

Implementation of African Human Rights Bodies' Decisions: Is a Model Law on Enabling Legislation a Way Forward?

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1. Introduction

Thank you very much for the invitation to speak and I am honoured to give this Lecture in memory of Josephine Onoh. I hope I can do her justice as I understand that she was hugely courageous and lost her life in re-entering the plane crash to save others.

I want this Lecture, therefore, to have a positive note, which is often not the case when speaking of international human rights law, nor of the African system. Indeed, I have seen in over two and a half decades of working with the African system that it is often perceived unfavourably when compared to others, and that the African system is presented as something that is dismissed, is developing, and needs to learn from others. In fact, I am constantly impressed by the dynamism and entrepreneurialism of the African human rights system and the lawyers who work within it, and I wanted to share an innovation with you this evening.

I am going to talk about the implementation of decisions emanating from supranational bodies such as the European Court of Human Rights, the Inter-American Court or Commission of Human Rights, UN Treaty Bodies and, what will be the focus of my talk, the African Court and Commission on Human and Peoples' Rights.

This research project arises from an ESRC-funded grant, which ran until 2019, led at Bristol University by myself in collaboration with Prof Viljoen at the Centre for Human Rights in Pretoria, as well as others at Essex and Middlesex Universities in the UK and the Open Society Justice Initiative.

The purpose of the project was to examine what happened to decisions or judgments from the African, Inter-American and European Courts and Commissions and treaties bodies of the UN once they had been adopted. We were looking to see if the reparations ordered in those decisions were actually implemented, addressing the following questions in particular:

- Who got to hear about it, both in government and beyond?
- Whose responsibility did it then become to implement it, and to coordinate the implementation of various reparations?
- What mechanisms and procedures had to be in place to ensure that the reparations were implemented, and who had to initiate these procedures?
- What influences came into play regarding whether a reparation was actually implemented or not?

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Our Project started from the premise that human rights 'systems' are a complex web of interaction and interdependence between various institutional actors who collectively may ensure that implementation occurs.

We selected a number of decisions from these supranational bodies and then traced the path between the decision and subsequent action by public authorities, through desk-based research, workshops, data collection and interviews.

2. What is Implementation?

Throughout our project, we took implementation to mean the process by which measures are taken – such as the adoption of legislation, or bureaucratic or administrative steps; compliance we saw as the status of the actions – whether they are in line with what the international body required, i.e. the outcome of the implementation. We also recognised, however, that these terms can be conflated and used interchangeably.

The African Commission and Court on Human and Peoples' Rights lament their implementation record. They publish statistics on the poor rate of compliance with their judgements and decisions. This, they say, goes to the heart of their legitimacy, concerned that states do not take them seriously enough to implement their findings.

The significant amount of literature and discussion on implementation and compliance sometimes attributes the failure to implement to a lack of 'political will' on the part of states which is often, rhetorically at least, used as a catch-all phrase, and one which I (and others) have not found to be particularly helpful in identifying where the real obstacles lie.

I also think that this generic term masks what are a complicated web of factors, relationships and actors affecting the domestic implementation, and ultimately compliance with, international judgments. In fact why states fail to respond to judgments or only implement in part what is required of them can be down to a whole range of factors, including: that those who are responsible for the implementation of a decision are not aware of it in the first place; that they are not clear as to what they are required to do; or that there is no system or process in place to clarify who should take the lead in implementing certain aspects of the decision (who should coordinate it, for example). As there are relatively few of these decisions or judgments, there may be no incentive to create systems to respond to them.

One of the first positives of this project (and I did not expect to find this when we began) was that there is more implementation than may at first appear. Sometimes it is simply not recorded; sometimes it goes forward and then backwards; sometimes states do not want to publicise that they have implemented an international judgment (one government official, for example, told us that this was the case for fear of a flood of compensation claims).

In addition, one of our other findings was that implementation is rarely automatic. Processes and systems will be required, whether this is to pay compensation (whose budget does this come from, which ministry is responsible, and how does it reach the victims' bank account?), to open an investigation or order a re-trial, to adopt legislation, or to engage in other action.

This then prompted us during the project to look further into what happens when bodies like the African Commission and Court on Human and Peoples' Rights adopt a decision: who hears of it?; who is passed information?; who coordinates any action at the national level?; what triggers which department to pay that compensation?; etc.

And one of the things that arose is that, actually, even with the best ‘political will’ in the world, administrative, bureaucratic and legal triggers are needed to ensure that that international decision is able to be implemented at the national level.

I am interested in talking to you this evening about the legal triggers. So, whilst the state may be bound by international law and obliged, for instance, to implement the African Court judgment to which it was a party – if not (and this is debated) the decision of the African Commission, the question is how the state authorities (i.e. the executive, legislature and judiciary) then respond to it in practical terms at the national level. What is the position of these international decisions and judgments at the national level? What legal status do they have?

Many states have foreign judgments laws, whereby the judgments of one state can be enforced by the courts of another. But these generally do not include international decisions or judgments among what are considered to be ‘foreign judgments’.

This is where ‘enabling legislation’ comes in, and a fantastic report written by Kate Fox Principi, who worked for the OHCHR, a few years back in 2017 identified a range of examples (mostly European) which provided, in various ways, international decisions with the domestic legal status to facilitate their implementation, so that the state authorities will then be able to respond to the international decision as they would a domestic court decision.

3. A model law on enabling legislation

This prompted us to consider the idea of practical tools to assist African states to implement decisions and judgments emanating from the African human rights bodies. Together with the Centre for Human Rights at the University of Pretoria, and the Pan-African Parliament, we are developing a Model Law on the Implementation of Decisions of African Human Rights Bodies. The Pan-African Parliament (PAP) is an organ of the African Union and, as part of its mandate, it has the ability to adopt model laws, which it has done on a number of occasions (for instance on disability, and a model police law).

A colleague at the PAP, Clement Phebe Mavungu, and myself presented the idea of a conference in Arusha in June 2024 and, after presentations before the Committee on Justice and Human Rights of the Pan-African Parliament, it has now authorised the adoption of this model law.

We have seen through our research that model laws can provide practical guidance for parliamentarians; that they can set a standard; and also that they can be not just a base line but also examples of good practice. For Africa, these can be home-grown, tailored to the continent’s own context, and that of its regional bodies. So, we saw this model law as providing a menu of options for states. In addition, as has been seen with other model laws, the actual process of its development is also, in and of itself, a useful advocacy tool to raise awareness of the implementation of these decisions.

We presented a policy framework with an outline of the content of the model law to the PAP Committee on Justice and Human Rights in early November 2024. The PAP then adopted a further resolution which requests the Committee on Justice and Human Rights to proceed with the development of the Model Law on Implementation of Decisions of African Human Rights Bodies. We are now in the process of considering precisely what to include in this Model Law, namely: how to assist states in determining budgetary issues when they are implementing these decisions and judgments; who will coordinate activities; who will report

to others and to the African human rights bodies; and what status it will have in domestic law. Additional provisions will focus on types of reparations, such as compensation and just satisfaction, and how to address systemic issues.

This draft will then be circulated for consultation with the three African human rights organs, and then, after the adoption of a draft by the plenary of the PAP, with states, parliamentarians, civil society and others.

This will be the first model law of its kind, and we hope it may provide not only a positive inspiration to others but also a practical tool for state authorities to better implement these international decisions and judgments.