Reflections on the Role of Civil Society Organisations in Implementing Cases from the African Commission and Court

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The African Commission on Human and Peoples' Rights forms an integral part of the African human rights system and mechanism for human rights protection and promotion. Since its establishment by the African Charter on Human and Peoples' Rights in 1987, the Commission has received over 600 communications based on violations of rights and freedoms laid down in the Charter. The Commission, together with the African Court on Human and Peoples' Rights (which was established through the 1998 Protocol to the African Charter and became operational in 2004) form dual pillars of the African human rights protection system. The Court was created to reinforce the protective functions of the Commission.

These organs have handled several cases and reached ground-breaking decisions on such contentious matters as self-determination, the right to development, and the right to environment (to name but a few). The bone of contention and the lacuna which has inevitably overshadowed the work of these bodies, however, is the implementation of these decisions by states, especially where complex, politically sensitive matters are concerned. Such cases raise critical issues and challenges for these bodies, since they often touch on the sovereignty of the state, as well as for states, who are often reluctant to comply. In such cases, litigants and civil society actors inevitably face stiff resistance in advocating for implementation. The issue, then, is whether the functions and powers of these organs should be improved upon, or whether they should rely on external bodies to encourage or even enforce implementation where possible, such as national courts, national human rights institutions (NHRIs) and civil society organisations (CSOs).

The challenges become even more heightened when, as noted, it comes to issues that touch on the sovereignty of the state party involved. As has been observed in several cases – not only on the continent but from other regional courts – supranational bodies can make findings that a state has breached its duties under the relevant human rights instrument(s), but can then be reluctant to comment on the implementation of such cases. For example, the International Court of Justice (ICJ), in its advisory opinion on the "Accordance with international law of the unilateral declaration of independence in respect of Kosovo," itself limited the scope of its decision to only that case and declined to reach a conclusion on the broader issue of unilateral declarations of independence. Also, in the *Katangese Peoples' Congress v Zaire* (1995) and in *Kevin Mgwanga Gunme et al v. Cameroon* (2009), the African Commission failed to fully and adequately address the charged issue of self-determination. This can easily be traced to the reluctance of the Commission to intervene in the political situation of countries that affect their sovereignty, notably their territorial boundaries. As the ICJ itself noted in its 1986 *Frontier Dispute* opinion, "the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice."

By contrast, the Commission and Court appear to be more comfortable addressing issues that fall within the internal affairs of a state, particularly in cases of reported violations of indigenous communities and their land rights. Such 'invasive' judgements that touch on the internal affairs of states include those against Nigeria in the Ogoniland case and against

Kenya in the well-known Endorois (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*) and Ogiek cases (*African Commission on Human and Peoples' Right v. Kenya*). Here, the existence of an active civil society that can sustain advocacy on a decision and develop an implementation strategy has been central to the progressive implementation of these decisions.

For instance, it was thanks to efforts of the Centre for Minority Rights Development (Kenya) and of Minority Rights Group (MRG) International on behalf of the Endorois Welfare Council that a complaint was lodged at the African Commission in the first place. CSOs have been recognised as key partners in the follow-up and implementation process. CSOs have employed a range of tools to this end, including engaging various stakeholders and the broader community at the national level in follow-up and implementation of decisions, written correspondence, meetings, and the use of other human rights mechanisms to bring attention and monitor developments. Despite the numerous challenges faced by CSOs with respect to follow-up and implementation, they have been instrumental in keeping the decisions of the Commission and Court alive. For instance, with the Ogiek case, MRG and the Ogiek Peoples Development Program (OPDP) created a task force that made several recommendations and continuously put pressure on the government of Kenya to take the measures necessary to enforce the judgement.

Notably, in its "Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights" (held in September 2018), the Commission identified a number of factors that hinder implementation of its decisions. These included inadequate commitment by states parties; financial and institutional constraints; lack of communication and visibility; and a lack of monitoring mechanisms. Similar constraints face the African Court as well.

Human rights CSOs can assist the Commission and Court in addressing some of these challenges. Many CSOs already play an important role in supporting the work of these organs through human rights monitoring, standard setting, provision of assistance, and education and sensitisation. In these capacities, these organisations can put pressure on the respective state parties through petitioning the national court system (see, for instance, the post by Masha Lisitsyna and Anastassiya Miller in this series), together with the national human rights institution (NHRI), as a way to enforce judgments of the Commission and the Court. The role of CSOs is again crucial here since they can also write to NHRIs and courts to advise them on the state of implementation of a given decision.

In addition, naming and shaming – a popular strategy to enforce international human rights decisions – has proven to be an effective tool, especially towards garnering international attention for a particular cause. CSOs use news media to publicize violations and urge implementation. Evidence has shown that governments that are put in the spotlight for their abuses and that have not yet implemented the decisions from these organs can be pressured to do so, as the Ogiek case in Kenya illustrates. In May 2017, the Court ruled that by routinely subjecting the Ogiek to arbitrary forced evictions from their ancestral lands in the Mau forest, the government of Kenya had violated seven separate articles of the African Charter, including the right to property, natural resources, development, religion, culture and non-discrimination. Together, OPDP and MRG continuously put pressure on the government when it became obvious that it was hesitant to implement the Court's decision. This tactic

can be better exploited by grassroot organisations, many of whom often represent vulnerable persons and can assist in bringing their cases to public attention.

At the same time, the threat of shrinking civic space confronts Africa. The Commission itself noted in its 2018 report that the "restrictive criteria for observer status before the Commission bars smaller grassroots NGOs from engaging at the institutional level with the activities of the Commission." Grassroot organisations must therefore be appropriately represented in these organs: representation would enable them to have a better understanding of the inner workings of the system and be able to help fill the lacuna that exists in terms of implementation. This would also go a long way to improving the way CSOs report on the failure of states to implement. In addition, the confidential nature and lack of transparency in how communications are submitted to the Commission hinders the monitoring of the its procedures when cases are pending. As Article 59(1) of the African Charter provides, "All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide." Such confidentiality – which can only be lifted by the Assembly, a body that is largely political – is problematic and gives states parties enormous leeway and ability to influence the Commission's decisions.

Human rights CSOs should also improve their cooperation with each other at the national, regional, and international levels to be more effective in naming and shaming, and in pressing for legislation to be adopted or improved that ensures the enforcement of judgements by foreign and/or international courts at the national level. CSOs should also collaborate more to lobby for the integration of implementation and enforcement mechanisms into national human rights plans of action, so as to ensure that these issues are considered from a wider perspective. Mobilizing this kind of support is a forte of many CSOs and would thus give them an ability to raise awareness at the grassroots level on the workings and decisions of the Commission and the Court. By garnering support from litigators in association with willing NHRIs, CSOs can help keep these decisions alive, both for the respondent government and within the human rights system as a whole.

Sensitisation and education efforts that seek to raise awareness and demystify the notion of international judicial bodies as being out of the reach of ordinary individuals is also critical. Through promotional activities of CSOs, such as conferences and trainings, stakeholders can become more aware of how to address human rights abuses that have not been adequately handled by the national human rights system. Indeed, sensitisation can go a long way to publicising human rights decisions and their state of implementation (see, for instance, the posts in this series by Philip Leach and Clara Sandoval). Sensitisation and education of media and other press actors can also serve to help keep a decision alive and ensure it circulates widely within the human rights community.

Finally, standard setting has always been an important role played by human rights CSOs. Through highlighting certain areas of human rights that have received limited attention by the international community human rights CSOs – in Africa and beyond Africas – have so far succeeded in bringing to the fore issues such as the prohibition of torture, involuntary disappearances, women's rights, children's rights, and LGBTQI+ rights. This crucial role of CSOs should be directed towards the implementation of the decisions of international judicial and quasi-judicial bodies as well; for instance, by highlighting the non-compliance of state parties through other mechanisms, like the UN treaty bodies or through other political organs, like the UN Human Rights Council. Failure to implement these decisions is a blatant

disregard of human rights values and obligations. It can also be highlighted as an ongoing failure of a state to promote, protect, respect and fulfil its obligations under the African Charter, as well as other binding international human rights instruments.

The state is the primary duty bearer for human rights protection and promotion; failure to implement the decisions of international judicial bodies can therefore be construed as a failure to protect the human rights of individuals. Arguably, these failures could thus be taken by individuals and CSOs before national court systems who are able and willing to hear them. Raising and setting the standards for implementation of decisions of international human rights bodies to the level of a non-derogatory obligation would certainly be an overdue turning point for human rights enforcement.

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