



BOOKLET ON THE IMPLEMENTATION OF DECISIONS OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

© Coalition for an Effective African Court
on Human and Peoples' Rights

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1 Introduction

The Coalition for an Effective African Court on Human and Peoples' Rights (the Coalition) was formed during the first conference for the promotion of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights (AfCHPR) in Niamey, Niger in May 2003. The Coalition is a membership-based organisation made up with Non-Governmental Organisations (NGOs), independent human rights institutions, legal and none-legal practitioners, and individual members. The key purpose for its establishment is to advocate for an effective and independent African Court on Human and Peoples' Rights in order to provide redress to victims of human rights violations and strengthen the human rights protection system in Africa. The Coalition secretariat is based in Arusha, Tanzania where it was registered under the Tanzania NGOs Act since the year 2007.

The Coalition is aware that there is a growing concern regarding the non-implementation of the African Court judgments, yet implementation of judgments or decisions of the Court is one of the key aspects of the litigation process that would make the work of the African Court effective. For the time being, the concept of implementation of decisions of the Court is largely new to national stakeholders who need to be aware that implementation of regional decisions at national level needs to be monitored to enhance chances of success.

It is with the above in mind that the Coalition developed this Booklet to provide basic understand of how regional decisions are received in the legal orders of selected countries for purposes of recognition and enforcement. Thus, the substantive part of this Booklet begins with an overall analysis of the legal and institutional framework put in place by the AU to ensure the implementation of the Court's judgments. The sections that follow then discuss implementation at country level for each of the States that have lodged the Declaration giving the Court competence to adjudicate on cases brought by individuals and NGOs.

For information purposes, the country sections first stress on the provisions of the municipal law governing recognition and enforcement of foreign judgments. The reports move on to describe the domestic framework and actual processes of implementation of judgments for States that have been parties to proceedings before the Court.

1.1 Background to the Court

The African Court on Human and Peoples' Rights (the African Court/the Court) is an integral component of the African human rights system.¹ The African Court was created by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (The Court Protocol) with a mandate to complement and reinforce the functions of the African Commission on Human and Peoples' Rights (the African Commission) in terms of its protection mandate.² The Court was also set up to increase the effectiveness of the African human rights system taking into account the non-binding nature of decisions of the Commission.³ As of December 15 2020, 31 states had ratified the Court Protocol⁴, while six of these states have made the declaration permitting NGOs and individuals to directly petition the African Court.⁵

1.2 Composition of the Court

The African Court consists of 11 judges elected by the Africa Union (AU) Assembly from a list of candidates nominated by Member States of the AU. The judges are elected in their personal capacity.⁶ At any given point, serving judges are all nationals of different states.⁷ No state can have two of its nationals serving at the same time.⁸ In electing the judges, due consideration is given to gender and geographical representation. Only the President of the Court holds office on a fulltime basis while the other ten judges work part-time.

1 The African Human Rights System is a combination of norms and institutions put in place under the auspices of the African Union to ensure the promotion and protection of human rights in Africa. It affords redress to victims of human rights violations. It includes normative frameworks such as the African Charter on Human and Peoples' Rights (The Charter) (1981), which establishes the African Commission on Human and Peoples' Rights (the Commission) (1987); the African Charter on the Rights and Welfare of the Child (the Children's Charter) (1990); which establishes the African Committee of Experts on the Rights and Welfare of the Child (the Committee of Experts) (2003), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)(2000) and the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (the Court Protocol) (1998), which established the African Court on Human and Peoples' Rights (the African Court) (2006).

2 Article 2 of the Protocol clearly sets out the relationship between the Commission and the Court by stating that "[t]he Court shall complement the protective mandate of the African Commission on Human and Peoples' Rights (Commission) conferred upon it by the African Charter on Human and Peoples' Rights".

3 Ebobrah, S 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations' *European Journal of International Law* <http://ejil.oxfordjournals.org/content/22/3/663>.

4 These are Algeria, Burkina Faso, Benin, Burundi, Cameroun, Chad, Côte d'Ivoire, Comoros, Congo, Democratic Republic of Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia, and Uganda.

5 These are Burkina Faso, Ghana, Mali, Malawi, The Gambia and Tunisia.

6 The first judges of the Court were sworn in on 1 July 2006. The judges meet for sessions at their official seat in Arusha, Tanzania or any other chosen venue as the case may be.

7 The judges are elected for a period of six years and are eligible for re-election only once.

8 Article 11(2) African Court Protocol.

1.3 Jurisdiction of the Court

The Court has jurisdiction over matters seeking the interpretation and application of the Charter, the Court Protocol and any other relevant human rights instruments ratified by State Parties to the Protocol.⁹ The following have competence to file cases before the Court;

- The African Commission;
- a State Party which would have lodged a complaint to the Commission;
- a State Party against which a complaint would have been lodged at the Commission;
- a State Party whose citizen is a victim of a human rights violation; and African Intergovernmental Organisations can bring matters before the Court.¹⁰

Additionally, a non-governmental organisation with Observer Status before the Commission and individual citizens of state parties to the Court Protocol may also submit cases to the Court where the State has made a declaration in terms of Article 34(6) of the Court Protocol.

1.4 Nature of the Court's decisions

The court's decisions are in the form of declaratory and remedial orders. Declaratory orders are instances whereby the Court makes declaratory statements that a violation of the Charter has occurred. Remedial Orders are where the Court makes a decision that remedies the circumstances, which it considers to constitute a violation of the Charter. Some remedial orders can be in the form of compensation or reparation where the Court requires states to pay monetary sums covering pecuniary and non-pecuniary damages and costs. Other remedial orders offer non-monetary remedies such as restitution of a job lost, reopening legal proceedings or adopting broad legal or policy reforms.

1.5 States' general undertaking(s) regarding decisions of the Court

The Court is a judicial human rights body, which passes judgements that are binding. The Respondent State in a given case before the Court is expected to comply with its judgments by virtue of being a party to the Court Protocol. Ratification of the Court Protocol creates obligations on the State to obey the judgments of the Court.

⁹ Art. 3(1) African Court Protocol.

¹⁰ Art. 5(1) African Court Protocol.

2 Existing legal and institutional framework

The implementation of the Court's judgments is the central measure of its efficacy. Without implementation, litigants before the Court do not get a remedy and their situations remain unresolved. The refusal or failure of a state to comply or delay compliance frustrates victims and undermines the credibility of the Court as a body capable of giving meaningful and effective remedies to victims of violations. This is the reason litigants should be aware of the steps and procedures that facilitate implementation and enforcement of the decisions of the Court. But first, there is need to define key terms used within this text.

2.1 Clarification of terminology

2.1.1 Decisions of international courts versus foreign judgments

Foreign judgments are judgments rendered in one jurisdiction for which recognition and enforcement is sought in another jurisdiction. Foreign judgments may be recognised unilaterally by a State based on its own national law provisions, or through bilateral or multilateral understandings, which expressly provide for the recognition of such judgments. Usually, recognition of foreign judgments takes place when the courts of one State take steps to enforce the foreign judgment of the other State through proceedings recognised under the enforcing State's domestic law without substantially departing from the terms of the original decision and without rehearing the substance of the original lawsuit.

A decision of an international court, such as the African Court must be distinguished from a foreign judgment; in fact it is not a foreign judgment.

When the Court, whose decisions are in nature binding, renders its decision, the State involved has to implement the judgment and cannot invoke its domestic legal processes for its failure to comply with a Treaty.¹¹ The State cannot subject the decision for review before its domestic courts as may be the case with foreign judgments or refuse to recognise them. By merely being bound by the provisions of the Protocol that sets up the Court, the State is also bound by the decisions of the Court, as the body mandated to interpret that Protocol.

¹¹ Art. 27 Vienna Convention on the Law of Treaties

2.1.2 Compliance

Compliance pertains to the outcome of the measures a State needs to adopt in order to fully implement the decision of the Court. The Vienna Convention on the Law of Treaties (VCLT) defines compliance as implementation of orders in good faith.¹² Compliance is seen as the litmus test for the effectiveness of a judicial body and its remedies,¹³ and is also considered one of the means of building institutional legitimacy, credibility and effectiveness.¹⁴ Tracking States' compliance with decisions of the Court is critical for evaluating observance of rule of law within the African human rights system.¹⁵

2.1.3 Implementation

Implementation refers to the actual steps or measures taken by a State to give effect to the orders of the Court. Implementation is adherence to the judgment of the Court. Implementation can be partial or full; partial when a State gives effect to some but not all aspects of the decision of the Court and full when a state ensures that all aspects of the decision are satisfied.

2.1.4 Monitoring

Monitoring is the process by which periodic reviews are done to measure progress made and steps taken to implement decisions of the Court. Monitoring the Court's decisions is a strategic aspect of ensuring implementation. Firstly, it helps to track the efforts made by a State and the steps taken to perform specific action steps set out in the Court's judgement. Secondly, it ensures that specific orders made are not only implemented but are aligned with the specific objective of giving the litigant the remedy requested from and granted by the Court. Thirdly, monitoring helps to ensure that implementation is done within the time limits set and hence that the set schedule is observed. Fourthly, monitoring allows for corrective action, namely to ensure that where decisions are not implemented, steps can be taken to force the State to comply.

12 Art. 26 VCLT.

13 Shany, Y *Assessing the effectiveness of international courts*, First Edition, Oxford University Press, 2014, p. 117.

14 Shany, Y 'Compliance with decisions of international courts as indicative of their effectiveness: A goal-based analysis' *SSRN Electronic Journal* (October 2010) 5.

15 See the argument made in respect of all international law by Kingsbury, B 'The concept of compliance as a function of competing conceptions of international law' (1998) 19 *Mich. J. Int'l L.* 348.

2.1.5 Enforcement

Enforcement arises where non-compliance has occurred. It entails the use of a series or set of compulsory measures designed to ensure that a State against which a judgment stands, and which has failed or refused to comply with the judgement voluntarily, does so, under sanctions. The object of enforcement is to execute or yield full implementation of the judgment of the Court against the wishes of the State concerned.

2.2 The process after delivery of the judgment: Implementation and monitoring

2.2.1 Implementation

2.2.1.1 The meaning of implementation under the law

The laws governing implementation of decisions of the African Court are mainly the African Charter and the African Court Protocol. Article 1 of the African Charter obligates Member States of the African Union to “recognise the rights, duties and freedoms enshrined in the Charter” and to “adopt legislative or other measures to *give effect* to them”.¹⁶ Article 30 of the African Court Protocol obligates the Respondent State to “comply with the judgment ... within the time stipulated by the Court and to guarantee its execution”. The obligation to comply under article 30 means that the state must *implement the orders* in full;¹⁷ *in good faith* (*Pacta sunt servanda*, Article 26 of the VCLT; and not invoke domestic technicalities to justify non-compliance with international obligations (Article 27 VCLT).

2.2.1.2 Practical steps to implement African Court decisions

Usual domestic implementation procedure

Mostly, international decisions are channelled to the State through its representative in the proceedings, which are usually from the ministry of foreign affairs, and sometimes that of justice, legislation and human rights. However, the procedure for implementing international decisions at the domestic level could be administrative, judicial or political depending on the nature of the order to be implemented and circumstances.

¹⁶ Emphasis in connection with the definition given above of implementation.

¹⁷ However, the complainant should be aware that, in practice, states may comply with only some of the orders, incidentally (prompted by reasons not related to the case) or progressively (scheduled over time). This is important to monitor compliance. See Viljoen, F & Louw, L ‘State compliance with the recommendations of the African Commission on Human and Peoples’ Rights 1994-2004’ (2007) 101 *The American Journal of International Law* 5; Adjolohoun, H *Giving effect to the human rights jurisprudence of the ECOWAS Court of Justice: Compliance and influence* doctoral thesis (Pretoria 2013).

When the national focal point for implementation receives the decision, it liaises with the competent organs to implement the orders. For a complainant or victim or their representatives, it is therefore, critical to understand how the state apparatus works in practice and which agency to engage with while seeking execution. For instance, an order to provide health care to expectant mothers at a particularly state facility obviously involves the health ministry, while that of payment of damages will require the ministry of finance to take specific action. Sections of this Booklet on implementation of specific decisions of the African Court provide illustrations of practical domestic procedures.

Role of the African Court in implementation

Based on the legal instrument that establish it, the African Court does not seem to have any role in the implementation of its decisions. However, it can play a facilitating role in the process. For instance, in accordance with Article 29(1) of its Protocol, the Court must first transmit the decision to the Parties in a suit before the Respondent State is expected to implement it. Besides, the Court may undertake to clarify its findings and orders upon request by the Respondent State on the ground that the vagueness of such orders are hampering implementation. In certain circumstances, it may be helpful to involve the victims as members of a committee in charge of implementation.

The Court Protocol also provides for a mechanism by which implementation is supervised through monitoring, namely by the Executive Council of the African Union.

2.2.2 Monitoring

2.2.2.1 The current approach

Under Article 29(2) of the African Court Protocol, the Court must notify the AU Council of Ministers (now the Executive Council in terms of AU structures) of any judgment for the Council to “monitor execution on behalf of the AU Assembly of Heads of State and Government (AHSG)”. Literally, only the Council is expressly vested with monitoring functions, albeit on behalf of the AHSG.

However, it appears that, thus far, the Council has been discharging its monitoring mandate mainly based on information provided to it by the Court. The Court does so in compliance with its obligation under Article 31 of the Protocol to submit an annual non-compliance report to the AHSG at each of the latter’s ordinary sessions. There is no information published by AU policy organs indicating that they have taken any step subsequent to the non-compliance reports by the Court.

As things stand, one is able to figure out what the monitoring process looks like only by referring to the Court's process towards compilation of its noncompliance report.

As indicated earlier, the Court has been reporting non-compliance to the Council through its annual reports and follow-up letters and statements during various meetings held with AU officials. Similar means were used for instance when the Respondent States failed to comply with the provisional orders of the Court in the case of *African Commission (Saif Gaddafi) v Libya*. The 2013 Report of the Court indicates that the Order was served on Libya through its Embassy in Addis Ababa. As Libya did not send any response by the 15-day deadline, the Court decided on its own motion to extend the time limit by 14 days but the Respondent State did not respond either. The Court then filed an interim report to the Secretariat of the African Union Commission (AUC) for the Executive Council to bring the matter to the attention of the AHS. The Court sent subsequent correspondences to the Council to follow-up on the matter.¹⁸ By the letter of the Court Protocol and practice, the Council is expressly assigned to monitor state compliance with decisions of the African Court and the Court is expected to participate in the process by filing non-compliance information as part of its annual activity report. From the practice recounted above, it appears however that the Court is actually carrying out the monitoring work, which is unavoidable if it is to accurately compile a non-compliance report as prescribed by the Protocol.

The problem with this approach as proposed under the Protocol is that a monitoring process that is meant to be primarily if not solely political under the law has been judicial and administrative so far. This is not proper as the choice of the nature of monitoring mechanisms is informed by peculiar demands as experiences in the European and American regional human rights systems reveal.¹⁹ With the current mechanism, even if the Council activated its monitoring function, the non-compliance reporting duty of the Court will lead to duplication or a mixed monitoring process involving political and judicial/administrative supervision concomitantly.

18 See Activity Report of the African Court on Human and Peoples' Rights for the year 2013 presented at the 24th Ordinary Session of the AU Executive Council (21-28 January 2014).

19 The European system adopts a purely political monitoring approach (the Council of Ministers of foreign affairs of all 41 Council of Europe states uses political and diplomatic means, but also so-called General Measures similar to judicial orders, to supervise implementation and ensure compliance). The Inter American system adopts a judicial approach (the Inter American Court of Human Rights invites information and observations, and examines non-compliance submissions by the parties – which occasionally includes hearings - before it issues a noncompliance finding in a way of a judgment). See Council of Europe Committee of Ministers 'Supervision of the execution of judgments of the European Court of Human Rights: First annual report' (2007); Stone Sweet, A & Keller, H 'The reception of the ECHR in national legal orders' in A Stone Sweet & H Keller (2008) *A Europe of rights: The impact of the ECHR on national legal systems* Oxford: Oxford University Press; and Adjolohoun as above 80-85.

2.2.2.2 A more effective approach

A mixed but non-concomitant approach would be more appropriate and effective. It could include the following steps:

- 1) the Court notifies the decision to the Parties, to the Council and other relevant organs;
- 2) the Council uses its own administrative, political and diplomatic means, including sending correspondences to the Parties, putting follow-up questions to the Respondent States during appropriate meetings, namely those of the AU policy organs, etc.;
- 3) the Council compiles and submits a report to the Court;
- 4) the Court invites observations from the Parties and makes a compliance finding;
- 5) the Council acts on the decision accordingly; it may give the State further time to implement the remaining orders in case of partial compliance; it may refer the matter to the AHSJ who may decide to impose sanctions; etc.

In 2014, the Executive Council adopted a Decision requiring the Court to conduct a comparative study and develop a compliance monitoring framework that would assist it in executing its monitoring role. The Decision read in part as follows:

Requests the Court to propose, for consideration by the PRC, a concrete reporting mechanism that will enable it to bring to the attention of relevant policy organs, situations of non-compliance and/or any other issues within its mandate, at any time, when the interest of justice so requires.²⁰

This development could be viewed as if the Executive Council is rekindling its commitment to be involved in monitoring and influencing compliance with decisions of the African Court. In response, the African Court undertook and completed the study and adopted a monitoring framework to be adopted by the AU policy organs. The framework, developed based on inspiration from other regional and sub-regional human rights systems, is a stage-by-stage process through which each decision or judgment of the Court will go in a long line of institutions responsible for ensuring implementation of these decisions. Several stakeholders will have roles to play in monitoring, reporting and influencing compliance with Court decisions.

²⁰ Paragraph 9 of the Decision Ex.Cl/Dec.806 (XXIV), adopted during the 24th Ordinary Session held from 21 – 28 January 2014.

2.3 Enforcement

2.3.1 The mechanism for possible enforcement

As expounded above, enforcement entails the use of compulsory measures directed at a State against which a judgment stands and which has failed or refused to comply with the judgment voluntarily.

The purpose of the compulsory measures is therefore to execute the judgment or yield full implementation of the judgment of the Court against the ostensible wishes of the State concerned. It must be noted that the use of enforcement procedures to secure compliance with decisions of international law adjudicatory bodies is not established. This is mostly because the international legal system is conceived of as lacking specialised agencies mandated to execute or enforce judgments or decisions.²¹ Even the United Nations Security Council (UNSC), which is mandated to take measures to give effect to judgments of the International Court of Justice (ICJ) in cases of non-compliance, has working methods that are considered inapposite for the task of enforcing such decisions.²² By contrast, domestic legal systems invariably have the sheriff or bailiff or indeed other similar authorities backed by the police as agencies empowered to use compulsory methods to secure full implementation of judgments of domestic courts.

Further, whereas the existing AU legal framework expressly provides for mechanisms for ensuring compliance with binding decisions of the AU,²³ decisions of the African Court are not expressly mentioned as decisions of the AU, which can be enforced through the AU mechanisms. Be that as it may, a purposive interpretation of the AU legal framework admits the conclusion that African Court decisions are AU decisions as long as it is accepted that the Court is an organ of the AU and was empowered by the AU through the Court Protocol to make binding decisions ostensibly on behalf of the AU.

21 This is based on the conception of law as a command of a sovereign backed by sanctions and the means of executing the sanctions.

22 For example, whereas the UN Charter provides for recourse to the Security Council to secure compliance with a judgment of the ICJ, the power of the Security Council is couched as discretionary (the Security Council, which *may, if it deems necessary*, make recommendations or decide upon measures to be taken to give to the judgment). The working methods of the SC include veto, which may result in no measures being taken at all. The nature of deliberations on any referral to the SC entails exchanges of arguments including on the merits of the case and thus assessment of the validity of the judgment itself, which undermines the authority of the ICJ. In the *Anglo-Iranian Oil Co. case*, the United Kingdom sought the SC to call upon Iran to comply with an order of provisional measures. A debate followed in the SC in which arguments similar to those advanced before the ICJ were taken up members of the SC. The referral was eventually withdrawn by the UK. In the *Case of Military and Paramilitary Activities in and Against Nicaragua*, Nicaragua sought from the SC the immediate and fully compliance with the judgment in its favour. The United States vetoed the proposal.

23 The AU Assembly has the mandate to monitor the implementation of policies and decisions of the Union as well as ensure compliance ... through appropriate mechanisms: Art. 9(1)(e) AU Constitutive Act. For this purpose and in appropriate circumstances, it may impose appropriate sanctions for ... violation of the principles enshrined in the Constitutive Act (such as respect for human rights (Art. 4(m) AU Act, or for non-compliance with the decisions of the Union: Rules of Procedure of the [AU] Assembly, Rule 4(1)(g) as read together with Art. 23 AU Act.

This section therefore, outlines the possibility of using the AU mechanism of compulsory measures to enforce judgments of the African Court when the Respondent State is non-compliant.

2.3.2 How decisions of the Court may qualify for AU enforcement mechanism

The possibility of using the existing AU framework is considered on the basis of a number of grounds; first the absence of express provisions for enforcement of decisions of the Court, it is possible to treat such decisions as decisions of the Union. Second, as already and more notable is the fact that the Court is an organ of the AU²⁴ and its decisions are, or must be treated in the same way as, binding decisions of AU policy organs, which, ironically, are suffering from non-compliance by AU member states. Importantly, like regulations and directives of the Union,²⁵ decisions of the Court are binding.²⁶

Even the ultimate remedial measures that may be ordered by the Court can be in the nature of regulations or directives.²⁷ For this purpose, the following part identifies the organs or institutions of the AU that may undertake enforcement, the procedure for enforcement, and the available measures of compulsion that would amount to enforcement for purposes of judgments of the Court.

2.3.3 Responsible organs of the AU

In terms of the organs, Article 29 of the Court's Protocol provides that the Executive Council²⁸ shall be notified of the Court's judgment and *shall monitor its execution* on behalf of the Assembly. The Executive Council's responsibility to monitor execution of judgments of the Court is delegated. The primary responsibility lies with the Assembly.²⁹ More importantly, the Assembly also has the power and function of ensuring compliance with all other decisions of

24 In the Matter of Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights (2014) ACTHPR (Request No 002/2013)

25 Decisions of the Assembly are generally categorized into three: regulations, directives and recommendations. Regulations and directives are binding on all member states. They only differ slightly in that States have a margin of appreciation to determine the form and means to be used for implementation of directives, whereas they do not have such margin of appreciation with respect to regulations. The latter are binding in their form and means of implementation. See Rules of Procedure of the Assembly of the African Union, Rule 33; and Rules of Procedure of the AU Executive Council, Rule 34.

26 The binding nature of the Court's decision is apparent from Art. 29 Court's Protocol by which State Parties undertake to be bound by the judgments of the Court and guarantee its execution.

27 Just like regulations, some remedial orders of the Court have to be complied with exactly in the form and means ordered by the Court. A typical example in this regard is an award of monetary compensation already assessed by the Court. Other remedial measures ordered by the Court may leave room to the State to determine the actual form and means of complying with the Court's order. A typical example in this regard is change of policy or law or elimination of systemic violations of rights or freedoms.

28 Formerly under the OAU, the Council of Ministers.

29 Constitutive Act of the African Union, Art. 9(1)(e).

the Union.³⁰ It may delegate this function to any organ of the Union³¹ such as the Executive Council. The Assembly and the Executive Council are therefore the two principal organs of the AU that are mandated to monitor execution and *ensure compliance* with decisions of the Union. As indicated above, this should ordinarily include decisions of the Court.

However, although the Executive Council secretariat is the AU Commission, Council work and agenda for each meeting is prepared by the Permanent Representatives Committee (PRC), which is permanently present in Addis Ababa, Ethiopia. It is composed of one representative from all 54 AU Member States. The representatives are usually Ministers of Foreign Affairs but may be any minister designated by the Member State's government.

The Executive Council adopts its agenda at the opening of each session. The provisional agenda for an ordinary session is drawn up by the PRC. Provisional agendas are usually divided into two parts: items for adoption, where the PRC has reached agreement and Executive Council approval is possible without discussion; and items for discussion, where agreement has not been reached by the PRC and debate is required.

The PRC conducts the day-to-day business of the AU on behalf of the Assembly and Executive Council. It reports to the Executive Council, prepares the Council's work and acts on its instructions (under Article 21 of the Constitutive Act). All AU Member States are members of the PRC. The PRC works through committees and sub-committees assigned to deal with specific mandates. Its functions are summarized in Article 21(2) of the Constitutive Act mainly to prepare the work of the Executive Council.

However, Rule 4 of its Rules of Procedure empowers it to ***'monitor the implementation of policies, decisions and agreements adopted by the Executive Council'***. The PRC meets at AU Headquarters at least once a month and extraordinary sessions may also be held. The agenda for each session is drawn up by the Chairperson in consultation with the PRC Bureau and AUC. Therefore, sight should not be lost of the fact that the PRC, which meets more regularly and is more involved in the day-to-day running of the AU affairs, may be better placed to deal with monitoring compliance by states with all decisions of the AU organs including Court decisions.

2.3.4 Existing measures of compulsion that can be used for enforcement

The similarity between the Court's decisions and first two categories of decisions of the Assembly and the Executive Council is important in several respects. Chiefly, just as non-implementation of regulations and directives attracts the use of the sanctions regime under

³⁰ See above, n3.

³¹ Constitutive Act of the AU, Art. 9(2).

Article 23 of the AU Act,³² non-compliance with the Court's decisions could or should as a measure of last resort attract the same sanctions.³³ Examples of sanctions are stipulated under Article 23 of the AU Constitutive Act. Ordinarily sanctions would be applied in an escalated manner depending of the circumstances of the case.

The procedure leading to sanctions is deliberative as is the procedure for dealing with any other issues that come up for decision by the Assembly or Executive Council. To this extent, the process is of a political nature.³⁴

2.3.5 Other non-AU avenues of enforcement

The above mechanism of the AU is based on the existing legal framework. Apart from the legally mandated mechanisms of the AU, there may be other extra-legal avenues that may be used to compel the non-complying states to implement the Court's decisions or indeed for realizing the fruits of a judgment through domestic execution in a third state. Such methods may include lobbying a friendly State to apply diplomatic pressure on the non-complying State. In cases where the remedy constitutes monetary award and the non-compliant respondent State has assets in another member State, the complainant may seek to enforce the judgment on such assets. Given that third states are not bound by the judgment, such a procedure may necessitate joining the State hosting the assets to the case not as a respondent, but merely for purposes of binding it to facilitate the execution on the assets through its domestic authorities.³⁵

As indicated in the definitions section of this section, such a procedure of enlisting the involvement of a third state should not be confused with, let alone be in the nature of the procedure for enforcement of foreign judgments, which exposes an international judgment such as the Court's to domestic law conditions for enforcement of foreign judgments.³⁶

32 Rules of the AU Assembly, Rule 33(2), Rules of the AU Executive Council, Rule 34(2).

33 ECOWAS adopts similar rules by which judgments of the ECOWAS Court of Justice are considered as decisions of the Community and failure to implement them attracts the same sanctions as for situations where states do not comply with community law or decisions of policy organs.

34 This exposes the process to the same risk associated with sanctions by the UNSC, except for the possibility of veto as AU decisions are made by consensus failing which by two thirds majority: see AU Assembly Rules of Procedure, Rule 18. The state involved would ordinarily be involved in the deliberations, which opens the possibility of reopening arguments advanced before the Court. Notably, even after sanctions have been adopted, a member state under sanctions may present its case to the Assembly: AU Assembly Rules, Rule 36(4)

35 A leaf could be borrowed from common law domestic enforcement procedure called *garnishee proceedings* in which the judgment debtor's banker is joined to the case and bound by a court order to release from the debtor's account a sum of money equivalent to the award.

36 International judgments are based on and settle states' international law obligations, e.g. under treaties. Pursuant to Article 27 of the Vienna Convention on the Law of Treaties international law does not permit states to invoke provisions of domestic law to evade international obligations such as may be pronounced in an international judgment.

3 Legal framework on the implementation of the African Court decisions in Benin, Burkina Faso, Côte D'Ivoire, The Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia

The purpose of this part is to investigate the national legal and institutional frameworks that exist in each state that has lodged the Declaration in terms of Article 34(6) of the Court Protocol, in essence vesting in the Court the competence to receive and consider cases filed by individuals or non-governmental organisations. The states discussed under this section have lodged such a declaration at some point in time during their membership to the African Court Protocol. This part also applies to those states that have withdrawn the Declaration on account of the fact that all decisions made by the Court against such states remain binding until fully executed notwithstanding the withdrawal.³⁷ The legal and institutional frameworks of those countries would play a key role in the process.



3.1 Benin

Benin ratified the African Charter on 21 October 1986, the African Court Protocol on 22 August 2014. The state party went further to lodge the Declaration on 8 February 2016 recognising the jurisdiction of the African Court to receive applications against it from individuals and NGOs. However, Benin took the decision to withdraw the Declaration on 25 March 2020 in the aftermath of receiving request for provisional measures in Gaby Kodeih Republic of Benin.³⁸ Benin then deposited instruments of withdrawal with the AU Commission, which withdrawal only takes effect after 12 months. Nevertheless, all cases pending against Benin and orders already issued by the Court against it will remain good for implementation.

3.1.1 The enforcement of foreign judgments

The Republic of Benin follows the *exequatur* procedure, where in terms of Article 1159 of the Civil Code, judgments rendered by foreign courts and documents received by foreign officers are not liable to execution in Benin unless having received the *exequatur* by way of a decision rendered by the president of the court of first instance of the place where the execution is to be carried out. Further, Article 1162 of the Benin Civil Code provides that the *exequatur* is granted whatever the value of the dispute, by the president of the court of first instance of the place where the execution of a foreign judgment is to take place.³⁹ The *exequatur*

³⁷ States that had withdrawn the Declaration at the time of writing this Booklet are Benin, Cote D'Ivoire, Rwanda and Tanzania.

³⁸ Application No. 006/2020.

³⁹ Loi n° 2008-07 DU 28 FEVRIER 2011 portant code de procedure civile, commerciale, sociale, administrative et des comptes. Available at: <https://documentation-anbenin.org/s/textes-de-lois/item/1119>.

decision has effect between the parties to the proceedings in exequatur and throughout the territory of Benin. This decision granting the exequatur is subject to appeal before the Court of Appeal within three (03) months from its referral.

3.1.2 The registration process

The law requires that the party who requests “execution must produce”;

- A copy of the decision meeting the conditions necessary for its authenticity;
- The original of the notice of service of the decision or of any other document which takes the place of service;
- A certificate from the clerk stating that there is no appeal against the decision or opposition or appeal. If it’s happened;
- Where applicable, a copy of the summons or summons from the party which failed in “instance.

3.1.3 Conditions for registration

A party who seeks to have a foreign decision registered for purposes of recognition and enforcement in Benin needs to satisfy some statutory conditions before registration could be accepted. These include;

3.1.4 Effects of registration of foreign decisions

In civil, commercial, social and administrative matters, all contentious and civil decisions rendered by foreign courts have full right the authority of *res judicata* on the territory of the Republic of Benin in the following conditions ;

- if the dispute relates in a specific way to the State whose judge has been seized and if the choice of jurisdiction was not fraudulent;
- if the decision is, according to the law of the “State where it was rendered, force of *res judicata* and capable of execution;
- if the parties have been regularly cited, represented or declared failing;
- if the decision does not contain anything contrary to the public order of the Republic of Benin.

However, Article 1160 provides that these foreign decisions will not have the authority of *res judicata* in Benin if a dispute between the same parties and having the same object is pending before a Beninese court previously seized, or has already been tried there, or has given rise to a judicial decision in another State, provided that this decision can be recognized in the Republic of Benin.

3.1.5 Cases against Benin before the African Court

3.1.5.1 Sébastien Germain Ajavon V. The République of Benin⁴⁰

Mr Sébastien Germain AJAVON, (Applicant), is a businessman and politician from Benin. He was charged in Benin with the trafficking of cocaine. He was first of all acquitted by a Court of first instance in Cotonou but was later sentenced to a twenty-year term by a Court for the repression of Economic crimes and Terrorism (CRIET). The Applicant seized the African Court to complain against the violation of his rights which include, the right to equal protection of the law (Article 3(2) of the African Charter ; the right to respect the dignity of the human person (Article 5 of the Charter), that is, violation of his honour and his reputation; the right to freedom and security of his person (Article 6 of the Charter) ; the right for his cause to be heard (Article 7 of the Charter), the right to be presumed innocent until proven guilty by a competent court (Article 7(1)b of the Charter) ;the right to property (Article 14 of the Charter) ; the duty of the State to ensure the independence of the judiciary (Article 26 of the Charter).

On the merits, the Court found that the Respondent State did not violate the right of the Applicant to equality before the law (Article 3 of the Charter) before the Court of First instance, first class of Cotonou, that the conditions of arrest and custody of the Applicant were not a violation of Article 5 of the Charter, that the Respondent State did not violate the right of the Applicant to freedom and security of his person (Article 6 of the Charter).

However, the Court found that there was violation of the right to fair trial because the provisions of Article 19(2) of the law establishing CRIET were a violation by the Respondent State, of the right of the Applicant to appeal against his declaration of guilt and his sentence before a higher court ;of the right to the respect of the dignity and reputation of the human person (Article 5 of the Charter) ; the right to defence Article 7(1)c of the Charter ; the right to be informed of charges brought against him and to access the case file Article 14(3)(a) of the International Covenant on Civil and Political Rights (ICCPR) ; the right to be represented by Counsel Article 14(3) d of the ICCPR ; of the principle of *Non bis in idem* (Article 14 (7) of the ICCPR; of the right to presumption of innocence (Article 7(1)b because of the statements

40. Application No. 053/2016.

made by public figures ; of Article 14 of the Charter by preventing the Applicant from carrying out his commercial activity and to enjoy his income ;of the duty of the Respondent State to ensure the independence of the judiciary (Article 26 of the Charter).

As for remedies, the Court ordered the Respondent State to take all the necessary measures to annul judgment No. 007/3C.COR delivered on 18 October 2018 by CRIET in a way that erases all its effects and to report thereon to the Court within six (6) months from the date of notification of this Judgment. It further awarded several monetary orders as reparations to the losses the Applicant suffered as a result of violations of his rights by Benin.

Status of Implementation of the decision

The African Court has reported in its 2019 Activity Report that the “State has not reported to the Court on measures taken to comply with the judgment”, thus categorising the case under the category of “non-compliance”.⁴¹

3.2 Burkina Faso



3.2.1 Enforcement of foreign judgments

The enforcement of a judgment requires that it has to be free of suspensive remedy or that it has to be a final judgment. Section 398 of Law No. 22-99/AN of 18 May 1999 on the Code of Civil Procedure of Burkina Faso provides that final judgments shall be enforceable irrespective of whether they are national or foreign.

The enforcement of foreign judgments first of all requires a categorisation of foreign judgments that are enforceable in Burkina Faso, and also a mastery of the procedures for the enforcement of foreign judgments.

3.2.2 Types of foreign judgments

Judgments that can be classified as foreign are judgments issued by courts other than the courts of Burkina Faso, notably judgments delivered by community, international or third State courts. They are diverse and different. Community courts (ECOWAS Court of Justice, WAEMU Court of Justice, OHADA Common Court of Justice and Arbitration) deliver judgments that are binding on Member States and do not require internal measures such as exequatur for their enforcement. However, for the two cases, there is no force or restraint to compel the State involved to enforce.

⁴¹ There are other Applications against Benin in which the African Court issues provisional measures such as App No 004/2020 - Houngue Eric Noudehouenou v. Republic of Benin; Application No. 006/2020 Ghaby Kodeih Republic of Benin.

The African Court on Human and Peoples' Rights delivers enforceable judgments that are binding on States Parties such as Burkina Faso. They are not subject to exequatur in order to be enforced in the national territory. There is however the challenge of the lack of enforcement. Judgments delivered by the national courts of third parties for which enforcement is sought in Burkina Faso are considered as foreign judgments. Their enforcement in Burkina Faso requires exequatur, except for countries which have signed a judicial cooperation convention.

3.2.3 Procedure for the enforcement of foreign judgments

The enforcement of a foreign judgment in Burkina Faso requires an exequatur. Exequatur means the enforceable character given by the court to a decision delivered by a foreign court, as well as the procedure for the granting or refusal of enforcement*.⁴²

3.2.3.1 The exequatur procedure

Section 668 of the Judicial Code of Burkina Faso provides that “exequatur for contentious and non-contentious decisions delivered in all matters by foreign courts shall be granted by the high court of the place where enforcement will be pursued...” The court shall merely verify if the decision for which exequatur is sought meets the requirements.

Exequatur can be partial or total and it can be appealed against (Section 670 of the Judicial Code). Exequatur is not required when the judgment is delivered by a competent foreign court and is final in accordance with national legislation and can be enforced in the State of origin (Section 996 of the Persons and Family Code). Exequatur is not also required when the judgment is delivered by an international competent court in a matter that does not fall under the exclusive jurisdiction of the courts of Burkina Faso and if the choice of the court was not fraudulent (Section 998 of the same Code). It is the case of the judgment delivered by the African Court in the matter of *Norbert Zongo and Others v Burkina Faso*.

3.2.3.2 Means of enforcement

The execution of a court judgment in Burkina Faso can be amicable or forced. Amicable execution means a voluntary execution (Section 410 of the Code of Civil Procedure). Voluntary execution is also provided for under Article 28 of the OHADA uniform act on the organisation of the simplified procedures of debt collecting and enforcement.

The forced execution of a judgment may be requested failing an amicable execution. In this case, the judgment has to be enforceable and notified (Section 414 of the Code). The

⁴² *While a decision by the AfCHPR should not be treated as a foreign judgement (and is not treated as such by Burkina Faso, see 2.2), this path is described here, as it could be tested in case a decision is not properly implemented.

OHADA Uniform Act enjoins States Parties to assist in enforcing decisions failing which their responsibility may be engaged (Articles 28 and 29 of the Act). Difficulties faced in the enforcement of decisions shall be brought before the judge of the place of enforcement who shall take an immediate decision (Section 422 of the Code) with the possibility of automatically ordering penalties in order to ensure the enforcement of the decision (Section 422).

3.2.4 *Norbert Zongo and others v Burkina Faso*

3.2.4.1 The Contents of the Judgment

After expedited proceedings before the courts in Burkina Faso, the beneficiaries of the late Norbert ZONGO *et al* instituted legal proceedings before the African Court on Human and Peoples' Rights. The Court issued two judgments: an interlocutory ruling on the exceptions; and a ruling on the merits in two stages.

The first decision dismissed the exceptions raised by the Respondent State concerning the competence of the Court and the exhaustion of local remedies. The second decision first of all ordered Burkina Faso to re-open the case of Norbert ZONGO *et al*. and ordered the beneficiaries to assess the damages and the costs not included in the expenses.

Secondly, the Court after receiving proposals made by the applicants and the counter-proposals of the respondent, decided by ordering Burkina Faso to pay to the beneficiaries a decided amount.

3.2.4.2 Actual status of execution of the Judgment

Marking the *Zongo* decision as the first one to be fully implemented,⁴³ the African Court reported in its Activity Report that the Counsel for the Applicants, by email of 26 May, 2016, informed the Court that Burkina Faso has so far taken the following measures in execution of the judgment of the Court;

- (i) Paid the Applicants the sum of 233,135,409 (two hundred and thirty three million one hundred and thirty five thousand four hundred and nine) CFA francs, representing the amounts owed to the beneficiaries of Norbert ZONGO and his three companions;
- (ii) On 30 March 2015, the Prosecutor General of Faso filed a motion with the Examining Magistrate seeking to reopen proceedings in the Norbert ZONGO case;

⁴³ See also Lohé Issa Konaté v Burkina Faso Application No. 004/2013 wherein, by an email of 11 April 2018, the Respondent State's Counsel transmitted an official report to the African Court indicating that the Respondent State has complied with all the Court's Orders. The official summary of the Judgment was published in the official journal of 15 October 2015, all payments have been made as ordered and the Applicant's criminal records have been expunged.

- (iii) On 8 April 2015, an Order to reopen investigations was issued by the Examining Magistrate of the Ouagadougou High Court and in December 2015, three soldiers belonging to the former Presidential Security Regiment (RSP), namely Christophe KOMBACERE (Soldier), Corporal Wamasba NACOULMA and Sergeant Banagoulo YARO were indicted by the Prosecutor for the murder of Norbert ZONGO and his companions.
- (iv) On 28 November 2016, the Respondent submitted copies of the Official Gazette Special Bis No. 07 of 9 November 2015 and the Newspaper Sidwaya of 10 September 2015 Edition Number 7997 where the summary of the Judgment was published.
- (v) In July 2017, the Respondent through the Ambassador in Addis Ababa, Ethiopia, provided information that the summary of the judgment was published on the website www.sig.bf/category/actualites/page/53 from 9 September 2015.
- (vi) By emails dated 11 and 27 April 2018 the Respondent State transmitted the Report on measures it has taken to implement the judgment of the Court. The Report indicates that the publication of the judgment and summary thereof has been done, compensation ordered has been paid on 9 December 2015 and the investigations ordered have been opened.

3.3 Côte d'Ivoire



3.3.1 Ivorian legislation on the enforcement of foreign judgements

- (i) Section 345 of the Code of Civil Procedure stipulates that: “court decisions, contentious or non-contentious, passed in a foreign country can be enforced (...) in the territory of the Republic only after they have been declared enforceable in the country...” This text institutes the exequatur procedure of foreign judgements in Côte d'Ivoire. Section 346 of the same Code provides that: “exequatur proceedings shall be initiated by summons according to the rules of common law...”
- (ii) Order No. 1060 MEF /DGCPT of 26 December 1997 on the organization of the Treasury Judicial Agency and on the responsibilities of the Treasury Judicial Agent stipulates in Article 2 that: “the Treasury Judicial Agency shall be responsible for:
 - the management of State litigation;
 - the enforcement of decisions for reparation for damages for or against the State passed by courts, arbitration courts and commissions;

- representing the State before courts, arbitration courts and commissions at the national level and abroad.

The Treasury Judicial Agency is placed under the Ministry of Economy and Finance. The Treasury Judicial Agency can be represented before these bodies by a practicing lawyer.

Regarding the judgements and orders of the African Court on Human and Peoples' Rights, there is no specific text for their enforcement in Côte d'Ivoire. They are part of Côte d'Ivoire's litigation which falls under the responsibility of the Treasury Judicial Agency in accordance with the aforementioned Order.

3.3.2 Institutions involved in the enforcement of foreign Judgements

Each African or international court or tribunal may have in its statute binding or non-binding provisions regarding the enforcement of its decisions in the territory of Member States. However, what is more important is the manner in which Member States organise, in their national legislation, the effective implementation of their enforcement obligation.

For example, Member States are obliged under Article 24 of the 2005 ECOWAS Court of Justice Additional Protocol to designate a national authority in charge of receiving and monitoring the implementation of the Court's decisions.

Côte d'Ivoire had already anticipated this requirement by establishment the Treasury Judicial Agency and by tasking it with all State litigation matters and State representation before national and international courts, tribunals and commissions.

Whenever an international court has a decision to be enforced in Côte d'Ivoire, the said court sends a certified copy of its decision to the Treasury Judicial Agency by diplomatic pouch. However, given that the Treasury Judicial Agency is placed under the authority of the Minister of Economy and Finance, the Minister informs the Government, in particular his colleagues at the Ministry of Justice and the Ministry of Foreign Affairs, of the enforcement of any foreign judgement. In fact, the Government has the final say when it comes to enforcing foreign judgements involving the State. These are completely unwritten internal political practices.

When it is a case of exequatur of foreign judgements provided under Sections 345 and 346 of the Code of Civil Procedure, the beneficiary of the foreign court judgement has to contact an Ivorian lawyer who will summon the exequatur defendant for trial before the competent court.

3.4 Ghana



3.4.1 The law

In Ghana enforcement of foreign judgment is guided, regulated and sanctioned by the Courts Act 1993 (ACT 459).

Section 81 (1) provides as follows:

“(1) Where the President is satisfied that, in the event of the benefits conferred by this Sub-Part being extended to judgments given in the superior courts of any country, substantial reciprocity of treatment will be assured in respect of the enforcement in that country of judgments given in the Superior Court of Judicature of Ghana, the President may by legislative instrument order.

- (a) that this Sub-Part shall extend to that country; and
- (b) that such courts of that country as are specified in the order shall be the superior courts of that country for the purposes of this Sub-Part.”

By this provision, the basis of execution of any foreign judgments in Ghana is reciprocity.

3.4.2 Procedures for enforcement of foreign judgments

These Requirements are by statutes laid down for execution of foreign judgments in Ghana:

- (i) Application for registration – it is required that any foreign judgment be registered in the High Court under section 82 of the Courts Act.
- (ii) The application is made by motion ex-parte and it is heard in the judges chamber.
- (iii) The motion is supported by Affidavit Evidence and the party making the application shall depose to sufficient evidence of facts and prove same by documents to convince the court that it has a case worthy of execution in the jurisdiction.
- (iv) The party must attach the judgment or a verified or certified or otherwise duly authenticated copy of the judgment or the awards sought to be executed
- (v) Where the judgment is not in English a translation of it in English certified by a Notary Public or authenticated by affidavit for the courts attention.

The application must also provide the address or the last known place of abode of the judgment creditor and the judgment debtor respectively, so far as is known to the deponent among other things.

State the specific amount with interest in both the country of the judgment's currency and that of Ghana.

- (vi) The Applicant must also show that the Judgment has executable orders capable of execution in the country of the judgment. Otherwise it may be set aside under section 83 of the Courts Act, 1993 (Act 459);

The courts of Ghana have the power to read into a judgment or a foreign award capable of execution in Ghana a provision where some provisions of the document related to the matter decided by the Court of the original judgment are such that if those provisions had been contained in separate judgments, those judgments could properly have been registered in Ghana.

It is worth noting that the judgment or the awards sought to be executed in Ghana must be given by a superior court of the country of the judgment. Also in the country of the original court the law of that country under which any interest has become due under the judgment as may be registered must exist.

3.4.3 Notice of registration

Notice of the registration of a judgment shall be served on the judgment debtor personally, unless the Court otherwise orders. Service of such a notice out of the jurisdiction may be effected without leave. The law also provides that notice of registration shall state in full particulars of the judgment registered and the order for registration the name and address of the judgment creditor or of the lawyer of the judgment creditor or agent on whom any notice issued by the judgment debtor may be served.

The rights of any party to set aside these judgments are covered and protected by and under the statutes that provides the procedures for execution of foreign judgments in Ghana.

3.4.4 Issue of execution

Where the court is satisfied that all conditions are satisfied for the implementation of the foreign judgment/awards in Ghana, the Court shall issue an order for execution and such judgments shall be executed in Ghana as if the judgment is obtained in Ghana.

Where a party raises an objection to the execution of the order to execute, the execution shall stay until the objection is determined by the court. Section 37 of the ARBITRATION ACT, 1961 (ACT 38) is headed Effect of Foreign Awards. The section provides as follows;

- (i) A foreign award shall, subject to this Part, be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 29 of this Act.
- (ii) Any foreign award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings, and any references in this Part to enforcing a foreign award shall be construed as including references to relying on an award.

Section 29 also provides that an arbitration award may, by leave of the Court, be enforced in the same manner as a judgment. By these provisions, implementation and execution of foreign judgment in Ghana is a matter of serious procedures.

3.4.5 Legislative instruments in execution of foreign judgments in Ghana

They set out which country's judgment can be executed in Ghana. Resolution of any conflict in respect of that judgment in the country shall be as specified in the legislative instrument made under the Courts Act by the instrument. This is necessary to give effect to the agreement made between Ghana and that country in relation to matters with respect to which there is power to make those rules.

3.5 Malawi



3.5.1 Legal framework for Enforcement

The Court Protocol is not domesticated in Malawi. There is no legislation dealing with implementation and enforcement of the Court's judgments and other issues attendant with that jurisdiction.⁴⁴ There is however legislation dealing with registration and enforcement of foreign national judgments and arbitral awards. These may also be enforced through common law procedures. In *Nicolaas Albertus Heyns v John Demetriou*⁴⁵ the High Court reaffirmed the two methods by which a foreign judgment may be enforced in Malawi, namely, through a statutory instrument and common law.⁴⁶

3.5.1.1 Enforcement through statutory instruments

3.5.1.1.a *British and Colonial Judgments Ordinance 1922*

This legislation is part of the laws of Malawi even though it is not specifically included in the current volumes of the Laws of Malawi.⁴⁷ It allows the registration of foreign judgments or foreign arbitration awards made in the United Kingdom and other Commonwealth countries as a local judgment. The effect of such registration is to confer on the judgment or award the same force and effect, and to render it subject to the same control and jurisdiction over the judgment, as if it had originally been given in the registering court.⁴⁸ Once registered, the other party is given time stated in the order, to apply to set aside the registration on good grounds.⁴⁹

For a foreign arbitration award, once registered, it is enforced under sections 27 and 37 of the Arbitration Act.⁵⁰ Judgments to be registered in the High Court are those delivered by superior courts.⁵¹ The President is given powers to extend its application to other Commonwealth countries.⁵²

The scheme of this legislation does not envisage the extension of its application to the Court. That would be doing violence to its language.⁵³

44 Interview with Mr. PacharoKayira, Chief State Advocate, Ministry of Justice & Constitutional Affairs, Lilongwe on 18 September 2015.

45 Civil Cause No.1 of 2000 (High Court of Malawi) (Principal Registry) (Unreported).

46 See also J. Masumbu, 'Recognition, Registration and Enforcement of Foreign Orders and Judgments in Malawi: The Case of Johannes Zacharias Human Muller and Three Others Versus OckertPhillipus Pretorius Commercial Cause No. 17 of 2010' 104 in Civil Procedure in Malawi-The Recent Talking Points 2nd Ed (Montfort Press) Limbe, Malawi.

47 Bauman, Hinde and Co. Ltd –Vs- David Whitehead & Sons (Mw) Ltd [2000-2001] MLR 6 (SCA).

48 Section 5(a) and (b).

49 Rule 14 of the British and Colonial Judgments Rules is to that effect.

50 Cap. 6:03 of the Laws of Malawi.

51 n5 above.

52 As above.

53 The preamble to the Ordinance provides that, an Ordinance to facilitate the reciprocal enforcement of judgments in

3.5.1.1.b Judgments Extension Ordinance 1922

This legislation deals with the transfer and execution of judgments obtained in Kenya, Uganda, Tanganyika, Northern Rhodesia (now Zimbabwe) and Zanzibar in Malawi.⁵⁴ Under section 6, the President has powers, by proclamation published in the Gazette, to extend the provisions of this Ordinance to judgments and decrees obtained in any commonwealth country. Again, the scheme is limited to judgments and decrees of national courts. Consequently, it cannot be extended to cover the registration, implementation and enforcement of the Court's judgments in Malawi.

3.5.1.1.c Service of Process and Enforcement of Judgments Act⁵⁵

This legislation provides for service of process, civil or criminal, among Malawi, Zambia and Zimbabwe and the enforcement in Malawi of civil judgments from the courts of those countries. As Chilenga observes, its application is more in breach than compliance. Very little regard is paid to it by legal practitioners in Malawi following the dissolution of the Federation of Rhodesia and Nyasaland.⁵⁶ It is not useful for this assignment.

3.5.2 Enforcement through common law

Common law is a source of law in Malawi.⁵⁷ Courts in Malawi have powers under the Common law jurisdiction to enforce foreign judgments. They do so, on the principle that the defendant is bound by the foreign court's jurisdiction over him or her.⁵⁸ In *Emmanuel v Symon*,⁵⁹ Buckley L.J. describes the circumstances in which courts enforce foreign court judgments:

In actions in personae there are five cases in which the court of this country will enforce a foreign judgment, (i) where the defendant is a subject of the foreign country in which the judgment has been obtained, (ii) where he was resident in the foreign country when the action begun; (iii) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued, (iv) where he has voluntarily appeared; and (v) where he has contracted to submit himself to the forum in which the judgment was obtained..

The above dictum was quoted with approval and used by the High Court in the Heyns case.⁶⁰ Similarly, the dictum refers to foreign national courts judgments or fora and is exclusive to actions in *persona*. It cannot apply to the Court's judgments.

Nyasaland (now Malawi) and in the United Kingdom and other parts of Her Majesty's Dominions and Territories under Her Majesty's protection.

54 Section 2.

55 Cap. 4:04 of the Laws of Malawi.

56 M. Chilenga (2011) Civil Procedure in Malawi (Kluwer Law International) 46.

57 Section 200 of the Constitution of the Republic of Malawi.

58 n5 above.

59 [1908] KB 302.

60 n5 above.

3.6 Mali

3.6.1 Procedures for enforcing judgments of regional courts in Mali (the African Court and ECOWAS Court of Justice)



In accordance with the principle of the primacy of community law over national law, the enforcement of judgments delivered by the African Court and the ECOWAS Court of Justice which have become final cannot encounter any “legal subterfuge” at the national level. These judgments are enforceable and are binding on States and must be taken into consideration by the national courts without any exequatur procedure.

In view of the foregoing, these judgments have to be enforced following the same procedures and under the same conditions as judgments and decisions issued by Malian courts and tribunals. In other words, the party concerned has to use the services of a bailiff to enforce decisions under Section 698 of the Code of Civil, Commercial and Social Procedure (CCCSP) of Mali contained in Decree No. 99-254/P-RM of 15 September 1999, amended by Decree No. 09-220/P-RM of 11 May 2009 on the amendment of the CCCSP, (CCCSP) which stipulates that: “only the bailiffs in charge of enforcement may conduct forced execution and precautionary seizure. The bailiff in charge of enforcement shall have the responsibility of conducting the enforcement operations. He shall be authorised, as required by law, to request the judge or any other authority mentioned in this Code, to give authorisations or prescribe the necessary measures. If there is any difficulty in enforcement, he shall prepare a report and have it approved by a competent judge who shall also hear the duly summoned debtor”.

The Prosecution through the Public Prosecutor shall ensure the enforcement of judgments and other enforceable orders through in particular an order to make available to the bailiff law enforcement officers to enable him to enforce decisions. He may enjoin all bailiffs under his authority to offer their services.

Concerning debt collection, the provisions relating to enforcement procedures are subject to the OHADA uniform act on the organisation of the simplified procedures of debt collecting and enforcement annexed to the CCCSP as forming an integral part thereof. However, it should be noted that the enforcement of judgments involving the Malian State or public services derogate from the provisions cited above.

If a judgment involves the State, a notice of the court decision is served on the Department of State Litigation for enforcement. The department shall in turn refer the matter to the department concerned. If the State does not act within the prescribed period, the party concerned may bring the matter before the Ombudsman who is a non-judicial remedy for citizens and an adviser to the Administration.

3.7 Rwanda



3.7.1 Legal framework

In Rwanda, the compliance to all foreign judgments are subjected to exequatur and regulated mainly by Article 91 of the law determining the organisation and functioning and jurisdiction of courts.⁶¹ According to Article 91 of that law the execution of such judgment shall be heard by the High Court and meet the following requirements:

- (i) whether the foreign judgment does not contradict Public order or basic Legal tenets of Rwandan public laws
- (ii) whether the case was finally heard and determined in accordance with the laws of the country of origin
- (iii) whether a copy of the judgment is by all means authentic in accordance with such laws
- (iv) whether the right of defense was respected. Thus, the law does not make a difference between foreign judgments and judgments of regional or international courts. However this law cannot be applied to judgments from regional or international courts. The issue whether a national court can enforce or give effect to remedies provided by an international or regional court has not received adequate attention from public and private international lawyers.

Considering the proliferation of such courts with individual *locus standi*, compulsory jurisdiction and recent decision of national courts to deny or enforce such remedies, it is necessary that greater attention be devoted to this issue and clear enforcement procedures be set.⁶²

Hence in the silence of the law in Rwanda, reference can be made to Article 30 of the Protocol related to execution of judgment which reads that ‘the States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution’.

⁶¹ Law 51/2008 of 09/09/2009 modified by the organic law 02/2013 of 06/06/2013 determining the organisation and functioning and jurisdiction of courts as modified and complemented to date.

⁶² Richard frimpong Oppong, Enforcing Judgments of International Courts in National Courts Journal of International Dispute Settlement 06/2014; 5(2):344-371. Available https://www.researchgate.net/publication/275299796_Enforcing_Judgments_of_International_Courts_in_National_Courts [accessed Jan 13, 2016].

The above mentioned will apply in Rwanda and the judiciary will need to comply should any judgment need to be enforced on its territory. Should Rwanda adopt any law that would seem to contradict the spirit of Article 30 of the Protocol mentioned above, Article 163 of the Rwandan Constitution states that international treaties and agreements shall take precedence over organic laws and ordinary laws.

3.8 Tanzania



3.8.1 Legal framework

In Tanzania, enforcement of foreign judgments⁶³ is regulated by the Reciprocal Enforcement of Foreign Judgments Act [Cap 8 R.E 2002] of the Laws of Tanzania. The Act provides for enforcement of judgments given by courts in certain foreign countries by way of registration with the High Court of Tanzania. The Act allows the enforcement of foreign judgment by registration on the legal basis of the principle of reciprocity.⁶⁴ According to the Schedule to Orders 2 and 3 of the Reciprocal Enforcement of Foreign Judgments (Extension of Part II) Order, GN No.8 and 9 of 1936, the following are countries from which judgments may be registered and enforced in Tanzania: Lesotho; Botswana; Mauritius; New South Wales; Zambia; Seychelles; Somalia; Zimbabwe; Kingdom of Swaziland; United Kingdom and Sri Lanka.

3.8.2 Procedure for recognition and enforcement of foreign judgments

To enforce a foreign judgment in Tanzania, a judgment creditor must make a formal application to the High Court of Tanzania to have the judgment registered with the Court. The application may be made *ex parte* to a judge in chambers.⁶⁵ Pursuant to Section 4 of the Act, and Rule 3 of the Reciprocal Enforcement of Foreign Judgments Rules, an application for registration of a foreign judgment must be supported by an affidavit stating facts—exhibiting a certified copy of the judgement issued by the original court and authenticated by its seal and a translation of the judgement certified by a notary public or authenticated by affidavit. It must also state to the best of the information and belief of the deponent - that the applicant is entitled to enforce the judgement. It must state that at the date of application the judgement has not been satisfied. Further requirement is that at the date of the application the judgement can be enforced by execution in the country of the original court; and that, if the judgement were registered, the registration would not be, or be liable to be, set aside under section

63 In the Consultant's view, judgments of the African Court are not foreign judgments and may not be enforced as if they were foreign judgments.

64 Section 11 of the Reciprocal Enforcement of Foreign Judgments Act, Cap 8, R.E 2002.

65 2002; read together with Rule 2 of the Reciprocal Enforcement of Foreign Judgments Rules, GN No.15 of 1936. Section 4 of the Reciprocal Enforcement of Foreign Judgments Act, Cap 8 R.E

6 of the Act. It should specify the amount of the interest, (if any). The application may be accompanied by such other evidence with respect to the matters as may be required by law. The affidavit shall also state the amount in the currency of the United Republic of Tanzania calculated at the rate of exchange prevailing at the date of the judgement.

3.8.3 Enforcement of the African Court's Judgment in Tanzania

The procedures and requirements for enforcement of foreign judgments do not apply to the decisions of the African Court because judgments of the African Court are not foreign judgments in law. They are supranational judgments.⁶⁶ Thus, the judgment of the African Court is not the judgment from those countries listed under the Reciprocal Enforcement of Foreign Judgments Act, [Cap 8 R.E 2002]. It would be fallacious to equate it with judgments of national courts of foreign states as such.

In terms of Article 30 of the Protocol establishing the African Court, “[t]he States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.” Consequently, the Government of Tanzania is obliged under Article 30 of the Protocol to comply with the judgments of the African Court.

However, enforcement of the African Court's judgment procedures is not specially provided for in Tanzania. This is an indication that the enforcement of the judgment of the African Court in Tanzania is based on the will of the executive arm of the state. It is necessary to approach the Attorney General for the implementation of the judgment.

The Attorney General is responsible on behalf the Government of Tanzania to advise on how best to execute judgments of the African Court.

⁶⁶ Luis Gabriel Franceschi., *The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective*; Cambridge Scholars Publishing, 2014.p.178

3.9 The Gambia



3.9.1 The Legal Framework

The recognition, registration and enforcement of foreign judgments in The Gambia is regulated by statute law, namely, Reciprocal Enforcement of Judgments Act (Act No 12 of 1922) Cap 8:05 Vol 3 Revised Laws of The Gambia 2009; and Foreign Judgment Reciprocal Act (Act No. 3 OF 1959) Cap 8:05 VOL 3 Revised Laws of The Gambia 2009. In essence, a foreign decision has to be registered for purposes of recognition and enforcement in the The Gambian legal system. Each of the two statutes provides for the registration procedure, which, according to the titles of the laws, is based on reciprocity.

The conditions for registration of a foreign judgment (judgment rendered by a court from judgments obtained in the High Court of England, Northern Ireland, or in the Court of Session in Scotland,) in terms of Reciprocal Enforcement of Judgments Act (Act No 12 of 1922) are as follows;

- The Judgment was obtained in a superior court.
- The judgment creditor applies to the High Court of The Gambia, at any time within twelve months after the date of judgment or such longer period as may be allowed by the High Court to have the judgment registered in the High Court.
- Once these conditions are satisfied, the High Court of The Gambia may, if in all the circumstances of the case it thinks it is just and convenient that the judgment be enforced in The Gambia, will order the judgment to be registered accordingly.
- This Act can be extended to apply to areas outside the Commonwealth, through an Order in the national Gazette, where the Minister is satisfied that there are reciprocal provisions made by the legislature of that other country with regards to the enforcement of judgments.

On the other hand, conditions for registration of judgments under the Foreign Judgment Reciprocal Act (Act No. 3 of 1959), which Act makes provisions for the enforcement in The Gambia of judgments given in foreign countries which accord reciprocal treatment to judgments given in The Gambia are similar to those in respect of the other law (Reciprocal Enforcement of Judgments Act (Act No 12 of 1922) Cap 8:05).

3.9.2 Procedure for registration

The Reciprocal Enforcement of Judgment Rules to the Act provides for the procedure to enforce judgments in The Gambia under both statutes as follows;

- An application to register a judgment obtained in a superior court outside The Gambia under the Act shall be made by leave through an ex parte summons or by summons to the Chief Justice. If the application is made Ex-parte the Chief Justice shall direct the summons to be issued.
- The application must be accompanied by an affidavit in support of the facts, exhibiting the judgment or a certified true copy of the judgment stating that to the best information of the deponent the judgment creditor is entitled to enforce the judgment.
- The originating summons shall be served in the same manner as a writ of summons in The Gambia.
- The order giving leave to register shall be drawn up and served on the Judgment debtor but where the application is made ex parte, service on the judgment debtor shall not be required.
- The order giving leave to register shall state the time within which the judgment debtor is entitled to set aside the registration.
- Notice of registration of the judgment must be served on the judgment debtor within a reasonable time after registration.

3.9.3 Grounds for refusing registration

A foreign judgment will not be registered under this law, if one of the conditions below exist, namely;

It has been wholly satisfied; or

It could not be enforced by execution in the country of the original court.

If the judgment debt is in foreign currency, the judgment will be registered as if it were a judgment for such sum in the currency of The Gambia as on the basis of the prevailing rate of exchange at the date of the judgment of the original court.

The judgment of the original court has been partly satisfied.

Where it appears to the Minister that the treatment of recognition and enforcement accorded by the courts of any foreign country to judgments given in the Court is less favourable, the Minister has the power to make the foreign judgment unenforceable in The Gambia.

3.9.4 The effect of registering a foreign judgment

Once a foreign judgment is registered in the Gambia, that judgment shall have new status. First, it shall for the purposes of execution be of the same force and effect as a judgment had been obtained in The Gambia. Second, the judgment shall carry interest, that it, have interest running on it until it is satisfied. Finally, the Gambian courts shall have the same control over the execution of a registered judgment as if the judgment had been a judgment originally given domestic courts with effect from the date of registration.

From the short discussion above, it is clear that reciprocity is key in the registration of foreign judgments, and in the absence of a reciprocal agreement or arrangements between The Gambia and the African Court, chances of registration of the African Court decisions and their enforcement through this procedure are diminished.

3.10 Tunisia



3.10.1 Legal Framework

Tunisian private international law⁶⁷ is relatively new. Prior to independence in 1956, private international law disputes involving a Tunisian party were resolved under the jurisdiction of French courts. It was only after independence and the unification of the Tunisian judicial system that Tunisian courts became competent to adjudicate over international private disputes.

Article 11 of the Tunisian Code of Private International Law (TCIL)⁶⁸ regulates the reception of foreign judgments for purposes of registration and enforcement in Tunisia. Tunisia follows the exequatur system as all judgments and decisions rendered by a competent foreign authority are liable to exequatur.

⁶⁷ Private international law should be understood, according to the common law conception, as the branch of law that addresses the questions of international jurisdiction, choice of law and the recognition and enforcement of foreign judgments. See TC Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge University Press, 2009), 3–4.

⁶⁸ Available at: <https://www.jurisitetunisie.com/tunisie/codes/cdip/cdip1015.htm>.

3.10.2 Procedure for registration

The most diligent party may bring action relating to the exequatur, non-recognition or declaration of unenforceability of foreign decisions and judgments before the court of first instance of the place of domicile of the party against whom the foreign judgment is invoked. In the absence of a domicile in Tunisia, the action is brought before the Tunis court of first instance.

It is important to note that actions relating to the recognition or enforcement of arbitral awards are brought in accordance with the provisions of Article 80 of the Tunisian Arbitration Code and the procedure is more or less the same with that of foreign judgments.

3.10.3 Grounds for non-registration

In terms of Article 11 of the TCPIL, A foreign judgment stands bad for registration for purposes of enforcement in Tunisia based on;

- The subject of the dispute falls within the exclusive competence of the Tunisian courts.
- The Tunisian courts have already rendered a decision that cannot be appealed through ordinary channels on the same subject, between the same parties and for the same cause.
- The foreign decision is contrary to public order within the meaning of Tunisian private international law, or was rendered following a procedure which did not preserve the rights of the defense.
- The foreign judgment has been annulled, or its execution suspended in accordance with the law of the country where it was rendered, or is not yet enforceable in the country where it was rendered.
- The State where the judgment or decision was rendered has not respected the rule of reciprocity.
- If it's an arbitral award, then Exequatur is only granted to foreign arbitral awards under the conditions provided for in Article 81 of the Arbitration Code.

Once one of the above grounds or conditions required for the exequatur is lacking in the judgment or the foreign decision, Tunisian courts will declare unenforceability of that decision.

3.10.4 Effect of registration

Articles 17 and 18 of the TCPIL provide for the various effects of registration. These include the fact that the declaration of unenforceability (recognition decision by Tunisian courts) is presented accompanied by an authentic dispatch of the judgment or the decision, translated into Arabic. Secondly, the judgment ruling on a request for exequatur, or non-recognition or declaration of unenforceability is now governed by Tunisian law with regard to the means of appeal. In other words any diligent party may appeal any decision of the Tunisian courts. Thirdly, foreign decisions and judgments which have become enforceable in Tunisia are executed in accordance with Tunisian law and subject to reciprocity. Therefore, reciprocity is also key to the Tunisian experience.

Based on the above expose and experience from Tunisia, it is necessary that formal arrangements be made between the African Court and Tunisia for purposes of recognition of its judgments for purposes of registration and enforcement in Tunisia. This is a new approach to international law that needs to be initiated and explored for better access to justice.

4 Conclusion

The African Court is the only continental judicial institution set up by the AU with the mandate to strengthen the protective mandate of the African Commission. Its decisions are binding. However, the Protocol which establishes the Court does not provide any clear provision on the implementation of the Court decisions. Perhaps this is in keeping with the drafting tradition of international treaties that leaves room for states to determine the choice of measures they will adopt to comply with international law obligations as a consequence of sovereignty. The obligation of compliance is one of result as opposed to process. Once compliance is achieved, it does not matter to the African Court or victims of violations how it has been done.

Furthermore, because decisions of the African Court are international and not foreign judgements, most domestic legal orders do not provide for their recognition. The current Booklet gives an overview of legal framework in implementation of the Court decisions in ten countries which have made declaration under Article 34(6), namely Burkina Faso, Benin, Cote D'Ivoire, Ghana, The Gambia, Malawi, Mali, Rwanda, Tanzania, and Tunisia.

As the African Court has now been on a continuous path of rendering decisions on merit, CSOs, NHRIs, institutions of the African human rights system, individuals and others are encouraged to embark into constructive discussions on how to set the framework for implementation of decisions rendered by the African Court more effective, including lobbying for the adoption of laws that recognise decisions of international courts or tribunals for purposes of enforcement at the national level.

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