⁰⁸ and provisional measures¹⁰⁹ for the period 2022-2023. Statistically, the reporting status of the African State parties is not impressive,¹¹⁰ making it a challenge for the Commission and the Court to assess the level of respect for human rights and the level of compliance with the Court and the Commission's decisions. States have been irregular in submitting reports, and the Commission has also been inconsistent in terms of utilising this

⁹⁸ M Killander & MG Nyarko 'Human rights developments in the African Union (January 2017-September 2018)' (2018) 18 *African Human Rights Law Journal* 732 at 737.

⁹⁹ ACHPR Rules of Procedure rule 125(1).

¹⁰⁰ ACHPR Rules of Procedure rule 125(1)-(6).

¹⁰¹ ACHPR Rules of Procedure rule 125(1)-(3).

¹⁰² ACHPR Rules of Procedure rule 125(2)-(5).

¹⁰³ ACHPR Rules of Procedure rule 125(6).

¹⁰⁴ ACHPR Rules of Procedure 125(7).

¹⁰⁵ ACHPR Rules of Procedure rules 125(8) & 137.

¹⁰⁶ ACHPR Rules of Procedure rule 125(8).

¹⁰⁷ ACHPR Rules of Procedure rule 125(10).

¹⁰⁸ ACHPR 54th and 55th Activity reports para 45.

¹⁰⁹ ACHPR 54th and 55th activity reports para 46.

¹¹⁰ MG Nyarko & AO Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 294 at 298.

process.¹¹¹ This has resulted in the reporting procedure performing poorly in terms of monitoring implementation, and in some instances appearing more like a formality than a tool aimed at ensuring effective implementation.

2.2.3 Implementation dossiers and hearings

The African human rights system has recently introduced implementation dossiers and hearings to monitor the execution of the Commission's decisions. The African Court and Commission have the authority to convene implementation hearings to evaluate the level of compliance with their decisions and issue further orders if necessary.¹¹² While the African Commission's Rules of Procedure do not explicitly mention implementation hearings, its broad follow-up functions can be interpreted as promoting such hearings.¹¹³

The Commission has been more active in conducting implementation hearings compared to the Court. For instance, in the *Malawi Africa Association v Mauritania* case,¹¹⁴ the Commission conducted an implementation hearing using information dossier¹¹⁵ compiled by various organisations to assess compliance with its decision. However, the Commission lacks a consistent approach to implementation hearings, and they are currently ad hoc processes. Furthermore, there have been no joint hearings involving either the Commission or the African Court. The Commission also held an oral hearing on the *Endorois* case in 2013, where parties updated it on the status of implementation of the recommendations with Kenya pledging to submit a report on measures taken to implement the recommendations within 90 days.¹¹⁶ Kenya however failed to do so, despite the Commission's follow-up efforts.¹¹⁷ The Commission has however not developed a consistent implementation hearing practice and approach, and implementation hearings are only purely an *ad hoc* process.¹¹⁸ Additionally, there is no development on joint hearings by either the African Commission or the African Court.¹¹⁹

¹¹¹ F Viljoen 'Forging a credible African system of human rights protection by overcoming state resistance and institutional weakness: compliance at a crossroads' in R Grote, M Morales Antoniazzi & D Paris (eds) *Research handbook on compliance in international human rights law* (2021) at 370.

¹¹² ACHPR Rules of Procedure rule 81(3).

¹¹³ ACHPR Rules of Procedure rule 125.

¹¹⁴ *Malawi Africa Association v Mauritania*, Communications 54/91-61/91, 98/93-164/97, 196/97-210/98, (2000) African Commission on Human and Peoples' Rights.

¹¹⁵ Murray & Mottershaw (n 89) at 362.

¹¹⁶ African Commission on Human and Peoples' Rights Thirty-Fourth activity report (2013) at 5.

¹¹⁷ ACHPR Resolution calling on the Republic of Kenya to implement the *Endorois* decision ACHPR/Res.257(LIV) 2013 (ACHPR/Res.257(LIV) of 2013).

¹¹⁸ VO Ayeni & A Von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 3 at 15.

¹¹⁹ As above.

2.2.4 Resolutions on implementation

The African Commission has also used resolutions to follow up on implementation of its recommendations. The Commission issues three types of resolutions: thematic, country-specific and administrative.¹²⁰ The Commission has issued thematic resolutions¹²¹ and resolutions targeting different states to implement its recommendations.¹²² For example, it has issued resolutions to Kenya to implement the *Endorois* decision¹²³ and Eritrea to implement its recommendations in *Zegveld and Another v Eritrea*.¹²⁴ The resolutions have however not been utilised on their own, but with other mechanisms such as special missions and implementation hearings.

2.2.5 Referral to the African Court

The African Commission can refer cases of non-implementation of its recommendations to the African Court based on their complementary relationship.¹²⁵ According to Viljoen, while the 2020 Rules of Procedure of the African Commission does not provide for this referral,¹²⁶ it can be logically deduced that the complementary relationship between the Commission and the Court allows for this.¹²⁷ The Court plays a protective mandate which complements that of the Commission.¹²⁸ The Commission initiates the process¹²⁹ and not the Court, and the Commission needs to have its records accurately to facilitate a clear and effective follow-up procedure.¹³⁰ The Commission has however not utilised this mechanism. The Commission has referred three communications to the Court so far,¹³¹ but none on non-implementation. The Commission has only referred two matters of non-implementation of its provisional measures, but none on its

¹²⁰ As above.

¹²¹ ACHPR '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(XXX)06' (African Commission on Human and Peoples' Rights, 9 August 2024) <<https://achpr.au.int/en/adopted-resolutions/97-resolution-importance-implementation-recommendations>> (accessed 9 October 2024).

¹²² Ayeni & Von Staden (n 120) at 15.

¹²³ ACHPR ACHPR/Res.257(LIV) of 2013.

¹²⁴ ACHPR Resolution on the human rights situation in Eritrea, ACHPR/Res.91(XXXVIII)05. See also *Zegveld and Another v Eritrea*, (2003) AHRLR 85 (ACHPR 2003).

¹²⁵ African Commission's Rules of Procedure rule 128(2). See also the art 2 of African Court Protocol.

¹²⁶ This referral was provided for under rule 118(1) of the 2010 Rules of procedure of the African Commission.

¹²⁷ Viljoen (n 113) at 374.

¹²⁸ African Court Rules of Procedure, 2020 rule 128(1).

¹²⁹ African Court Rules of Procedure, 2020 rule 125(8).

¹³⁰ Murray & Mottershaw (n 89) at 368.

¹³¹ These are *African Commission on Human and Peoples' Rights v Libya*, Application 002/2013, African Court on Human and Peoples' Rights (*ACHPR v Libya*), the *Endorois* case and *In the Matter of the African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya*, Application 004/2011 African Court on Human and Peoples' Rights (Order for provisional measures).

recommendations on merits.¹³² This can be attributed to the lack of clear referral mechanisms on the part of the Commission, the Commission's inability to fully gather evidence of non-implementation and the fear that the Commission might be seen to have failed to be taken seriously.¹³³

2.2.6 Use of judicial and political processes as monitoring mechanisms by the African Court

The African Court combines political and judicial monitoring mechanisms,¹³⁴ with the Protocol and Rules emphasising a political process of follow-up through the Executive Council of the AU.¹³⁵ Upon delivering a judgment, the Executive Council is notified and monitors its execution on behalf of the Assembly.¹³⁶ States undertake to comply with the Court's judgments,¹³⁷ with the Court reporting any non-compliance issues to the Assembly.¹³⁸ The Court's Rules of Procedure also provide for orders on provisional measures,¹³⁹ with the Court making appropriate recommendations in case of non-compliance.¹⁴⁰ The Court publishes activity reports presented to the Assembly, under which it captures information on implementation of its decisions.¹⁴¹

The report, while highlighting violations by State parties, lacks a comprehensive analysis by the Court and does not outline actions by the Assembly or other AU organs to ensure the implementation of decisions, making it appear like a mere formality rather than a genuine effort to ensure the Court's orders are followed. What is only contained is a call by the Executive Council for full compliance with the decisions of the Court,¹⁴² following a judicial dialogue on advancing human rights in Africa organised by the Court in Algiers, Algeria.¹⁴³

The Court and Commission should cautiously explore the adoption of political channels, as their commitment to human rights promotion and protection remains questionable, and any

¹³² These are *ACHPR v Libya* in 2013, and *the Endorois case* in 2012.

¹³³ Sandoval, Leach, & Murray (n 35) at 84.

¹³⁴ AU Executive Council 'Comparative Study on the Monitoring and Reporting Mechanisms of Relevant International and Regional Courts on Human Rights' (2019) Annex 2 10.

¹³⁵ African Court Protocol art 29(2).

¹³⁶ As above.

¹³⁷ African Court Protocol art 30.

¹³⁸ As above art 31.

¹³⁹ ACHPR Rules of Procedure rule 59(4).

¹⁴⁰ As above.

¹⁴¹ African Court Protocol art 31.

¹⁴² See a Draft Decision on the 2023 activity report of the African Court on Human and Peoples' Rights para 9.

¹⁴³ Sixth judicial dialogue advancing human rights in Africa: Challenges and opportunities for integrating regional and international human rights jurisprudence in domestic courts, 20-22 November 2023. For more, see activity report of the African Court on Human and Peoples' Rights 1 January – 31 December 2023 para 52.

referral to such mechanisms should be carefully considered.¹⁴⁴ This was seen recently when the AU Executive Council adopted decisions underlining that the Court and the Commission are not independent from the organs that created them,¹⁴⁵ making any greater engagement by the Court and the Commission at this juncture detrimental.¹⁴⁶ This is in addition to the recent move to avoid the naming and shaming of non-compliant states by the AU Executive Council.¹⁴⁷ This therefore threatens to cripple the functionality of the two institutions, especially in terms of follow-up.

2.2.7 The use of the Peace and Security Council, the African Peer Review Mechanism and the Pan-African Parliament

The AU normative framework also provides for other tools which have the potential to aid in ensuring effective follow-up and implementation. These are the use of the Peace and Security Council (PSC), the African Peer Review Mechanism (APRM) and the Pan-African Parliament (PAP).

One of the mandates of the PSC is to promote and encourage democratic practices, good governance, human rights and fundamental freedoms and the rule of law.¹⁴⁸ Some of its powers are to make follow-up on the progress towards the promotion of the rule of law and human rights and fundamental freedoms¹⁴⁹ and encourage and promote the implementation of the AU normative instruments.¹⁵⁰ Article 19 provides for close cooperation between the Commission and the PSC, and the Commission can bring to its attention any matter relating to the objectives and mandates of the PSC.¹⁵¹ In that sense, the PSC can examine the Commission and the Court's decisions and take action in case of non-implementation.¹⁵²

The APRM, established in 2002, serves as a platform for sharing experiences, reinforcing best practices, and assessing capacity-building needs and deficiencies.¹⁵³ Human rights is a key

¹⁴⁴ Sandoval, Leach, & Murray (n 35) at 86.

¹⁴⁵ In this sense, the Executive Council stated in 2018 that the Commission enjoys only a functional independence and not independence from the organs that created it, expressing concern with the Commission seemingly acting as an appellate body and thus undermining national legal systems. For more, see Decision on the report on the joint retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) DOC.EX.CL/1089(XXXIII) at 1.

¹⁴⁶ As above.

¹⁴⁷ See activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2018) (2018 activity report) para 51.

¹⁴⁸ Protocol Relating to the Establishment of the Peace and Security Council (PSC) of the African Union, 2003 (PSC Protocol) art 3(f).

¹⁴⁹ PSC Protocol art 7(1) (m).

¹⁵⁰ PSC Protocol art 7(1) (n).

¹⁵¹ PSC Protocol art 15.

¹⁵² Murray & Mottershaw (n 89) at 370.

¹⁵³ African Union 'African Peer Review Mechanism (APRM) | African Union' <<https://au.int/en/organs/aprm>> (accessed 17 September 2024).

focus area, offering an opportunity to monitor the enforcement of the African Charter¹⁵⁴ and the implementation of the decisions of the Court and the Commission. However, this process has not been fully used to ensure implementation of these decisions.¹⁵⁵ Due to its past successes,¹⁵⁶ leveraging the APRM could potentially influence the political will of reluctant states, which is essential for enforcement. Collaboration among stakeholders and integrating the APRM into implementation strategies could facilitate cohesive follow-up and enforcement.¹⁵⁷ While there have been some interactions between the Commission and the APRM, further exploration of their potential synergy is crucial to ensure successful follow-up and implementation.

PAP is the legislative organ of the AU.¹⁵⁸ Part of PAP's mandate is to facilitate effective implementation of the AU policies, promote the principles of human and peoples' rights in Africa and encourage good governance and the rule of law amongst AU State parties.¹⁵⁹ PAP receives activity reports from the Commission and Court, allowing it to adopt strategies for implementation and collaborate with them. PAP's open sessions provide an opportunity for CSOs and other interested parties to ask questions on implementation issues, fostering a more effective collaboration.¹⁶⁰

These mechanisms however have not been fully explored in ensuring implementation of the Court and Commission's decisions. Should the Court, the Commission and other relevant AU body organs focus more on a coordinated and integrated approach, then there would be greater potential to address implementation issues at least from different pressure points.¹⁶¹

2.3 Challenges experienced

As the Commission and the Court grapple with implementation issues and try to adopt different mechanisms, several challenges have been witnessed. These challenges have threatened to cripple the legitimacy of the Commission and the Court's efforts in ensuring implementation, and by extension has resulted in continued violation of fundamental human rights. These challenges

¹⁵⁴ New Partnership for Africa's Development (NEPAD) 'Declaration on democracy, political, economic and corporate governance adopted by the thirty-eight ordinary session of the Assembly of the OAU' held on 8 July 2002, Addis Ababa, Ethiopia paras 9, 10 and 15.

¹⁵⁵ Sandoval, Leach & Murray (n 35) at 89.

¹⁵⁶ M Killander 'The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward' (2008) 30 *Human Rights Quarterly* 41 at 18.

¹⁵⁷ Murray & Mottershaw (n 89) at 370.

¹⁵⁸ Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament during its June 2014 Summit (Assembly/AU/Dec.529(XXIII)) a (PAP Protocol) rt 3.

¹⁵⁹ PAP Protocol art 3 (a)-(c).

¹⁶⁰ Murray & Mottershaw (n 89) at 370.

¹⁶¹ Open Society Justice Initiative (OSJI), *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010) 108. As cited in Murray & Mottershaw (n 89) at 370-371.

have been experienced both at the national and supranational levels. This section highlights some of the challenges which have been experienced thus far.

2.3.1 Relationship between the African Commission and the African Court: The fear of the African Commission losing legitimacy?

While the Commission and Court are supposed to complement each other in their operations,¹⁶² this has not always been the case. This is seen through the lack of referral of any matter of non-implementation of the Commission's recommendations so far, even though several recommendations of the Commission have not been complied with. The Court's relationship with the Commission should be complementary, ensuring the credibility and legitimacy of the Commission are not undermined.¹⁶³ The worry that referral of any cases of non-implementation of the Commission's recommendations to the Court may hamper the Commission's legitimacy or make it look like it has failed in its mandates¹⁶⁴ seems to play out, looking at the history of follow-up on implementation and the relationship between the Court and the Commission.

The 2010 Rules of Procedure of the Commission clearly provided for a referral of cases of non-implementation of the Commission's recommendations.¹⁶⁵ This provision is however not contained in the 2020 Rules of Procedure of the Commission.¹⁶⁶ While the 2020 Rules provide for complementarity,¹⁶⁷ and consultation with the Court,¹⁶⁸ it only refers to the general competent policy organs of the AU in terms of referral of a matter of non-compliance.¹⁶⁹ The Rules make reference to the competent policy organs of the AU as provided for under Rule 137, but Rule 137 does not mention the Court.¹⁷⁰

While the two institutions are independent of each other, they are originally intended to work in collaboration with each other, and ought to be seen to be doing so. Such seemingly lack of cooperation between them taints their image before the States and even parties to cases, who

¹⁶² African Court Protocol arts 2, 5(1) (a), 6, 29(1) and 33. See also African Charter arts 30 and 45(2).

¹⁶³ Murray & Mottershaw (n 89) at 368.

¹⁶⁴ Sandoval, Leach & Murray (n 35).

¹⁶⁵ Rule 118(1) of the 2010 Rules of Procedure of the Commission stated that "If the Commission has taken a decision with respect to a communication submitted under Articles 48, 49 or 55 of the Charter and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 112(2), it may submit the communication to the Court pursuant to Article 5 (1) (a) of the Protocol and inform the parties accordingly."

¹⁶⁶ Murray and Long also note that the revised 2020 Rules make no explicit reference to the possibility to refer a decision to the African Court based on failure to implement. For more, see 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* 836 at 846.

¹⁶⁷ ACHPR Rules of Procedure rule 128.

¹⁶⁸ ACHPR Rules of Procedure rule 129.

¹⁶⁹ ACHPR Rules of Procedure rule 125(8).

¹⁷⁰ ACHPR Rules of Procedure rules 125(8) and 137.

are the key stakeholders in matters before the Court and the Commission and their follow-up on implementation.

2.3.2 Lack of political will

The implementation of decisions made by human rights bodies is greatly influenced by political will.¹⁷¹ The lack of political will has led to a system of defiance,¹⁷² rendering effective implementation strategies illusory.¹⁷³ This challenge has been experienced by the Commission and the Court in terms of implementing their decisions. The Commission has recognized political will as a major challenge, noting that enforcement is a significant problem, and that no mechanism can compel states to abide by its decisions more than the goodwill of States.¹⁷⁴ This is evident in the responses that State parties give during reporting on the status of implementation and the steps taken. Tanzania has, in several instances, either not complied or failed to file any report on compliance,¹⁷⁵ or has expressly stated that it cannot comply with the Court's judgments and orders, particularly on provisional measures.¹⁷⁶ The Court's 2019 activity report recorded a total of 6 cases in which State parties either partially complied or did not comply with the Court's judgments on merits,¹⁷⁷ 12 incidences of non-compliance with the Court's order for provisional measures,¹⁷⁸ and 18 incidences where States expressly stated that they cannot comply with the Court's orders for provisional measures.¹⁷⁹

2.3.3 Lack of the Commission and the Court's presence and visibility in member States

One of the other challenges which have been experienced in terms of follow-up on implementation is the lack of the Court and the Commission's presence and visibility in the State parties. This ranges from the mode of follow-up on implementation of the Court and

¹⁷¹ CM De Vos (n 76).

¹⁷² C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 27 at 28.

¹⁷³ CM De Vos (n 76).

¹⁷⁴ The African Commission on Human and Peoples' Rights information sheet No.3 at 9.

¹⁷⁵ Some of these cases include *Rev. Christopher R. Mtikila v United Republic of Tanzania*, Application 009 and 011/2011, African Court on Human and Peoples' Rights, *Alex Thomas v United Republic of Tanzania*, Application 005/2013, African Court on Human and Peoples' Rights and *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*, Application 003/2015 African Court on Human and Peoples' Rights.

¹⁷⁶ Some of these cases include *Ally Rajabu and Others v United Republic of Tanzania*, Application 007/2015 African Court on Human and Peoples' Rights, *John Lazaro v United Republic of Tanzania*, Application 007/2015 African Court on Human and Peoples' Rights and *Evodius Rutechura v United Republic of Tanzania*, Application 004/2016 African Court on Human and Peoples' Rights where Tanzania expressly stated that it cannot comply with the Court's orders for provisional measures.

¹⁷⁷ Activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2019) (ACHPR 2019 Activity report) Annex II 18-19.

¹⁷⁸ ACHPR 2019 activity report 20-22.

¹⁷⁹ ACHPR 2019 activity report 22-24.

Commission's decisions to lack of knowledge of the Commission and the Court's soft laws by enforcement personnel and lawyers at the State levels.¹⁸⁰

States have also in some instances lacked knowledge of their obligations in the implementation of a decision, coupled with issues of credibility, misgivings and acceptability of the Commission's decisions.¹⁸¹ Among the causes of this is the lack of sufficient follow-up criteria and bureaucratic composition¹⁸² that does not allow the Court and the Commission's impact to be felt at the states' level. Additionally, this could be attributable to the Commission and the Court's lack of diligent follow-up on implementation of decisions and lack of clear communication channels. In *Femi Falana v African Commission on Human and Peoples' Rights*,¹⁸³ the Applicant went before the African Court with frustrations that his request for the Commission to submit an application on behalf of the alleged victims of serious human rights violations before the Court were ignored. This application exposed latent defects in the Commission's follow-up mechanisms.¹⁸⁴

During its second regional seminar on the implementation of decisions of the Commission, the Commission identified lack of communication and visibility as one of the main challenges affecting the implementation of both judgments on merits and orders for provisional measures. This was attributable to a lack of communication strategy to enhance the Commission's visibility in the continent,¹⁸⁵ lack of awareness of the Commission's recommendations because of non-publication or delayed publication for action and public consumption and lack of effective and sustained communication, interaction and engagement with State parties.¹⁸⁶

Other identified factors are ineffective dissemination of the Commission's decisions at the national level, non-responsiveness of State parties to communications and provisional measures, failure of State parties to authorise promotion missions or visits by the Commission and lack of popularisation of the Commission's instruments and its work within the State parties.¹⁸⁷ In terms of monitoring mechanisms, the challenges identified are lack of provisions in the Commission's Rules of Procedure for the implementation of the Commission's

¹⁸⁰ Declaration of the 1st Joint Forum of the Special Mechanisms of the African Commission on Human and Peoples' Rights (2024) preamble.

¹⁸¹ Second Regional Seminar Report (2019) para 19 (l) (b).

¹⁸² Okoloise (n 174) at 55.

¹⁸³ *Femi Falana v African Commission on Human and Peoples' Rights*, Application 019/2015 African Court on Human and Peoples' Rights paras 3-4.

¹⁸⁴ Okoloise (n 174) at 55.

¹⁸⁵ ACHPR Report of the second regional seminar on the implementation of decisions of the African Commission on Human and Peoples' Rights from 04 - 06 September 2018 in Zanzibar, Tanzania (2019) (Second Regional Seminar Report (2019)) para 19 (l) (c).

¹⁸⁶ As above.

¹⁸⁷ As above.

recommendations, lack of guidelines to assist various stakeholders in monitoring the implementation of the Commission's recommendations, and non-establishment of implementation unit and monitoring mechanisms at the Commission's Secretariat to conduct country visits and monitor implementation.¹⁸⁸ Whereas the Commission's Rules¹⁸⁹ require that a Commissioner be designated to monitor implementation, practically, it is the Working Group on Communications and the Commissioner tasked with the promotion in the specific country who takes this function.¹⁹⁰

The lack of visibility and effective communication and implementation follow-up criteria pulls back the progress which has been made by the Court and the Commission in rendering decisions, especially on indigenous peoples.

2.3.4 Resource constraints

The Commission and the Court suffer from inadequate human and financial resources, hindering their ability to conduct follow-up activities effectively.¹⁹¹ For instance, understaffing in the Commission's Secretariat has resulted in delays in its functioning, including in the adoption and publication of concluding observations on State Reports and handling of correspondences.¹⁹² These delays, along with irregular publication and limited sharing of concluding observations with the public, diminish the potential impact of state reporting on enhancing compliance.¹⁹³

The Commission's structure has not been reviewed since 2009, leading to a shortage of human resources to support its mandates.¹⁹⁴ Both institutions rely on minimal resources allocated by the AU, with insufficient legal officers to aid in implementation follow-up across the continent.¹⁹⁵ Inadequate funding from State parties has forced the Commission to heavily depend on donor funding.¹⁹⁶ There is therefore a need to ensure that the Commission and the Court are effectively resourced for them to fulfil their protective mandates under the Charter and follow up on their decisions.

¹⁸⁸ Second Regional Seminar Report (2019) para 19 (l) (d).

¹⁸⁹ African Commission 2020 Rules of Procedure rule 125(5).

¹⁹⁰ Viljoen (n 113) 369.

¹⁹¹ Murray & Mottershaw (n 89) at 366.

¹⁹² Second regional seminar on the implementation of decisions of the Commission (Second regional seminar) para 19 (l) (b).

¹⁹³ Viljoen (n 113) 373.

¹⁹⁴ 54th and 55th ACHPR activity reports para 62.

¹⁹⁵ Okoloise (n 174) 56.

¹⁹⁶ Second regional seminar (n 194).

2.3.5 Lack of support from the AU policy organs

The AU policy organs have not shown much support to the Court and the Commission in terms of non-implementation of their decisions. This has affected the Commission and the Court's ability to push forward its efforts to ensure implementation by States. The Court in each ordinary session of the Assembly submits cases in which States have not complied with the Court's judgment.¹⁹⁷ The Assembly then notifies the Executive Council shall be notified of this, which shall monitor its execution on behalf of the Assembly.¹⁹⁸

However, in 2018 the Permanent Representatives Committee (PRC) recommended to the Executive Council that the Council should no longer mention the names of the State parties which have not complied with the Court's judgments.¹⁹⁹ Despite the intervention of the President of the Court in opposition to the same, the Executive Council adopted the proposal and proceeded not to mention Libya, Tanzania and Rwanda which had not complied with the Court's judgments as of 2018.²⁰⁰ This is against the African Court Protocol, and does not give the Executive Council the opportunity to monitor execution of Court judgments on behalf of the Assembly and also leads to the Assembly not knowing whether or not the Council has effectively discharged its functions.²⁰¹

The same case applies to the Commission. The Commission's activity reports have been limited to a maximum of 12 pages, making it difficult for the Executive Council to assess the status of implementation.²⁰² One major casualty that suffered as a result of this is the annexure of full Communications, making it rather impossible for many decisions to be made publicly available through publication on the Commission's website.²⁰³ In response to this lack of support and actions to enhance compliance by the AU policy organs, the Commission has in the recent past attempted to take initiatives aimed at directly engaging with states with an aim to coax them to comply,²⁰⁴ even though it has yielded unpromising results. Such lack of support not only undermines the credibility of the Court and Commission but also their ability to ensure effective implementation of their decisions.

¹⁹⁷ African Court Protocol art 31.

¹⁹⁸ As above art 29(2).

¹⁹⁹ ACtHPR 2018 activity report para 51.

²⁰⁰ As above.

²⁰¹ ACtHPR 2018 activity report para 52.

²⁰² Murray & Mottershaw (n 89) at 369.

²⁰³ Viljoen (n 113) 371.

²⁰⁴ Viljoen (n 113) 373.

2.4 Conclusion

This chapter has shown the steps which have been taken by the African Court and Commission thus far to ensure implementation of their decisions. These steps have been taken in collaboration with other AU bodies. However, challenges with implementation still abound. This shows that the efforts which have been taken have not been sufficient, threatening to water down human and peoples' rights especially the rights of indigenous peoples. More efforts therefore need to be put in place to ensure that there is a hands-on approach to implementation and that the Court and the Commission are doing more to follow-up on their decisions. This can best be done through concerted efforts to address these challenges.

Chapter 3: Follow-up measures by African Court and Commission to implement *Ogiek* and *Endorois* decisions

3.1 Introduction

The African Court and Commission have taken various follow-up steps to ensure implementation of the *Ogiek* and *Endorois* decisions by Kenya. These follow-up mechanisms range from state reporting to implementation hearings. These mechanisms have however not yielded their intended fruits, which are ensuring full compliance with the Court and Commission's decisions and positively impacting on the lives of the indigenous peoples in Kenya. There have been challenges which have been experienced, which have undermined follow-up on implementation.

This chapter looks specifically at the follow-up mechanisms adopted by the Court and Commission with respect to the *Ogiek* and *Endorois* decisions against Kenya. It also looks at some of the challenges which have been experienced, which have potentially and actually led to non-implementation of these decisions. From the onset, the author holds the view that these challenges are among the major causes of continued injustices against the members of the *Ogiek* and *Endorois* communities and other indigenous peoples in Kenya.

3.2 Follow-up mechanisms adopted by the African Court to follow up on implementation of the *Ogiek* decision

3.2.1 State reporting on implementation

The Court has used State reporting to monitor implementation of its orders in the *Ogiek* decision. One of the orders of the Court in the decision was for Kenya to submit a report detailing the measures taken to implement the judgment within 12 months.²⁰⁵ The reports submitted by Kenya or failure to do so are captured in the Court's activity reports submitted to the Assembly of Heads of States.²⁰⁶ The Court has included information on the status of implementation of the *Ogiek* decision in some of its activity reports, based on the requirement that Kenya reports on the status of its implementation.²⁰⁷ In the activity reports, the Court has noted Kenya's failure to report on the status of implementation even after the reporting time has lapsed,²⁰⁸ urging Kenya to take all the necessary measures to implement the decision.²⁰⁹ The Court noted that Kenya was only able

²⁰⁵ *Ogiek* case para 160 (xv).

²⁰⁶ African Court Protocol art 31.

²⁰⁷ Activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2019) Annex II 18. The report on Kenya's non-compliance is similar to the report submitted in 2020. See activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2020) Annex II 18.

²⁰⁸ Activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2020) 11-12.

²⁰⁹ As above.

to report on the status of implementation in January 2022,²¹⁰ since the time for reporting lapsed in 2017.²¹¹ While the Court's activity report shows some of the details as reported by Kenya,²¹² it lacks any deeper analysis by the Court, and does not contain any information on the correspondences between Kenya and the Court, any actions taken by the Court and any questions or concerns raised directly to the State on the issue of implementation. Additionally, there is no concrete way of testing the veracity of what the State says it has done, and this may only come down to whether the complainant or the applicant accepts what the State claims to have done.²¹³

3.2.2 Information-gathering

The Court has also used this approach to monitor the implementation of the *Ogiek* decision. The Court has the power to invite any party with any relevant information relating to implementation to provide such information to it.²¹⁴ For example, it has previously taken judicial notice of the publicly available information on the formation of a Taskforce on Implementation of the Court's Judgment in *Ogiek*.²¹⁵ It has also in the past conducted a sensitisation visit to Kenya,²¹⁶ which apart from urging Kenya to implement the Court's orders has been the best opportunity for the Court to collect information on the issues affecting implementation. Notably, despite the Court gathering information through state reports, seminars, and sensitization visits, it has not proactively followed up on non-implementation of the *Ogiek* decision, especially regarding the issues affecting implementation.

²¹⁰ African Union Activity report of the African Court on Human and Peoples' Rights (AfCHPR) (1 January – 31 December 2023) Annex 2 10.

²¹¹ As above.

²¹² As above Annex 2 10-11.

²¹³ Murray & others (n 77) at 162.

²¹⁴ African Court Rules of Procedure, 2020 rule 54(5).

²¹⁵ See African Union activity report of the African Court on Human and Peoples' Rights (AfCHPR) (1 January – 31 December 2023) (ACTHPR 2023 activity report) Annex 2 at 10 and the activity report of the Court for the period 1 January – 31 December 2022 Annex 2 at 18.

²¹⁶ ACTHPR 'African Court undertakes three-day sensitisation mission to the Republic of Kenya' (African Court on Human and Peoples' Rights, 19 July 2023) (ACTHPR Sensitisation visit to Kenya) <<https://www.african-court.org/wpafc/african-court-undertakes-three-day-sensitisation-mission-to-the-republic-of-kenya/>> (accessed 25 September 2024).

3.2.3 Letters to the State

The Court through its Registry has written a letter reminding Kenya to file a report on the measures taken to comply with the *Ogiek* judgment.²¹⁷ Kenya has however not responded to the Court's letter written in 2018,²¹⁸ making it challenging for the Court to know the status of implementation of the judgment. The letters written by the Registry are however not publicly available, and the contents of the letter cannot be assessed to determine the specific steps that Kenya was asked to take.

3.2.4 Sensitisation visit to Kenya

The Court's delegation led by the Court's President made a sensitisation visit to Kenya between 18 and 20 July 2023, where it met high-ranking government officials in Kenya.²¹⁹ The delegation called on the government of Kenya to take urgent steps to implement the *Ogiek* judgment.²²⁰ The Kenyan authorities pledged to consider the delegation's requests, and expressed their willingness to engage with all the relevant stakeholders to see how best to implement the judgment.²²¹ This was the second sensitisation visit to Kenya in relation to the rights of indigenous peoples after another visit in 2013,²²² where the Court on its joint visit with the Commission urged Kenya to abide by the Court's orders for provisional measures in the *Ogiek* case.²²³ Apart from the pledges by Kenya, there is no publicly available information on the impact and the outcome of the visits by the Court.

3.3 Follow-up mechanisms adopted by the African Commission to follow up on implementation of the *Endorois* decision

3.3.1 Information-gathering

Just like the Court, the Commission has used information-gathering as a follow-up mechanism in various forums. During the 2021 and 2022 reporting period, the Commission received communication on the status of implementation of the *Endorois* decision compiled by the Centre for Minority Rights Development, Endorois Welfare Council, Minority Rights Group International

²¹⁷ Activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2020) 12.

²¹⁸ As above.

²¹⁹ ACtHPR 2023 activity report paras 38-39.

²²⁰ ACtHPR 2023 activity report para 39.

²²¹ ACtHPR 2023 activity Report para 40.

²²² ACtHPR sensitisation visit to Kenya.

²²³ International Federation for Human Rights 'Visit of major African human rights mechanisms: An opportunity for the country to uphold its human rights commitments' <<https://www.fidh.org/en/region/Africa/kenya/visit-of-major-african-human-rights-mechanisms-to-kenya-13666>> (accessed 25 September 2024).

and WITNESS.²²⁴ The communication indicated that while some aspects of the decision had been partially implemented with only one having been fully implemented, the Kenyan government did not fully comply with the recommendations.²²⁵

It further revealed that the failure of the government of Kenya to implement the decision had negatively impacted on the rights of the members of Endorois community, resulting in severe poverty, illiteracy, poor health and life destitution.²²⁶ The Working Group on Indigenous Peoples has also conducted national dialogues to gather information on issues affecting indigenous peoples, facilitating discussions and making recommendations on these issues. The National Dialogue in 2019 urged the Government of Kenya to reconstitute the failed task force that had been formed to foresee the implementation of the *Endorois* decision.²²⁷

3.3.2 State reporting on implementation status

The Commission has used state reporting to monitor implementation of its recommendations in the *Endorois* decision, even though this has not worked. One of the recommendations of the Commission in the *Endorois* decision was for Kenya to report to the Commission on the status of implementation within three months of it being notified of the decision,²²⁸ with the Commission offering its good offices to assist in the implementation process.²²⁹ However, Kenya failed to implement the recommendations including reporting on the status of implementation within the specified period, prompting the Commission to devise other methods including implementation hearings and seminars to follow up on implementation.²³⁰

²²⁴ 52nd and 53rd activity reports of the African Commission on Human and Peoples' Rights (6 December 2021 to 9 November 2022) (52nd and 53rd African Commission activity reports) para 43.

²²⁵ 52nd and 53rd African Commission activity reports para 43.

²²⁶ As above.

²²⁷ ACHPR 'National dialogue on the rights of indigenous peoples and extractive industries, from 7 to 8 October 2019, Nairobi, Kenya' (African Commission on Human and Peoples' Rights, 9 August 2024) <<https://achpr.au.int/en/news/communiques/2019-10-14/national-dialogue-rights-indigenous-peoples-and-extractive-industries>> (accessed 23 September 2024).

²²⁸ *Endorois* case para 298 (1) (g).

²²⁹ *Endorois* case para 298 (2).

²³⁰ ACHPR 'Working Group on Indigenous Populations/Communities in Africa - 54OS' (African Commission on Human and Peoples' Rights, 9 August 2024) <<https://achpr.au.int/en/intersession-activity-reports/working-group-indigenous-populationscommunities-africa-54os>> (accessed 23 September 2024) paras 14-19.

3.3.3 Implementation hearing

The Commission has also conducted an implementation hearing to follow up on implementation of the *Endorois* decision. In 2013, the Commission conducted an oral hearing with the Kenyan government's representatives and the complainants,²³¹ a hearing which was requested by the complainants and whose aim was to collect information on the status of implementation and foster dialogue to encourage implementation by Kenya.²³² The hearing however did not result in any tangible results.²³³ Despite committing to submit an interim report within 90 days of the oral hearing and a comprehensive report at the 54th Ordinary Session of the Commission, Kenya failed to do so.²³⁴

3.3.4 Implementation workshops

The Commission has also conducted implementation workshops aimed at encouraging Kenya to implement the Commission's recommendations.²³⁵ Following the implementation hearing in 2013, the Commission conducted an implementation workshop on 23 September 2013 organised by the Commission's Working Group on Indigenous Populations, working with the Endorois Welfare Council.²³⁶ During the workshop, the present stakeholders urged the Commission to compel the government of Kenya to provide a roadmap for implementation within 90 days as had been agreed during the 53rd Ordinary Session of the Commission.²³⁷ Kenya however did not take part in the implementation workshop,²³⁸ and did not submit an implementation report as it had promised during the implementation hearing.²³⁹ Following the workshop, the Commission adopted Resolution 257 of 2013, urging Kenya to report to the Commission on the proposed measures to implement the *Endorois* decision and engage all other

²³¹ African Commission on Human and Peoples' Rights 'Thirty-fourth activity report' (2013) at 5.

²³² 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* 836 at 845.

²³³ Viljoen (n 113) at 370.

²³⁴ ACHPR ACHPR/Res.257(LIV) of 2013.

²³⁵ ACHPR 'Working Group on Extractive Industries, Environment and Human Rights Violations in Africa - 54OS' (African Commission on Human and Peoples' Rights, 9 August 2024) <<https://achpr.au.int/en/intersession-activity-reports/pacifique-manirakiza-chairpersonworking-group-extractive-industries>> (accessed 23 September 2024) para 14.

²³⁶ Minority Rights Group International "The Endorois decision" – four years on, the Endorois still await action by the government of Kenya' [2014] Blog <<https://minorityrights.org/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/>> (accessed 23 September 2024).

²³⁷ ACHPR 'Final communiqué of the Workshop on the Status of the Implementation of the Endorois Decision of the African Commission on Human and Peoples' Rights' (African Commission on Human and Peoples' Rights, 9 August 2024) (ACHPR Workshop Communique) <<https://achpr.au.int/en/news/final-communiques/2013-10-18/final-communique-workshop-status-implementation-endo>> (accessed 23 September 2024) (paras 2-3).

²³⁸ Nasirumbi (n 51) at 512.

²³⁹ ACHPR/Res.257(LIV) of 2013.

players including the victims,²⁴⁰ and to submit a comprehensive report including a roadmap on implementation of the decision.²⁴¹

3.4 Challenges experienced

Despite the measures that have been put in place with the aim of ensuring compliance by the Court and the Commission, full implementation remains a challenge, further risking the rights of the indigenous peoples in Kenya. There have been challenges which have been experienced, which have interfered with follow-up and implementation. This section highlights some of the challenges.

3.4.1 Lack of political will

Kenya has lacked the political will to implement the Commission and the Court's decisions. This has been seen in several ways, ranging from Kenya's non-implementation of the Court and the Commission's decisions²⁴² and failure to submit reports on implementation to its failure to send representatives to attend sessions aimed at tracking the implementation process.²⁴³ During the workshop on the implementation of the *Endorois* decision organised by the Commission's Working Group on Indigenous Populations, while all other relevant stakeholders attended, Kenya failed to send representatives, even though the session was held in Nairobi, Kenya's capital.²⁴⁴ Kenya also failed to give any feedback on the steps taken to implement the decision.²⁴⁵ As a result, the Working Group was unable to facilitate a joint roadmap of implementation as earlier planned,²⁴⁶ which would have perhaps fast-tracked the implementation process. This has presented challenges to the Commission and the Court hampering their ability to effectively discharge their functions, since implementation mainly rests on the will of States.²⁴⁷

²⁴⁰ ACHPR/Res.257(LIV) of 2013 para 2.

²⁴¹ ACHPR/Res.257(LIV) of 2013 para 3.

²⁴² Nasirumbi (n 51) at 510.

²⁴³ ACHPR/Res.257(LIV) of 2013.

²⁴⁴ ACHPR Workshop communique paras 2-3.

²⁴⁵ ACHPR/Res.257(LIV) of 2013.

²⁴⁶ ACHPR Workshop communique para 4.

²⁴⁷ Nasirumbi (n 51) at 516.

3.4.2 Unhealthy relationship and lack of cooperation between the Court and the Commission

While the Court and the Commission are supposed to complement each other in their protective mandates,²⁴⁸ this does not seem to be the case when it comes to follow-up on implementation. The complementary relationship in their protective mandates between the Court and the Commission can be said to allow for referral to the Court by the Commission of cases of non-compliance by States.²⁴⁹ While the Commission has referred Communications and matters of non-compliance with orders for reparations, there have not been any cases referred to the Court on non-compliance with recommendations on merits. This can be attributed to the perception that will attach to the Commission on its legitimacy,²⁵⁰ and also the lack of clarity on the specific role of the Court in the event that a matter of non-compliance is referred to it.²⁵¹ The *Endorois* decision can be seen as one of the cases in which the Commission should have referred to the Court, given that it is more than a decade since the decision was handed down without a substantive progress in terms of its implementation.

3.4.3 Lack of presence and visibility of the Commission and Court in Kenya

One of the other challenges which have been seen is the lack of the Commission and the Court's presence and visibility in Kenya. This coupled with the Court and the Commission's lack of adequate mechanisms to ensure their regular involvement in activities relating to implementation at the State level has seen the *Endorois* and the *Ogiek* cases lagging in their implementation. The Commission and Court rely on Kenya's state reporting for information, resulting in the inability to verify the accuracy of this information due to their structured systems, as they only receive data from Kenya. This was seen in 2020 where Kenya in its combined initial and periodic reports claimed that it had implemented four out of the seven recommendations given by the Commission in the *Endorois* case.²⁵² It took a report compiled by other interest groups and victims in 2022 for the Commission to realise that the implementation report by Kenya was not accurate, and that only one of the recommendations in the *Endorois* decision had been implemented.²⁵³ Additionally, the Court has organised only two sensitisation missions to

²⁴⁸ African Commission's Rules of Procedure, 2020 rule 128(2); African Court Protocol art 2.

²⁴⁹ Viljoen (n 113) at 374.

²⁵⁰ Sandoval, Leach & Murray (n 35) at 85.

²⁵¹ Viljoen (n 113) at 375.

²⁵² Combined report of the 12th and 13th periodic reports on the African Charter on Human and Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2010) para 145.

²⁵³ 52nd and 53rd African Commission activity reports para 43.

Kenya, partially touching on implementation of the *Ogiek* decision,²⁵⁴ with the Commission having not organised any mission concerning the *Endorois* decision.

3.4.4 Resource constraints

The other challenge which has been experienced is the unavailability of resources. This is on the part of the Court and the Commission and on the part of Kenya. The Commission and the Court lack sufficient human and financial resources to be able to conduct effective follow-up on implementation.²⁵⁵ Kenya has also raised the challenge of resources, especially when the Taskforce on Implementation of the *Endorois* decision could not complete its tasks due to budgetary constraints.²⁵⁶ This challenge can be said to be one of the contributors to ineffective follow-up and implementation of the *Endorois* and the *Ogiek* decisions.

3.5 Conclusion

This chapter has shown the follow-up mechanisms that the Court and the Commission have adopted to ensure the implementation of the *Endorois* and the *Ogiek* decisions. These steps include state reporting on the status of implementation, writing of letters, implementation hearings and sensitisation visits. These steps have however not been sufficient, and have not resulted in the full or substantive implementation of the *Ogiek* and *Endorois* decisions. There have been challenges which have been experienced along the way. Some of the challenges include resource constraints, lack of political will on the part of Kenya, lack of the Court and Commission's presence and visibility, and poor coordination between the Commission and the Court. These challenges have not only interfered with the implementation process but have also led to continued violation of the rights of indigenous peoples in Kenya through continued eviction, leading to environmental and forest degradation and health impacts.²⁵⁷

²⁵⁴ ACtHPR 'African Court undertakes three-day sensitisation mission to the Republic of Kenya' (African Court on Human and Peoples' Rights, 19 July 2023) <<https://www.african-court.org/wpafc/african-court-undertakes-three-day-sensitisation-mission-to-the-republic-of-kenya/>> (accessed 25 September 2024). It is to be noted that the second sensitization mission in 2023 was aimed at urging Kenya to deposit its Article 34 (6) Declaration, with the issue of implementation not being the main agenda but part of the mission.

²⁵⁵ 52nd and 53rd African Commission activity reports para 63. See also C Rickard 'African Court's existence threatened by lack of cooperation from AU states' (2021) <<https://africanlii.org/articles/2021-03-26/carmel-rickard/african-courts-existence-threatened-by-lack-of-cooperation-from-au-states>> (accessed 26 September 2024).

²⁵⁶ 52nd and 53rd African Commission activity reports para 144.

²⁵⁷ See a letter by Samuel Ade, Minority Rights Group & Fernando Delgado, ESCR-Net secretariat on behalf of other interest groups on 'call for Kenyan State to fulfil legal obligation to implement African Court on Human & Peoples' Rights twin judgments in case Application no. 006/2012 in favour of the *Ogiek* Community' (2024).

Chapter 4: Implementation follow-up mechanisms adopted by the inter-American Court and Commission on Human Rights

4.1 Introduction

This Chapter discusses the follow-up mechanisms which have been adopted within the inter-American human rights system. It highlights some of the positive developments that have led to full and continued compliance with the decisions of the inter-American Commission and inter-American Court, with the belief that these best practices serve as important lessons for the African Court and Commission.

The inter-American human rights system was created in 1948²⁵⁸ within the Organization of American States (OAS), and the American Convention on Human Rights (AmCHR) was adopted in 1969, leading to the establishment of the inter-American Court and Commission (IACHR).²⁵⁹ The IACHR works to promote human rights,²⁶⁰ raise awareness, make recommendations, and address complaints of AmCHR violations.²⁶¹ The inter-American Court of Human Rights (IACtHR) has jurisdiction over AmCHR interpretation²⁶² and submits reports to the OAS General Assembly, indicating cases where states have not complied with its judgments and making relevant recommendations.²⁶³

The IACHR and the IACtHR have adopted various mechanisms to ensure implementation of their decisions, which have led to implementation and a positive impact on human rights protection. While the African and inter-American systems are two different institutions in terms of treaties, instruments and traditions, the basic principles of human rights protection and human dignity that underlie their operations and existence form a common ground.²⁶⁴ There are thus various lessons that can be picked from the inter-American system that can aid in improving the follow-up and implementation of decisions within the African system.

²⁵⁸ Basic documents pertaining to human rights in the inter-American system (2001) 1 & 76. Available at <https://www.corteidh.or.cr/docs/libros/basingl01.pdf> (accessed 2 October 2024).

²⁵⁹ The OAS has 35 member states, the American Convention on Human Rights came into force after the 11th instrument of ratification was deposited in 1978.

²⁶⁰ American Convention on Human Rights, 1969 (AmCPR) art 41.

²⁶¹ As above.

²⁶² AmCHR art 62(3).

²⁶³ AmCHR art 65.

²⁶⁴ M Leonardo 'What lessons can be learned from the inter-American system of human rights protection?' (3 March 2020) <<https://www.acthprmonitor.org/what-lessons-can-be-learned-from-the-inter-american-system-of-human-rights-protection/>> (accessed 3 October 2024).

4.2 Follow-up mechanisms adopted by the inter-American Court and Commission of Human Rights to ensure implementation of their decisions

Both the IACHR and the IACtHR have powers to follow up on implementation of the recommendations and the orders they make. While the AmCHR does not explicitly provide for how they should monitor implementation of their decisions, this has given room for them to be innovative and develop follow-up mechanisms through their respective rules of procedure.²⁶⁵ Under article 69 of the IACtHR's Rules of Procedure, there are various means through which the Court can monitor implementation of its orders.²⁶⁶ Article 48 of the IACHR Rules of Procedure also gives it powers to adopt appropriate follow-up mechanisms.²⁶⁷ Various follow-up mechanisms have been deployed by both the IACtHR and the IACHR to ensure the implementation of their decisions, which has seen positive outcomes over time. The following subsection contains some of the mechanisms.

4.2.1 Implementation hearings

The IACtHR and IACHR both conduct implementation hearings, with the IACtHR being more common since 2007. Unlike the African human rights system, implementation hearings within the Americas are not *ad hoc* and have positively impacted compliance with the decisions of both bodies.²⁶⁸ The IACtHR while changing its implementation hearing procedures including its Rules of Procedure has been consulting different stakeholders including the IACHR to ensure that the monitoring and compliance process is successful.²⁶⁹ Compliance hearings are called by the IACtHR as deemed appropriate and involve the opinion of the IACHR.²⁷⁰ After obtaining relevant information, the IACtHR determines compliance and issues relevant orders.²⁷¹ The IACtHR holds two types of hearings, private and public. Private hearings are conducted informally, in the presence of two or three judges, the IACHR, the victims and their representatives and the state delegation.²⁷² Private hearings are not procedurally technical since they are conducted rather informally, lasting for about two hours.²⁷³ During the hearing, the IACtHR's delegation will hear submissions from both parties and will ask questions, suggest solutions and prepare

²⁶⁵ Sandoval, Leach & Murray (n 35) at 74.

²⁶⁶ Rules of procedure of the inter-American Court of Human Rights, 2009 (IACtHR Rules of Procedure) art 69.

²⁶⁷ Rules of procedure of the inter-American Commission on Human Rights, 2009 (IACHR's Rules of Procedure) art 48.

²⁶⁸ Sandoval, Leach & Murray (n 35) at 81.

²⁶⁹ IACtHR 'Statement of reasons to modify the Rules of Procedure' <https://www.corteidh.or.cr/docs/reglamento/ene_2009_motivos_ing.pdf> (accessed 15 October 2024). See also the 2009 Rules of Procedure of the inter-American Court.

²⁷⁰ IACtHR rules of procedure art 69(3).

²⁷¹ IACtHR Rules of Procedure art 69(4).

²⁷² Sandoval, Leach & Murray (n 35) at 81.

²⁷³ As above.

compliance schedules.²⁷⁴ Public hearings on the other hand are attended by all seven judges, follow formal protocols, are adversarial, and can be broadcast on the IACtHR's website with third-party interventions..²⁷⁵

The IACtHR may hold compliance hearings to ensure compliance during long implementation delays, as seen in the *La Rochela Massacre* case.²⁷⁶ In 2008, the IACtHR also conducted private implementation hearings to pressure the state in question, such as in *Fermín Ramirez and Raxcacó v Guatemala*²⁷⁷ and preventing it from taking anti-human rights actions. Compliance hearings have significantly impacted the implementation process within the inter-American human rights system by creating more pressure on states to comply and publicising non-compliance incidences.²⁷⁸

Compliance hearings are more effective when the IACHtHR requests all relevant information central to the implementation process before the hearing, as seen in the cases against Guatemala in 2015.²⁷⁹ After the implementation hearing, the Court can issue further orders to ensure implementation, including provisional measures to prevent any irreparable harm.²⁸⁰ Once compliance hearings are done and the state has implemented all the orders, then a case is marked as completed and the case is closed.²⁸¹

The IACHR has also very exceptionally held compliance hearings in some occasions to push forward the implementation of its recommendations.²⁸² While the ACHR does not provide for implementation hearings, the Rules of Procedure of the IACHR provides for implementation hearings as one of the follow-up mechanisms.²⁸³ The IACHR conducted an implementation hearing in the *Carandiru Massacre* case in Brazil, which the IACHR had resolved in 2000 before the initiation of its system of reporting on follow-up. Implementation hearing helped in addressing the decision of a local court to overturn a verdict holding members of the military responsible for the massacre of more than 100 detainees in Carandiru complex.²⁸⁴

²⁷⁴ Inter-American Court of Human Rights annual report (2010) at 5.

²⁷⁵ Sandoval, Leach & Murray (n 35) at 87.

²⁷⁶ *LRM v C* IACHR (2007) Ser C/ Doc 163 (11 May 2007) (*La Rochela Massacre* case).

²⁷⁷ Inter-American Court of Human Rights annual report (IACtHR annual report), 2008 17.

²⁷⁸ Sandoval, Leach & Murray (n 35) at 86-87.

²⁷⁹ Sandoval, Leach & Murray (n 35) at 82.

²⁸⁰ IACtHR 2023 annual report at 98-100.

²⁸¹ IACtHR 2023 annual report at 100-103.

²⁸² E Abi-Mershed 'The inter-American Commission on Human Rights and implementation of recommendations in individual cases' (2020) 12 *Journal of Human Rights Practice* 177 at 175.

²⁸³ Rules of Procedure of the inter-American Commission on Human Rights, 2009 art 25(10).

²⁸⁴ Implementation hearing on case 11.291 – Carandiru Massacre (follow-up of recommendations), Brazil human rights education in Brazil, available at <http://www.oas.org/es/cidh/audiencias/topicslist.aspx?lang=en&topic=22> (accessed 8 October 2024).

Implementation hearings by the IACHR as a means of maintaining the continuity of the follow-up process has been relevant in maintaining a good level of attention to cases.²⁸⁵ Parties may reach a settlement at any point during implementation hearings, but the IACHR must review and approve its report before a case is closed as being compliant with the AmCHR.²⁸⁶

4.2.2 Referral to a judicial organ

As opposed to the African human rights system, where referral to a judicial organ has been used only for merit communications and not on implementation,²⁸⁷ the process has been used frequently within the inter-American human rights system. Under its Rules of Procedure, the IACHR can refer cases to the IACtHR relating to the states which have accepted the IACtHR's jurisdiction if the state has not complied with the recommendations of the IACHR.²⁸⁸ The IACHR refers cases to the IACtHR even where there have been various opportunities given to the State to implement the decision, as was seen in *Las Dos Erres Massacre v Guatemala*.²⁸⁹ The IACHR has been referring several cases of non-compliance to the IACtHR over the years. In 2023 alone, the IACHR referred 34 cases of non-compliance with its recommendations to the IACtHR, with an aim to enforce implementation and facilitate access to justice for victims.²⁹⁰

The process has been successful in preventing states from implementing measures that could undermine human rights defense and the implementation of inter-American human rights mechanisms. In *the Members of the village of Chichupac* case,²⁹¹ the ICtHR prevented Guatemala from taking regressive measures to defeat the implementation of the recommendations of the IACHR and the orders of the IACtHR.²⁹²

4.2.3 Increasing presence, visibility and publicity

One of the main contributors of success in the follow-up on implementation within the inter-American human rights system has been through increasing its public presence, relevance and

²⁸⁵ *Abi-Mershed* (n 30) at 175.

²⁸⁶ As above.

²⁸⁷ A Rudman 'The Commission as a party before the Court – Reflections on the complementarity arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 4. It is however to be noted that the Commission has referred only two cases on non-implementation of its orders for provisional measures. These are *ACHPR v Libya* case and the *Endorois* case.

²⁸⁸ IACHR rules of Procedure art 44.

²⁸⁹ In this case, the parties had signed a friendly settlement agreement before the IACHR in 2000, but the Commission continued to monitor its implementation, and in 2008 referred it to the IACtHR, even though Guatemala had partially complied with some of the elements of the friendly settlement agreement.

²⁹⁰ Inter-American Commission on Human Rights 2023 annual report at 173.

²⁹¹ *CR v G IACHR* (30 November 2016) Ser C/ Doc 328 Rev 1 (*the Members of the village of Chichupac* case) para 2.

²⁹² *The Members of the village of Chichupac* case para 341.

visibility and creating publicity on non-compliance issues. This has been done in different ways, as discussed in the following subsection.

4.2.3.1 On-site implementation hearings

One of the ways in which visibility has been seen in the Americas is by conducting on-site implementation hearings which are closer to the victims, particularly in the exact place and country where the violation of human rights occurred.²⁹³ This has been beneficial for the indigenous populations, due to their vulnerabilities while also helping the IACtHR to better comprehend their views and culture.²⁹⁴ This has also aided in ensuring the attendance of state officials and victims who are the key players in the implementation process.²⁹⁵ This has also increased the state's willingness to comply with the IACtHR's decisions, since instant communication is facilitated between the state and the victims, leading to the former's commitment to taking concrete actions leading to full compliance.²⁹⁶ Between 2015 and 2018, the IACtHR has conducted on-site hearings on cases relating to Madungandi and the Emberá indigenous peoples²⁹⁷ in El Salvador, Panama, Guatemala and Paraguay, processes which have been possible courtesy of collaboration from these states.²⁹⁸ In 2019, on-site hearing was also conducted in relation to two cases against Costa Rica, which are the cases of *Artavia Murillo et al (In Vitro Fertilization)* and *Gómez Murillo et al*, both against Costa Rica, leading to tangible measures to implement the decisions by Costa Rica.²⁹⁹

4.2.3.2 Special follow-up mechanisms and working group on implementation of human rights policies

To ensure presence and visibility in the OAS States, the IACHR has established special follow-up mechanisms, tailored to suit the unique circumstances of a state at hand and ensure effective follow-up on implementation of its recommendations. The special follow-up mechanisms facilitate a holistic analysis of the recommendations of the IACHR, providing public exposure on a case or situation, enabling the IACHR to conduct a systematic and periodic monitoring of an issue, resulting in a more in-depth follow-up efforts and outcome.³⁰⁰ In 2019, the IACHR

²⁹³ Inter-American Commission on Human Rights annual report (IACHR 2019 annual report) para 10.

²⁹⁴ Sandoval, Leach & Murray (n 35) at 83.

²⁹⁵ As above.

²⁹⁶ Inter-American Court of Human Rights annual report (2019) (IACtHR 2019 annual report) at 69.

²⁹⁷ As above.

²⁹⁸ As above.

²⁹⁹ IACtHR 2019 annual report 70.

³⁰⁰ IACHR 'IACHR: Special mechanisms' (Inter-American Commission on Human Rights (IACHR)) <<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/activities/follow-up/special-mechanisms.asp>> (accessed 7 October 2024).

established a follow-up mechanism in Honduras to support legal initiatives promoting compliance with IACHR recommendations. In 2019 the IACHR also did the same in Venezuela, Ecuador, and Nicaragua to strengthen the initiatives of the states and civil society, support human rights initiatives, and ensure the implementation of its recommendations.³⁰¹ The IACHR has also established a working group on implementation of human rights policies in the Dominican Republic.³⁰² The working group aims to assist in improving the implementation of human rights policies and the recommendations of the IACHR. The first working group was held in Washington, DC in 2018,³⁰³ and the second one took place in 2020 and 2021 in Santo Domingo, the Dominican Republic.³⁰⁴

4.2.3.3 Working meetings

The IACHR has also utilised working meetings to move forward the implementation process. In 2018, it organised up to 99 working meetings on precautionary measures, matters in friendly settlements and follow-up on recommendations on cases involving 17 countries,³⁰⁵ where CSOs and the victims involved in the cases presented their views to states. 15 working meetings were conducted on follow-up on recommendations in 2018 alone, which was a 434% increase over those held in 2017.³⁰⁶ Such a proactive action led to a 200% increase in state and victims' responses in relation to follow-up on implementation.³⁰⁷ As late as 2023, the IACHR has continued to increase the number of working meetings with states during implementation follow-up.³⁰⁸

4.2.3.4 Telephone conversations and contact with victims and petitioners

As part of a proactive engagement in the follow-up on implementation process, the IACHR has made telephone calls to victims and petitioners to get a clear picture of implementation status in individual cases.³⁰⁹ This has had a positive impact, with the IACHR in 2018 receiving a

³⁰¹IACHR 'IACHR: Follow-up of Recommendations' (Inter-American Commission on Human Rights (IACHR)) <<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/activities/follow-up/default.asp>> (accessed 7 October 2024).

³⁰² IACHR 2017 annual report. See particularly follow-up on recommendations issued by the IACHR in its country or thematic reports follow-up on the recommendations issued by the IACHR regarding the situation of human rights in the Dominican Republic.

³⁰³ OAS, 'OAS - Organization of American States: Democracy for peace, security, and development' (1 August 2009) <https://www.oas.org/en/iachr/media_center/preleases/2018/163.asp> (accessed 7 October 2024).

³⁰⁴ OAS, 'OAS - Organization of American States: Democracy for peace, security, and development' (1 August 2009) <https://www.oas.org/en/iachr/media_center/PReleases/2018/253.asp> (accessed 7 October 2024).

³⁰⁵ IACHR 2018 annual report para 21.

³⁰⁶ IACHR 2018 annual report para 67.

³⁰⁷ As above.

³⁰⁸ IACHR 2023 annual report para 10.

³⁰⁹ Sandoval, Leach & Murray (n 35) at 92.

substantial number of state responses concerning implementation of recommendations on individual cases.³¹⁰ On its part, the IACtHR has also leveraged direct contact especially with victims, whereby judges have developed the practice of having direct contact with victims during country visits.³¹¹

4.2.4 Active involvement of CSOs and NHRIs in the implementation process

Both the IACHR and the IACtHR have actively engaged the Civil Society Organisations (CSOs) and the National Human Rights Institutions (NHRIs) in their activities, especially with regard to follow-up on implementation. In recent years, the IACtHR has been quite proactive in engaging NHRIs. This was seen in *Artavia Murillo et al. 'In Vitro Fertilization' v Costa Rica*,³¹² where the Defensoría de los Habitantes, an NHRI in Costa Rica actively engaged in the implementation process. This led the President of Costa Rica to sign an executive decree lifting the prohibition of in vitro fertilisation (IVF) a few hours before a public hearing on implementation was held.³¹³ The active role of NHRIs and CSOs in the implementation process includes presenting as *amicus curiae* during implementation monitoring processes.³¹⁴

The IACtHR has acknowledged the importance of active involvement of NHRIs, CSOs, academia and other interested players in the follow-up on compliance.³¹⁵ In 2019, the IACtHR began publishing compliance monitoring information on its website, acknowledging the interest of CSOs, NGOs, academia, and other stakeholders in monitoring judgment execution.³¹⁶ The IACHR has collaborated with CSOs and other institutions, including the UN bodies, other OAS member states, universities, and other organizations, to implement special follow-up mechanisms in Venezuela since 2019, focusing on victims, their families, and human rights promotion.³¹⁷

³¹⁰ IACHR 2018 annual report 173.

³¹¹ A Donald, D Long & A Speck 'Identifying and assessing the implementation of human rights decisions' (2020) 12 *Journal of Human Rights Practice* 125 at 130.

³¹² *AM v CR* IACHR (28 November 2012) Ser 85/10 Doc 12.361.

³¹³ Sandoval, Leach & Murray (n 35) at 93.

³¹⁴ IACtHR Rules of Procedure art 44.

³¹⁵ Sandoval, Leach & Murray (n 35) at 93.

³¹⁶ IACtHR 2019 annual report.

³¹⁷ IACHR 'IACHR:: Special mechanisms' (Inter-American Commission on Human Rights (IACHR)) <<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/activities/follow-up/special-mechanisms.asp>> (accessed 7 October 2024).

4.2.5 Joint compliance monitoring processes

The IACtHR uses two joinder mechanisms to monitor the implementation of its orders. The first involves joining cases against one state and monitoring their implementation at a go, while the second involves joining similar orders against multiple states and monitoring them at a go.³¹⁸ Implementation hearings can also be held for closely related orders.³¹⁹ Here, the IACtHR upon conducting the implementation hearing against the same state will then issue and publish joint resolutions.³²⁰ The IACtHR conducted a compliance hearing in 2009 against Colombia³²¹ and the Dominican Republic,³²² focusing on victim rehabilitation. This process has been effective in ensuring compliance, particularly in states with structural issues and frequent human rights violations like Guatemala, Colombia, and Peru.³²³ Joint compliance monitoring processes, like those in the inter-American system, ensure political buy-in and local legitimacy for implementation.³²⁴

4.2.6 Institutionalisation of the monitoring function and categorising implementation

The inter-American human rights system has established a new recommendations monitoring section to track all decisions made by the IACHR, including individual cases, country reports, on-site visits, and thematic reports, resulting in positive outcomes.³²⁵ From 2007, the IACHR embarked on the process of documenting the status of compliance, recording whether the compliance process is complete and not just whether it has been started.³²⁶ The IACHR's annual reports thus contain three sections, which are on either full, partial or either pending or non-compliance with the IACHR's recommendations.³²⁷ The IACHR improved this process by adopting a new strategic plan for 2017-2021, creating an opportunity for better coordination amongst the various organs of the Commission to monitor implementation.³²⁸ As part of the strategic plan, the IACHR is developing a special program to monitor its recommendations (Program 21). Program 21 is implementing coordinated actions to enhance the IACHR's capacity

³¹⁸ Sandoval, Leach & Murray (n 35) at 77.

³¹⁹ IACtHR rules of procedure art 30(5).

³²⁰ Sandoval, Leach & Murray (n 35) at 83.

³²¹ These are *Manuel Cepeda Vargas, Escué Zapata, Valle Jaramillo et al., Ituango Massacres, La Rochela Massacre, Pueblo Bello Massacre, Gutiérrez Soler, Mapiripán Massacre* and *19 Tradersmen* cases.

³²² IACtHR 2019 annual report 62-63.

³²³ Sandoval, Leach & Murray (n 35) at 83.

³²⁴ Asaala (n 34) at 440.

³²⁵ Sandoval, Leach & Murray (n 35) at 77.

³²⁶ IACHR 2018 annual report para 55.

³²⁷ IACHR 2018 annual report para 56.

³²⁸ IACHR 'IACHR: Follow-up of Recommendations' (Inter-American Commission on Human Rights (IACHR)) <<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/activities/follow-up/default.asp>> (accessed 7 October 2024).

to monitor and verify state compliance with international human rights obligations, based on its recommendations.³²⁹

The 2018 IACHR annual report categorizes implementation progress into full, partial, or pending categories, indicating whether a state has fully complied, taken some steps but not all required steps, expressed its intention not to comply, or has not reported on compliance status.³³⁰ In 2018, the IACHR introduced a follow-up of recommendations section, linked to the assistant executive secretariat for monitoring, promotion, and technical cooperation in human rights, to coordinate the follow-up of recommendations in line with the 2017-2021 strategic plan.³³¹ First, for friendly settlements, a percentage is given, showing the number of clauses that have been complied with against all the recommendations, which enables the parties to visualise the status of implementation.³³² Secondly, tables are included, which indicate the progress made for friendly settlements and individual recommendations.³³³ Two further categories are included, substantial partial which is distinct from partial and non-compliance which is distinct from pending compliance.³³⁴ Thirdly, there are detailed narrative reports for each case, which summarises information provided by the parties and the IACHR's analysis of the status of compliance with each recommendation.³³⁵ Information on the status of implementation is obtained through reports on the status of compliance by the state concerned and the Commission's pursuit of such information from other sources.³³⁶

Within the IACtHR, monitoring on implementation is done through supervision resolutions which do not alter the orders of the Court but can provide guidance on how to achieve compliance.³³⁷ The IACtHR's resolutions also include sections tracking implementation status, including reporting, and describing each order as pending, partial, or full compliance. Once full compliance is achieved, case supervision is closed, ensuring a smooth process from implementation to reporting.³³⁸ Institutionalising follow-up on implementation and clear indicators is crucial in the inter-American system. It directs states on expected or pending

³²⁹ As above.

³³⁰ Donald, Long & Speck (n 313) at 140.

³³¹ IACHR (n 328).

³³² IACHR 2018 annual report 147.

³³³ IACHR 2018 annual report 175-178.

³³⁴ IACHR 2018 annual report 146.

³³⁵ Donald, Long & Speck (n 313) at 141.

³³⁶ As above.

³³⁷ A Perez-Liñán & A García Atehortúa 'Oversight hearings, stakeholder engagement, and compliance in the inter-American Court of Human Rights' (2024) 78 *International Organization* 293 at 301.

³³⁸ As above.

implementation,³³⁹ simplifies it, allows for aggregate assessment of state records, and enables comparison across states, cases, courts, and tribunals to learn from successes and identify shortcomings.³⁴⁰

4.2.7 State reporting

One of the main procedures used to monitor implementation of the decisions of the IACtHR is through a State party to a proceeding reporting on the status of implementation of the orders given.³⁴¹ The victims and their legal representatives will have an opportunity to observe the reports and give their views on them³⁴² once the IACtHR shares the report with them. The IACtHR also shares the report with the IACHR, which has an opportunity to give its observations on the state's report and the victims' observations.³⁴³ Based on this information, the IACtHR then issues resolutions³⁴⁴ outlining the actions needed of the state and further reporting if needed, with timelines to do so.³⁴⁵ The IACtHR maintains the overall control of the process until it is satisfied that the state has fully complied.³⁴⁶

4.2.8 Information gathering on implementation

The IACtHR has the power to seek relevant information on the status of implementation of its orders from other sources apart from the state to determine and evaluate compliance with its directions.³⁴⁷ Such information includes expert opinion or reports as the IACtHR deems fit.³⁴⁸ The same applies to the IACHR, where there has been more emphasis on seeking information on the status of implementation from states, victims, CSOs and other entities to fill any information gaps left by states.

³³⁹ R Murray 'Confidentiality and Implementation of the Decisions of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 1 at 2.

³⁴⁰ Donald, Long & Speck (n 313) at 142.

³⁴¹ IACtHR Rules of Procedure art 69 (1).

³⁴² As above.

³⁴³ As above.

³⁴⁴ As above.

³⁴⁵ African Court *African comparative study on international and regional courts on human rights on mechanisms to monitor implementation of decisions/judgments African Court* 50.

³⁴⁶ Asaala (n 34) at 438.

³⁴⁷ IACtHR Rules of Procedure art 69 (2).

³⁴⁸ As above.

4.2.9 Facilitation of constructive dialogue

The IACtHR has adopted dialogues between states, where the Court creates a conducive environment for parties in a case to come to an amicable settlement.³⁴⁹ This has helped in fast-tracking the hearing process, and importantly in shortening the implementation period. This was seen in the *Awasi Tingni* case,³⁵⁰ where the IACtHR ruled in favour of Awasi Tingni Community, an indigenous group and confirmed their right to their communal ancestral land. The IACtHR awarded damages to the community, and ordered the State to submit a report every six months on the status of implementation of the decision, and decided to oversee the implementation process to the end.³⁵¹ A work plan was agreed during the hearing process, and within just six months of the issuance of orders the whole judgment had been complied with.³⁵² Dialogue between the state and the applicants and allowing them to establish the way forward on their own³⁵³ was instrumental since both parties were at ease and that facilitated the closure of the file upon full compliance.³⁵⁴

4.2.10 Resolutions, declarations and press releases

The IACHR and the IACtHR have used resolutions, declarations, press releases and other related mediums to either put pressure on states to implement their decisions or applaud them for taking proactive steps to implement the decisions. The IACtHR can issue resolutions and can use them as a means to set out what is expected of a state on implementation.³⁵⁵ This was applied successfully in *Molina Theissen* case,³⁵⁶ which concerned the disappearance of a child and the illegal detention and rape of his sister in 1981, where there was a lack of diligent investigation into the facts.³⁵⁷ The Court issued clear instructions for Guatemala to report to the Court, conduct an effective investigation, and submit a schedule outlining all steps, potential dates, and involved institutions and persons. This was to ensure an ongoing dialogue and effective investigation.³⁵⁸ The IACHR has also used this process, where it has either commended³⁵⁹ a state for the steps taken to comply with the orders or to criticise the lack of compliance.³⁶⁰

³⁴⁹ Sandoval, Leach & Murray (n 35) at 80.

³⁵⁰ *AT v N IACHR* (31 August 2001) Ser C/ Doc 79 Rev 1 (*Awasi Tingni* case).

³⁵¹ *Awasi Tingni* case (n 350) paras 173(8)-(9).

³⁵² Sandoval, Leach & Murray (n 35) at 80.

³⁵³ Sandoval, Leach & Murray (n 35) at 82.

³⁵⁴ As above.

³⁵⁵ As above.

³⁵⁶ *MT v G IACHR* (3 July 2004) Ser C/ Doc 108 Rev 1 (*Molina Theissen* case).

³⁵⁷ Sandoval, Leach & Murray (n 35) at 80.

³⁵⁸ *Molina Theissen* case para 25.

³⁵⁹ IACtHR 2017 annual report.

³⁶⁰ IACtHR 2014 annual report.

4.2.11 Cooperation from the states and civil society organisations

The IACtHR has leveraged the cooperation of OAS states to advance its follow-up and implementation agenda, with the highest number of private implementation hearings held between 2007 and 2018 in relation to Colombia (32) and Guatemala (38), which cooperated with the IACtHR.³⁶¹ On the other hand, there was only one hearing in relation to Venezuela in the *Barrions Family* case (2016), mainly because Guatemala was not cooperative and had even strongly contested the authority of the IACtHR, and eventually denounced the ACHR in 2012.³⁶²

The CSOs have also been instrumental in facilitating the follow up on implementation process, especially with regards to implementation hearings. For example, the majority of cases relating to Colombia, most of which implementation hearings have taken place, have been filed before the IACtHR and facilitated by CSOs.³⁶³

4.2.12 Referral to a political organ

In case of a continued incident of non-compliance of a state and failure to implement its orders, the IACtHR can report the case to the OAS General Assembly.³⁶⁴ This option has however rarely been invoked, and only used with regards to uncooperating states such as Venezuela, Nicaragua, Haiti, Trinidad and Tobago and Ecuador whenever the IACtHR considers it beneficial to resort to the ‘naming and shaming’ option within a political context.³⁶⁵ Just as the case is with the African human rights system, this option has not yielded much fruit, and the General Assembly of the OAS has not taken any tangible measures in relation to the concerned states.³⁶⁶

4.2.13 Inter-American SIMORE

To ensure openness and transparency in terms of follow-up and the status of implementation of its recommendations, the IACHR has developed the inter-American SIMORE,³⁶⁷ an online tool aimed at monitoring and promoting compliance with the recommendations of the IACHR.³⁶⁸ This tool has strengthened follow-up and ensured the presence of monitoring mechanisms and focal

³⁶¹ Sandoval, Leach & Murray (n 35) at 82.

³⁶² As above. See also IACtHR 2015 annual report 58.

³⁶³ P Engstrom & P Low ‘Mobilising the inter-American human rights system: Regional litigation and domestic human rights impact in Latin America’ in P Engstrom (ed) *The inter-American human rights system: Impact beyond compliance* (2019) 23 at 42 as cited in Sandoval, Leach & Murray (n 13) at 82-83.

³⁶⁴ ACHR art 65.

³⁶⁵ Sandoval, Leach & Murray (n 35) at 86.

³⁶⁶ As above.

³⁶⁷ SIMORE is a Spanish acronym that stands for a Monitoring System of Recommendations.

³⁶⁸ Geneva Academy ‘Tracking tools - The Geneva Academy of International Humanitarian Law and Human Rights’ <<https://geneva-academy.ch/geneva-humanrights-platform/tracking-tools/detail/5-simore-interamericano>> (accessed 7 October 2024).

points at the state level, which aids in updating and accessing information on the status of implementation in a timely manner. Its particular aim is to democratise follow-up of the IACHR's recommendations and promote participation by different actors through exchange of information between states, CSOs, NHRIs and academics.³⁶⁹ Information contained in SIMORE is updated regularly, so that the implementation of decisions is monitored,³⁷⁰ challenges are identified and the decision-making towards implementation of recommendations is strengthened.³⁷¹ In that sense, in-depth provision and analysis of not only laws and policies but also their implementation and their outcome are enhanced, leading to greater protection of human rights.³⁷²

4.3 Effectiveness of the mechanisms adopted

The IACHR and IACtHR have effectively implemented follow-up mechanisms, despite challenges in implementation, resulting in a high success rate compared to the African human rights system. As of 2023, the annual reports of the IACHR show that as a result of active follow-up of recommendations and compliance agreements, out of 380 decisions including recommendations and compliance agreement clauses, 186 show that there was some degree of progress in their implementation.³⁷³ Out of these, there were 81 cases of full compliance, 27 substantial partial compliance, and 78 partial compliance.³⁷⁴ The follow-up mechanisms adopted by the IACtHR have been equally effective, and have been instrumental in opening spaces and listening to parties and allowing them to come up with implementation agreements.³⁷⁵ This has induced better implementation, especially with regard to the rights of indigenous people, as was seen in 2009 in the *Awes Tingni* case.³⁷⁶ This, has aided in moving implementation forward especially when states appear to be dragging their feet.³⁷⁷

4.4 Conclusion

This chapter has shown that there are various follow-up mechanisms which the IACHR and the IACtHR have put in place to ensure the implementation of their decisions. These mechanisms

³⁶⁹ As above.

³⁷⁰ International Justice Resource Centre 'IACHR launches searchable database of recommendations, to track implementation' (International Justice Resource Center, 17 June 2020) <<https://ijrcenter.org/2020/06/17/iachr-launches-searchable-database-of-recommendations-to-track-implementation/>> (accessed 7 October 2024).

³⁷¹ United Nations Office of the High Commissioner for Human Rights 'National mechanisms for reporting and follow-up: A practical guide to effective state engagement with international human rights mechanisms' (2016) at 26.

³⁷² As above.

³⁷³ IACHR 2023 annual report chapter II para 682.

³⁷⁴ As above.

³⁷⁵ Sandoval, Leach & Murray (n 35) at 80.

³⁷⁶ *Awes Tingni* case (n 352).

³⁷⁷ Sandoval, Leach & Murray (n 35) at 81.

have yielded fruits and have led to more cases being successfully implemented and files closed. While not all the cases have not been closed, a good number of the IACHR and the IACtHR's cases are on the right implementation trajectory. There are therefore several lessons that the African Court and Commission can pick from the inter-American system.

Chapter 5: Conclusion and recommendations

5.1 Conclusion

Despite the handing down of the *Ogiek* and the *Endorois* decisions by the African Court African and the African Commission respectively, indigenous peoples still face several challenges. The government of Kenya continues to evict them from their ancestral lands, and in the process continues to violate their human rights. Additionally, the *Ogiek* and *Endorois* decisions have largely not been implemented. This research has also shown that there are follow-up mechanisms which have been adopted by the African Commission and the African Court to ensure implementation of their decisions. These mechanisms have however not been effective, and most of the African Court and Commission's decisions, including in the *Ogiek* and *Endorois* cases, have not been implemented.

This research has compared the African human rights system to the inter-American human rights system, revealing that the IACtHR and the IACHR's decisions have been largely implemented, with some decisions being fully implemented and others advancing steadily. This has been attributed to the proactive follow-up mechanisms which have been adopted by the IACHR and the IACtHR to follow up on implementation of their decisions. It has been seen that the mechanisms adopted have increased presence and visibility of the IACHR and IACtHR in the States parties and the entire implementation process. To that end, the inter-American Court and Commission have effectively implemented both the boomerang and the experimentalist governance theories, partnering with CSOs, NHRIs victims and applicants to create pressure externally and locally to ensure that states implement their decisions. The African African Court and Commission on the other hand have not fully engaged the CSOs, victims and other players in their implementation follow-up mechanisms. There are therefore several lessons which the African human rights system and states including Kenya can learn from the inter-American human rights system. The following section contains recommendations to the African Commission and Court; the AU; African states generally; and Kenya, specifically.

5.2 Recommendations

5.2.1 Recommendations to the African Court and Commission

The African Court and Commission should develop clear communication strategies to enhance their presence and visibility among African State parties. This should involve continuous dialogues between the Court, Commission, States, and victims. Proactive communication, including direct phone calls, should be used to follow up on implementation, ensuring that the Commission and Court's presence is maintained and engagement is maintained.

For more clarity and to ensure compliance the African Court and Commission need to come up with strategies aimed at creating more awareness on the States' obligations during implementation. Such should be accompanied by clear communication structures and timelines.

To enhance a seamless implementation process, the African Court and Commission should collaborate more with State parties and establish focal points at the state level, especially in government departments to aid in updating the Court and Commission and following up on the status of implementation in a timely manner.

In the spirit of leveraging collaborative efforts to ensure compliance, the African Court and Commission should adopt clear guidelines to assist other stakeholders including CSOs in monitoring implementation of the Court and Commission's decisions. This will ensure that the State party in question is compelled to comply from different pressure points, both from within the state and externally.

To address the issue of financial resource-scarcity human, the African Court and Commission should establish and adequately resource implementation units and monitoring mechanisms to among others conduct country visits and monitor implementation. Such resources should be both human and financial.

The African Court and Commission should explore collaborations with the PAP, PSC and the APRM to champion for implementation. In fostering collaboration, PAP should also adopt strategies aimed at supporting the Court and the Commission in following up on implementation of their decisions.

The African Court and Commission should collaborate to ensure the implementation of their decisions, ensuring good coordination and follow-up. Both institutions should not operate in isolation, but complement each other's efforts due to their human rights protection mandate. Collaborative efforts should include referring non-implementation cases to the Court by the Commission and clarifying the Court's role once a case is referred. This will help ensure the protection of human rights in Africa.

To identify the underlying issues affecting State parties that lead to non-compliance, the African Court and Commission should thoroughly investigate the root causes of States parties' non-implementation of their decisions. During state reporting procedures, they should adopt a more rigorous approach and press states to explain reasons for their non-compliance. Merely noting the states' non-compliance is not sufficient.

To create more awareness and ensure availability of relevant information relating to decisions and compliance with them, it is incumbent upon the African Court and Commission to

publish their decisions and avail more information on the steps taken to follow up on implementation, including its correspondences with states, applicants and victims. Such information should be timely and easily accessible.

5.2.2 Recommendations to the AU

To ensure that there are adequate human and financial resources which are necessary for following up on compliance, the AU should allocate more resources to the African Court and Commission, to aid them in enhancing their follow-up capacities.

To enhance collaborative efforts in addressing non-compliance, the AU should strengthen its partnerships with the African Court and the African Commission, particularly in their follow-up and enforcement processes. The AU Executive Council in that sense needs to reinstate ‘naming and shaming’ of non-compliant states to compel states to implement the Court and Commission’s decisions.

In the spirit of independence and inter-dependence of AU institutions, the AU should allow the African Court and Commission to conduct their operations without unnecessarily interfering with them. The AU Executive Council should refrain from taking measures including adopting declarations and resolutions aimed at limiting the Court and Commission’s operational independence and independence from any interference by other AU organs.

5.2.3 Recommendations to the African states

To ensure effective protection of human rights, African states should collaborate more with the African Commission and Court. States need to implement the decisions of the African Commission and Court, since that is the only best way of guaranteeing human rights protection. The African states should channel more resources to the African Court and Commission, which will assist in the follow-up on implementation of their decisions. This is through honouring their contributions to the AU and championing for more allocation of resources to the African Commission and Court during assemblies of heads of states and governments.

To enhance the capacity and legitimacy of the African Court and Commission, African states should cease taking regressive actions that undermine these institutions and instead focus on supporting their development and effectiveness. Such regressive actions include making any negative comments about the Court and Commission and withdrawing from the African Court Protocol. They should also submit reports of human rights situation and implementation of the Court and Commission’s decisions in a timely manner.

Lastly, African states should collaborate with the Court and Commission to establish focal points to assist in coordinating with the African Court and Commission and following up on reports, concluding observations and other implementation mechanisms.

5.2.4 Recommendations to Kenya

To ensure more protection of human rights in general and the rights of the indigenous peoples specifically, Kenya should take concrete steps to implement the *Ogiek* and *Endorois* decisions. Such steps include reviving and allocating resources to the taskforce responsible for overseeing the implementation of the *Endorois* decision, as well as expanding its mandates to include the implementation of the *Ogiek* decision. Furthermore, a dedicated government department should be created to oversee the execution and reporting on these and other decisions of the African Court and Commission, ensuring consistent and sustained compliance and timely reporting on the same.

Importantly, in line with the African Charter and other human rights instruments, Kenya should stop forcefully evicting members of the *Ogiek* and *Endorois* and other indigenous communities from Kenyan forests. Such actions not only violate the African Charter but also delegitimize the African Court and Commission and their decisions in terms of the protection of the rights of indigenous peoples.

In conclusion, for effective compliance and seamless implementation process, Kenya should take part in the implementation workshops and other programs of the Court and the Commission. This includes any session organised to follow up on implementation of the Court and Commission's decisions.

Word Count: **19 862 words.**

Bibliography

International legal instruments and official documents

- 2021-2022 Combined activity reports of the African Commission, activity report of the African Court on Human and Peoples' Rights: Report on the implementation of judgments of the Court as of 7 November 2022 and activity report of the African Court on Human and Peoples' Rights (AFCHPR) – 1 January – 31 December 2023
- 52nd and 53rd activity reports of the African Commission on Human and Peoples' Rights (6 December 2021 to 9 November 2022)
- ACHPR 54th and 55th activity reports of the African Commission on Human and Peoples' Rights
- ACHPR Report of the second regional seminar on the implementation of decisions of the African Commission on Human and Peoples' Rights from 04 - 06 September 2018 in Zanzibar, Tanzania (2019)
- ACHPR Resolution calling on the Republic of Kenya to implement the Endorois decision ACHPR/Res.257(LIV) 2013 (ACHPR/Res.257(LIV) of 2013)
- ACHPR Resolution on the human rights situation in Eritrea, ACHPR/Res.91(XXXVIII)05.
- Activity report of the African Court on Human and Peoples' Rights (AfCHPR) as of 1 January- 31 December 2018
- Activity report of the African Court on Human and Peoples' Rights: Report on the implementation of judgments of the court as of 7 November 2022
- Activity report of the African Court on Human and Peoples' Rights (AFCHPR) – 1 January – 31 December 2023 (African Court 2023 activity report)
- Activity report of the African Court on Human and Peoples' Rights 1 January – 31 December 2023.
- Activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2018)
- Activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2019)
- Activity report of the African Court on Human and Peoples' Rights (1 January – 31 December 2020)
- Activity report of the Court for the period 1 January – 31 December 2022
- African Charter on Human and Peoples' Rights, 1981
- African Commission on Human and Peoples' Rights 'Thirty-fourth activity report' (2013)
- African Commission's Rules of Procedure, 2020
- African Court 'Activity report of the African Court on Human and Peoples' Rights' (1 January – 31 December 2019)

African Court African comparative study on international and regional courts on human rights on mechanisms to monitor implementation of decisions/judgments African Court

African Court on Human and Peoples' Rights 2019 activity report

African Court Rules of Procedure, 2020

African Union 'Conference on the implementation and impact of decisions of the African Court on Human and Peoples' Rights: The Dar Es Salaam communiqué' (3 November 2021 Dar Es Salaam, Tanzania)

African Union Activity report of the African Court on Human and Peoples' Rights (AfCHPR) (1 January – 31 December 2023)

American Convention on Human Rights, 1969

AU Executive Council 'Comparative Study on the Monitoring and Reporting Mechanisms of Relevant International and Regional Courts on Human Rights' (2019)

Combined report of the 12th and 13th periodic reports on the African Charter on Human and Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2010)

Decision on the report on the joint retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) DOC.EX.CL/1089(XXXIII)

Declaration of the 1st Joint Forum of the Special Mechanisms of the African Commission on Human and Peoples' Rights (2024)

Draft Decision on the 2023 activity report of the African Court on Human and Peoples' Rights.

Inter-American Commission on Human Rights 2018 annual report

Inter-American Commission on Human Rights 2019 annual report

Inter-American Commission on Human Rights 2023 annual report

Inter-American Court of Human Rights 2008 annual report

Inter-American Court of Human Rights 2010 annual report

Inter-American Court of Human Rights 2014 annual report

Inter-American Court of Human Rights 2015 annual report

Inter-American Court of Human Rights 2017 annual report

Inter-American Court of Human Rights 2019 annual report

New Partnership for Africa's Development (NEPAD) 'Declaration on democracy, political, economic and corporate governance adopted by the thirty-eight ordinary session of the Assembly of the OAU' held on 8 July 2002, Addis Ababa, Ethiopia

Protocol Relating to the establishment of the Peace and Security Council (PSC) of the African Union, 2003

Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, 1998

Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament during its June 2014 Summit (Assembly/AU/Dec.529(XXIII))

Rules of procedure of the inter-American Commission on Human Rights, 2009

Sixth judicial dialogue advancing human rights in Africa: Challenges and opportunities for integrating regional and international human rights jurisprudence in domestic courts, 20-22 November 2023

The African Commission on Human and Peoples' Rights information sheet No.3

Case law

African Commission on Human and Peoples' Rights v Kenya Application 6/2012 (ACtHPR 2022)

African Commission on Human and Peoples' Rights v Libya, Application 002/2013, African Court on Human and Peoples' Rights

Alex Thomas v United Republic of Tanzania, Application 005/2013 African Court on Human and Peoples' Rights.

Ally Rajabu and Others v United Republic of Tanzania, Application 007/2015 African Court on Human and Peoples' Rights

AM v CR IACHR (28 November 2012) Ser 85/10 Doc 12.361

AT v N IACHR (31 August 2001) Ser C/ Doc 79 Rev 1. *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgment of August 31, 2001) (Merits, Reparations and Costs).

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

CR v G IACHR (30 November 2016) Ser C/ Doc 328 Rev 1

Evodius Rutechura v United Republic of Tanzania, Application 004/2016 African Court on Human and Peoples' Rights

Evodius Rutechura v United Republic of Tanzania, Application 004/2016

Femi Falana v African Commission on Human and Peoples' Rights, Application 019/2015.

In the Matter of the African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya, Application 004/2011 African Court on Human and Peoples' Rights

Inter-American Court of Human Rights case of the members of Chichupac village and neighbouring communities of the municipality of Rabinal (Judgment of November 30, 2016)

John Lazaro v United Republic of Tanzania, Application 007/2015 African Court on Human and Peoples' Rights

Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania, Application 003/2015 African Court on Human and Peoples' Rights

LRM v C IACHR (2007) Ser C/ Doc 163 (11 May 2007)

Malawi Africa Association v Mauritania, Communications 54/91-61/91, 98/93-164/97, 196/97-210/98, (2000) African Commission on Human and Peoples' Rights

MT v G IACHR (3 July 2004) Ser C/ Doc 108 Rev 1 *Molina Theissen v Guatemala* (Judgment of July 3, 2004 (Reparations and Costs)

Open Society Justice Initiative (au nom de Puis Njawe Noumeni) v Cameroon, Communication 290/04, (ACHPR 2022)

Rev. Christopher R. Mtikila v United Republic of Tanzania, Application 009 and 011/2011 African Court on Human and Peoples' Rights

Zegveld and Another v Eritrea, (2003) AHRLR 85 (ACHPR 2003)

Books and book chapters

De Búrca G *Reframing human rights in a turbulent era* (Oxford University Press 2021)

De Vos CM *From judgment to justice: Implementing international and regional human rights decisions* (2010)

Engstrom P (ed) *The inter-American human rights system: Impact beyond compliance* (2019)

Engstrom P & Low P *Mobilising the inter-American Human rights system: regional litigation and domestic human rights impact in Latin America. The inter-American human rights system: Impact beyond compliance* (2019)

United Nations Office of the High Commissioner for Human Rights *National mechanisms for reporting and follow-up: A practical guide to effective state engagement with international human rights mechanisms* (2016)

Viljoen F 'Forging a credible African system of human rights protection by overcoming state resistance and institutional weakness: compliance at a crossroads' in in Grote R, Antoniazzi M & Paris D (eds) *Research handbook on compliance in international human rights law* (2021)

Journal articles

- Abi-Mershed E 'The inter-American Commission on Human Rights and implementation of recommendations in individual cases' (2020) 12 *Journal of Human Rights Practice* 177
- Allendoerfer MG, Murdie A & Welch RM 'The path of the boomerang: human rights campaigns, third party pressure, and human rights', (2020) 64 *International Studies Quarterly* 111 at 116
- Asaala E 'Assessing the mechanisms and framework of implementation of decisions of the African Court on Human and Peoples' Rights fifteen years later' (2021) 54 *De Jure Law Journal* 430
- Ayeni VO & von Staden A 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 3
- De Búrca G 'Human rights experimentalism' (2016) 111 *The American Journal of International Law* 277
- Donald A, Long D & A Speck A 'Identifying and assessing the implementation of Human Rights Decisions' (2020) 12 *Journal of Human Rights Practice* 125
- K Tsutsui & J Smith 'Human rights and social movements: From the boomerang pattern to a sandwich effect' in *The Wiley Blackwell companion to social movements* (2018) 586
- Killander M 'The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward' (2008) 30 *Human Rights Quarterly* 41
- Killander M & MG Nyarko MG 'Human rights developments in the African Union (January 2017-September 2018)' (2018) 18 *African Human Rights Law Journal* 732
- Lungu S '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
- Lynch G 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 *African Affairs Journal* 24
- Murray R & D Long D '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* 836
- Murray R & Mottershaw E 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 349
- Murray R & 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* 150

- Nasirumbi S 'Revisiting the Endorois and Ogiek cases: Is the African human rights mechanism a toothless bulldog?' (2020) 4 *African Human Rights Yearbook* 497
- Nyarko MG & Jegede AO 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 294
- Okoloise C 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 27
- Perez-Liñán A & García Atehortúa A 'Oversight hearings, stakeholder engagement, and compliance in the inter-American Court of Human Rights' (2024) 78 *International Organization* 293
- R Murray 'Confidentiality and implementation of the decisions of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 1
- Rösch R 'Indigenesness and peoples' rights in the African human rights system: Situating the Ogiek judgement of the African Court on Human and Peoples' Rights' (2017) 50 *Law and Politics in Africa, Asia and Latin America* 242
- Rudman A 'The Commission as a party before the Court – Reflections on the complementarity arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 1
- Sandoval C, Leach P & Murray R '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

Internet sources

- ACHPR 'National dialogue on the rights of indigenous peoples and extractive industries, from 7 to 8 October 2019, Nairobi, Kenya' (African Commission on Human and Peoples' Rights, 9 August 2024) <<https://achpr.au.int/en/news/communiqués/2019-10-14/national-dialogue-rights-indigenous-peoples-and-extractive-industries>> (accessed 23 September 2024)
- ACHPR '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(XXX)06' (African Commission on Human and Peoples' Rights, 9 August 2024) <<https://achpr.au.int/en/adopted-resolutions/97-resolution-importance-implementation-recommendations>> (accessed 9 October 2024)
- ACHPR 'Working Group on Extractive Industries, Environment and Human Rights Violations in Africa - 54OS' (African Commission on Human and Peoples' Rights, 9 August 2024)

- <<https://achpr.au.int/en/intersession-activity-reports/pacifique-manirakiza-chairpersonworking-group-extractive-industries>> (accessed 23 September 2024)
- ACHPR ‘Working Group on Indigenous Populations/Communities in Africa - 54OS’ (African Commission on Human and Peoples’ Rights, 9 August 2024) <<https://achpr.au.int/en/intersession-activity-reports/working-group-indigenous-populationscommunities-africa-54os>> (accessed 23 September 2024)
- ACtHPR ‘African Court undertakes three-day sensitisation mission to the Republic of Kenya’ (African Court on Human and Peoples’ Rights, 19 July 2023) (ACtHPR Sensitisation visit to Kenya) <<https://www.african-court.org/wpafc/african-court-undertakes-three-day-sensitisation-mission-to-the-republic-of-kenya/>> (accessed 25 September 2024).
- African Union ‘African Peer Review Mechanism (APRM) | African Union’ <<https://au.int/en/organs/aprm>> (accessed 17 September 2024)
- Amnesty International ‘Kenya: Indigenous peoples targeted as forced evictions continue despite government promises’ (Amnesty International, 9 August 2018) <<https://www.amnesty.org/en/latest/news/2018/08/kenya-indigenous-peoples-targeted-as-forced-evictions-continue-despite-government-promises/>> (accessed 1 May 2024)
- Basic documents pertaining to human rights in the inter-American system (2001) 1 & 76. Available at <https://www.corteidh.or.cr/docs/libros/basingl01.pdf> (accessed 2 October 2024)
- Borona K, Johnson S & Kipalu P ‘In Kenya, violations of African Court’s ruling lead to illegal evictions of the Ogiek - rights + resources - supporting forest tenure, policy, and market reforms’ (22 December 2020) <<https://rightsandresources.org/blog/in-kenya-violations-of-african-courts-ruling-lead-to-illegal-evictions-of-the-ogiek/>> (accessed 1 May 2024)
- Cultural Survival ‘Endorois and Ogiek to take over attorney general’s office over Kenyan government’s refusal to make reparations | cultural survival’ (2 February 2024) <<https://www.culturalsurvival.org/news/endorois-and-ogiek-take-over-attorney-generals-office-over-kenyan-governments-refusal-make>> (accessed 20 August 2024)
- Geneva Academy ‘Tracking tools - The Geneva Academy of International Humanitarian Law and Human Rights’ <<https://geneva-academy.ch/geneva-humanrights-platform/tracking-tools/detail/5-simore-interamericano>> (accessed 7 October 2024)
- IACHR ‘IACHR:: Follow-up of recommendations’ (Inter-American Commission on Human Rights (IACHR)) <<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/activities/follow-up/default.asp>> (accessed 7 October 2024)

IACHR ‘IACHR:: Special mechanisms’ (Inter-American Commission on Human Rights (IACHR))
<<https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/activities/follow-up/special-mechanisms.asp>> (accessed 7 October 2024)

IACHR 2017 annual report. See particularly follow-up on recommendations issued by the IACHR in its country or thematic reports follow-up on the recommendations issued by the IACHR regarding the situation of human rights in the Dominican Republic

IACtHR ‘Statement of reasons to modify the Rules of Procedure’
<https://www.corteidh.or.cr/docs/reglamento/ene_2009_motivos_ing.pdf> (accessed 15 October 2024)

Implementation hearing on case 11.291 – Carandiru Massacre (follow-up of recommendations), Brazil human rights education in Brazil, available at <http://www.oas.org/es/cidh/audiencias/topicslist.aspx?lang=en&topic=22> (accessed 8 October 2024)

International Federation for Human Rights ‘Visit of major African human rights mechanisms: An opportunity for the country to uphold its human rights commitments’
<<https://www.fidh.org/en/region/Africa/kenya/visit-of-major-african-human-rights-mechanisms-to-kenya-13666>> (accessed 25 September 2024)

International Justice Resource Centre ‘IACHR launches searchable database of recommendations, to track implementation’ (International Justice Resource Center, 17 June 2020) <<https://ijrcenter.org/2020/06/17/iachr-launches-searchable-database-of-recommendations-to-track-implementation/>> (accessed 7 October 2024)

Kimeu C “‘We are living in absolute fear’: Call to stop indigenous evictions in Rift Valley’ The Guardian (8 November 2023) <<https://www.theguardian.com/global-development/2023/nov/08/we-are-living-in-absolute-fear-call-to-stop-indigenous-evictions-in-rift-valley>> (accessed 1 May 2024)

Langat A ‘Violent evictions are latest ordeal for Kenya’s Ogiek seeking land rights’ (Mongabay Environmental News, 20 December 2023) <<https://news.mongabay.com/2023/12/violent-evictions-are-latest-ordeal-for-kenyas-ogiek-seeking-land-rights/>> (accessed 1 May 2024)

Leonardo M ‘What lessons can be learned from the inter-American system of human rights protection? |’ (3 March 2020) <<https://www.acthprmonitor.org/what-lessons-can-be-learned-from-the-inter-american-system-of-human-rights-protection/>> (accessed 3 October 2024)

Letter by Samuel Ade, Minority Rights Group & Fernando Delgado, ESCR-Net secretariat on behalf of other interest groups on ‘call for Kenyan State to fulfil legal obligation to implement African Court on Human & Peoples’ Rights twin judgments in case Application no. 006/2012 in favor of the Ogiek Community’ (2024)

Marshall C ‘Kenya’s Ogiek people being evicted for carbon credits - lawyers’ (9 November 2023) <<https://www.bbc.com/news/world-africa-67352067>> (accessed 20 August 2024)

Minority Rights Group International “‘The Endorois decision” – four years on, the Endorois still await action by the government of Kenya’ [2014] Blog <<https://minorityrights.org/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/>> (accessed 23 September 2024)

OAS ‘OAS - Organization of American States: Democracy for peace, security, and development’ (1 August 2009) <https://www.oas.org/en/iachr/media_center/preleases/2018/163.asp> (accessed 7 October 2024)

Rickard C ‘African Court’s existence threatened by lack of cooperation from AU states’ (2021) <<https://africanlii.org/articles/2021-03-26/carmel-rickard/african-courts-existence-threatened-by-lack-of-cooperation-from-au-states>> (accessed 26 September 2024)