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State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five African states

by

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Submitted in fulfilment of the requirements for the degree

Doctor Legum (LLD)

in the Faculty of Law

University of Pretoria

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Supervisor: Professor Frans Viljoen

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Declaration of originality

I, the undersigned, hereby declare that this thesis, which I submit for the degree of Doctor Legum (LLD) in the Faculty of Law at the University of Pretoria, is my own work, and has not previously been submitted for a degree at another university.

I have correctly cited and acknowledged all my sources.

Signed: ……………………………………………………………........
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Date: …………………………………………………………….

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Dedication

To the Creative and Unseen Force behind the things that are seen;

To my mother, Elizabeth Omoseke Ayeni (née Lawani); thanks for fighting hard for us!

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Acknowledgment

My greatest gratitude goes to my supervisor, Professor Frans Viljoen, for the thorough supervision, insightful criticisms and constant review of ideas presented in this thesis. You are more than a supervisor! You are a father, mentor and friend. Professor Viljoen did not only facilitate my research in human rights judgment compliance, he demonstrated genuine interest in the research. Words alone cannot express my gratitude to you! I am also grateful to all the reviewers and examiners whose contributions and suggestions have greatly enriched the thesis.

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Acronyms and abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AGA	African Governance Architecture
AHRLR	African Human Rights Law Report
AIPPA	Access to Information and Protection of Privacy Act
AMU	Arab Maghreb Union
ANAW	African Network for Animal Welfare
ANZ	Associated Newspapers of Zimbabwe
APRM	African Peer Review Mechanism
ASEAN	Association of South-east Asian Nations
AU	African Union
CAEA	Court of Appeal for East Africa
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Elimination of All forms of Discrimination against Women
CED	Convention for the Protection of all Persons from Enforced Disappearance
CEMAC	Economic and Monetary Community of Central African States
CENSAD	Community of Sahel-Saharan States.
CEPGL	Economic Community of Great Lake Countries
CHR	Centre for Human Rights
CoE	Council of Europe

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COMESA	Common Market for Eastern and Southern Africa
CPR	civil and political right
CRC	Convention on the Rights of the Child
CRP	Constitutional Rights Project
CRPD	Convention on the Rights of Persons with Disabilities
DRC	Democratic Republic of Congo
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
ECCAS	Economic Community of Central African States
ECCJ	ECOWAS Community Court of Justice
ECJ	European Court of Justice
ECHR	European Convention for Protection of Human Rights
ECtHR	European Court of Human Rights
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
EGASPIN	Environmental Guidelines and Standards for the Petroleum Industry in Nigeria
EIU	Economic Intelligence Unit
ESCR	economic, social and cultural right
EU	European Union
FEPA	Federal Environmental Protection Agency
FGM	female genital mutilation
HRC	Human Rights Committee

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HRJC	human rights judgment compliance
HRJI	human rights judgment impact
HRT	human rights tribunal
HRVIC	Human Rights Violations Investigation Commission
HYPREP	Hydrocarbon Pollution Restoration Project
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICGLR	International Conference on the Great Lakes Region
ICJ	International Court of Justice
ICPC	Independent Corrupt Practices Commission
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IGAD	Inter-Governmental Authority on Development
IHRDA	Institute for Human Right and Development in Africa
IHRL	international human rights law
IHRT	international human rights tribunal
IOC	Indian Ocean Commission
IQMR	Qualitative and Multi-Method Research
LDA	Lunatic Detention Act
LLD	Doctor Legum

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LRA	Lord's Resistance Army
MDA	Ministries, departments and agencies
MHLAP	Mental Health Leadership and Advocacy Programme
MIC	Media and Information Commission
MRA	Media Right Agenda
MRU	Mano River Union
MOSOP	Movement for the Survival of the Ogoni People
NEPAD	New Partnership for Africa's Development
NESREA	National Environmental Standards and Regulations Enforcement Agency
NGO	non-governmental organisation
NIRA	National Identification and Registration Authority
NNPC	Nigerian National Petroleum Corporation
NOSCP	National Oil Spill Contingency Plan
NOSDRA	National Oil Spill Detection and Response Agency
NSCDC	Nigeria Security and Civil Defence Corps
OAS	Organization of American States
OAU	Organisation of African Unity
OHADA	Organisation for the Harmonisation of Business Law in Africa
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
OSJI	Open Society Justice Initiative
PALU	Pan African Lawyers Union
PAP	Pan African Parliament
PRC	Permanent Representatives Committee

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PRDP	Peace, Recovery, and Development Plan
PSC	Peace and Security Council
RECs	regional economic communities
RSISTF	Rivers State Internal Securities Task Force
SACU	Southern Africa Custom Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SERAC	Social Economic Right Action Centre
SERAP	Socio-Economic Right and Accountability Project
SPDC	Shell Petroleum Development Company
TLP	transnational legal process
TNC	transnational corporation
UBEC	Universal Basic Education Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNEP	United Nations Environment Programme
UNICEF	United Nations Children's Fund
VAW	Violence against women
VMCZ	Voluntary Media Council of Zimbabwe
WAEMU	West African Economic and Monetary Union
WAMZ	West African Monetary Zone
WEU	Western European Union
WHO	World Health Organisation
ZLHR	Zimbabwe Lawyers for Human Rights

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Abstract

This thesis analyses state compliance with 75 reparation orders contained in 32 decisions of six selected regional and sub-regional human rights tribunals (HRTs) in Africa, decided in the period between 1 January 2000 and 31 December 2015, in five states – Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe. Of the six selected HRTs, three are sub-regional (ECOWAS Community Court of Justice (ECCJ), the East African Court of Justice (EACJ) and the SADC Tribunal) and three are regional (African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child). The five states selected for the study are those that have the highest number of human rights cases decided on the merits by both regional and sub-regional HRTs in Africa.

The study establishes, based on available data, supplemented by in-depth interviews conducted between July 2015 to July 2017, the compliance status of the 75 reparations orders. In categorising the level of compliance, the study introduces the concept of aggregate compliance, which is calculated as follows: Aggregate Compliance (AC) = Full Compliance (FC) + ½ Partial Compliance (PC). This concept aims to avoid the rigid distinction between full and partial compliance, which suggests that nothing has *really* been accomplished until *everything* has been achieved. Using this yardstick, the study finds an overall aggregate compliance rate of 31 percent. Full compliance was recorded in only 13 (17 percent) of the 75 reparation orders; and partial compliance was recorded in 21 (28 percent) of the reparation orders. Of the five countries, Uganda recorded the highest aggregate compliance rate (68%), followed by Nigeria (48%), Tanzania (19%), The Gambia (13%) and Zimbabwe (11%). A factor common to the two least complying states is lack of commitment to compliance and poor system of governance.

Finding that sub-regional HRTs recorded 29 percent aggregate compliance with respect to the five studied states, while regional HRTs recorded 33 percent aggregate compliance, the study concludes that the hypothesis that *states comply better with decisions of sub-regional HRTs than regional HRTs* cannot be substantiated. It therefore argues that the selected African states do not necessarily comply better with decisions of sub-regional

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HRTs than regional tribunals; rather, it establishes that human rights judgment compliance in every case is a function of a multiplicity of factors.

Correlating the data generated by the study with possible circumstances inducing compliance, specific to the study countries, the study identifies five primary factors facilitating human rights judgment compliance in the selected states: (1) some commitment to compliance by states; (2) low-cost, specific and limited remedies; (3) the existence of free, stable and democratic system of governance in the state required to implement the decision; (4) the effectiveness of follow up by the HRTs and NGOs; and (5) political transition or regime change subsequent to the decision. Of these five factors, the study singles out 'commitment to compliance' as the most important factor predictive or indicative of compliance.

Acknowledging the limitations of the optic of compliance, being focused on the implementation of clearly delineated reparation orders, the thesis also identifies various forms of impact or influence of HRTs' decisions in the selected states. Some of the notable influences of HRTs' decisions in the selected states include amicable settlement of disputes and proactive remediation of violations, legislative and policy reforms; transnational judicial communication and the use of HRTs' decisions as tools for social mobilization, advocacy and research. The thesis also identifies at least five major obstacles or hindrances to compliance in the selected states, namely poor supervision mechanisms, weak domestic infrastructures for judgment implementation, overall weak institutions, poor institutional designs of regional and sub-regional HRTs, ineffective follow-ups by HRTs and NGOs, poor system of governance in some of the selected states, lack of awareness and erroneous perceptions about international human rights system, among others.

The study concludes that if the impact of HRTs' decisions in the selected states is to be enhanced, domestic activist forces and transnational compliance actors ought to pay more attention to the domestic implementation process, the degree of commitment to compliance by the relevant actors as well as the nature of reparation orders issued by the

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respective HRTs. Other practical ways of enhancing compliance and overall impact of HRTs' decisions in the selected states are also suggested.

The study adds to the growing literature on state compliance with reparation orders of regional and sub-regional human rights tribunals in Africa. The study differs from and extends the insights from previous judgment compliance studies related to Africa by focusing on the specific reparation orders, rather than on the case as a whole. It introduces a novel concept, that of aggregate compliance, to categorise state compliance. Although the study does not make definitive generalisations or identify universal pattern of state compliance with decisions of HRTs in Africa or anywhere else, its findings may be relevant for other regional and international human rights systems.

Key words: Africa, compliance, impact, human rights tribunals, regional, sub-regional, decisions, reparation orders, factors of compliance, theories of compliance

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Chapter 1

General introduction

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1.1. Background

International law has over the years grown in size and importance.[1] The same is true of international adjudication.[2] Scholars have frequently talked about the increasing institutionalisation of international politics through the proliferation of multilateral agreements and international adjudicatory tribunals.[3] One aspect of international law most intensely affected by this development is international human rights law (IHRL).[4] The institutionalisation of IHRL has been described by scholars as one of the most remarkable

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[1] S Baradaran, M Findley, D Nielson & JC Sharman 'Does international law matter?' (2013) 97 *Minnesota Law Review* 743, 745.

[2] See A-M Slaughter & AS Sweet 'Assessing the effectiveness of international adjudication' (1995) 89 *Structures of world order (Proceedings of the 89th Annual Meeting of the American Society of International Law)* 91; EA Posner & JC Yoo 'Judicial independence in international tribunals' (2005) 93 *California Law Review* 1, 3; B Simma 'International adjudication and US policy: Past, present and future' in N Dorsen & P Gifford (eds) *Democracy and the rule of law* (2001) 39; H Kissinger *Does America need a foreign policy? Toward a diplomacy for the 21st century* (2002) 273.

[3] J Goldstein, M Kahler, RO Keohane & A-M Slaughter 'Introduction: Legalization and world politics' (2000) 54 *International Organization 385*, 385 - 399; LR Helfer & A-M Slaughter 'Why states create international tribunals: A response to Professors Posner and Yoo' (2005) 93 *California Law Review* 899, 910.

[4] C Hillebrecht *Domestic politics and international human rights tribunals: The problem of compliance* (2014) 3; J Donnelly *International human rights* (2007) 1; CR Beitz 'Human rights as a common concern' (2001) 95 *American Political Science Review* 269.

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developments in contemporary international law.[5] It is significant because, unlike international law related to trade and security which govern mainly the horizontal relationship between states, IHRL governs the vertical relationship between states and their citizens.[6] Despite the advancements recorded over the years in international human rights norm setting, translating 'rights' contained in human rights instruments to tangible 'remedies' for victims of human rights violations remains the greatest challenge of IHRL and international human rights adjudication.[7]

Two branches of IHRL may be identified, namely the normative and the institutional systems.[8] Following the formation of the United Nations (UN) in 1945 and the subsequent adoption in 1948 of the Universal Declaration of Human Rights (UDHR), states have adopted and ratified numerous human rights treaties at the global and regional levels.[9] There are also treaties relevant to human rights at the sub-regional level.[10] Together with

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5 G Born 'A new generation of international adjudication (2012) 61 *Duke Journal of Law* 775, 778; Helfer & Slaughter (n 3 above); C Brown 'The proliferation of international courts and tribunals: Finding your way through the maze' (2002) 3 *Melbourne Journal of International Law* 453, 453 - 454; RO Keohane, A Moravcsik & A-M Slaughter 'Legalized dispute resolution: interstate and transnational' (2000) 54 *International Organization* 457; T Buergenthal 'Proliferation of international courts and tribunals: Is it good or bad?' (2001) 14 *Leiden Journal of International Law* 267; B Kingsbury 'Foreword: Is the proliferation of international courts and tribunals a systemic problem?' (1999) 31 *New York University Journal of International Law and Politics 679,* 680; CPR Romano 'The proliferation of international judicial bodies: The pieces of the puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709.

6 Hillebrecht, (n 4 above).

7 See Open Society Justice Initiative 'From rights to remedies: Structures and strategies for implementing international human rights decisions' (2013); Open Society Justice Initiative 'From judgment to justice: Implementing international and regional human rights decisions' (2010).

8 M Pinto 'Fragmentation or unification among international institutions: Human rights tribunals' (1999) 31 *International Law and Politics* 833, 833.

9 See International Covenant on Civil and Political Rights (ICCPR) 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1979, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984, Convention on the Rights of Child (CRC) 1989, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) 1990, Convention on the Rights of Persons with Disabilities (CRPD) 2006, International Convention for the Protection of All Persons from Enforced Disappearance 2006, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, European Social Charter 1961, European Convention for the Prevention of Torture 1987; American Convention on Human Rights 1969, African Charter on Human and Peoples' Rights 1981, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, African Charter on the Rights and Welfare of the Child 1990, among others.

10 See ECOWAS Revised Treaty 1993, ECOWAS Supplementary Court Protocol 2005, Treaty of the Southern African Development Community 1992, as amended in 2001, Protocol on Tribunal in the Southern African Development Community 2000, and Treaty of the East African Community 1999 among others.

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the relevant soft law standards, these treaties make up the international human rights normative system. Series of empirical studies have shown that treaty ratification by states often has little or no positive effect on human rights practice at the domestic level.[11] In fact, some of these studies have found that human rights condition at the domestic level can actually degenerate after treaty ratification.[12] While the normative system on the one hand comprises treaties and soft law standards, the institutional protection system on the other hand comprises mechanisms for monitoring and supervising states' implementation of human rights treaties and standards. These mechanisms, described in this thesis as international human rights tribunals (IHRTs),[13] comprise independent expert committees as well as quasi-judicial and fully-fledged judicial institutions established by state parties to monitor and promote states' implementation of human rights treaty standards, and to provide redress for individuals whose rights under the treaties are violated by their states.

The UN human rights protection system comprises both Charter-based and treaty-based bodies.[14] The Charter-based bodies comprise the Human Rights Council and its special procedures.[15] There are currently nine core human rights treaties and ten human rights treaty bodies at the global level. The treaty based bodies are: The Human Rights Committee (HRC) and committees on CESCR, CERD, CEDAW, CAT, CRC, ICRMW, CRPD and CED. Eight of the treaty-based bodies may under certain conditions receive and consider individual complaints.[16]

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[11] LC Keith 'The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior?' (1999) 36 *Journal of Peace Research* 95, 95 - 118; OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935, 1935 - 2042; EM Hafner-Burton & K Tsutsui 'Human rights in a globalizing world: The paradox of empty promises' (2005) 110 *American Journal of Sociology* 1373, 1401 (arguing that 'there is no systematic evidence to suggest that ratification of human rights treaties in the UN system itself improves human rights practices').

[12] Hafner-Burton & Tsutsui (n 11 above).

[13] The use of the term – international human rights tribunals (IHRTs) – is clarified in the definition section of the study.

[14] United Nations Human Rights, 'Human rights bodies', available at http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (accessed 30 August 2015).

[15] As above. As at 31 December 2014, the Human Right Council's special procedures has 14 country mandates and 39 thematic mandates.

[16] 'Human rights bodies - complaints procedures - Committees', available at http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm (accessed 11 August 2015). The individual complaints mechanism of the Committee on Migrant Workers (CMW) has not yet entered into force. The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) also does not have the mandate to receive individual complaints.

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The African human rights system is based primarily on the African Charter on Human and Peoples' Rights (African Charter).[17] On the one hand, the African Charter has been hailed as a very ambitious human rights instrument as result of its 'uniquely African features'.[18] On the other hand, the Charter has been criticized as 'window-dressing',[19] 'woefully deficient',[20] and the least developed of the regional human rights systems.[21] The Charter established the African Commission on Human and Peoples' Rights (African Commission) as its primary supervisory mechanism and vests on the Commission both a promotional and protective mandate.[22] The communication procedure of the Commission has been

[17] The African Charter was adopted by the Organization of African Unity (OAU), now the African Union (AU), on 27 June 1981. The Charter came into force on 21 October 1986 after it had been ratified by an absolute majority of member states of the OAU (now the AU). Other human rights instruments in Africa include: the Constitutive Act of the African Union 2000, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, African Charter on the Rights and Welfare of the Child 1990, Cultural Charter for Africa 1976, Convention on Prevention and Combating Corruption 2003, African Charter on Democracy, Elections and Good Governance 2007, and the AU Convention for the Protection of and Assistance of Internally Displaced Persons 2009.

[18] The African Charter recognizes peoples' rights; first, second and third generations of rights are contained in one human rights document; economic, social and cultural rights are justiciable; there is no derogations in the Charter; and there is provision for duties of states and individuals. See R Murray 'The African Charter on Human and Peoples' Rights 1987 - 2000: An overview of its prospects and problems' (2001) 1 *African Human Rights Law Journal* 1; F Viljoen 'Africa's contributions to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 20; VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case study of Nigeria' unpublished LLM dissertation, University of Pretoria (2011) 1.

[19] L Sindjoun 'La civilisation internationale des murs: éléments pour une sociologie de l'‟ide´alisme structurel dans les relations internationales' (1996) 27 *Etudes internationales* 848 referred to in JD Boukongou 'The appeal of the African system for protecting human rights' (2006) 6 *African Human Rights Law Journal* 268, 271.

[20] R Gittleman 'The African Charter on Human and Peoples' Rights' (1981 - 1982) 22 *Virginia Journal of International Law* 669, 694.

[21] HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (2000) 920.

[22] See African Charter, art 45. For a review of the effectiveness of the African Charter and the African Commission, see generally VO Ayeni *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 1 - 331; P Amoah 'The African Charter on Human and Peoples' Rights: An effective weapon for human rights' (1992) 86 *American Journal of International Law* 226, 226; W Benedek 'The African Charter and the African Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 25, 25; J Oloka-Onyango & S Tamale 'The personal is political', or why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691; J Oloka-Onyango 'The plight of the larger half: Human rights, gender violence and the legal status of refugee and internally displaced women in Africa' (1996) 24 *Denver Journal of International Law* 349; E Ankumah *The African Commission on Human and Peoples' Rights: Practices and Procedures* (1996); U Essien 'African Commission on Human and Peoples' Rights: Eleven years after' (2000) 6 *Buffalo Human Rights Law Review* 93, 93; R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000); C Heyns 'The African human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155; F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for dignity and sustainable democracy in Africa* (2003); M Evans & R Murray (eds) *The*

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criticized.[23] Scholars have pointed out that recommendations of the Commission are more often than not ignored or disregarded by states.[24] In some cases, it has been pointed out that the Commission does not know what steps have been taken by the defaulting state to give effect to its recommendations.[25]

In order to complement the protective mandate of the African Commission, the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) was adopted in June 1998.[26] The Protocol came into force on 25 January 2004 after it had been ratified by 15 states, while members of the Court were sworn-in before the AU Assembly on 2 July 2006.[27] The jurisdiction and limited case law of the African Court have also attracted some criticisms from scholars.[28] The third regional

African Charter on Human and Peoples' Rights: The system in practice 1986 - 2006 (2008); BT Nyanduga 'Perspectives on the African Commission on Human and Peoples' Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 255, 255 - 268.

[23] CO Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20 *Human Rights Quarterly* 235.

[24] N Enonchong 'The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197; C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *African Human Rights Law Journal* 333; GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465, 471.

[25] Ayeni (n 22 above); Boukongou (n 19 above) 288. See, for instance, a statement credited to the Chairperson of the African Commission at the Commission's 22nd ordinary session that 'none of the decisions on individual communications taken by the Commission and adopted by the [AU] Assembly had ever been implemented.' See R Murray 'Report on the 1997 sessions of the African Commission on Human and Peoples' Rights – 21st and 22nd Sessions: 15 - 25 April and 2 - 11 November 1997' (1998) 19 *Human Rights Law Journal* 170.

[26] African Court Protocol, art 2.

[27] As at 31 July 2017, only the following 30 states have ratified the African Court Protocol: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. See African Union, 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights' https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 31 July 2017).

[28] See generally A O'Shea 'A critical reflection on the proposed African Court on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 285, 285 - 98; K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234, 234; RW Eno 'The jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223, 223; J Harrington 'The African Court on Human and Peoples' Rights' in Evans & Murray (n 22 above); D Juma 'Access to the African Court on Human and Peoples' Rights: A case of the poacher turned gamekeeper' (2007) 4 *Essex Human Rights Review* 1; G Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the interests of African states' (2007) 51 *Journal of African Law* 151; I Kane & A Motala 'The creation of a new African Court of Justice and Human Rights' in Evans & Murray (n 22 above); R Murray 'The

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human rights tribunal in Africa is the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).[29] The ACERWC was established under the African Charter on the Rights and Welfare of the Child (African Children's Charter).[30] The 11-person African Children's Committee was inaugurated in May 2002.[31]

The three most active sub-regional organizations or regional economic communities (RECs) in Africa are the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern Africa Development Community (SADC).[32] Each of these RECs has a judicial body responsible for settlement of interstate disputes and individual complaints. The Tribunal of the Southern Africa Community (SADC Tribunal) was originally established in August 2005 and inauguration of judges only took place in 2005.[33] As a result of several rulings made by the Tribunal against the government of Zimbabwe, the Tribunal was disbanded or, put differently, *de facto* suspended in 2010.[34] On 18 August 2014 during a SADC Summit at Victoria Falls, Zimbabwe, a new Protocol on the SADC Tribunal was adopted.[35] When the new Protocol eventually comes into force, the jurisdiction of the SADC Tribunal will be limited to inter-state disputes, and only member states of SADC will be competent to refer a dispute to the Tribunal. However, it will be

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African Court on Human and Peoples' Rights' order for provisional measures against Libya: Greater promise for implementation of human rights in Africa?' (2011) 4 *European Human Rights Law Review* 464; M Ssenyonjo 'Direct access to the African Court on Human and Peoples' Rights by individuals and non-governmental organisations: An overview of the emerging jurisprudence of the African Court 2008 - 2012' (2013) 2 *International Human Rights Law Review 17*, 17 - 56.

[29] In addition to the African Commission, African Court and the ACERWC, there are other political bodies monitoring the implementation of human rights in Africa. These include the AU Assembly, Executive Council, Peace and Security Council (PSC), Pan-African Parliament (PAP), African Peer Review Mechanism (APRM) and other mechanisms. See generally J Cilliers, 'NEPAD's peer review mechanism' Institute for Security Studies, Paper 64, November 2003, available at www.iss.co.za (accessed 26 July 2015); R Herbert 'Implementing NEPAD: A critical assessment' Institute for Security Studies, 2002, available at www.iss.co.za (accessed 26 July 2015).

[30] The African Children's Charter was adopted 11 July 1990 and entered into force on 29 November 1999.

[31] BD Mezmur 'Still an infant or now a toddler? The work of the African Committee of Experts on the Rights and Welfare of the Child and its 8th ordinary session' (2007) 7 *African Human Rights Law Journal* 258, 258.

[32] HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: Compliance and influence' unpublished LLD thesis, University of Pretoria, 2013, 8.

[33] Southern Africa Development Community 'SADC Tribunal', available at http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 27 August 2017).

[34] As above.

[35] Mike Campbell Foundation 'New Protocol on SADC Tribunal' available at http://www.mikecampbellfoundation.com/page/new-protocol-on-sadc-tribunal (accessed 27 August 2017).

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interesting to investigate the extent of state's compliance with judgments in cases already handed down by SADC Tribunal. The East African Court of Justice (EACJ) was established in November 1999.[36] The Court was formally inaugurated on 30 November 2001.[37] The EACJ has jurisdiction over interpretation and application of the Treaty of the EAC. Although individuals have direct access to the Court, the Court lacks an explicit human rights mandate.[38] Despite lacking a clear human rights mandate, the EACJ has handed down several 'human rights related decisions' under its jurisdiction over rule of law.[39]

The most active sub-regional HRT in Africa is the ECOWAS Community Court of Justice (ECCJ). The ECCJ was originally created as a tribunal under the ECOWAS founding treaty.[40] The tribunal was however replaced with the ECOWAS Community Court of Justice (ECCJ) in 1991.[41] In 1993, the 1975 founding treaty was revised and the normative standard in the African Charter was expressly mentioned as one of the Fundamental Principles of ECOWAS.[42] By a Supplementary Protocol adopted in 2005, the ECCJ was clearly vested with the mandate 'to determine cases of violation of human rights that occur in any member state.'[43] The Court also has direct access to individuals and the admissibility criteria for accessing the Court do not include exhaustion of domestic remedies.[44] The human rights mandate of the ECCJ derives from the 1991 Protocol, article 4(g) of the 1993 Revised ECOWAS Treaty and the 2005 Supplementary Protocol.

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36 See Treaty for the Establishment of the East African Community (EAC), art 9. The EAC Treaty came into force on 7 July 2000.

37 East African Court of Justice, 'Establishment', available at http://eacj.org/?page_id=19 (accessed 27 August 2017).

38 See Adjolohoun (n 32 above) 116 - 117; BP Kubo 'Overview of human rights issues dealt with by the East African Court of Justice' Colloquium of the African Human Rights and Similar Institutions (Arusha, 4 - 6 October 2010) 6.

39 See Open Society Justice Initiative *Case digests: Human rights decisions of the East African Court of Justice* (2013).

40 See Treaty of the Economic Community of West African States (ECOWAS) 1975, art 11.

41 Protocol A/P1/7/91 of 6 July 1991 on the Community Court of Justice, art 2. It should be noted that this Court first existed in the Treaty of the Economic Community of West African States.

42 See Economic Community of West African States (ECOWAS) Revised Treaty 1993, art 4(g).

43 See ECOWAS Supplementary Protocol A/SP.1/01/05 of 19 January 2005, art 3(4).

44 See ST Ebobrah 'A rights-protection gold mine or awaiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 2 *African Human Rights Law Journal* 307, 328.

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1.2. Statement of research problem

Decisions of the various HRTs mentioned above, whether at the regional or sub-regional level, are not always legally enforceable.[45] Discussions on the legal status and enforceability of the decisions of the various HRTs is contained in chapter 2 of the thesis. Unlike domestic mechanisms for the enforcement of judgments, intergovernmental organisations cannot seize assets of non-complying states nor order the arrest of officials of non-complying states for contempt.[46] Still, non-implementation of the rulings and findings of these tribunals may impose huge political, financial and reputational costs on states. States at times raise issues of democratic legitimacy and state sovereignty to challenge unfavourable rulings of IHRTs.[47] Despite these facts, empirical evidence seems to suggest that states at least sometimes comply with some decisions of IHRTs.[48] The exact reason they do so, and factors that motivate them, largely remains a profoundly intellectual puzzle. Besides, when states choose to comply with decisions of IHRTs, they rarely comply with all the reparation orders or recommendations contained in every decision. What factors cause some reparation orders in a particular case to be complied with while other reparation orders in the same case are disregarded? Is such trend more peculiar to the sub-regional or regional system in Africa? Do states comply more with decisions of sub-regional HRTs than the regional ones, and if so, why? In other words, what factors could make decisions of HRTs at the sub-regional level to be better complied with in a particular state than decisions of regional HRTs? *This is the first and foremost problem investigated in this thesis*.

It is appropriate to provide some context for the primary research problem. There is some consensus among scholars that three causal pathways or mechanisms are responsible for

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45 LR Helfer & A-M Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273, 276.

46 AT Guzman 'International tribunals: A rational choice analysis' (2008) 157 *University of Pennsylvania Law Review* 171, 179.

47 See J Mayerfield 'Democratic legitimacy of international human rights adjudication' (2009) 19 *Indian International and Comparative Law Review* 49, 49 - 88.

48 See Hillebrecht (n 4 above) 1 - 158; D Hawkins & W Jacoby 'Partial compliance: Comparison of the European and Inter-American courts of human rights' (2010 - 2011) 6 *Journal of International Law and International Relations* 35, 35 - 85; F Viljoen &L Louw 'State compliance with the recommendations of the African Commission on Human and People's Rights, 1994 - 2004' (2007) 101 *American Journal of International Law* 1, 1 - 34.

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states' compliance whether with treaty norms or decisions of IHRTs; and these are coercion, persuasion and acculturation.[49] The unanswered question is: Which of these mechanisms takes the lead in pulling states towards compliance? Scholars are also in agreement that states generally comply with treaty norms or decisions of IHRTs for 'normative' or 'instrumental' reasons.[50] The unanswered question is: Which of the two reasons accounts for most acts of compliance by states? The final puzzle relates to factors that influence states to comply with decisions of IHRTs. Most scholars agree that multiple factors account for compliance, and this range of factors may be categorised broadly into three, namely international enforcement factors, management factors, and domestic politics factors. The unanswered question is: Which of these broad factors is the best predictor of compliance in the context of regional and sub-regional HRTs in Africa, and why?

Scholars such as Guzman, Posner and Yoo; Helfer and Slaughter; and Hillebrecht have extended the traditional rational actor theory, liberalist theoretical framework and domestic politics theory, respectively, to their rationalization of state's compliance with decisions of IHRTs.[51] One problem with the 'domestic politics theory' is that it plays down the significant roles of HRTs themselves and other international stakeholders in shaping how states respond to decisions of IHRTs.[52] Liberal theorists like Helfer and Slaughter

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[49] See R Goodman & D Jinks *Socializing states: Promoting human rights through international law* (2013) 1 - 256.

[50] For the instrumental or rational actor theory, see generally Guzman (n 46 above); Posner & Yoo (n 2 above); J Goldsmith & EA Posner *The limits of international law* (2005); AT Guzman *How international law works: A rational choice theory* (2010). For the normative or constructivist theory, see JT Checkel 'Norms, institutions, and national identity in contemporary Europe' (1999) 43 *International Studies Quarterly* 83, 83 - 114; J Brunée & SJ Toope 'Constructivism and international law' in JL Dunoff & MA Pollack (eds) *Interdisciplinary perspectives on international law and international relations: The state of the art* (2012) 119. For approaches combining rational actor theory with constructivism, see Hillebrecht (n 4 above); T Risse, SC Ropp & K Sikkink (eds) *The persistent power of human rights: From commitment to compliance* (2013) 1 - 372.

[51] See Guzman (n 46 above) 179; Posner & Yoo (n 2 above); Helfer & Slaughter (n 3 above) 906; Helfer & Slaughter (n 45 above) 276; Hillebrecht (n 4 above) 1 - 158.

[52] For some discussions of domestic politics theory, see Hillebrecht (n 4 above); BA Simmons 'From ratification to compliance: Quantitative evidence on a spiral model' in Risse, Ropp & Sikkink (n 50 above); BA Simmons *Mobilizing for human rights: International law in domestic politics* (2009); BA Simmons 'International law and state behaviour: Commitment and compliance in international monetary affairs' (2000) 94 *American Science Review* 819, 819; D Cortright & GA Lopez (eds) *Smart sanctions: Targeting economic statecraft* (2002); J Kelley 'International actors on the domestic scene: Membership conditionality and socialization by international institutions' (2004) 58 *International Organization* 425, 425; MA Vachudova *Europe undivided: democracy, leverage and integration after Communism* (2005).

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believe regime type accounts for compliance or non-compliance with decisions of IHRTs, and yet the compliance rating of states in certain type of rulings especially in socio-economic rights cases and decisions requiring measures of accountability or structural reforms hardly reflects differences in regime type.[53] Rational actor analysts like Guzman and Posner rule out the possibility that state actors may comply with decisions of IHRTs for purely altruistic reason.[54] Sound, substantial and convincing reasoning by IHRTs, regime change at the domestic level as well as the fact that the values and belief systems of domestic actors are not static but always in a state of transition makes the rational actor theory quite implausible.

The problem is that none of the existing theories or perspectives, taken in isolation, can fully explain why there is variance in the pattern of states' compliance with decisions of IHRTs across cases, over time and even across tribunals and regional systems. At least four variations in pattern of compliance have been observed in previous studies:[55] variations in pattern of compliance between HRTs, variations in pattern of compliance between states, variations in compliance within a state; and variation in compliance between different types of reparation orders. While liberal and domestic politics theories have attempted to explain the variations between tribunals and states, they do not explain with satisfaction why there should be variations in the pattern of compliance within a particular state. Liberal and domestic politics theories also have not provided high-quality explanation for the similarity in the pattern of compliance by states irrespective of regime type with the different genre of reparation orders contained in decisions of HRTs.

One of the major limitations with the various attempts at addressing the primary research problem,[56] in relation to African states, is that very little is known about the status of compliance with reparation orders of sub-regional and regional HRTs in Africa, while information on the status of compliance with rulings of the European and Inter-American

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53 Helfer & Slaughter (n 3 above) 906; Helfer & Slaughter (n 45 above) 276.
54 Guzman (n 46 above); Posner & Yoo (n 2 above).
55 Hillebrecht (n 4 above) 11.
56 See Helfer & Slaughter (n 45 above) 276; Guzman (n 46 above) 179; Hillebrecht (n 4 above) 1 - 158; Hawkins & Jacoby (n 48 above) 35 - 85.

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regional HRTs is available in much more details.[57] *This gap in literature in relation to Africa is the second problem that motivated this study.* Helfer and Slaughter have mooted the possibility of 'exporting' principles of effective supranational adjudication from the European human rights system to other regional systems.[58] Hillebrecht too has suggested that results of studies on compliance with rulings of the ECtHR and the IACtHR may provide insights for compliance with decisions of IHRTs in other regions.[59] The problem with those suggestions is that the range of factors that motivates domestic actors to comply with rulings of IHRTs differs from state to state, region to region; and from one tribunal to the other. Consequently, insights gained from other states, IHRTs or other regional systems, though quite valuable, may not substitute for a specific study on compliance with reparation orders of sub-regional and regional HRTs in specific African states.

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[57] See, for instance, CN Bailliet 'Measuring compliance with the Inter-American Court of Human Rights: The ongoing challenge of judicial independence in Latin America' (2013) 31 *Nordic Journal of Human Rights* 477, 477 - 495; A Huneeus 'Courts resisting courts: Lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 493, 501; M Tan 'Compliance theory and the Inter-American Court of Human Rights' (2005) *Bepress Legal Series* 3, 10 - 11; E Lambert-Abdelgawad 'Dialogue and the Implementation of the European Court of Human Rights' Judgments' (2016) 34 *Netherlands Quarterly of Human Rights* 340, 340 - 363; E Lambert-Abdelgawad 'Measuring the judicial performance of the European Court of Human Rights' (2017) 8 *International Journal for Court Administration* 20 - 29; E Lambert-Abdelgawad 'Is there a need to advance the jurisprudence of the European Court of Human Rights with regard the award of damages' in A Seibert-Fohr & ME Villiger (eds) *Judgments of the European Court of Human Rights - Effects and implementation* (2017) 115 - 136; M Janis 'The efficacy of Strasbourg Law' (2000) 15 *Connecticut Journal of International Law* 39, 39 - 46; A Staden 'Assessing the impact of the judgments of the European Court of Human Rights on domestic human rights policies' (Paper presented to the annual meeting of the American Political Science Association, Chicago, August 2007), available at www.allacademic.com/meta/ p212106_index.html (accessed 26 July 2015); H Keller & AS Sweet 'Introduction: The reception of the ECHR in national legal orders' in H Keller & AS Sweet (eds) *A Europe of rights: The impact of the ECHR on national legal systems* (2008); R Ryssdal & SK Martens 'European Court of Human Rights: The enforcement system set up under the European Convention on Human Rights; commentary' in MK Bulterman & M Kuijer (eds) *Compliance with judgments of international courts: Proceedings of the symposium organized in honour of Professor Henry G Schermers by Mordenate College and the Department of International Public Law of Leiden University* (1996) 47 - 79; C Hillebrecht 'Implementing international human rights law at home: Domestic politics and the European Court of Human Rights' (2012) 13 *Human Rights Review 279,* 279 - 301; C Hillebrecht 'The domestic mechanisms of compliance with international human rights law: Case studies from the Inter-American human rights system' (2012) 34 *Human Rights Quarterly* 959, 959 - 985; T Farer 'The rise of the Inter-American human rights regime: No longer a unicorn, not yet an ox' (1997) 19 *Human Rights Quarterly* 510, 510 - 546.

[58] Helfer & Slaughter (n 45 above) 276 - 386; Helfer & Slaughter (n 3 above) 906.

[59] Hillebrecht (n 4 above) 137.

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The above is not to say that no empirical study has been carried out on state's compliance with decisions of regional and sub-regional HRTs in Africa.[60] Despite the growing influence of regional and sub-regional HRTs in the development of human rights jurisprudence in Africa, existing studies on the subject of compliance with reparation orders of these tribunals in Africa generally are insufficient, not up to date, and raise some methodological concerns. *This is the third problem that motivated this research.* Nearly all existing studies on compliance with decisions of sub-regional and regional HRTs in Africa adopted 'case-level' compliance analysis.[61] Of course, case-level compliance analysis was the favoured approach amongst 'compliance scholars' when those studies were conducted. Compliance scholarship however has increased in sophistication and finesse in recent years.[62] It is now widely acknowledged by compliance scholars such as Hawkins, Jacoby, Viljoen, Hillebrecht, Kapizewski and Taylor that it is not accurate to assess the status of state compliance with decisions of IHRTs by categorizing *cases* as full compliance, partial compliance or non-compliance.[63] While 'case-level categorization' remains an indispensable 'descriptive tool' in compliance studies, it is not a reliable yardstick for analysing the overall status of compliance with decisions of a HRT in a particular state.

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[60] See, for instance, R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015); Adjolohoun (n 32 above); T Mutangi 'An examination of compliance by states with the judgments of the African Court on Human and Peoples' Rights: Prospects and challenges' unpublished LLD thesis, University of Pretoria, 2009; Viljoen & Louw 'State compliance' (n 48 above); L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005; F Viljoen & L Louw 'The status and findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1 - 22.

[61] A case-level compliance analysis is one that treats each case, irrespective of the number of reparation orders, as the basic unit of analysis. For instance, see the *Ogoniland case* where the African Commission required the Respondent State to implement at least five reparation orders. Case level analysis treats the *Ogoniland* case as one compliance mandate like for example the case of *Constitutional Rights Project v Nigeria* where the African Commission merely asked the respondent state to free the complainants. See Communication 155/96 *Social Economic Right Action Centre (SERAC) and Another v Nigeria (Ogoniland case)* (2001) AHRLR 60 (ACHPR 2001); *Communication 60/91 Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

[62] ES Bates 'Sophisticated constructivism in human rights compliance theory' (2015) 25 *European Journal of International Law* 1169, 1169.

[63] See for instance Hillebrecht (n 4 above) 41 - 45; Hawkin & Jacoby (48 above) 46; D Kapiszewski & MM Taylor 'Compliance: Conceptualizing, measuring, and explaining adherence to judicial rulings' (2013) 38 *Law and Social Inquiry* 803, 803 - 835; C Hillebrecht 'Rethinking compliance: The challenges and prospects of measuring compliance with international human rights tribunals' (2009) 1 *Journal of Human Rights Practice* 362, 362 - 379; F Viljoen 'The African human rights systems and domestic enforcement' in M Langford, C Rodriguez-Garavito & J Rossi *Social rights judgments and the politics of compliance: Making it stick* (2017) xx.

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States do not comply with *cases*; rather, they comply with 'discrete obligations' or *specific reparation orders* contained in each case.[64] Case-level compliance analysis tends to mask significant measures of compliance in cases with multiple reparation orders, which are most often categorized as partial compliance.[65] How then do we conceptualize compliance in cases of multiple reparation orders? The appropriate unit of analysis for a HRT-related compliance study is the reparation order, not the case. Scholars studying compliance with decisions of other regional human rights mechanisms have identified this problem, and have adjusted their methodology accordingly but no empirical study in respect of sub-regional or regional HRTs in Africa has yet adopted this new order-level method of analysis.[66] This methodological shift, arguably, could have a significant impact on existing literature on states' compliance with decisions of regional and sub-regional HRTs in Africa, and could provide great insights into the relationship between the two human rights systems.

Although this study interrogates the problem of human rights judgment compliance (HRJC) at sub-regional and regional levels in Africa, it does so using only five countries, namely, Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe, as case studies. Each of these countries has been involved in a significant number of cases at both the regional and sub-regional HRTs in Africa. For instance, Nigeria and the Gambia have a sizeable number of cases with which judgment compliance at the African Commission and the ECCJ can be compared. Nigeria has the highest number of communications and merit decisions of all states before the African Commission, and a significant percentage of all judgments of the

[64] Scholars such as Hillebrecht as well as Hawkins and Jacoby prefer to use the term 'discrete obligations' to describe reparation orders or recommendations. See Hillebrecht (n 4 above) 41 - 45; Hawkins & Jacoby (n 48 above) 46.

[65] A case categorised as partial compliance in the existing case-level studies might have more order-level compliance than cases categorised as full compliance. For instance, if a case contains only one reparation order and the state concerned (later referred to here as State A) has complied fully with the order, such is treated in case-level studies as full compliance. However, if a case contains ten reparation orders and the state concerned (later referred to here as State B) has complied with nine of the reparation orders, the case is categorised as partial compliance. On the other hand, if a case contains ten reparation orders and the state concerned (later referred to here as state C) has complied with only one of such orders, the cases is still categorized as partial compliance. Case level analysis usually assumes that State A in the scenario above is generally more compliant than State B; and the compliance levels of State B and C are regarded as equal. This categorisation is very problematic and quite inaccurate if used in analyzing the overall compliance level of states with decisions of a HRT.

[66] See Hillebrecht (n 4 above) 11.

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ECCJ in human rights cases involve Nigeria and the Gambia. Nearly all the decisions of the now defunct SADC Tribunal were issued against Zimbabwe, and Zimbabwe has the second largest number of communications of all states before the African Commission. Although lacking a clear human rights mandate, the EACJ under its jurisdiction over 'rule of law' has issued a number of human rights related decisions against a number of states, and some of the cases in which violations have been found relate to Tanzania and Uganda.[67] The EACJ, as at December 2015, has decided on the merits 12 human rights related cases, 7 of which involve Uganda.[68] Tanzania is a likely candidate in any discussion of state compliance with decisions and reparation orders of the African Court. Additional justifications for case and country selected are provided in chapter 3 of the thesis.

1.3. Research questions

The summarized aim of the thesis is to establish and better understand compliance and influence of reparations orders of regional and sub-regional human rights tribunals in five states in Africa. This thesis thus concerns itself with the following overarching question: What is the status of compliance and influence of the reparation orders of regional and sub-regional human rights tribunals in the five African states, and what factors explain the extent of compliance and influence? The overarching question is interrogated in the light of five specific questions, namely:

(i) What constitutes regional and sub-regional HRTs in Africa, and to what extent do states have obligations to comply with reparation orders issued by them?
(ii) What is the status of compliance with reparation orders of the selected HRTs in Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe, and how does state compliance compare with respect to the selected regional and sub-regional HRTs?
(iii) What factors make state compliance of reparation orders of sub-regional as opposed to regional HRTs more likely, and to what extent do existing theories explain the identified factors?

[67] See Open Society Justice Initiative *Case digests: Human rights decisions of the East African Court of Justice* (2013).
[68] As above; OSJI *Case digest: Human rights decisions of the East African Court of Justice* (2015). The two reports above listed 12 merits decisions, seven of which involve the Republic of Uganda.

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(iv) What are the various forms of impact of the decisions of regional and sub-regional HRTs have in the selected states, and how significant is such influence relative to compliance?

(v) What are the hindrances to compliance with and influence of reparation orders of HRTs in the selected states and how can compliance and overall impact of HRTs' decisions be improved?

1.4. Theoretical approach, study hypothesis and thesis statements

The existing scholarship on compliance with international law converge around two main theoretical models, namely; rational choice and constructivist approaches.[69] While the rational choice model, otherwise described simply as rationalism, emphasizes material inducement, sanctions, self-interest and power relations among states as the primary drivers of human rights change at the domestic level, constructivist theorists argue that normative considerations, argumentation, and repeated transnational interactions are responsible for human rights treaty effects.[70] One of the earliest strands of the rational choice theory is realism. For realist theorists, power, material inducements, sanctions and self-interests are the magic wands that make international human rights norms to cascade into the domestic legal systems.[71] Another important model within the rational choice approach is liberalism.[72] Liberal theorists argue that regime type and state-level characteristics are the most important predictors of whether any human rights treaty will have effects domestically.[73]

[69] Bates (n 62 above) 1170.

[70] As above.

[71] See generally OR Young 'The effectiveness of international institutions: Hard cases and critical variables' in JN Rosenau & E-O Czempiel (eds) *Governance without government: Order and change in world politics* (1992) 160; OR Young *Compliance and public authority: A theory with international applications* (1979); L Henkin *How nations behave* (1979); HJ Morgenthau *Politics amongst nations: The struggle for power and peace* (1978); H Simon *Models of man: Social and rational – mathematical essays on rational human behaviour in a social setting* (1957) 200 - 204.

[72] Hathaway (n 11 above) 1952.

[73] AM Slaughter 'International relations, principal theories' (2011) 4 *Max Planck Encyclopaedia of Public International Law* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e722?prd=EPIL (accessed 2 March 2017).

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Constructivist approaches have revolved around the power of ideas, identity, beliefs, and the role of social norms, non-state actors and transnational institutions in causing human rights change at the domestic level.[74] What may be regarded as the earliest constructivist theory was proposed by Chayes and Chayes, who argued that states' non-compliance with international law does not result from cost-benefit analysis but from ambiguity, indeterminacy of treaty language, lack of capacity and the temporal dimension of the obligations imposed by treaties.[75] In order to improve states' compliance with treaty obligations, they proposed a managerial model which entails the use of 'iterative process of justificatory discourse'.[76] Another constructivist theorist, Franck, argued that fairness and legitimacy of treaty provisions are the elements of a treaty that exert compliance pull on states.[77] A relatively recent normative perspective described as 'transnational legal process' (TLP) was proposed by Koh.[78] The TLP is a three-part process of *interaction, interpretation* and *internalisation* whereby International human rights norms are interpreted through continuous transnational interactions, after which the norms are internalised into the domestic legal system.[79]

More recent scholarships on the domestic effects of human rights treaties tend to integrate constructivist models with rational choice approaches. This hybrid perspective is described in some literature as modern constructivism.[80] The modern constructivist approach is also present in recent works of Risse, Ropp and Sikkink,[81] Von Staden,[82]

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[74] As above. See also JT Checkel 'The constructivist turn in international relations theory' (1998) 50 *World Politics* 324, 324.

[75] A Chayes & AH Chayes 'On compliance' (1993) 47 *International Organization* 175, 204.

[76] As above.

[77] T Franck *Fairness in international law and institutions* (1995); T Franck *The power of legitimacy among nations* (1990) 24.

[78] See HH Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1397, 1398; HH Koh 'The 1998 Frankel Lecture: Bringing international law home' (1998) 35 *Houston Law Review* 623, 626; HH Koh 'The 1994 Roscoe Pound Lecture: Transnational legal process' (1996) 75 *Nebraska Law Review* 181, 181.

[79] As above.

[80] Bates (n 62 above) 1181.

[81] T Risse, SC Ropp & K Sikkink 'The socialisation of international human rights norms into domestic practices: Introduction' in T Risse, SC Ropp & K Sikkink (eds) *The power of human rights: International norms and domestic change* (1999) 8.

[82] A Von Staden 'Rational choice within normative constraints: Compliance by liberal democracies with the judgments of the European Court of Human Rights' SSRN eLibrary 6 February 2012.

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Cardenas,[83] Goodman and Jinks,[84] Hillebrecht[85] and Simmons,[86] all of which view human rights change as largely a function of domestic politics rather than transnational interactions. A theme common to all domestic politics theorists is the integration of the incentive-based rational choice models with the ideational constructivist perspectives. This thesis concludes that the findings of the study are consistent with three main theories of compliance with international law: management theory, transnational legal process theory and the domestic politics theory. These theoretical models are discussed in detail in chapter 4 of the thesis.

Overall, I argue, with respect to the first research question, that states generally have an obligation to comply with reparation orders of regional and sub-regional HRTs in Africa, regardless of whether the decisions of the tribunals are perceived to be binding or recommendatory. The thesis argues that the obligation to comply with decisions of HRTs is based on the principle of *pacta sunt servanda* and is also part of the common overarching obligation to 'give effect' to the provisions of the relevant human rights treaties.[87] For decisions of quasi-judicial HRTs, the thesis argues that they become fully binding on states as soon as the decisions are adopted by the relevant HRT or when the reports on the decisions have been adopted by the relevant intergovernmental organisation such as the AU Assembly or the Executive Council.[88]

The general assumption that underpins the second research question is that compliance with reparation orders of HRTs in Africa is likely to be better at the sub-regional than the regional level. This assumption is based on an ideational logic of regional contagion, discussed later in chapter 4, that states have stronger incentives to commit to human rights regimes that are closer to them, and which neighbouring states are committed to, than regimes that are situated far away and which proximate states are not committed

[83] S Cardenas *Conflict and compliance: State responses to international human rights pressure* (2007).
[84] Goodman & Jinks (n 49 above).
[85] Hillebrecht (n 4 above).
[86] Simmons (n 52 above).
[87] See African Charter, art 1. See also Murray & Long (n 60 above) 55.
[88] See Wachira & Ayinla (n 24 above) 488; Viljoen & Louw 'The status of the findings of the African Commission' (n 60 above) 2; F Viljoen 'A human rights court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 1, 13 - 14.

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to.[89] The above assumption leads to the formulation of the following study hypothesis: *States comply better with decisions of sub-regional HRTs than regional HRTs.* This hypothesis is unconfirmed, as the results in subsequent chapters of the thesis show that it makes little or no difference to compliance whether a decision is issued by regional or sub-regional HRTs.

With regards to the third research question - *what factors make state compliance of reparation orders of sub-regional as opposed to regional HRTs more likely, and to what extent do existing theories explain the identified factors* - the thesis identifies five primary compliance factors. It argues, first, that for compliance with reparation orders of regional and sub-regional HRTs to happen, a minimal degree of *compliance commitment* at supranational, national and sub-national level is necessary. Second, the thesis argues that the nature of the reparation order issued by a HRT is crucial for state compliance. Three aspects of the nature of reparation orders of HRTs identified in the study are cost, specificity and limited remedies. The thesis argues that the lower the cost of implementing a decision, the higher the chances of compliance. In other words, the higher the cost of non-compliance, the lower the incidence of non-compliance. This implies that the rate of judgment compliance is proportional to the cost of compliance. The thesis further argues that limited remedies and specificity of reparation orders are also very crucial for state compliance. In addition to the two factors highlighted above, the thesis argues that three additional factors have significant capacity to facilitate state compliance. These are: the effectiveness of follow-up by HRTs and NGOs; political transition or regime change at the state-level; and the presence of stable, open, free and democratic system of government at the domestic level. These five factors, the thesis argues, are responsible primarily for the variation in compliance with reparation orders of HRTs in the selected states.

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[89] See Simmons *Mobilizing for human rights* (n 52 above) 13; OA Hathaway 'Why do countries commit to human rights treaties?' (2007) 51 *Journal of Conflict Resolution* 588, 597 & 613; Cardenas (n 83 above) 19; IL Claude *Swords into plowshares: The problems and progress of international organization* (1971) 103; JV Stein 'Do treaties constrain or screen? Selection bias and treaty compliance' (2005) 99 *American Political Science Review* 611, 620; YM Dutton 'Commitment to international human rights treaties: The role of enforcement mechanisms' (2012) 34 *University of Pennsylvania Journal of International Law* 31, 55 - 56; CM Wotipka & K Tsutsui 'Global human rights and state sovereignty: State ratification of international human rights treaties, 1965 - 2001' (2008) 23 *Sociological Forum* 724, 744 - 747.

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In relation to the fourth research question, the thesis argues that despite the general low level of compliance, decisions of regional and sub-regional HRTs have had a modest, yet significant, impact in each of the selected states. Laws have been enacted, policies adopted, and resources allocated as a direct or indirect consequence of decisions of the selected HRTs. There is no doubt the influence of HRTs' decisions at the domestic level can be enhanced. Accordingly, the thesis in the final chapter identifies challenges and hindrances to state compliance in the selected states and proposes a set of recommendations that are relevant for enhancing compliance and domestic-level impact of the decisions of the selected regional and sub-regional HRTs in Africa.

1.5. Clarification of terms

While providing answers to the five research questions raised above, various concepts are used, and it is significant to clarify at this early stage what those concepts mean whenever they are used in this study. While the actual meaning of each of these terms is context-specific, that is, depends on the context in which the term is used, the following is an attempt to clarify the denotation of these concepts for the purpose of this thesis.

(a) Compliance, implementation, influence, follow-up and enforcement

Key terms commonly used in compliance studies include: compliance, implementation, impact, influence, use, effect and effectiveness.[90] These terms are often used interchangeably, thus blurring the subtle and fine-drawn distinctions between them. Compliance may be defined as conformity between an observable behaviour and a legal rule or standard.[91] In this study, 'compliance' is used to mean conformity between state actions or factual situation at the domestic level on the one hand and a discrete obligation or reparation order prescribed in a judicial decision on the other hand.[92] Sometimes

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[90] Murray & Long (n 60 above) 27.

[91] K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, 388 - 391; B Kingsbury 'The concept of compliance as a function of competing conceptions of international law' (1998) 19 *Michigan Journal of International Law* 345, 345; R Fisher *Improving compliance with international law* (1981).

[92] This type of compliance is described in this study as 'full compliance'. Other categories of compliance used in this study include partial compliance.

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compliance does not happen the same way 'a twist to the hand causes pain'.[93] More often than not, compliance is the result of coincidence, inadvertence or reasons extrinsic to a legal rule or reparation order of a HRT.[94] It must be noted that some scholars have argued that the focus on compliance tends to over-simplify the various ways through which international law can have effect at the domestic level.[95]

'Influence' is akin to 'impact', which may be defined as 'a powerful effect that something, especially something new, has on a situation or person'.[96] Due to its common usage in the literature, the term 'impact' may be used more often in this study, since the two terms, 'influence' and 'impact', may be used interchangeably. For the purpose of this thesis, 'influence' is the totality of effect or impact of a judicial decision on the behaviour of state and non-state actors.[97] It comprises both the direct and indirect impact and effect of a judicial decision. While the direct effect of a decision refers to the immediate, conscious and deliberate measures taken because of a decision, indirect effects encompass the incremental use and subtler forms of influence of the decision. A decision which has a high rate of compliance may have low impact, just as a judicial decision may have high impact but little effectiveness. Similarly, a HRT may have high compliance rate but low effectiveness. On the other hand, decisions of a HRT may be very effective even though its compliance rate or overall impact is low.[98] Effectiveness is the degree to which a judicial decision induces a desired change at the domestic level.[99]

'Implementation' refers to the process of taking measures whether legislative, judicial or administrative to give effect to a legal rule or decision of a HRT.[100] Implementation is a

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93 OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 116 - 117.

94 Raustiala (n 91 above) 391 - 392.

95 R Howse & R Teitel 'Beyond compliance: Rethinking why international law really matters?' (2000) 1 *Global Policy* 127, 127; JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, 768 - 827; A Huneeus 'International criminal law by other means: The quasi-criminal jurisdiction of the human rights courts' (2013) 107 *American Journal of International Law* 1, 1 - 44. See also Okafor (n 93 above) 43 & 49.

96 Cambridge Dictionaries Online http://dictionary.cambridge.org/dictionary/english/impact (accessed October 2015).

97 C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483, 484 - 485.

98 Raustiala (n 91 above) 387 - 397.

99 See Murray & Long (n 60 above) 29; Raustiala (n 91 above) 393 - 394.

100 See M Burgstaller *Theories of compliance with international law* (2004) 4.

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process that leads to compliance. In other words, compliance is the end-point or end result of implementation. However, compliance can occur in the absence of implementation, and implementation can occur without leading to compliance.[101]

It must be noted that 'follow up' is not synonymous with implementation. Follow up is a process of facilitating implementation.[102] Responsibility for facilitating implementation of the decisions of IHRTs devolves on IHRTs themselves, political bodies within the relevant inter-governmental organizations, focal points established at domestic level to coordinate implementation of decisions of IHRTs and civil society actors. Enforcement is the act of compelling compliance with a legal rule or judicial decision.[103] This may be done through imposition of 'supplementary' legal sanctions or penalties directly on a defaulting party, or indirectly on a third party the consequence of which forces the defaulting party to comply.

(b) Regional, sub-regional or International HRTs

In this study, the word 'international' is used to describe all layers of post-national institutions that involve at least two states. In other words, 'international' comprises global, regional and sub-regional arrangements. This definition aligns with the views of Viljoen arguing that 'from the perspective of the nation-state, the sub-regional, regional and the global tiers together comprise the international level.'[104]

A tribunal is sometimes defined as a judicial body which renders legally binding decisions like domestic courts, but this type of narrow definition overlooks the fact that even the so-called 'courts' also exercise quasi-judicial mandates like giving advisory opinions and facilitating amicable settlement.[105] A broader definition has thus been suggested by scholars like Guzman, Helfer and Slaughter. Guzman defines a tribunal as 'a disinterested institution to which the parties have delegated some authority and that produces a

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[101] See Raustiala (n 91 above) 392. Raustiala referred to the international whaling treaties and the Treaty on Non-Proliferation of Nuclear Weapons (1968) which codified current state practice or what states are already doing.

[102] See Murray & Long (n 60 above) 28.

[103] J Brunnée 'Enforcement mechanisms in international law and international environmental law' in U Beyerlin *et al* (eds) *Ensuring compliance with multilateral environmental agreements: A dialogue between practitioners and academia* (2005) 3.

[104] F Viljoen *International human rights law in Africa* (2012) 9.

[105] See Guzman (n 46 above) 185.

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statement about the facts of a case and opines on how those facts relate to relevant legal rules'.[106] Helfer and Slaughter define 'international tribunals' both as tribunals formally designated as 'courts' as well as 'less formal or permanent bodies established to resolve specific disputes or clusters of disputes'.[107]

For the purpose of this thesis, 'international tribunals' refer to *both judicial and quasi-judicial bodies* set up to resolve disputes between states or between states and their citizens. International human rights tribunals comprise judicial and quasi-judicial bodies that monitor the implementation of human rights treaties through inter-state or individual complaints procedures. However, in this study, the term 'human rights tribunals' (HRTs) is used only in relation to regional and sub-regional mechanisms set up to oversee the implementation of regional and sub-regional human rights treaties. For the purpose of this study, 'Africa' or 'African states' refers to the 55 member-states of the African Union.[108] Additionally, 'regional or sub-regional HRTs in Africa' is used in this study to represent HRTs set up exclusively by African states for African states, and which have jurisdiction over the five states selected for this study. Although the EACJ does not have an 'explicit' human rights mandate, and the human rights mandate of the SADC Tribunal (when it existed) was disputed in some cases, these tribunals are nonetheless treated as HRTs for the purpose of this thesis.

(d) Decision, judgment and reparation order

The term 'decision', on the one hand, is usually used in respect of quasi-judicial HRTs to describe the totality of the submissions, views, written observations or findings of the

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[106] As above.

[107] Helfer & Slaughter (n 45 above) 285.

[108] The 55 member states of the AU includes: Zimbabwe, Zambia, Uganda, Tunisia, Tanzania, Togo, Swaziland, Sudan, South Sudan, South Africa, Somali Republic, Sierra Leone, Saharawi Republic, Sao Tome and Principe, Senegal, Seychelles, Rwanda, Nigeria, Namibia, Niger, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Lesotho, Liberia, Libya, Kenya, Guinea-Bissau, Guinea, Ghana, Gabon, The Gambia, Equatorial Guinea, Eritrea, Ethiopia, Egypt, Democratic Republic of Congo, Djibouti, Cape Verde, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Côte d'Ivoire, Benin, Botswana, Burkina Faso, Burundi, Angola, Algeria and Morocco. See African Union, 'Member state profiles', available at https://au.int/memberstates (accessed 5 February 2018). Morocco re-joined the AU in January 2017 following a vote by a majority of AU member states to re-admit Morocco. See C Gaffey 'Why has Morocco re-joined the African Union after 33 years?' *Newsweek* 2 February 2017 http://www.newsweek.com/morocco-african-union-western-sahara-551783 (accessed 3 September 2017).

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tribunal in respect of specific aspects of the case. Judgment, on the other hand, refers to the totality of written observations and submissions of a court or judicial HRT in respect of a case. In this thesis, a decision, also referred to as judgment, is the final articulation of a tribunal's reasoning in respect of a case.[109] It comprises the summary of facts of the case, procedure followed, evidence received, arguments of counsels, a summary of the legal issues and tribunal's finding on each issue, and the reparation orders for the state to implement.[110] However, for this thesis, both judgments and decisions of judicial and quasi-judicial tribunals are referred to simply as 'decisions'.

Decisions of HRTs usually contain one or more 'discrete obligations', 'discrete mandates' or recommendations which states are required to implement in order to redress the violations established against them.[111] These discrete obligations, mandates or recommendations are referred to in this thesis as 'reparation orders'. While it may be argued that discrete mandates imposed by quasi-judicial tribunals are more in the nature of 'recommendations', and discrete obligations imposed by judicial tribunals are more in the nature of 'orders', this thesis acknowledges this technical dichotomy. Nonetheless, for the purpose of methodological simplification, 'reparation order' is used in this study to describe remedial obligations imposed on states by both judicial and quasi-judicial HRTs.

1.6. Delineation of study

The study may be delineated in terms of geographical coverage, temporal dimension and substantive scope.

The geographical scope of the study is limited to five countries in Africa, namely Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe. This limitation of necessity narrows down the regional and sub-regional HRTs covered in this study to those that have jurisdiction over these countries. In order to avoid a situation whereby all regional and sub-regional

[109] See Louw (n 60 above) 9. In the practice of the HRC, the term 'view' is used instead of decision.

[110] See Louw (n 60 above) 9. 'Findings' relate to the concluding part of the decisions of a quasi-judicial tribunal while 'rulings' is the concluding part of the judgment of a court. It must be noted that the term 'ruling' may also be used to describe the submission of a court in respect of a preliminary or interlocutory issue.

[111] See Hillebrecht (n 4 above); Hawkins & Jacoby (n 48 above).

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HRTs related to the selected countries are included in the analysis, the study selected three HRTs from the regional system and three at the sub-regional level. The selected tribunals are the African Commission, the African Court, the ACERWC, the ECCJ, EACJ and the SADC Tribunal. The geographical spread of the selected tribunals is wide enough to demonstrate how compliance compares across regional and sub-regional systems, and why compliance may be better at one level and not the other in respect of the selected states.

Temporally, the study is confined to the period from *1 January 2000* to *31 December 2015*, the two cut-off dates for *cases included in the study. In other words, only cases decided against the five study countries during the study period (2000 to 2015) are included in the analysis.* The choice of starting date (1 January 2000) is motivated by the need to exclude cases that are no longer pertinent, or in respect of which it may be very difficult to establish the implementation status; and the end date (31 December 2015) is informed by the need to allow some time to track implementation subsequent to the decision being taken. However, *collection of data in respect of implementation* extends as far as possible to *31 July 2017*, a few months prior to submission of the thesis. Continuously changing information is as far as possible updated to reflect the position on this date.

The substantive scope of the study relates to only *merit decisions of the selected HRTs*. The study investigates merit decisions, including decisions on reparations and taxation, in which the selected HRTs find any of the five states in violation of specific human rights instruments and issued specific reparation orders for the defaulting state to implement. The scope of the study therefore does not extend to cases declared inadmissible, cases concluded through amicable settlement between parties or cases in which no violation were found against the defendant states. The subject of the study further excludes provisional or interim measures because the scope of the study is narrow. Concluding observations, general comments, resolutions and recommendations of the selected HRTs arising from fact finding missions are also beyond the scope of the study. Though equally important, the inclusion of these various issues would overstretch the scope of this study; more so, other scholars have already dealt with various aspects of these issues.[112] Because

[112] See for instance, J Biegon 'The impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2016. See also Murray & Long (n 60 above).

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it is only merit decisions that are included in the analysis, the total number of cases to be analysed in the study is relatively restricted, and therefore manageable.

Framed by five countries under study, the temporal scope, the HRTs involved, and the substantive scope identified, the analysis in this study occupies itself with *only 75 remedial or reparation orders* contained in *32 merits decisions*. The African Commission, for instance, issued its first findings or decisions on individual communication in 1994.[113] From 1994 up to 31 December 2014, the African Commission found violation of the African Charter in 83 communications, involving 27 states that are parties to the African Charter.[114] Fifteen of these merit decisions were issued against Nigeria, The Gambia, Uganda and Zimbabwe during the study period. The African Children's Committee had adopted three merit decisions as at December 2015, and one of the decisions relates to Uganda, one of the states selected for this study.[115] Only two African Court's judgments fall within the parameters set for this study, and these cases are discussed in chapter 3 of the thesis. From 2005, when the ECCJ was vested with a human rights mandate, up to 31 December 2015, the ECCJ issued 12 merit judgments in human rights cases in which it found five African states in violation of the African Charter.[116] Eight of these merits judgments were issued against Nigeria and the Gambia. The EACJ and SADC Tribunal have found Uganda and Zimbabwe in violation of human rights related obligations in four and three cases, respectively. This makes a total of 32 human rights and human rights related cases selected for this study; and the 32 selected decisions contain a total of 75 reparation orders. The list of the cases selected for the study is appended to the thesis as Annexure I.

[113] See the Seventh Activity Report of the African Commission.
[114] The African Commission has found the following states to have violated the African Charter: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroun, Chad, Côte d'Ivoire, Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Malawi, Mauritania, Nigeria, Republic of Congo, Rwanda, Sierra Leone, Sudan, Swaziland, The Gambia, Uganda, Zambia and Zimbabwe. See http://www.achpr.org/communications/ (accessed 1 September 2015).
[115] The African Children's Rights Committee is yet to issue any final decision against Nigeria, The Gambia or Zimbabwe.
[116] See for instance, Adjolohoun (n 32 above) 38 & 45.

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1.7. Literature review

As earlier stated, this study provides answers to five main research questions: What are regional and sub-regional HRTs in Africa, and to what extent do states have obligations to comply with their decisions; what is the status of compliance with reparation orders of the HRTs in the selected states and how does it compare with regard to regional and sub-regional HRTs; what factors make compliance more likely at one level than the other, and to what extent do existing theories explain the identified factors; what impact do decisions of HRTs have in the selected countries; and how may states' compliance with decisions of the selected HRTs and the overall impact of such decisions in the studied countries be improved? Accordingly, the review of literature below follows these research questions. While it may not be possible to review every literature on each of these questions, some of the most relevant and the most recent works on this subject are included here.

(a) What constitutes regional and sub-regional HRTs

Regionalism has been defined as a system whereby 'a limited number of states are linked together by a geographical relationship and a degree of mutual interdependence.'[117] Other scholars define regionalism to encompass a greater 'social cohesiveness in ethnicity, race, language, history, trade patterns, economic complementarity, and formal regional institutions.'[118] The central element in any definition of regionalism is the degree of cohesion and functionality as an 'actor' in the global order.[119] Using the tests of functionality and 'actorness', Hettne has suggested that it is misleading to describe the more functional and operational regional economic communities in Africa (RECs) as 'sub-regions'.[120] Hettne argues that RECs such as ECOWAS, EAC and SADC are fully fledged regional systems since they are arguably more operational than the continental body, the

[117] Adjolohoun (n 32 above) 3.
[118] See B Hettne 'Beyond the 'new' regionalism' (2005) 10 *New Political Economy* 543, 543, cited in Adjolohoun (n 32 above) 3.
[119] Hettne (n 118 above) 566.
[120] As above.

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AU.[121] Each of the three main RECs in Africa has a permanent judicial body regarded in this thesis as 'sub-regional HRTs'. The tribunals which are generally regarded as the primary mechanisms for enforcement and implementation of human rights at the continental level, referred to as 'regional HRTs in Africa' in this thesis include the African Commission, the African Court and the African Children's Rights Committee.[122] Till date, no studies have investigated the status of compliance with the various reparation orders issued by all the tribunals, and no study has attempted a cross-regional comparison of compliance data arising from these HRTs.

(b) Status of compliance

Various attempts have been made by scholars to measure the rate of compliance with the various HRTs, but these have led sometimes to conflicting figures and compliance rates for the same HRT, depending on the number of cases studied, the number of compliance reports used and the period of each study.[123] Understandably, compliance rates cannot be the same over time even for the same HRT. For these reasons, only the most recent studies setting out the rate of compliance for IHRTs are be reviewed here.

Hillebrecht published in 2014 combined quantitative method with case studies from seven countries selected from Europe and Americas.[124] Her empirical results revealed that the European Court of Human Rights (ECtHR) has 49 percent compliance rate while the Inter-American Court of Human Rights (IACtHR) has 34 percent compliance rate.[125] Using Argentina and Chile as examples since both countries have had similar experience with

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[121] See generally OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and* promotion (2009) 275 - 319; ST Ebobrah 'Human rights developments in sub-regional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 312, 312; ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Law Journal* 233, 233 - 264; ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *African Human Rights Law Journal* 223, 223 - 253; ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2012' (2013) 13 *African Human Rights Law Journal 178,* 178 - 213.

[122] Viljoen (n 104 above) 169.

[123] C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of Internal Law* 434, 434 - 459; Posner & Yoo (n 2 above); Helfer & Slaughter (n 3 above) 918.

[124] Hillebrecht (n 4 above).

[125] Hillebrecht (n 4 above) 11. It should be noted that in another study published in 2007 by Hawkins and Jacoby, the compliance rate for the Inter-American Court was put at six percent. Partial compliance and non-compliance was put at 83 and 11 percent respectively. See Hawkins & Jacoby (48 above) 35 - 85.

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authoritarian regimes in the past, Hillebrecht finds that while Chile complies with almost 81 percent of the IACtHR's orders, Argentina complies with only 31 percent.[126] Even within strong democracies, Hillebrecht found marked difference in the levels of compliance. For instance, the compliance rates of Belgium, France, Ireland and the Netherlands with the ECtHR's orders requiring policy change and non-repetition were found to be 45, 56, 80 and 77 percent, respectively.[127] Hillebrecht also found that states engage in *a la carte* compliance. Her study found that member states of the ECtHR complied 82 percent with reparation orders such as compensation while they complied 31 percent with measures requiring accountability.[128] In the IACtHR, on the other hand, the compliance rate for reparation orders such as compensation was 55 percent, and 14 percent for measures of accountability.[129]

The seminal study by Viljoen and Louw which analysed the status of compliance with recommendations contained in 44 merit decisions of the African Commission as at 2004 put the compliance rate of the African Commission at 14 percent (representing six out of the 44 study cases).[130] Partial compliance was recorded in 14 cases representing 32 percent of the finalised cases while non-compliance was found in 13 cases representing 30 percent of the finalised cases.[131] A doctoral research study by Louw which analysed 31 individual communications in which the HRC found violations against 13 African states as at 2003, found that African states complied fully with the views of the HRC in only nine cases (representing 29 percent of the finalised cases).[132] Partial compliance was recorded in six cases representing 19 percent of the finalised cases while non-compliance was found in 16 cases representing 52 percent of the finalised cases.[133] Another doctoral research study completed in November 2013 by Adjolohoun which analysed nine merit decisions of the ECCJ found that states complied fully with the rulings of the ECCJ in six cases representing 66 percent of the study cases.[134] There is not yet an empirical study of the status of

[126] Hillebrecht (n 4 above) 12.
[127] As above.
[128] Hillebrecht (n 4 above) 13.
[129] As above.
[130] Viljoen & Louw 'State compliance' (n 48 above) 5; Louw (n 60 above) 61.
[131] Viljoen & Louw 'State compliance' (n 48 above) 5 - 6; Louw (n 60 above) 61.
[132] Louw (n 60 above) 81.
[133] As above.
[134] Adjolohoun (n 32 above) vi.

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compliance with decisions of the EACJ and the SADC Tribunal. A recent doctoral research study however examines the role of the East African Court of Justice (EACJ) in promoting and protecting human rights within the East African Community (EAC).[135]

It is noteworthy that no single empirical study has used a comparative method to investigate the status of compliance with the reparation orders of regional and sub-regional HRTs in the five study countries. The seminal paper by Viljoen and Louw,[136] the doctoral research studies by Louw and Adjolohoun,[137] and a 2015 monograph by Murray and Long[138] are some of the major empirical studies on compliance with decisions of regional ad sub-regional HRTs in Africa but all these studies are limited to the African Commission and the ECCJ only, and these studies do not compare how a particular state fare across regional and sub-regional HRTs.

(c) Factors that influence compliance with decisions of HRTs

Much has been written on factors that pull states towards compliance with decisions of HRTs. Helfer and Slaughter proposed a checklist of thirteen factors that improve effectiveness of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).[139] They discussed the 13 factors under three categories.[140] The first set of factors are those within the control of state parties that set up the tribunal. These include the composition of the tribunal, its case load and fact finding capability, and the perceived legal status of the treaty the tribunal is required to interpret.[141] The second set of factors are those within the tribunal's control such as the quality of its legal reasoning, neutrality and autonomy from political interests, judicial cross-fertilization and dialogue, incrementalism and acceptance of dissenting opinions.[142] The third set of factors are those beyond the control of state parties the tribunal. These include the nature of violation alleged, presence of autonomous domestic institutions who are committed to the rule of

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135 A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' unpublished LLD thesis, University of Pretoria, 2014.
136 Viljoen & Louw 'State compliance' (n 48 above).
137 Louw (n 60 above); Adjolohoun (n 32 above).
138 Murray & Long (n 60 above).
139 Helfer & Slaughter (n 45 above) 298 - 337; Helfer & Slaughter (n 3 above) 906.
140 Helfer & Slaughter (n 45 above) 298 - 336.
141 Helfer & Slaughter (n 45 above) 300 - 304.
142 Helfer & Slaughter (n 45 above) 307 - 327.

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law, and relative cultural and political homogeneity of states subject to the tribunal.[143] Helfer and Slaughter believe the single most important factor that accounts for the success of the ECtHR is the strong domestic traditions of rule of law and liberal democracy among states that are members of the Council of Europe.[144] Similar sentiments have been shared by other scholars and jurists.[145]

In his rational choice analysis of international tribunals, Andrew Guzman argues that international tribunals are simply 'tools to produce a particular kind of information.' Guzman therefore attempted to explain how the type of information produced by an international tribunal may influence states' actions towards compliance.[146] Guzman argues that effectiveness of a court's decision is not related to whether or not the court's ruling is binding on parties because non-binding decisions can and do exert substantial compliance pull.[147] Guzman however argues that 'tribunal design' can influence compliance outcomes.[148] Guzman agrees with Helfer and Slaughter that the quality and expertise of judges appointed into supranational tribunals have significant impact on compliance. On derivative or implied right, Guzman argues that 'if a tribunal exceeds the authority that it is granted and embarks on policy-making adventures, the effect is similar to a loss of quality, which though do not stripe the decision completely of influence but reduces its compliance pull.'[149] One of the main controversies amongst scholars is the effect of judicial independence on the effectiveness, and by implication compliance with decisions, of international tribunals. Posner and Yoo argue that judicial independence impedes effectiveness of international tribunals because more independent international tribunals are more likely to render decisions that will conflict with state interests.[150] Helfer, Slaughter and Guzman on the other hand contend that independence of international

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[143] Helfer & Slaughter (n 45 above) 328 - 335.
[144] As above.
[145] See HG Schermers 'International human rights in the European community and in the nations of Central and Eastern Europe: An overview' (1993) 8 *Connecticut Journal of International Law* 313, 313 - 319. Judge Rudolf Bernhardt of the ECtHR also attributed the success of the ECtHR to what he called 'the considerable measures of homogeneity among European states'. See R Bernhardt 'Commentary: The European system' (1987) 2 *Connecticut Journal of International Law* 299, 299 - 300.
[146] Guzman (n 46 above) 180.
[147] Guzman (n 46 above) 189.
[148] Guzman (n 46 above) 203.
[149] Guzman (n 46 above) 207.
[150] Posner & Yoo (n 2 above) 7 & 28; Guzman (n 46 above) 210.

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tribunals contributes to increased compliance rate and overall effectiveness of the international tribunals.[151]

Hillebrecht identified the nature of violation involved in the case, type of obligation imposed by a ruling, the level of executive constraint in the state concerned, the GDP per capital of the state, the number of treaty ratified by the state concerned, and overall level of democracy as factors that may determine whether or not a state would comply with ruling of HRTs[152] Hillebrecht however singles out executive constraint as the most statistically significant factor that drives compliance.[153] Her empirical results also demonstrate that only domestic institutions matter for compliance. The type of obligations imposed on states by a ruling and GDP per capital of states have little or no statistical effect on compliance.[154]

Louw identified sound and substantial reasoning, clarity of reparation orders, nature of violations found, type of obligations imposed on states, nature of remedies formulated by HRTs, the degree of domestic and international mobilization around the case, the type political system in place in the states concerned, and follow up activities by domestic NGOs and HRTs.[155] In addition to the factors identified by Louw above, Viljoen and Louw also identified certain factors inherent in the institutional architecture of the African Commission which cause states not to comply with the Commission's decisions. These factors include the recommendatory character of the decisions of the Commission, the Commission's perceived legitimacy deficit, and the fact that the political bodies within the AU demonstrate general lack of commitment to human rights.[156] Viljoen and Louw however noted that these inherent factors do not account for the variation in compliance between the cases or among states.[157] Significantly, Viljoen and Louw found that the two factors most likely to influence compliance outcomes are: the presence of stable, open

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151 Helfer & Slaughter (n 45 above) 312 - 14; Guzman (n 46 above) 213.
152 Hillebrecht (n 4 above) 41 - 65.
153 As above.
154 Hillebrecht (n 4 above) 60 - 61.
155 Louw (n 60 above) 311 - 327.
156 Viljoen & Louw 'State compliance' (n 48 above) 12.
157 As above.

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and democratic system of government in the state concerned, and the involvement of NGOs in submitting and following up of cases.[158]

In his analysis of compliance with nine human rights decisions of the ECCJ, Adjolohoun identified the political environment of the case and the nature of the remedy as the two most important compliance factors.[159] In addition to these two primary compliance factors, Adjolohoun identified other compliance factors such as the low cost remedies imposed by ECCJ, and the application of international pressure on states.[160] A paper by Alter, Helfer and McAllister has made similar contributions to the understanding of factors that could make decisions of the ECCJ to very effective.[161] Recently, Murray and Long highlighted the following as factors that influence states to comply with the decisions of HRTs, particularly the African Commission: the legal or moral authority of the HRT, the quality of its finding, the process of arriving at the decision, and the added value of the decision to existing human rights standard.[162] The authors argued that both legal and political factors are responsible for compliance. Importantly, the authors noted that the dichotomy between binding and non-binding decisions is not a decisive factor in determining compliance.[163] However, none of these studies tested the correlation between the factors affecting compliance and behaviour of particular states in the same subject areas, over time and across more than one HRT.

(d) Influence of HRTs' decisions

While much has been written on the domestic-level impact of human rights treaties,[164] very few scholars have interrogated the broad impact of HRTs' decisions. The vast majority of

158 Viljoen (n 63 above).
159 Adjolohoun (n 32 above) 321 - 323.
160 As above.
161 KJ Alter, LR Helfer & JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737, 737 - 779.
162 Murray & Long (n 60 above) 10-26.
163 Murray & Long (n 60 above) 24 - 25.
164 See generally CH Heyns & FJ Viljoen (eds) *The impact of the United Nations human rights treaties on the domestic level* (2002) 1; Hathaway (n 11 above) 1935 - 2042; D Cassel 'Does international human rights law make a difference?' (2001) 2 *Chicago Journal of International Law* 121, 121; Hafner-Burton & Tsutsui (n 11 above) 1373; Keith (n 11 above) 95; C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483, 484; FN Kabata 'Impact of international human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, 2015; Centre for Human Rights *The impact of the African Charter and the Women's Protocol in selected African states* (2012);

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literature on decisions of HRTs are focused on compliance and factors inducing states to comply with decisions of HRTs.[165] The focus on compliance and implementation is due to the fact that far too many observers of HRTs evaluate their effectiveness from equivalent understandings of domestic courts systems.[166] Howse and Teitel, however, have challenged this approach that is based on unfair analogy between international HRTs and domestics courts. They argued that too much focus on compliance 'obfuscates the character of international legal normativity', and the concept of compliance, especially viewed as rule observance, is inadequate for understanding how international law has normative effects.[167]

At least two works, Murray and Long, and Adjolohoun have used empirical methods to investigate the impact of HRTs' decisions in Africa.[168] These studies are however limited to two HRTs: the African Commission and the ECCJ. In addition to reviewing the various themes that arise from the two studies above, this thesis discusses why it is important for scholars to 'look beyond compliance' in assessing how HRTs' decisions matter at the domestic level. The thesis also highlights some positive impact of HRTs' decisions in each of the selected states.

(e) A brief review of the methodology used in prior compliance studies

Qualitative case study approach has been the favoured methodology in human rights compliance literature.[169] While this approach has helped to achieve a more nuanced analysis of specific compliance cases, it has not produced broad evidence of compliance

VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case study of Nigeria' unpublished LLM dissertation, University of Pretoria, 2011; E Neumayer'Do international human rights agreements improve respect for human rights?' (2005) 49 *Journal of Conflict Resolution* 925, 925; Simmons *Mobilising for human rights* (n 52 above); DW Hill 'Estimating the effects of human rights treaties on state behaviour' (2010) 72 *Journal of Politics* 1161, 1161; Okafor (n 93 above); VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected Africa states* (2016).

[165] See for instance, Viljoen & Louw 'State compliance' (n 48 above) 1; Adjolohoun (n 32 above); AT Guzman 'A compliance-based theory of international law' (2002) 90 *California Law Review* 1823, 1849; Hillebrecht (n 4 above).

[166] M Koskenniemi 'The pull of the mainstream' (1990) 88 *Michigan Law Review* 1946, 1954.

[167] Howse & Teitel (n 95 above) 2.

[168] See Murray & Long (n 60 above) 69 - 86; Adjolohoun (n 32 above) 264 - 317. See also Okafor (n 93 above).

[169] Simmons 'From ratification to compliance' (n 52 above) 43 - 60.

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relationships across cases, over time and even across treaties or HRTs.[170] Many scholars had expressed scepticism about the possibility of verifying state's compliance through empirical methods.[171] The increasing use of empirical or social science methods in legal research has, however, proved sceptics wrong.[172] The first generation of empirical legal scholarship on international human rights law was devoted to state's compliance with human rights treaties.[173] These bodies of literature employed not merely descriptive statistics but also formal statistical tools such as regression and time series analyses. Keith used time series analysis to test whether ratification of the ICCPR and its Optional Protocol on individual complaints has any observable impact on the actual behaviour of states in 178 countries over a period of 18 years.[174] Hathaway used 'ordered probit analysis' and 'ordinary least squares analysis' to test whether ratification of treaties in five areas of human rights law, namely – torture, genocide, civil liberties, fair and public trials, and political representation of women – improves domestic human rights records of 166 countries over a period of 40 years.[175]

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170 As above; Hillebrecht (n 4 above).

171 A Chayes & AH Chayes 'On compliance' (1993) 47 *International Organization* 175, 176 - 177; D Cassel 'Does international human rights law make a difference?' (2001) 2 *Chicago Journal of International Law* 121, 123.

172 See for instance Simmons 'From ratification to compliance' (n 52 above) 43 - 59; A Chilton & D Tingley 'Why the study of international law needs experiments' (2013) 52 *Columbia Journal of Transnational Law* 173, 173 - 237; G Shaffer & T Ginsburg, 'The empirical turn in international legal scholarship' (2012) 106 *The American Journal of International Law* 1, 1; EM Hafner-Burton, DG Victor & Y Lupu 'Political science research on international law: The state of the field' (2012) *American Journal of International Law* 47, 47; DE Ho & DB Rubin 'Credible causal inference for empirical legal studies'(2011) 7 *Annual Review of Law and Social Science* 17, 17; BA Simmons 'Treaty compliance and violation' (2010) 13 *Annual Review of Political Science* 273, 273; SS Diamond & P Mueller 'Empirical legal scholarship in law reviews' (2010) 6 *Annual Review of Political Science* 581, 581 - 589; H Spamann 'Large-sample, quantitative research designs for comparative law?' (2009) 57 *American Journal of Comparative Law* 797, 797 - 810; L Epstein & G King 'The rules of inference' (2002) 69 *University of Chicago Law Review* 1.

173 Goodman & Jinks (n 49 above) 4. See, for instance, Keith (n 11 above) 95 - 118; Hathaway (n 11 above) 1935 - 2042; Hafner-Burton & Tsutsui (n 11 above) 1373 - 1411; LR Helfer 'Overlegalizing human rights: International relations theory and the Commonwealth Caribbean backlash against human rights regimes' (2002) 102 *Columbia Law Review* 1832, 1832 - 1835; C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483; C Heyns & FJ Viljoen (eds) *The impact of the United Nations human rights treaties on the domestic level* (2002) 1; R Goodman & D Jinks 'Measuring the effects of human rights treaties' (2003) 14 *European Journal of International Law* 171, 173 - 178.

174 Keith (n 11 above) 106 - 110.

175 Hathaway (n 11 above) 1991.

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The second generation of empirical scholarship focused on factors that make an international tribunals effective.[176] The third generation of empirical scholarship are concerned with the status of compliance with decisions of HRTs and the statistical significance of each of the factors that pull states toward compliance.[177] Viljoen and Louw for instance combined qualitative and quantitative methods to assess the status of compliance with recommendations of the African Commission.[178] They used Fisher Exact Test to determine the statistical significance of each of the factors that influence state's compliance with recommendations of the African Commission.[179] Hillebrecht combined quantitative analyses with case studies from seven countries selected from Europe and Americas.[180] She featured multi-method research design and adopted two models for her quantitative analyses, namely generalised estimating equation (GEE) and Heckman selection model. The various methods highlighted above, one way or another, influenced the methodology adopted for this study.

1.8. Research methodology

This study is interdisciplinary.[181] It adopts an analytical and exploratory research design, and encompasses empirical legal research, combining elements of both qualitative and quantitative research methods.[182] The use of tables and charts in the analysis makes it possible to investigate compliance relationships across cases, over time and across tribunals. The study also adopts the Qualitative Comparative Analysis (QCA) method. The QCA is a research method that bridges qualitative and quantitative analysis.[183] One of the

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176 Helfer & Slaughter (n 45 above) 276; Posner & Yoo (n 2 above); Helfer &Slaughter (n 3 above) 910; Keohane, Moravcsik & Slaughter (n 5 above) 457.

177 See Hillebrecht (n 4 above), Hawkins & Jacoby (n 48 above) and Viljoen & Louw 'State compliance' (n 48 above).

178 See Viljoen & Louw 'State compliance' (n 48 above) 12. The authors could not use the Chi-square Test due to the small number of cases analysed in the study.

179 As above.

180 Hillebrecht (n 4 above) 15 & 52 - 65.

181 Compliance with international law or decisions of human rights bodies is a subject of interest not only to international lawyers but also political scientists and international relations experts. In recent times, this field has also received substantial sociological perspective.

182 Simmons believes combining both qualitative and quantitative methods improves 'our parallax on human rights'. See Simmons 'From ratification to compliance' (n 52 above) 44.

183 CC Ragin 'What is qualitative comparative analysis (QCA)?' http://eprints.ncrm.ac.uk/250/1/What_is_QCA.pdf (accessed 19 February 2017).

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advantages of QCA is that it is useful to assess 'cross-case' patterns and could be a powerful tool for making causal inference – two objectives that this study seeks to achieve.[184] With QCA, it is possible to do a cross-case comparison without losing grasp of the complexity of each case.[185] QCA is ideal for Medium-N research design, not so large, not so small.

This study assesses state compliance with reparation orders of regional and sub-regional human rights tribunals in five African countries with a view to determining not only the status of compliance but also the factors responsible for state compliance and the overall impact of HRTs' decisions in the selected states. The research leading to the completion of this thesis was conducted in four phases, namely desk research, collecting data through primary research, data analysis and data presentation.

(a) Desk research

This phase involved mapping the theoretical framework through extensive desk research of compliance literature, including but not limited to scholarly manuscripts, journal articles, reports and doctoral or other research studies to identify gaps and unanswered questions in the existing literature. The desk research was also used to understand theories of compliance with international law as well as factors that influence states to comply from the perspective of various scholars. It involved a careful assessment and analysis of the total number of cases handled by each regional and sub-regional HRT, the number of merits decisions, and the number of reparation orders issued against the states in each of those merits decisions. The analysis covered cases decided by the selected HRTs during the period from 1 January 2000 to 31 December 2015.

This phase also entailed analysing existing compliance literature to identify steps taken by states to implement the reparation orders of the selected HRTs in the five case study countries. The study relied on compliance data obtained from previous human rights

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[184] As above.

[185] J Sehring, K Korhonen-Kurki, & M Brockhaus 'Qualitative comparative analysis (QCA): An application to compare national REDD+ policy processes' *Working paper 121, Centre for International Forestry Research* (2013) http://www.cifor.org/publications/pdf_files/WPapers/WP121Sehring.pdf (accessed 19 February 2017).

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judgment compliance studies by Viljoen and Louw,[186] Adjolohoun,[187] Murray and Long,[188] and Possi.[189] Viljoen and Louw, for instance, contains compliance information on 44 out of the 83 decisions of the African Commission.[190] Adjolohoun has information up to November 2013 on nine out of the 12 decisions of the ECCJ that are relevant to this study.[191] Useful compliance information was also sourced from states' periodic reports and the activity reports of regional and sub-regional HRTs. Measures taken by states to implement the reparation orders and recommendations of the selected tribunals were extracted from the annual reports of HRTs, reports of the UN Special Rapporteur for follow-up on Views; reports of relevant inter-governmental, governmental and non-governmental organisations; administrative records of the HRTs; government memos, news reports, reports of previous compliance studies, and other relevant sources. These sources were also relied upon in part for identifying factors that influenced states to take the measures that led to compliance. Desk research was also used to investigate the impact of the decisions of the various HRTs in the study countries.

(b) Primary research: Data collection

The second stage of the study involves primary data collection. The purpose of this stage is to fill information gaps noticed at the desk research stage. The primary research was carried out using semi-structured interviews conducted in person, telephonically and by other electronic means to determine the status of compliance with the selected decisions of regional and sub-regional HRTs in the studied countries. The interviews were conducted with complainants or their legal representatives, NGOs involved in a case, government officials and key policy makers, eminent lawyers, notable academics, and in some cases, officials of the selected HRTs. The various interviews also provided an ample opportunity to investigate the underlying factors and rationale that motivated state officials to comply with decisions of regional and sub-regional HRTs in the studied countries, and to identify

[186] Viljoen & Louw 'State compliance' (n 48 above).
[187] Louw (n 60 above); Adjolohoun (n 32 above).
[188] Murray & Long (n 60 above).
[189] Possi (n 135 above).
[190] Viljoen & Louw 'State compliance' (n 48 above).
[191] Adjolohoun (n 32 above).

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the pattern of influence of the selected decisions of these tribunals in the studied countries.

My first research visit to Nigeria was in May 2016 where I spent about four weeks speaking to NGO representatives and authors of communications decided by the African Commission. Prior to carrying out interviews in The Gambia, Tanzania and Zimbabwe, the author attended a two-week intensive research training in qualitative research methods. The training, held from 13 June to 24 June 2016, was organised by the Institute for Qualitative and Multi-Method Research (IQMR) at the Moynihan Institute of Global Affairs of the Syracuse University, United States. The IQMR is a workshop for achieving professional development, and a conference to present and receive feedback on doctoral research designs.

An Interview Protocol, Participants' Information Leaflets, Informed Consent Form and Interview Guides were prepared. The Participants' Information Leaflets and Informed Consent Form is attached as Annexure II; and Interview Guides for litigants, government representatives, HRTs' officials and human rights experts are attached as Annexures III to VI. A list of the cases in which each of the selected HRTs has found violations against any of the states under study, together with a list of potential interviewees or respondents, were drawn up. Persons who have information about any of the selected cases because of their position, activities or responsibilities were identified as interviewees. The research protocol and research guide, together with a cover letter, a declaration for the storage of research data, a list of research participants, a participants' information leaflet, an informed consent form and the questionnaire for participants, were presented to the Research Ethics Committee of the Faculty of Law, University of Pretoria, for approval. An interview plan was also prepared, and arrangements were made with each of the respondents. The Ethics Clearance Certificate was issued by the Research Ethics Committee on 1 June 2016; a copy of the Clearance is appended to the thesis as Annexure VII. Recording equipment was arranged and respondents contacted to confirm the interview schedule. Interviews were conducted telephonically and by other electronic means with respondents in The Gambia, Tanzania and Zimbabwe. Further visits were undertaken to Nigeria, to speak with more respondents. As far as feasible, the data

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collection process adopted a 'triangulation' technique. Attempts were made to triangulate data from various sources – state representatives, complainants, stakeholders and other sources – before using the data in the analysis that follows.

To save cost and time, most of the interviews were conducted electronically, and the assistance of in-country experts were sought especially where the reparation orders or recommendations require amendment of laws or adoption of some policies. However, it must be noted that government representatives in most cases did not respond to invitation for interviews. Each respondent was requested to sign an informed consent form, copies of which are on file with the author. The list of interview participants; name, title, position, date and time and place of interview is appended to the thesis as Annexure VIII.

It is pertinent to briefly describe the methods used in investigating the various factors that influenced states to comply or not comply with the selected decisions. The methodology adopted involved an in-depth study of the 32 cases selected for the study. This approach was supplemented by extensive review of the most relevant literature to document compliance factors related to each of the 32 cases. Information relevant to factors that influenced states to comply with some of the cases selected were also extracted from previous studies by Viljoen and Louw,[192] Murray and Long,[193] Alter, Gathii and Helfer,[194] Alter, Helfer and McAllister,[195] Adjolohoun,[196] Mutangi[197] and Possi.[198] Further information relating to possible compliance factors was obtained through in-depth interviews involving government representatives, NGO representatives and complainants. The information obtained through the various sources was used to develop several Tables where the 32 cases were checked against each of the 15 compliance factors selected for

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192 Viljoen & Louw (n 48 above).
193 Murray & Long (n 60 above).
194 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293, 297 - 298.
195 Alter, Helfer & McAllister (n 161 above) 737 - 779.
196 Adjolohoun (n 32 above).
197 Mutangi (n 60 above).
198 Possi (n 135 above).

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the study.[199] Each factor was coded 1 or 0. A '1' response signifies that the factor was present; a '0' response means that the factors is either absent or irrelevant. While coding the relevance of compliance factors in binary terms as a 'yes' or 'no' may in some ways underestimate the complexity of compliance factors, it nonetheless provides some useful insights, which future research in this field needs to take into account.

(c) Data analysis

The third phase of the research was data analysis and this entailed interpretation of the data obtained during desk and primary research stages,[200] categorization of data, as well as basic descriptive analysis. Data obtained from the various sources was interpreted and placed into categories. States' implementation of each reparation order was classified under three broad compliance categories, namely 'full compliance', 'partial compliance', and 'non-compliance'.[201] A state is considered to have 'fully complied' with the reparation order of a regional or sub-regional HRT in a case if it has implemented all the components of the reparation order. A reparation order is categorised as 'non-compliance' if the state that has responsibility to implement the reparation order in the case has failed to implement any of the components of the order and has not made any political commitment to do so. The 'non-compliance' category also include instances where the state is challenging or contesting the findings or rulings of the HRT on legal or factual grounds. The 'partial compliance' category refers to cases where the state concerned has implemented at least one of the components of a reparation order

(d) Presentation of study results

The final stage of the research involved presentation of study results. Based on information obtained from the desk research and qualitative in-depth interviews, the study compared the study results with existing theories in the field of human rights judgment compliance with a view to ascertain whether the study results are consistent with the

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[199] See chapter 4 of the thesis. See also Appendix III: Analysis and categorisation of the 75 reparation orders in terms of factors indicative of compliance.

[200] Data interpretation is a process of attaching meaning to data or drawing useful inferences from data.

[201] See Viljoen & Louw 'State compliance' (n 48 above); Louw (n 60 above).

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existing theories. To do this, the study reviewed existing theories of compliance with international law and the three main theories most compatible with the study results were identified.

1.9. Limitations of the study

Three main limitations are identified: the limited scope of the study restricts its generalizability; the integrity of data gathering is affected by a lack of cooperation by governments and a consequent (over-)reliance on civil society actors; and the categorization of the status of compliance remains contested.

The limited number of decisions and remedial orders selected for and analysed in the study affects the generalizability of the findings. Since the findings of the study are based on 75 selected remedial orders from five countries (Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe), the results of the analysis are directly applicable only to those countries. Clearly, this study does not assess the status of compliance with *all decisions* of the African Commission or any of the other HRTs selected for the study. The list of cases selected are only a sample of the cases determined by the respective HRTs. Even for the selected countries, not all cases related to them are selected for the study. The cases selected are those decided between the start of 2000 and the end of 2015, the cut-off period selected for the study. As a consequence, important decisions of the African Court against one of the selected states, Tanzania, are excluded from the ambit of the study; the cases are highlighted in part 3.2 of chapter 3. The limited number of reparation orders studied also makes it difficult to establish the statistical significance of the compliance factors discussed in the thesis. However, other countries may draw inspiration from the findings; and some general trends may be postulated.

Despite its best efforts to overcome them, the study may contain inaccuracies in data on implementation and compliance. The first factor hampering data accuracy is that *government institutions* were not forthcoming with information. They did not respond to requests for interviews and when they did respond, they gave very ambiguous response and requested anonymity. State officials rarely keep accurate and up to date records of steps taken to implement decisions of HRTs in Africa. This is largely as a result of lack of

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coordination amongst domestic implementing authorities. Compliance is usually an *ad hoc* arrangement without a permanent coordinating body from which information on compliance may be accessed. Also, government delegations are changed from time to time. The new ones were found not to have full information about what has been done in relation to the cases and what factors motivated their predecessors to comply with a particular decision. A second factor is that *regional and sub-regional HRTs in Africa* are yet to evolve well established and efficient procedures for following up states' implementation of their decisions. A third factor is that the data gathering had to rely, to a great extent, on information supplied by civil society organizations and the legal counsels who helped during submission and follow up of cases decided by the HRTs. It was not possible to search for the actual victims in all the selected cases. It was a lot more economical and practical to start through NGO representatives. In many cases, the NGO representatives knew the victims and relevant government officials who have custody of useful information. Also, it was not possible, mainly due to time and resource constraints, to interview every person or organisation who had information relevant to the selected cases within study period.

The grouping of implementation status is not based on watertight categories. Even after gathering as much compliance information as possible, the study was faced with the very delicate yet critical task of determining in which case compliance has taken place. Scholars have argued that measuring compliance is not only a data gathering exercise but also an interpretive one.[202] A set of information which this study accepts as full compliance of a reparation order may not be so treated by subsequent researchers especially where the judicial order is complex and multi-level. A measure which satisfies the spirit of a judicial remedy may not satisfy its letters. The outcome of this study therefore will only be as accurate as the definitions of the compliance categories adopted for the study. Certainly, there may be other possible categories. Another study using a slightly different compliance categories or criteria may arrive at a slightly different result other the results presented in this study.

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202 Murray & Long (n 60 above) 40 - 41.

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The implication of these limitations is that this study does not attempt to provide a conclusive explanation on the status of compliance, factors indicative of compliance and the impact of HRTs' decisions in the selected states. Rather, it seeks to make a modest contribution to the existing literature on human rights judgment compliance in Africa.

1.10. Structure of the thesis

This introductory chapter provides background information to the study. It describes the research problems that the study investigates and the specific research questions which the study aims to answer. The chapter also clarifies the methodology used in answering the research questions, articulates the basic assumptions underlying the study, notes the significance, limitations and delineation of the study, as well as a review of relevant and recent literature on the subject.

Chapter 2, which answers the first research question, explores the mandate, nature, structure and operation of regional and sub-regional HRTs in Africa. The chapter provides an overview of the jurisprudence and nature of findings of HRTs in Africa as well as states' obligation to comply with them. The chapter concludes with a checklist of challenges facing HRTs in Africa, the most significant of which is non-compliance with decisions of HRTs.

Chapter 3 is concerned with the second research question: 'What is the status of compliance with reparation orders of the selected HRTs in Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe, and how does state compliance compare with respect to the selected regional and sub-regional HRTs?' The chapter assesses the status of compliance with 75 reparation orders contained in 32 decisions of six selected regional and sub-regional HRTs operating in Africa, adopted in respect of five African countries (Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe). The chapter compares human rights judgment compliance in six regional and sub-regional human rights regimes in Africa, and assesses the interplays between regional and sub-regional HRTs, using five states, as case studies.

Chapter 4 answers the third research question: 'What factors make state compliance of reparation orders of sub-regional as opposed to regional HRTs more likely, and to what

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extent do existing theories explain the identified factors?' This chapter provides a theoretical and empirical analysis of the various factors that influenced the selected states to comply with decisions of the selected regional and sub-regional HRTs in Africa. The chapter provides a checklist of five primary factors that are indicative of compliance by states.

Chapter 5 is concerned with the fourth research question: 'What are the various forms of impact of the decisions of regional and sub-regional HRTs have in the selected states, and how significant is such influence relative to compliance?' Sometimes, decisions of HRTs are considered ineffective because of low rate of compliance. A decision that has not been implemented could nonetheless have significant impact just as a decision which has been fully complied with could have little impact. The chapter discusses the various ways in which decisions of regional and sub-regional HRTs in Africa have had effects beyond the compliance narrative.

Chapter 6 explores the challenges and hindrances to human rights judgment compliance in the selected states. The chapter partly provides answers to the last research question: *What are the hindrances to compliance with and influence of reparation orders of HRTs in the selected states* and how can compliance and overall impact of HRTs' decisions be improved?

Chapter 7 considers the prospects for improving compliance with decisions of regional and sub-regional HRTs in the five studied countries. The chapter summarises the study and makes pertinent recommendations for improving compliance. In a way, the chapter provides additional answers to the fifth and final research question, the part relating to how to improve and enhance state compliance and influence of HRTs' decisions in the selected states.

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Chapter 2

Overview of regional and sub-regional human rights tribunals in Africa

2.1. Introduction

2.2. The African regional human rights system

2.3. The major regional human rights tribunals (HRTs) in Africa

2.4. The major sub-regional HRTs in Africa

2.5. Chapter conclusion

2.1. Introduction

Regional systems for the promotion and protection of human rights are important building blocks and pillars of the international human rights system. The adoption in 1945 of the United Nations (UN) Charter set in motion the process for the internationalisation of human rights. This was followed by the adoption in 1948 of the Universal Declaration of Human Rights (UDHR), which has been described as the centrepiece of international human rights law.[1] Article 52 of the UN Charter provides for the creation of 'regional arrangements or agencies', provided such arrangement are in line with the principles and purpose of the United Nations.[2] Pursuant to this provision, a number of regional arrangements have been put in place in Africa, Europe and the Americas.[3] There are also emerging systems in the Southeast Asia region and the Arab world.[4] The strength of the regional human rights systems is that they generally are more accessible, offer relatively more effective institutional mechanisms for the protection of human rights, and provide regional perspectives to the development of international human rights norms and standards.[5]

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[1] GW Mugwanya 'Realizing universal human rights norms through regional human rights mechanisms: Reinvigorating the African system' (1999) 10 *Indiana International and Comparative Law Review* 35, 35.

[2] T Maluwa 'International law-making in the Organisation of African Unity: An overview' (2000) 12 *African Journal of International and Comparative Law* 201, 201.

[3] Mugwanya (n 1 above) 40.

[4] As above. For a schematic comparison of the three regional human rights systems, see C Heyns, D Padilla & L Zwaak 'A schematic comparison of the regional human rights systems' in FG Isa & KD Feyter (eds) *International protection of human rights: Achievements and challenges* (2006) 545.

[5] See C Heyns, D Padilla & L Zwaak 'A schematic comparison of the regional human rights systems: An update' (2006) 4 *SUR - International Journal on Human Rights* 162, 163; Office of the High Commissioner for

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The first legally binding regional human rights instrument was adopted in Europe.[6] On the 4 November 1950, the Council of Europe adopted the Convention for Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention).[7] The Convention, which entered into force on 3 September 1953, initially established two monitoring bodies – the European Commission of Human Rights and the European Court of Human Rights.[8] At the time of writing, each of the three main inter-governmental organisations in Europe – the Council of Europe (CoE), the European Union (EU) and the Organisation for Security and Cooperation in Europe (OSCE) – has its own distinct human rights instruments and mechanisms.[9] However, the Council of Europe's instruments and mechanisms remain the most developed.[10] In the Americas, the Inter-American Commission on Human Rights (IACmHR) was established in 1959 as an autonomous organ of the Organisation of American States (OAS). This was followed in 1969 by the adoption of the American Convention on Human Rights (ACHR). The ACHR established the Inter-American Court of Human Rights and reinforced the existing role of the IACmHR.[11] There are fledging regional human rights systems in the Southeast Asia and the Arab states.[12] However, as Viljoen argues, 'it is better to have a weak system in place than nothing at all'.[13] The incremental approach to improving the effectiveness of regional human rights systems may be supported for the reason that over the years, the African human rights system which was

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Human Rights (OHCHR), 'An overview of regional human rights systems' http://bangkok.ohchr.org/programme/regional-systems.aspx (accessed 31 July 2017).

6 See JW Hart 'The European human rights system' (2010) 102 *Law Library Journal* 532, 537 (arguing that the ECHR is the first legally binding human rights treaty).

7 E Neamtu 'The European system for human rights protection' (2008) 1 *Juridical Sciences Series* 142, 142.

8 By Protocol 11 of 1998, the European Commission of Human Rights was abolished. See Hart (n 6 above).

9 Office of the High Commissioner for Human Rights, 'Regional human rights systems in other parts of the world: Europe, the Americas and Africa' http://bangkok.ohchr.org/programme/other-regional-systems.aspx (accessed 13 September 2016); Council of Europe 'Human rights' http://www.coe.int/en/web/portal/organisation (accessed 27 November 2016); European Union 'EU institutions and other bodies' https://europa.eu/european-union/about-eu/institutions-bodies_en (27 November 2016), Organisation for Security and Cooperation in Europe (OSCE) 'OSCE Office for Democratic Institutions and Human Rights' http://www.osce.org/odihr (accessed 27 November 2016).

10 As above.

11 AAC Trindade 'The Inter-American system of protection of human rights: The developing case-law of the Inter-American Court of Human Rights (1982 - 2005)' in FG Isa & K de Feyter (eds) *International protection of human rights: Achievements and challenges* (2006) 475.

12 F Viljoen *International human rights law in Africa* (2012) 12.

13 Viljoen (n 12 above) 15.

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initially criticized as 'weak' and 'inefficient' is gradually being recognised and categorized among the 'well established' regional human rights systems.[14]

Each of the three well established regional human rights systems in Europe, the Americas, and Africa has at least one mechanism, referred to in this thesis as a 'tribunal', which monitors the implementation of the various human rights treaties and adjudicate on individual complaints. While the European system has a single-tiered system comprising a judicial body, both the Inter-American and African systems have double-tiered systems comprising judicial and quasi-judicial bodies.[15] One interesting feature of the African human rights architecture is the existence of 'sub-regional trade courts' that in instances rely on regional human rights treaties for adjudicating individual complaints.

This chapter explores the mandate, nature, structure and operation of regional and sub-regional human rights tribunal (HRTs) in Africa. In order to thoroughly engage with these various themes, some preliminary issues are discussed as a run-up to the main discussion in the chapter. Part 2.2 for instance provides an overview of the normative and institutional framework of the African human rights system. This is significant in order to provide a context for the analysis that will be done in subsequent chapters. Part 2.3 takes a close look at the array of human rights tribunals within the African human rights system. This includes analyses of the communication procedures of each of the tribunals and states' obligation to comply with their decisions. Part 2.3 concludes with a narrative capturing the emerging architecture of regional HRTs in Africa in the light of the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

An overview is provided in part 2.4 of how regional economic communities (RECs) created what may now be regarded as 'sub-regional human rights system' in Africa. Some rudimentary understanding of the process through which these economic communities became platforms for the realisation of human rights is vital in order to appreciate the

[14] Office of the High Commissioner for Human Rights 'An overview of regional human rights systems' http://bangkok.ohchr.org/programme/regional-systems.aspx (accessed 19 September 2016).

[15] Viljoen (n 12 above) 12. It is noteworthy that in the European human rights system, there was a commission, the European Commission on Human Rights, until 1998.

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place of sub-regional HRTs within the RECs' institutional architecture. Part 2.5 takes a brief look at the range of human rights tribunals at the sub-regional level in Africa. In part 2.6 which touches on the emerging architecture of sub-regional HRTs in Africa, reference is made to lesser known sub-regional tribunals such as the COMESA Court of Justice and the OHADA Common Court of Justice and Arbitration.

2.2. The African regional human rights system

The African regional human rights system, also referred to by Odinkalu as the 'pan-continental human rights system in Africa' comprises of both normative and institutional components.[16] Under the auspices of the Organisation of African Unity (OAU), now the African Union (AU), African states have adopted and ratified numerous human rights treaties.[17] Together with the relevant soft law standards, these treaties make up the African human rights normative system. While the normative system consists of treaties and soft law standards, the institutional component comprises mechanisms for monitoring and supervising state's implementation of human rights treaties and standards. These mechanisms comprise independent expert committees as well as quasi-judicial and fully-fledged judicial institutions established by state parties to monitor and promote states' implementation of human rights treaty standards, and to provide redress for individuals whose rights under the treaties are violated by their states.

Odinkalu has argued that the true origin of the African human rights system dates back to 1969 when the OAU Convention on the Specific Aspects of Refugee Problem in Africa was adopted.[18] While the Refugee Convention is no doubt a notable normative precursor to

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[16] See CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 225, 226. See also M Pinto 'Fragmentation or unification among international institutions: Human rights tribunals' (1999) 31 *International Law and Politics* 833.

[17] Some of the treaties adopted by member states of the OAU (now AU) include the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, Cultural Charter for Africa 1976, African Charter on the Rights and Welfare of the Child 1990, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998, the Constitutive Act of the African Union 2000, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Convention on Prevention and Combating Corruption 2003, African Charter on Democracy, Elections and Good Governance 2007, and the AU Convention for the Protection of and Assistance of Internally Displaced Persons 2009.

[18] Odinkalu (n 16 above) 226.

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the African human rights system, it is argued that the OAU had no real 'system' in place for the promotion and protection of human rights across the continent until the African Charter on Human and Peoples' Rights (African Charter) was adopted. To take Odinkalu's argument further, people who view decolonization as an important aspect of the right to self-determination will likely regard the OAU Charter as a truer origin of the African human rights system. Tracing the origin further, there existed some 'processes' for the promotion, protection and enforcement of rights of human beings in pre-colonial Africa.[19] It is argued that these isolated indigenous practices did not crystallise into an 'African system' for the promotion and protection of human rights until the African Charter was adoption in 1981.

One important contribution of Odinkalu to the conceptualisation of the 'African human rights system' is his insistence that the respective domestic legal systems of African states necessarily form part of the African human rights system.[20] The exhaustion of local remedies requirement under the African Charter is an umbilical cord that connects the continental processes with the domestic legal system. In a way, it is also possible to argue that the respective human rights sub-systems of the various regional economic communities in Africa are not autonomous systems but integral parts of the one complex 'African human rights system'. Conceived in this way, the African human rights system is a complex superstructure comprising the AU human rights mechanisms, human rights apparatuses of RECs as well as national and other African intergovernmental arrangements for the promotion and protection of human rights.

The desire to promote regional cooperation and decolonisation in Africa prompted African elites to establish the Organisation of African Unity in 1963.[21] The Charter establishing the OAU focused on states sovereignty, territorial integrity and non-interferences in the affairs

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[19] See JF Ade-Ajayi & Y Akinseye-George *Kayode Eso: The making of a judge* (2002) 1 - 514.
[20] Odinkalu (n 16 above) 227 - 228.
[21] Maluwa (n 2 above). For a more detailed analysis of the history of the OAU, see Z Cervenka *The unfinished quest for unity: Africa and the OAU* (1977) 1. See generally GJ Naldi *The Organization of African Unity: An analysis of its role* (1999) 109; T Maluwa 'From the Organisation of African Unity to the African Union: Rethinking the framework for inter-state cooperation in Africa in the era of globalisation' (2007) 5 *University of Botswana Law Journal* 10, 10.

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of states.[22] Human rights was essentially relegated to the side-lines in the agenda of OAU.[23] As a matter of policy, human rights issues were treated as matters falling within the exclusive purview of states,[24] and individuals advocating such issues were considered subversive.[25] One way to sum up the human rights milieu under the OAU Charter is that the rights of states outweighed human and peoples' rights.[26] Thus, one notable achievement of the OAU is the political liberation and decolonisation of African states.[27] The continental body failed in achieving a good number of its set objectives such as promotion of African unity and integration, advancement of socio-economic development in Africa, and addressing poverty, famine, political instability, ravaging conflicts and massive human rights violations that were (and still are) common place in Africa.[28] These failings together with the reality of globalisation led to calls for the amendment of the OAU Charter.[29]

At the fourth extraordinary session of the OAU Assembly held in Sirte, Libya, on 9 September 1999, African Heads of State and Government agreed to form the African Union (AU) to replace the OAU.[30] The Constitutive Act of the AU which replaced the OAU was adopted on 11 July 2000. It entered into force on 26 May 2002.[31] While a number of human rights instruments were adopted by the OAU, the transition from the OAU to AU marked an important milestone in the history of human rights in Africa.[32] The new founding instrument places human rights directly on the agenda of the AU.[33] Article 3(h)

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22 OAU Charter, art III.

23 See F Viljoen & E Baimu 'Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 241, 241.

24 As above.

25 AMB Mangu 'The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa's Development and the African Court' (2005) 23 *Netherlands Quarterly of Human Rights* 379, 381.

26 Mangu (n 25 above); JM Isanga 'The Constitutive Act of the African Union, African courts and the protection of human rights: New dispensation?' (2013) 11 *Santa Clara Journal of International Law* 266, 271.

27 Maluwa 'From the Organisation of African Unity to the African Union' (n 21 above).

28 Maluwa 'From the Organisation of African Unity to the African Union' (n 21 above) 12.

29 It is reported that from 1980 to 1996, the OAU Charter Review Committee met only six times. See Maluwa 'From the Organisation of African Unity to the African Union' (n 21 above) 13.

30 Constitutive Act of the AU, Preamble.

31 Mangu (n 25 above) 380.

32 Isanga (n 26 above) 269.

33 C Heyns 'The African human rights system: The African Charter' (2003-2004) 108 *Penn State Law Review* 679, 681.

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of the AU Constitutive Act states that the organisation's objectives include the promotion and protection of human rights in accordance with the African Charter and other relevant human rights instruments.[34] One of the fundamental objectives guiding the operations of the AU is 'respect for democratic principles, human rights, the rule of law and good governance'.[35]

2.2.1 Normative system

The normative framework of African human rights system is based primarily on the African Charter on Human and Peoples' Rights (African Charter).[36] At July 2017, all the 55-member countries of the AU except Morocco have ratified the African Charter.[37] The African Charter is the primary instrument for the promotion and protection of human rights in Africa.[38] Flinterman and Henderson argue that the adoption of the Charter marks the beginning of 'organised commitment' to human rights promotion and protection in Africa.[39]

The African Charter has been hailed as a unique human rights instruments.[40] The Charter, it is argued, responds to 'African concerns, African traditions and African conditions'.[41] The African Charter is one of the few human rights instruments that combines the first-generation rights, that is civil and political rights, and the second general rights, that is economic, social and cultural rights (ESCRs), in a single document, and both these generations of rights are made justiciable. The Charter is one of the foremost binding international human rights instruments to have directly incorporated the concept of

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34 See also AU Constitutive Act, art 3(e).

35 AU Constitutive Act, art 4(m).

36 VO Ayeni 'Introduction and preliminary overview of findings' in VO Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 6.

37 See African Union 'List of countries which have signed, ratified/acceded to the African Charter on Human and people's rights' https://au.int/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 31 July 2017).

38 S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Journal* 118, 119.

39 C Flinterman & C Henderson 'The African Charter on Human and Peoples' Rights' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights* (1999) 387.

40 M Mutua 'The Banjul Charter and the African cultural fingerprint: An assessment of the language of duties' (1995) 35 *Virginia Journal of International Law* 339, 339.

41 T van Boven 'The relations between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 181, 186.

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peoples' rights, solidarity rights or collective rights.[42] Articles 19 to 24 of the Charter guarantee peoples' rights to right to equality, existence, free disposal of wealth and natural resources, rights to development, peace and security as well as a right to a generally satisfactory environment. Unlike some international human rights treaties, provisions of the African Charter cannot be derogated from even during national emergencies.[43]

In spite of its distinctive features, the African Charter has been criticised on a number of grounds. For instance, the Charter has been criticised for its normative deficiency in relation to protection of vulnerable groups such as women, children and persons with disability.[44] The presence of limitation clauses, also referred to as 'claw-back clauses', casts doubt on the normative scope and value of a number of its provisions.[45] Many commentators have expressed concerns that the language of individual duty in the African Charter could provide leeway for states to detract from its obligations under the Charter.[46] Thankfully, a number of these shortcomings have been 'neutralised' through creative interpretation of the Charter by the African Commission.[47]

Of course, not all shortcomings of the African Charter can be remedied through creative interpretation, even by the most activist human rights tribunal. As a result, the 'need for reform' has been one common theme in most academic papers assessing the

[42] See R Kiwanuka 'The meaning of peoples' rights in the African Charter on Human and Peoples' Rights' (1988) 80 *American Journal of International Law* 80.
[43] *Commission nationale des droits de l'Homme et des libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.
[44] Viljoen (n 12 above) 269.
[45] See S Singh 'The impact of clawback clauses on human and peoples' rights in Africa' (2009) 18 *African Security Review* 95, 95 - 105. See also OHCHR 'Minority rights under the African Charter on Human and Peoples' Rights' http://www.ohchr.org/Documents/Publications/GuideMinorities6en.pdf (accessed 22 September 2016).
[46] HWO Okoth-Ogendo 'Human and peoples' rights: What point is Africa trying to make?' in R Cohen, G Hyden & W Nagan (eds) *Human rights and governance in Africa* (1993) 74 - 79; A Hansen 'African refugees: Defining and defending human rights' in R Cohen, G Hyden & W Nagan (eds) *Human Rights and Governance in Africa* (1993) 139 & 161; R Cohen 'Endless teardrops: Prolegomena to the study of human rights in Africa' in R Cohen, G Hyden & W Nagan (eds) *Human Rights and Governance in Africa* (1993) 15; all referred to in M Mutua 'The African human rights system: A critical evaluation' http://hdr.undp.org/sites/default/files/mutua.pdf (accessed 13 October 2016).
[47] See C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 155, 157.

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effectiveness of the African Charter.[48] In order to address the normative shortcomings of the African Charter, the OAU/AU has adopted the Protocol on the Rights of Women in Africa (Maputo Protocol). The African Charter, the Maputo Protocol, together with the Protocol to the African Charter on the establishment of the African Court, may appropriately be referred to as the 'African Charter system'.[49] The Maputo Protocol was adopted on 11 July 2003 in Maputo, the capital city of Mozambique. After achieving 15 ratifications, the Protocol entered into force on 25 November 2005. The Maputo Protocol was adopted to eliminate three evils: discrimination against women, traditional practices which are harmful to women, and violence against women (VAW).[50] The Maputo Protocol speaks to African concerns and situates the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) within African reality.[51] Like the African Charter, the Maputo Protocol 'blazed a trail' in a number of areas such as the right to medical abortion,[52] prohibition of domestic violence,[53] and protection against HIV infections.[54]

Beyond the African Charter system, the normative framework of the African human rights system includes other regional human rights treaties such as the African Charter on the Rights and Welfare of the Child (African Children's Rights Charter).[55] There are also other treaties which relate to pertinent human rights issues such as protection of refugees and

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[48] See for instance, Heyns 'The African regional human rights system: In need of reform?' (n 47 above) 155 - 174.

[49] As above.

[50] See CA Odinkalu 'Africa's regional human rights system: Recent development and jurisprudence' (2002) 2 *Human Rights Law Review* 99, 102. See also F Banda 'Blazing a trail: The African protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 72, 72 - 84; F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11, 11 - 46.

[51] VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case study of Nigeria' unpublished LLM dissertation, University of Pretoria, 2011, 14.

[52] Maputo Protocol, art 14(2).

[53] Maputo Protocol, art 4(2).

[54] Maputo Protocol, art 14(1); Banda (n 50 above).

[55] African Union 'OAU/AU Treaties, Conventions, Protocols & Charters' http://www.au.int/en/treaties (accessed 24 September 2016).

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internally displaced persons,[56] conservation of nature and environment,[57] and promotion of democracy, elections and good governance.[58]

The normative component of the African human rights system also covers treaties establishing political organs whose mandate include the promotion and protection of human rights in Africa.[59] For example, the Protocol on the Establishment of Peace and Security Council (PSC) of the African Union states that in carrying out its mandate, the PSC ought to be guided by 'respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law'.[60] The normative system also comprises 'soft law' standards. There are many of these technically 'non-binding' human rights instruments in Africa, and they constitute an integral component of the African human rights system.[61] Shelton demonstrates how these often-underestimated soft laws 'harden' and become even more compelling for compliance in certain situations than the so-called 'hard laws'.[62]

2.2.2 Institutional mechanisms

In 2017, the African human rights protection system comprises both specialised human rights tribunals and other AU organs that contribute to the promotion and protection of human rights in Africa. The tribunals which are generally regarded as the primary mechanisms for enforcement and implementation of human rights in Africa include the African Commission, the African Court and the African Committee of Experts on the Rights

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[56] OAU Convention Governing Specific Aspects of Refugee Problems in Africa 1969; AU Convention for the Protection and Assistance of Internally Displaced Persons 2009.

[57] OAU Convention on the Conservation of Nature and Natural Resources 1969; African Convention on the Conservation of Nature and Natural Resources 2003.

[58] African Charter on Democracy, Election and Governance 2007.

[59] See for instance the Constitutive of African Union 2000; Treaty Establishing the African Economic Community 1991; Protocol to the Treaty Establishing the Pan-African Parliament 2001; Statute of the Economic, Social and Cultural Council of the African Union 2004; and Protocol relating to the Establishment of the Peace and Security Council of the African Union 2002.

[60] 2002 Protocol on the Peace and Security Council, art 4(c).

[61] Examples of soft laws in Africa include the Solemn Declaration on Gender Equality in Africa 2004, Banjul Declaration 2006, Declaration on the Principles Governing Democratic Elections in Africa 2002, and Declaration on Unconstitutional Change of Government 2002.

[62] DL Shelton 'Soft law' in D Armstrong (ed) *Routledge handbook of international law* (2009) 1; DL Shelton 'Introduction: Law, non-law and the problem of soft law' in DL Shelton (ed) *Compliance and commitment: The role of non-binding norms in the international legal system* (2007) 1.

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and Welfare of the Child (African Children's Rights Committee).[63] Details about the operations of each of these human rights tribunals is discussed in part 2.3. Each of the main organs of the AU contributes towards realising human rights in Africa. The Constitutive Act of the African Union (AU) spells out the responsibilities of these organs with regards to human rights.[64] The AU Assembly, being the supreme organ of the AU, is responsible for adopting and amending human rights treaties. The AU Assembly also adopts non-binding soft law standards such as resolutions, declaration and guiding principles on specific human rights themes such as gender equality, employment and poverty alleviation.[65] The Assembly also contributes to monitoring implementation of these soft law standards.[66]

Responsibility for implementation of AU laws, policies and programmes lie with the AU Assembly with the support of the Executive Council, the Permanent Representatives Committee, the AU Commission and also the Peace and Security Council.[67] The Assembly is responsible for allocating funds to the various human rights bodies, and also for electing members of those bodies. Like other organs within the AU, the Assembly has adopted a number of resolutions that are relevant to human rights. Some human rights bodies, especially the African Commission and the African Children's Committee make recommendations for the AU Assembly to consider and approve. The Assembly, on the recommendation of the African Commission, could request the Commission to carry out an 'in-depth study' when series of massive human rights violations are reported to the Assembly. Being the approving authority, the Assembly, through the Executive Council, is responsible for ensuring compliance with decisions of the various human rights bodies.[68] It is within the powers of the Assembly to impose political or economic sanctions on states for non-compliance with decisions of institutions within the AU.[69] If this power is duly exercised, one would expect it to induce states to comply with decisions of AU HRTs.

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63 Viljoen (n 12 above) 169.
64 A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 165, 165 - 186.
65 See for instance Solemn Declaration on Gender Equality in Africa, adopted in July 2004.
66 Viljoen (n 12 above) 172.
67 Viljoen (n 12 above) 179.
68 See Constitutive Act of the AU, art 30.
69 Viljoen (n 12 above) 179.

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Another organ of the AU is the Pan-African Parliament (PAP). The establishment of the PAP according to its founding treaty is predicated on the need to 'promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.[70] The PAP is mandated to make recommendations on matters pertaining to respect of human rights, democratic consolidation, the rule of law and promotion of good governance, including bringing attention to non-compliance to HRTs' decisions.[71] It also has the important task of ensuring harmonisation of laws of member states.[72] Along this line, the PAP on 12 May 2006 adopted a resolution to conduct an audit of the constitutions of members, and there is no records showing that this was ever done.[73] Since its inauguration in 18 March 2004, the PAP has adopted important resolutions on pertinent human rights themes such as the resolution urging member states to ratify the Maputo Protocol.[74] However, due to its advisory, deliberative and consultative status, the PAP has been criticised and described as 'ineffectual talk show'.[75]

The Executive Council is responsible for monitoring implementation of decisions of the AU Assembly including consideration of Activity Reports of the African Commission.[76] Unlike when the Activity Reports were considered by the AU Assembly, consideration of the Report by the Executive Council has resulted in closer scrutiny although this has also led to some undesirable consequences, discussed later in this chapter. For instance, the Council has issued several decisions requesting the African Commission to include responses from states to its mission reports, resolutions and decisions before submitting them to the Council for consideration.[77] The Council has also established a procedure whereby states against whom decisions have been made by the African Commission are given two months within which to provide their observation about the decision to the

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[70] Protocol to the Treaty Establishing the African Economic Community relating to the Pan African Parliament 2001, preamble.
[71] Protocol to the Treaty Establishing the African Economic Community relating to the Pan African Parliament 2001, art 11(1).
[72] Protocol to the Treaty Establishing the African Economic Community relating to the Pan African Parliament 2001, art 11(3).
[73] Pan African Parliament Resolution No PAP – RES 002/006. See also Viljoen (n 12 above) 175.
[74] http://panafricanparliament.org/about-pap (accessed 24 September 2016).
[75] Viljoen (n 12 above) 175. See Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament adopted by the AU on 27 June 2014.
[76] Viljoen (n 12 above) 197.
[77] Viljoen (n 12 above) 188.

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Council.[78] Despite these challenges, the involvement of the Executive Council in the consideration of decisions of the African Commission has been identified as a viable opportunity to involve the Council in the follow up of those decisions.[79] The new mandate of the Executive Council has started to yield fruits; and Viljoen argued that the Executive Council is officially now the first AU organ to have specifically requested member states to comply with decisions of the African Commission.[80] The Council also has the responsibility of monitoring judgments of the African Court.[81]

The role of the AU Commission, as the 'heart' of the pan-African continental body, cannot be stressed strongly enough. The Commission comprises eight departments. Two of these departments – the Political Affairs as well as Social Affairs departments – play vital roles in the realisation of human rights within the AU. The Commissioner for Political Affairs oversees the African Commission while the African Children's Committee is supervised by the Commissioner for Social Affairs.[82] Other departments of the AU Commission also contribute to the overall human rights mandate of the AU Commission in the areas of IDPs and refugee protection,[83] development of legal texts,[84] as well as gender mainstreaming and coordination.[85]

The Peace and Security Council (PSC) is the foremost institution for the maintenance of regional peace, security and stability in Africa.[86] Promotion and protection of human rights and fundamental freedoms occupy a central place in the objectives and principles of the PSC.[87] The Protocol establishing the PSC clearly mandates the Council to work closely with

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[78] AU Doc Ex.CL/Dec.310 (IX), Decision on the activity report of the African Commission on Human and Peoples' Rights. See also Viljoen (n 12 above) 189.

[79] Viljoen (n 12 above); I Kane 'The African Commission on Human and Peoples' Rights and the new organs of the African Union in L Wohlgemuth & E Sall (ed) *Human rights, regionalism and the dilemma of democracy in Africa* (2006) 160.

[80] Viljoen (n 12 above) 190.

[81] See Rules of Procedure of the African Court, rule 64.

[82] Viljoen (n 12 above) 192.

[83] Directorate of Humanitarian Intervention of the AU Commission.

[84] Legal Affairs Department of the AU Commission.

[85] Directorate of Women, Gender and development.

[86] See the Protocol relating to the Establishment of the Peace and Security Council of the African Union. It was adopted on 10 July 2002 and entered into force on 26 December 2003.

[87] Peace and Security Council Protocol, art 3 (f) & 4(c).

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the African Commission.[88] The PSC since its inauguration has taken a number of measures to address the problem of unconstitutional change of government in African and promote multi-party democracy.[89] The PSC plays a crucial role in the securing state compliance with decisions of AU HRTs' decisions, especially in ensuring that sanctions imposed on defaulting states are complied with.

One more institution within the AU that has direct mandate for the promotion and protection of human rights is the African Peer Review Mechanism (APRM). Although the APRM process is not all about human rights, it has been argued that human rights occupy a foremost position in the process.[90] As at January 2016, 37 countries have acceded voluntarily to the APRM process, and 17 of these have been peer-reviewed.[91] It has been argued that the APRM process shares some similarity with the state reporting procedure of the African Commission.[92] Despite its many shortcomings, there is no doubt that the APRM is an important mechanism for the protection of human rights in Africa. Issues of non-compliance with selected decisions of HRTs may be raised during the APRM process.

Notwithstanding the proliferation of bodies with human rights mandate, the AU is yet to adequately mainstream human rights into its processes and programmes.[93] This has resulted in lack of coordination and collaboration among the various AU organs. Avoidable overlaps and duplication of functions is commonplace. There is also the problem of limited capacity of, and limited access to, the various human rights-protecting institutions. These problems have been recognised, and in order to address these challenges, the Human Rights Strategy for Africa was adopted in 2011 by the Political Affairs Department of the AU to enhance coordination and collaboration among the various AU organs and also to

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88 Peace and Security Council Protocol, art 19; Rules of Procedures of the African Commission, rules 80 & 84.
89 Viljoen (n 12 above) 197 - 198.
90 See M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41, 42 - 55.
91 Remarks by Uhuru Kenyatta, Chairperson of the African Peer Review (APR) Forum, during the Special Summit of the Committee of Heads of State and Government participating in the African Peer Review Mechanism in Addis Ababa, Ethiopia, 29 January 2016, available at http://aprm-au.org/admin/pdfFiles/Speech-HE_Uhuru_Kenyatta_24th_APRM_Special_Summit_EN.pdf (accessed 25 September 2016).
92 Viljoen (n 12 above) 202.
93 Viljoen (n 12 above) 169.

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strengthen the capacity of these institutions in the areas of human rights.[94] The Strategy was adopted as part of a broader process to establish greater coordination amongst AU institutions within the framework of the African Governance Architecture (AGA). While the Human Rights Strategy has not solved the problem of lack of coordination and collaboration among AU institutions in terms of their human rights mandates, the Strategy remains one of the clearest policy documents from a major AU organ aimed at addressing the problem. It is hoped that when it is formally operationalised, the multi-chamber African Court of Justice and Human and Peoples' Rights will contribute to enhancing coordination among institutions that have human rights mandate within the AU.

2.3. The major regional human rights tribunals in Africa

As earlier stated, the three main regional human rights tribunals in Africa are the African Commission, the African Court and the African Children's Rights Committee. Two of these tribunals – the African Commission and the African Children's Rights Committee – are quasi-judicial in nature. Only the African Court has the full character and powers of a court. While processes are ongoing to restructure the African human rights architecture through the establishment of a multi-chaomber court, the Protocols containing these reforms are yet to enter into force.[95] Below is an overview of the three main regional human rights tribunals in Africa.

2.3.1 African Commission

The African Commission on Human and Peoples' Rights (African Commission) was established under the African Charter for the dual purposes of promoting and protecting the rights enshrined in the Charter.[96] It has been argued that the promotional and protective roles of the Commission are interrelated and complementary.[97] The African

94 See African Union 'Human Rights Strategy for Africa' http://au.int/en/sites/default/files/HRSA-Final-table%20EN%29%5B3%5D.pdf (accessed 25 September 2016).

95 Details about the multi-chamber African Court of Justice and Human and Peoples' Rights is covered in part 2.3.4 of the thesis.

96 African Charter, art 30.

97 Gumedze (n 38 above) 118, 119. This view has also been expressed in CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' referred to in H Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 925.

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Commission comprises 11 members selected from among 'Africans personalities of the highest reputation'.[98] Members of the Commission are elected by the AU Assembly through secret ballot from a list of nominees presented by state parties to the African Charter.[99] Members of the Commission serve in their personal capacity,[100] and no two nationals of a state party to the African Charter may serve on the Commission at the same time.[101] Members of the Commission are elected for a term of six years, renewable indefinitely.[102] All members of the Commission work on a part-time basis, and this has been identified as one of the major obstacles confronting the Commission.[103]

One of the shortcomings of the African Charter with regard to the composition of the African Commission relates to the absence of an explicit provision to ensure a balance gender or geographical representation within the Commission.[104] However, these shortcomings have been addressed over the years through the selection process of the AU Assembly.[105] In 2017, six of the 11 commissioners are female.[106]

The functions of the African Commission are set out in articles 45, 55 and 62 of the African Charter. While the Charter merely provided the skeletal structure for the functioning of the African Commission, the Commission through its practice and procedure has elaborated on its mandate. In addition to performing other tasks assigned to it by the AU Assembly, the African Commission has three key aspects to its mandate under the African Charter: promotion of human and peoples' rights, interpretation of the provisions of the African Charter and protection of human and peoples' rights.[107] The African Charter provides a checklist of what the promotional mandate of the Commission entails.[108] In

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98 African Charter, art 31.
99 African Charter, art 33.
100 African Charter, art 31(2).
101 African Charter, art 32.
102 Viljoen (n 12 above) 290.
103 Opening speech by the Chairperson of the African Commission on Human and Peoples' Right at the opening ceremony of the 52nd ordinary session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire. The speech is available at http://www.achpr.org/sessions/52nd/speeches/atoki-opening-speach/ (accessed 26 September 2016).
104 Viljoen (n 12 above) 290.
105 As above.
106 'About ACHPR' http://www.achpr.org/about/ (accessed 5 February 2018).
107 African Charter, art 45. See also African Commission on Human and Peoples' Rights 'About ACHPR' http://www.achpr.org/about/ (accessed 6 July 2016).
108 African Charter, art 45(1)(a) - (c).

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terms of its protective mandate, the African Commission has received, assessed and considered inter-state and individual communications submitted in terms of articles 47 and 55 of the African Charter.[109]

(a) Communication procedure

The communication procedure of the African Commission may be divided broadly into inter-state and individual communication procedures. In terms of inter-state communications, the African Charter provides that if a state party has good reasons to believe that another state party has violated the provisions of the Charter, the state may draw the attention of the offending state to the violation through a written communication.[110] The communication may also be submitted directly to the African Commission, provided a copy of the communication is forwarded to the Chairperson of the AU Commission and the State Party concerned.[111] As at July 2017, the African Commission has received three inter-state communications, and decided only two, namely: *DRC v Burundi, Rwanda and Uganda*[112] and Communication 422/12 *Sudan v South Sudan*.[113]

In the earliest years of its operations, the Commission's powers to receive and consider individual communications was called into question.[114] The grounds of the legal challenge and scepticisms relate to the ambiguity of the individual communications provisions of the

[109] See Ayeni (n 51 above) 12. See also African Commission on Human and Peoples' Rights 'Mandate of the Commission' http://www.achpr.org/about/mandate/ (accessed 7 July 2016).
[110] African Charter, art 47.
[111] African Charter, art 49.
[112] (2004) AHRLR 19 (ACHPR 2003).
[113] See inter-session activity report of Hon Commissioner Lucy Asuagbor, Chairperson of the Working Group on Communications, presented at the 61st ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 1 - 15 November 2017 http://www.achpr.org/files/sessions/61st/inter-act-reps/293/eng_comm_asuagbor_ar_wgc_chair__61st_os.pdf (accessed 12 December 2017). The third inter-state communication submitted to the African Commission is Communication 478/14 *Djibouti v Eritrea*, seized during the 17th extraordinary session of the Commission in February 2015. No decision has yet been reached on this communication.
[114] See CA Odinkalu 'African Commission on Human and Peoples' Rights: Recent cases' (2010) 1 *Human Rights Law Review* 98. See also *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000). See also W Benedek 'The African Charter and Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 25, 31; R Murray 'Decisions of the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412, 413.

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African Charter.[115] Article 55 of the Charter relating to 'other communications' states that the Secretary of the African Commission shall make 'a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.'[116]

In order for a communication to be admissible by the Commission, the African Charter prescribes a set of criteria (admissibility criteria) which the communication must satisfy.[117] Of these criteria, the requirement of exhaustion of domestic remedy has received the most attention from the African Commission. First, the African Commission has clarified that only the ordinary 'common law' remedies need to be exhausted.[118] Litigants are not under an obligation to exhaust extra-judicial remedies before submitting communications to the Commission.[119] In *Jawara v The Gambia*,[120] the African Commission established the rule that only judicial remedies which are available, effective and adequate need to be exhausted prior to submitting communication before the Commission. The Commission has held in subsequent cases that domestic remedies need not be exhausted in the following instances: if the victims are extremely indigent,[121] the complaints involves serious or massive violations,[122] domestic legislation ousts the jurisdiction of the national court,[123] the

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115 Murray (n 114 above) 413; Benedek (n 114 above) 31.

116 African Charter, art 55.

117 African Charter, art 56. The communications must indicate the name of the authors and it must not have been written in insulting or disparaging language. See African Charter, art 56(1) & (3). An author may however request anonymity. In such a case, the Commission may not disclose the author's name, identity or description to the state concerned or any member of the public. See Viljoen (n 12 above) 311. The rights which the communication seeks to enforce must be compatible with the African Charter as well as the OAU Charter, now the Constitutive Act of the AU. See African Charter, art 56(2). The violations alleged in the communication must not be based exclusively on media reports and the state concerned must have been given the opportunity to redress the violations. In other words, the complainant must have exhausted 'domestic remedies'. See African Charter, art 56(5). The communication must have been submitted to the Commission within reasonable time from the date of exhaustion of local remedy, and the subject matter of the communication must not have been settled under any UN or the AU mechanisms. See African Charter, art 56(6) & (7).

118 Viljoen (n 12 above) 317; Communication 221/98, *Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999) (12th Activity Report) para 13; Communication 60/91, *Constitutional Rights Project (in respect of Akamu and others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995) (8th Activity Report) para 8.

119 Viljoen (n 12 above) 317.

120 (2000) AHRLR 107 (ACHPR 2000) paras 31 & 32.

121 *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 37 & 53.

122 *Free Legal Assistance Group v Zaire* (2000) AHRLR 74 (ACHPR 1995) paras 35 - 38.

123 *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 50.

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rights claimed are not guaranteed by national laws,[124] it is dangerous for the complainant to return to the defaulting state in order to exhaust domestic remedy,[125] or if the procedure for exhaustion of domestic remedy has been or would be prolonged unduly.[126]

From 1994 when the African Commission published its first activity report that contains findings on individual communications handled by the Commission up to November 2017, the Commission has received 659 communications, finalised 446 of which more than 100 are on merits, and the Commission has found violations in 83 communications, involving 27 states that are parties to the African Charter.[127] As at November 2017, the Commission was having 221 pending communications; five of which were at seizure stage, 177 at admissibility and 38 on merits.[128]

(b) States' obligation to comply with decisions of the African Commission

The decisions and remedial orders of the African Commission are generally considered as 'non-binding'. As early as 1997, the problem of non-compliance by states with remedial orders of the Commission had been identified.[129] For this reason, chiefly, the African Commission was branded as 'impotent' and 'incompetent'.[130] In a study conducted in 2004, Viljoen and Louw found that only 14 percent of the decisions of the African Commission in individual communications have been complied with by states.[131] Partial compliance was recorded in 32 percent while non-compliance was found in 13 cases representing 30

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124 *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 35 - 42.
125 Communication 103/93 *Abubakar v Ghana*, paras 6 & 7.
126 African Charter, art 56(5). See generally Centre for Human Rights (n 64 above) 20.
127 See inter-session activity report (June - November 2017) of Hon Commissioner Lucy Asuagbor, Chairperson of the Working Group on Communications, presented at the 61st ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 1 - 15 November 2017 http://www.achpr.org/files/sessions/61st/inter-act-reps/293/eng_comm_asuagbor_ar_wgc_chair__61st_os.pdf (accessed 12 December 2017).
128 As above.
129 See African Commission 'Non-compliance of state parties to adopted recommendations of the African Commission: A legal approach' www.chr.up.ac.za/chr_old/hr_docs/african/docs/achpr/achpr7.doc (accessed 6 October 2016). See also R Murray & M Evans *Documents of the African Commission on Human and Peoples' Rights* (2001) 758.
130 Odinkalu (n 26 above) 383; Mangu (n 25 above).
131 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and People's Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1, 4 - 5; L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005, 61.

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percent of the finalised cases.[132] States have generally argued that decisions of the Commission are no more than 'mere recommendations' which they may or may not implement.[133] I argue that, contrary to states' proposition above, the legal status of the findings of the African Commission changes once the Activity Reports embodying the decisions have been approved by the AU Assembly or very recently the Executive Council.[134] The binary categorisation of the decisions of the African Commission as either binding or non-binding has been called to question in recent studies.[135] Murray and Long referred to it as 'a blunt tool'.[136]

International human rights law has grown beyond the level where only explicitly binding instruments create legal obligations. I argue that states have an obligation to implement decisions of the African Commission, regardless of the explicit legal status of those decisions. This is because obligations arising from individual communications are not new obligations created by the Commission's decisions; they are obligations assumed by states as a consequence of ratifying the African Charter. The African Charter gives the Commission the mandate to interpret provisions of the Charter. All that the African Commission does when it decides an individual communication is to interpret and define a state's obligation under the African Charter in relation to a given set of facts presented in the communication. It is therefore argued that states' obligation to implement decisions of the African Commission, once approved by the AU Assembly, cannot be separated from the existing obligation of states to implement provisions of the African Charter.

This argument is based on the 'interpretive authority' of the Commission, otherwise referred to as *res interpretata*, which has been developed significantly in the European human rights system.[137] The *res interpretata* theory, in the African context, implies that

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132 Viljoen & Louw 'State compliance' (n 131 above) 4 - 6; Louw (n 131 above) 61.

133 See R Murray & D Long *Implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 50. See, for instance, the Botswana government's response with regard to Communication 313/05 *Good v Botswana*, as reported in the combined 32nd and 33rd activity report of the African Commission (2012) EX.CL/782(XXII) Rev 2, para 24.

134 F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1, 1. See also Viljoen (n 12 above) 339.

135 Murray & Long (n 133 above) 1 - 216.

136 Murray & Long (n 133 above) 9.

137 See, for example, A Bodnar 'Res interpretata: Legal effect of the European Court of Human Rights' judgments for other states than those which were party to the proceedings' in Y Haeck & E Brems (eds)

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states are bound by interpretations given to the African Charter by the African Commission, even in decisions concerning violations that occurred in other countries that are state parties to the Charter.[138] Within the purview of the *res interpretata* theory, I argue that the interpretive content of a decision given by the African Commission binds all state parties to the African Charter. Thus, in order to clarify the binding effect of the Commission's decisions especially on other states, a distinction needs to be made between the 'decisional content' and the 'interpretive content' of the Commission's findings. With regard to the defaulting state, I argue that both the decisional and interpretive contents are binding, as the Commission's authority to issue the decision flows directly from the Charter. Thus, states that are subjects of a decision from the Commission ought to accept the decision as binding, the decision being an extension or elaboration of their obligations under the African Charter.

2.3.2 African Court

The Protocol Establishing the African Court on Human and Peoples' Rights (African Court Protocol) was adopted on 10 June 1998, and entered into force 25 January 2004.[139] As at 15 June 2017, 30 member-states of the AU have ratified the African Court Protocol.[140] The seat of the Court is in Arusha, Tanzania. The African Court was established primarily to complement the protective mandate of the African Commission.[141] Unlike the African Commission, decisions of the Court are *unequivocally* binding on state parties.[142] The African Court was established in anticipation that the Court, unlike the African

Human and civil liberties in the 21st Century (2014) 223 - 262. A von Bogdandy *et al* (eds) *Transformative constitutionalism in Latin America: The emergence of a new ius commune* (2017) 401.

[138] See A Zysset *The ECHR and human rights theory: Reconciling the moral and the political conceptions* (2017) 217; Committee on Legal Affairs and Human Rights of Parliamentary Assembly (Council of Europe), 'Strengthening subsidiarity: Integrating the Strasbourg Court's case law into national law and judicial practice', Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1 - 2 October 2010 http://www.assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf (accessed 12 February 2018).

[139] African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' http://www.au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and (accessed 16 October 2016).

[140] African Union 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 28 August 2017).

[141] African Court Protocol, art 2.

[142] See 2010 Rules of Procedure of the African Court, rule 61(5).

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Commission, will demonstrate greater clarity in framing its remedies, develop a more comprehensive procedure for implementation of its judgments, promote openness in carrying out its protective mandate, adopt effective measures for dealing with urgent cases, raise the profile and visibility of human rights adjudication on the continent, and ensure that cases are finalised with dispatch.[143]

The African Court comprises 11 judges elected by the AU Assembly from member states of the AU. This raises a fundamental question as to whether the Assembly can elect onto the Court nationals of non-state party to the Court's Protocol. While only state parties to the Protocol may nominate candidates for election into the Court, it seems perfectly possible for nationals of non-state parties to be elected into the Court.[144] In 2017, all judges of the Court are nationals of states that have ratified the Protocol.[145] In the election of judges, the Protocol requires due consideration to be given to 'adequate gender representation'.[146] As at July 2017, the African Court comprises six male and five female judges.[147]

Another consideration in the election of judges is regional representation,[148] as well as representation of the main legal traditions.[149] The Protocol does not however require that the regions or principal legal traditions should be represented 'equally'. I argue that the requirement of regional representation is very problematic. If taken at a face value, it could result in over representation or under representation of certain regions or legal traditions. For instance, the composition of the African Court is in favour of Francophone states. As at July 2017, out of the 11 members constituting the Court, five are francophone, three are Anglophone, two Arabic speaking and one is from a Lusophone country.[150] The three

143 Viljoen (n 12 above) 414 - 420.
144 See Viljoen (n 12 above) 420. See also African Court Protocol, art 12(1).
145 African Court 'Current judges' http://www.african-court.org/en/index.php/judges/current-judges (accessed 12 February 2018).
146 African Court Protocol, art 12(2).
147 See n 156 above.
148 There are currently five regions in Africa: North, West, East, Central and South. See Viljoen (n 12 above) 422.
149 The main legal traditions in Africa include: common law, civil law, African customary law, Roman-Dutch law, and the Islamic/ Shari'ah systems. See Viljoen (n 12 above) 422.
150 African Court, 'Current judges' http://en.african-court.org/index.php/judges/current-judges (accessed 16 October 2017).

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Anglophone countries representing the Common Law tradition are Kenya, Uganda (both in East Africa) and Malawi in Southern Africa. The two judges representing West Africa are both from francophone states – Côte d'Ivoire and Senegal. While this arrangement meets the requirement of the Protocol, it clearly does not reflect the nuances of the various legal traditions in the regions. An alternative arrangement would be to share the countries representing the Common Law tradition among the various regions, and to share judges representing the West African region between the two main legal traditions in that region.

(a) Jurisdiction and mandate

The African Court's contentious and advisory jurisdiction is wider than that of the African Commission. Its contentious jurisdiction for instance covers all disputes regarding the interpretation and application of the African Charter, the Court's Protocol and other human rights instruments ratified by a state that is party to a case before it.[151] Any of the following entities has direct access to the Court: the African Commission, state parties to the Court's Protocol, any African Intergovernmental organisation, and natural as well as legal persons from states that have made a declaration pursuant to article 34(6) of the Court's Protocol.[152]

The first entity competent to refer cases to the African Court is the African Commission. The Commission's competence in this regard is expansive. The Commission may refer cases to the Court 'at any stage', provided the state in respect of whom a case is referred has accepted the African Court Protocol.[153] It may refer a case that is already finalised if the state concerned failed to comply with its decisions, or a pending cases whether before making a ruling on admissibility or after it has 'part-heard' the case.[154] The Commission may also refer to the Court any case that reveals serious or massive human rights violations.[155]

The second entity that may refer cases to the Court is a state party to the Court's Protocol. This may happen in three instances. First, state parties may refer cases to the Court by way

151 African Court Protocol, art 3.
152 African Court Protocol, art 5.
153 2010 Rules of Procedure of the African Commission, rule 118(4).
154 See Viljoen (n 12 above) 428. See also Rule 118(1).
155 See 2010 Rules of Procedure of the African Commission, rule 118(3).

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of 'appeal' as respondents in a communication finalised by the African Commission.[156] Secondly, they may refer cases to the Court on behalf of their citizens where the rights of their citizens are violated by another state party to the Court's Protocol.[157] Thirdly, any state party to the Court's Protocol which has lodged an inter-state communication before the African Commission may refer such communication to the African Court.[158]

The third entity that may refer cases to the Court is 'African intergovernmental organisation'. In the case of *Falana v African Union,* the African Court by a majority of seven to four held that the African Court does not have jurisdiction over a suit instituted against the African Union, the AU not being a party to the Court's Protocol.[159] However, in terms of article 5(1)(e) of the Court's Protocol, the African Union, it is argued, may submit a case as an applicant to the Court as an 'African intergovernmental organisation'. It would be recalled that in 2013, the African Children's Rights Committee submitted a request to the Court seeking its advisory opinion on whether the Committee is competent under article 5(1)(e) of the Court's Protocol to refer cases to the African Court. The Court found that the African Children's Rights Committee is not competent to do so.[160]

The fourth entity that may submit cases to the African Court is NGOs and individuals. However, the right of NGOs and individuals to approach the Court is qualified. In order for the rights of NGOs and individuals to be activated in relation to a particular state, the state must have made a declaration pursuant to article 34(6) of the Court's Protocol. At the time of writing, tha is July 2017, only seven states – Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali and Tanzania – have made the relevant declaration.[161] Rwanda, which had made the declaration in 2013, withdrew its declaration via a letter to the Chairperson of the AU Commission in March 2016.[162] This means that NGOs and individuals may approach

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156 African Court Protocol, art 5(1)(c).
157 African Court Protocol, art 5(1)(d).
158 African Court Protocol, art 5(1)(b).
159 Application No 001/2011 - *Femi Falana v African Union*.
160 African Court 'List of all cases' http://en.african-court.org/index.php/cases#advisory-opinions (accessed 16 October 2016).
161 African Union (n 151 above).
162 See Centre for Human Rights 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court.html (accessed 16 October 2016).

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the African Court directly only with respect to seven of the 30 state parties to the African Court Protocol.

In order for any case submitted to the African Court to be admissible, the case must satisfy the admissibility requirements stipulated in article 56(1) to 56(7) of the African Charter.[163] In addition to this, an NGO intending to submit a case against any of the seven states that have made the article 34(6) must have been granted 'observer status' by the African Commission.[164] As at November 2017, the African Commission has granted observer status to a total of 477 NGOs.[165] The African Court may apply both the African Charter and other relevant international human rights treaties ratified by a state while adjudicating on a matter involving the state.[166]

(b) States' obligation to comply with judgments of the African Court

Judgments of the Court are final and binding on states. All state parties to the Court's Protocol undertake to comply with judgments of the Court and ensure their execution within the time stipulated by the Court.[167] While the AU Assembly has responsibility for ensuring that judgments of the Court are complied with, the Executive Council has the duty of following up the status of implementation of the Court's decisions.[168] The African Court has a duty to submit to the AU Assembly on a yearly basis a report of its activities in the preceding year. Specifically, the Court is required to disclose to the Assembly or any other relevant organs of the AU, states that have failed to comply with its judgments.[169]

2.3.3 African Children's Rights Committee

The African Children's Rights Committee was established under the African Charter on the Rights and Welfare of the Child, adopted on 11 July 1990, and entered into force 29

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[163] African Court Protocol, art 6.
[164] See African Court Protocol, art 5(3).
[165] African Commission on Human and Peoples' Rights 'Network: Non-governmental organisations' http://www.achpr.org/network/ (accessed 30 November 2017).
[166] African Court Protocol, art 3(1) and 7.
[167] African Court Protocol, art 30.
[168] African Court Protocol, art 29.
[169] African Court Protocol, art 31.

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November 1999.[170] The Committee comprises 11 members elected by the AU Assembly.[171] The Committee was formally inaugurated in April 2002.[172] It is headed by a Chair and three Vice Chairs elected by members from among themselves.[173] The Committee has three main functions: promoting and protecting the rights in the African Children's Rights Charter; monitoring the implementation of the Charter; and interpreting the provisions of the Charter.[174] It is also empowered to receive individual communications.[175]

As at 31 December 2015, the Committee has received four communications against state parties and has finalized only three - *IHRDA and OSJI v Kenya*,[176] *Hansungule v Uganda*,[177] and the *Centre for Human Rights and RADDHO v Senegal*.[178] The Committee in October 2016 finalised one of the communications submitted to it through amicable settlement.[179] Even though decisions of the Committee in individual communications are recommendatory in nature, it is argued that states have a legal obligation to implement them. As argued earlier in relation to the African Commission, obligations arising from individual communications are not new obligations created by the Committee's decisions; they are obligations assumed by states as a consequence of ratifying the African Charter and the African Children's Rights Charter.

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[170] The African Children's Rights Charter was adopted on 11 July 1990, and entered into force 29 November 1999. See Viljoen (n 12 above) 391.

[171] African Children's Rights Charter, art 33.

[172] DM Chirwa 'African human rights system' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 334.

[173] African Children's Rights Charter, art 38.

[174] African Children's Rights Charter, art 42.

[175] African Children's Rights Charter, art 44.

[176] Communication 002/09 *IHRDA and OSJI (on behalf of children of Nubian descent in Kenya) v Kenya*, decided by the African Children's Rights Committee on 22 March 2011.

[177] Communication 2/2009 *Hansungule and Others (on behalf of children in Northern Uganda) v Uganda*. This communication was decided at the Committee's 21st ordinary session, 15 - 19 April 2013.

[178] *Centre for Human Rights and La Rencontre Africaine pour la Defense des Droits de l'Homme v Government of Senegal* decided by the African Children's Rights Committee on 15 April 2004.

[179] African Children's Rights Committee 'Amicable Settlement on Communication No. 004' http://www.acerwc.org/amicable-settlement-on-communication-no-004/ (accessed 27 November 2016). See in Communication: No. 004/Com/001/2014 *Institute for Human Right and Development in Africa v Malawi*.

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2.3.4 Emerging architecture of regional HRTs in Africa

In addition to the three main human rights tribunals discussed above, other African regional human rights bodies have been 'created' but none have been operationalized.[180] For instance, the AU Constitutive Act established a Court of Justice, and provides that the composition and functions of the Court shall be defined by member states in a separate protocol.[181] The Protocol on the African Court of Justice was adopted on 11 July 2003.[182] While the Protocol on the African Court of Justice was yet to enter into force,[183] the AU in 2008 decided to create a new judicial institution, the African Court of Justice and Human Rights, thus merging the African Court of Justice with the African Court on Human and Peoples' Rights.[184] The Protocol merging the two courts – the Protocol on the Statute of the African Court of Justice and Human Rights – was adopted on 1 July 2008 but has not secured the necessary ratification to enable it come into force. [185]

While waiting for the Protocol on the Statute of the African Court of Justice and Human Rights to enter into force, the AU on 27 June 2014 adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). The Malabo Protocol changed the name of the African Court of Justice and Human Rights to 'African Court of Justice and Human and Peoples' Rights',[186] and extended the jurisdiction of the Court to include international crimes.[187] The Malabo Protocol also vests on the yet to be established court the jurisdiction to entertain matters or appeals arising from agreements concluded by international organisations recognized by the AU.[188] Such international organisations include regional economic communities

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180 See the Protocol on the African Court of Justice 2003; the Protocol on the Statute of the African Court of Justice and Human Rights 2008.

181 AU Constitutive Act, art 18.

182 African Union 'OAU/AU Treaties, Conventions, Protocols & Charters' http://www.au.int/en/treaties (accessed 24 September 2016).

183 The Protocol entered into force on 11 February 2009.

184 Protocol on the Statute of the African Court of Justice and Human Rights, arts 1 & 2.

185 African Union 'OAU/AU treaties, conventions, protocols & charters' http://www.au.int/en/treaties (accessed 27 November 2016).

186 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2004), art 8.

187 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014), art 3(1).

188 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014), art 3(2).

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(RECs).[189] This raises the question whether parties aggrieved with decisions of the ECOWAS Court of Justice, the East African Court of Justice and the SADC Tribunal could appeal to the new Court once the founding Protocol enters into force but this is still to be determined. It is also not yet clear how the multi-chamber Court established under the Malabo Protocol would operate. Article 4 of the Malabo Protocol states that the Court, if and when finally, operationalized, will complement the protective mandate of the African Commission. In addition to serving as a human rights court for Africa, the Court will function also as a court of justice of the AU and as an African regional criminal court.

2.4. The major sub-regional HRTs in Africa

Article 52 of the United Nations Charter preserves the rights of states to set up regional arrangements as are appropriate for regional action. Within the framework of article 52 of the UN Charter, the African Union, African Economic Community and regional economic communities (RECs) are all regional arrangements. Why then are RECs referred to as sub-regional arrangements? Malan argues that the concepts of 'sub-region' is unique to Africa.[190] At the end of colonial rule in the 1960s, African states were largely unstable and fragile.[191] Due to political instability and economic fragility, states in Africa were advised mainly by Western democracies and development partners to integrate economically and politically in order to achieve prosperity.[192] Political leaders on the continent clearly had no choice but to integrate if they were to 'undo' the balkanization of Africa brought about as a result of colonialism.[193] While regional integration at the continental level could not be realised rapidly due to several reasons including sovereignty concerns, uneven distribution of integration benefits, and lack of political will, geographically proximate states had

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[189] As above.
[190] M Malan 'The OAU and African sub-regional organisations: A closer look at the 'peace pyramid'' *Institute for Security Studies Occasional Paper No 36* (1999).
[191] LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 13 *SUR-International Journal on Human Rights* 119, 120.
[192] As above.
[193] S Sako 'Challenges facing Africa's regional economic communities in capacity building', The African Capacity Building Foundation (ACBF) Occasional paper No 5 2006, http://www.sarpn.org/documents/d0002737/RECs_Occasional_Paper5_ACBF_2006.pdf (accessed 27 October 2017); Viljoen (n 12 above) 472; Murungi & Gallinetti (n 191 above) 120.

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started coming together to create larger markets and economic consolidation through regional economic communities.[194]

In July 2017, Africa comprised at least 14 regional economic communities (RECs), eight of which are recognized by the AU as building blocks of economic integration in Africa.[195] The eight recognised bodies usually referred to as RECs in Africa are: the Arab Maghreb Union (AMU), Community of Sahel-Saharan States (CENSAD), Economic Community of West African States (ECOWAS), Economic Community of Central African States (ECCAS), East African Community (EAC), Inter-governmental Authority on Development (IGAD), Common Market for Eastern and Southern Africa (COMESA), and the Southern African Development Community (SADC).[196] Only very few of these sub-regional intergovernmental organisations provide for a permanent tribunal for the adjudication of disputes, described in this thesis as sub-regional tribunal. Below is an overview of the three main sub-regional tribunals that have adjudicated on significant human rights or human rights related cases.

2.4.1 ECOWAS Community Court of Justice (ECCJ)

The Economic Community of West African States (ECOWAS) was formed in 1975.[197] The objective of the Community is to promote regional cooperation and economic development 'for the purpose of raising the standard of living of its people'.[198] The treaty established a number of institutions including a judicial body referred to simply as 'the Tribunal of the Community'.[199] The Tribunal was charged with the responsibility of settling disputes and for ensuring just and lawful application of the provisions of the founding treaty.[200] The 1975 ECOWAS Treaty transferred to the Authority of Heads of State and

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194 Murungi & Gallinetti (n 191 above).

195 ST Ebobrah 'Litigating human rights before sub-regional Courts in Africa: Prospects and challenges' (2009) 17 *African Journal of International and Comparative Law* 79, 80; Office of the Special Adviser for Africa(OSAA), 'The regional economic communities (RECs) of the African Union' http://www.un.org/en/africa/osaa/peace/recs.shtml (accessed 27 October 2016).

196 Viljoen (n 12 above) 474 - 480.

197 See Treaty of the Economic Community of West African States 1975 (1975 ECOWAS Treaty). The treaty was adopted on 28 May 1975 and entered into force on 20 June 1975.

198 See 1975 ECOWAS Treaty, art 2.

199 See 1975 ECOWAS Treaty, art 4(1).

200 See 1975 ECOWAS Treaty, art 11(1).

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Government of ECOWAS the responsibility of adopting a protocol to prescribe the composition and competence of the Tribunal.[201] The Protocol was adopted in 1991.[202] The 1991 Protocol established the Community Court of Justice as a principal organ of ECOWAS, thus changing the name of the court from 'Tribunal of the Community'.[203]

(a) Jurisdiction

The jurisdiction of the Court under the 1991 Protocol was two-fold.[204] Firstly, the Court had jurisdiction over interpretation and application of the ECOWAS Treaty and other legal instruments adopted by ECOWAS including the Protocol establishing the Court.[205] Secondly, the Court had jurisdiction over proceedings commenced by member states on behalf of their nationals against other member states or an ECOWAS institution.[206] In order to activate the second leg of the Court's jurisdiction, it must be shown that attempts at amicable settlement have been made and failed.[207] The Court may also issue advisory opinion on any matter relating to the ECOWAS Treaty. However, the 1991 Protocol did not grant private individuals access to the Court.

In response to developments which have taken place at the international scene, the Authority of Heads of State and Government of ECOWAS on 30 May 1990 constituted a Committee of Eminent Persons to come up with a proposal for the review of the 1975 ECOWAS Treaty.[208] In its report, the Committee underscored the importance of access to the Court for private litigants.[209] The report of the Committee formed the basis of the 1993 Revised ECOWAS Treaty.[210] Under the revised Treaty, the ECOWAS acquired more

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[201] 1975 ECOWAS Treaty, art 11(2).
[202] See Protocol (A/P.I/7/91) on the Community Court of Justice.
[203] See 1991 Protocol on the Community Court of Justice, art 2; 1993 revised ECOWAS Treaty, art 15.
[204] See KJ Alter, LR Helfer & JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law*746.
[205] 1991 ECOWAS Court Protocol, art 9(1).
[206] 1991 ECOWAS Court Protocol, art 9(2).
[207] As above.
[208] See 1993 Revised ECOWAS Treaty, Preamble; ECOWAS Authority of Heads of State and Government Decision A/DEC.10/5/90 of 30 May 1990. See also Final report of the Committee of Eminent Persons, chap v.
[209] Final Report of the Committee of Eminent Persons for the Review of the ECOWAS Treaty (16 June 1992), quoted in Alter, Helfer & McAllister (n 204 above) 741.
[210] The 1993 Revised ECOWAS Treaty was adopted on 24 July 1993, and entered into force on 23 August 1995.

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responsibilities for security, good governance and human rights.[211] The Revised Treaty rededicated the Community to economic integration, introduced far reaching structural changes, created new organs such as the ECOWAS Community Parliament and strengthened existing organs.[212] One of the most significant additions following the 1993 revised Treaty is the proposal which increased the participation of civil society in the activities of the Community.[213] The 1993 revised ECOWAS Treaty however jettisoned the proposal for individual access to the ECOWAS Court.

(i) *Afolabi* case as the 'game changer'

A case filed by a Nigerian trader, Olajide Afolabi, provided the much-needed impetus for stakeholders to mount a campaign for vesting the ECOWAS Court with specific human rights jurisdiction.[214] In 2003, Mr Afolabi concluded arrangements with his customers in Benin for the purchase and delivery of certain good on a specified date. Afolabi sets out on the trip to the Benin but on getting to *Seme* border, he discovered to his disappointment that the border was closed on the order of agents of the Nigerian government. Security operatives at the border refused to grant him entry despite his entreaties. Because of his inability to make the trip, Afolabi suffered huge losses in his business.

As a Community citizen, Afolabi commenced an action at the ECOWAS Court against the government of Nigeria. This was to become the maiden case decided by the new Court. Afolabi asked the ECOWAS Court to declare that the circumstances that led to the closure of the border violated his right to freedom of movement, free movement of goods and services as well as the right of ingress and egress as guaranteed in the 1993 revised ECOWAS Treaty and as well as article 12 of the African Charter. The government filed a preliminary objection arguing that under the revised ECOWAS Treaty and other

211 Alter, Helfer & McAllister (n 204 above) 744.
212 See Alter, Helfer & McAllister (n 204 above) 743. ECOWAS Member states had in 1978 and 1981 respectively adopted the Protocol on Non-Aggression and the Protocol relating to Mutual Defence Assistance. The Liberian crisis led to the formation of the Economic Community of West African States Monitoring Group (ECOMOG). Although a monitoring outfit, ECOMOG contributed significantly in quashing unrests and civil wars in Sierra Leone, Guinea Bissau, and Côte d'Ivoire.
213 Alter, Helfer & McAllister (n 204 above) 745.
214 See ECW/CCJ/JUD/01/04 *Afolabi Oladjide v Nigeria.*

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instruments defining the jurisdiction of the Court, the only time a matter involving a national of any state party to the ECOWAS Treaty may be heard by the Court is when such matters have been filed by a state on behalf of its national. The legal counsel to the applicant replied by stating that the revised ECOWAS Treaty did not envisage the situation where a national drags his or her own country before the ECOWAS Court. That would have made Nigeria both the applicant and respondent in the same case. In the end, the Court upheld the preliminary objection, and dismissed the case on grounds of lack of jurisdiction. Despite its unfavourable decision, the Court admitted that the *Afolabi* case raised 'a serious claim touching on free movement and free movement of goods.'[215]

After the *Afolabi* case was dismissed, it became glaring to all stakeholders that the promises of economic integration through ECOWAS was nothing more than an empty shell. Even though the Court knew a situation like that would occur, the decision in the *Afolabi* case awoken all stakeholders to the grim reality facing cross-border businesses. The decision exposed the weakness of the 'ECOWAS economic integration project'. On the very day judgment was delivered in the *Afolabi* case, the Judges issued a joint press release lamenting the unfairness of their decision and calling on all member states to allow private litigants access to the Court.[216] To demonstrate their commitment to this campaign, the Court published a booklet where they elaborated on why the ECOWAS laws that produced the *Afolabi* decision must change. This booklet was widely disseminated by the Court.[217]

The Court continued to engage with the media, civil society, bar associations, ECOWAS secretariat and government officials on the need to allow private litigants have access to the Court. The denial of access to Community citizens flies in the face of the slogan describing the Community as 'ECOWAS of peoples' as opposed to 'ECOWAS of states'. During this process, a vibrant lobby group was formed within the West African Bar Association. The lobby group advocated for granting individuals access to the Court in human rights matters.[218] The turning point in the campaign process was when the

[215] ECW/CCJ/JUD/01/04 *Afolabi Oladjide v Nigeria*, para 55.
[216] L Okenwa 'ECOWAS Court' *Thisday (Nigeria)* (28 April 2004), referred to in Alter, Helfer & McAllister (n 204 above) 750.
[217] As above.
[218] Alter, Helfer & McAllister (n 204 above) 752.

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ECOWAS Secretariat joined the call for the expansion of the Court's jurisdiction. The Secretariat officials had always wanted the Court to be more active. The Court is a permanent body; its judges work full time with huge budgetary implication, yet the Court had no case in its docket. Officials at the ECOWAS Secretariat felt expanding the jurisdiction of the Court was one sure way to get the judges to work for the salary they earn.[219]

Ultimately, the Protocol expanding the jurisdiction of the Court was adopted by the ECOWAS Authority in 2005 with little or no opposition from government representatives. The Protocol contains provisions that limits the powers of states on many grounds. Why did state officials not raise their voice in opposition even if they would fail eventually? Following series of interviews with stakeholders in ECOWAS member states, Alter, Helfer and McAllister, argued that the involvement of the ECOWAS Secretariat was critical. States trusted the ECOWAS Secretariat, and the NGO lobby group partnered with the Secretariat, activist judges of the ECOWAS Court and the West African Bar Association to build an influential civil society coalition in support of the campaign to grant explicit human rights jurisdiction to the ECOWAS Court. The group also met with heads of state and top-level officials in several countries to get their 'buy in' into the campaign.[220]

(ii) Jurisdiction under the 2005 ECOWAS Supplementary Protocol

Under article 3 of the 2005 Supplementary Protocol, the Court is competent to receive and determine cases involving the interpretation and application of the ECOWAS Treaty and other ECOWAS instruments including non-binding soft law standards.[221] The jurisdiction of the Court may also be invoked where a member state fails to honour its obligation under the ECOWAS Treaty or other Community laws. This implies the possibility of inter-state human rights complaints. Any matter involving the Community, or its staff is also within the Court's competence. In addition to these, the Court has jurisdiction over sundry

[219] For a comprehensive report and report of in-depth interviews with major stakeholders, see Alter, Helfer & McAllister (n 204 above) 737 - 779.
[220] Alter, Helfer & McAllister (n 204 above) 752.
[221] See 1991 Protocol, art 9 as amended by art 3 of the 2005 Supplementary Protocol.

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matters such as action for damages against officials or institutions of the Community for actions taken in official capacity.[222]

Article 9(4) of the 1991 Protocol, as amended by article 3 of the 2005 Supplementary Protocol, provides: 'the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.' While article 3 is the most fundamental and transformative provision of the 2005 Supplementary Protocol, the provision arguably retains the wider jurisdiction on non-human rights cases. Section 4 of the Supplementary Protocol lists the categories of persons that have access to the Court to include: member states, specified ECOWAS organs, individuals and corporate bodies, staff of the Community or the courts of member states.[223] Some distinctive features of the Court's jurisdiction under the 2005 Supplementary Protocol include: direct access for human rights litigants, an open-ended catalogue of human rights and human rights instruments, as well as the absence of a requirement for exhaustion of domestic remedies.[224]

(b) States' obligation to comply with judgments of the ECCJ

Judgments of the ECCJ are binding on states.[225] The process of execution of ECCJ judgments begins when the Registrar of the Court submits a writ of execution to a relevant state. In terms of the 2005 Supplementary Protocol, states have an obligation to receive the writ of execution and give effect to them according to the rules of procedure for enforcement of judgments in place in their respective countries.[226] Adjolohoun has argued that the reference to domestic rules of procedure entails no more than for state officials to verify that the writ of execution is from the registry of the ECCJ.[227] It is also not clear whether only states that are parties to the case have the obligation to receive and register the writ of execution from the ECCJ or if states that are non-parties to the case should also do so. A purposive interpretation of article 6 of the 2005 Supplementary Protocol supports

[222] See 1991 Protocol, art 9 as amended by art 3 of the 2005 Supplementary Protocol.
[223] See 1991 Protocol (as amended), art 10; 2005 Supplementary Protocol, art 4.
[224] Alter, Helfer & McAllister (n 204 above) 755.
[225] 1999 ECOWAS Court Protocol, art 24 as amended by 2005 ECOWAS Supplementary Protocol, art 6.
[226] 1999 ECOWAS Court Protocol, art 24 as amended by 2005 ECOWAS Supplementary Protocol, art 6.
[227] HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: compliance and influence' unpublished LLD thesis, University of Pretoria, 2013, 55.

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the latter view. States are required to appoint competent national authorities responsible for receiving and enforcing a writ of execution from the Court.[228] As at July 2017, only four countries – Nigeria, Guinea Bissau, Mali and Burkina Faso – had designated the relevant national authority.[229] The other 11 countries are at various levels of compliance; the national process of designation is ongoing.

In 2012, the Authority of Heads of State and Government adopted the Supplementary Act A/SP.13/02/12 on sanctions against member states that fail to honour their obligations to ECOWAS.[230] Article 2 of the 2012 Supplementary Act defined member states' obligations to ECOWAS to include the obligation to 'respect and protect human rights'[231] The Act further states that the judgments of the ECOWAS Community Court of Justice are binding on member states, ECOWAS institutions as well as individuals and corporate bodies within ECOWAS.[232] In terms of the 2012 Supplementary Act, non-compliance with decisions of the ECCJ constitutes failure to adhere to obligations states owe the Community. The Act enumerates detailed sanctions, political and judicial, which may be imposed on a non-complying state. Whenever a state fails to honour its obligations under any of law of the Community, the ECCJ may impose financial and other sanctions against the defaulting member state.[233] Political sanction which may be imposed on states that fail to comply with the judgments of the ECCJ include: suspension from participation in Community activities, freezing of financial assets of the state, arms embargo, travel ban, and suspension of the member state concerned from all ECOWAS decision-making organs. The sanctions are to be imposed in increasing order of severity.[234] Sanctions imposed on a member state as a result of non-compliance with Community obligations are not

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228 1999 ECOWAS Court Protocol, art 24 as amended by 2005 ECOWAS Supplementary Protocol, art 6.

229 'Forty-six cases filed before the ECOWAS Court during the last legal year' http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=336:forty-six-cases-filed-before-the-ecowas-court-during-the-last-legal-year&catid=14:pressrelease&Itemid=36 (accessed 31 July 2017).

230 See Supplementary Act A/SP.13/02/12 on Sanctions against Member States that Fail to Honour their obligations to ECOWAS, fortieth ordinary session of the Authority of Heads of State and Government, Abuja, 16 to 17 February 2012.

231 ECOWAS Supplementary Act A/SP.13/02/12, art 2.

232 ECOWAS Supplementary Act A/SP.13/02/12, art 3.

233 ECOWAS Supplementary Act A/SP.13/02/12, art 5.

234 ECOWAS Supplementary Act A/SP.13/02/12, art 13.

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appealable to the ECCJ or any other court or tribunal.[235] The records of the ECCJ indicates that 21 of the total cases finalised by the Court have been fully complied with while 34 other cases are at various stages of implementation.[236] In Chapter 3, this thesis investigates the extent to which Nigeria and the Gambia have complied with the various decisions of the ECCJ.

2.4.2 East African Court of Justice (EACJ)

The East African Community (EAC) was first established in 1967.[237] The Community was dissolved in 1977 and later re-established in 1999 with the adoption a new founding treaty.[238] The Treaty for the Establishment of the EAC (EAC Treaty) was signed on 30 November 1999 and entered into force on 7 July 2000. Kenya, Tanzania and Uganda are the founding member states of the EAC. Membership of the Community is open to any geographically proximate state that expresses willingness to abide by EAC's membership conditions as stipulated in article 3 of the EAC Treaty. Burundi and Rwanda acceded to the Treaty and have since 1 July 2007 become full members of the EAC.[239] The main aim of the EAC whose headquarters is in Arusha, Tanzania, is to deepen cooperation among states in the East African sub-region in a vast number of areas including trade, culture, research, technology, security and legal affairs for the mutual benefits of the participating states.[240] One of the seven principal organs established under the 1999 EAC Treaty is the East African

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[235] ECOWAS Supplementary Act A/SP.13/02/12, art 16(4).

[236] 'ECOWAS Court holds 89 sessions, delivers 34 judgements in 2015/2016 legal year' *Premium Times* 28 September 2016 http://www.premiumtimesng.com/foreign/west-africa-foreign/211540-ecowas-court-holds-89-sessions-delivers-34-judgements-20152016-legal-year.html (accessed 1 December 2016). The Court, however, does not provide a list of these cases that have been complied with.

[237] Regional integration in East Africa dates back to the colonial era. Kenya, Uganda and later Tanzania have formed a Customs Union in 1917. This was followed by the East African High Commission in 1948 and the East African Common Services Organisation in 1961. See A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' unpublished LLD thesis, University of Pretoria, 2014, 27.

[238] See Treaty for the Establishment of the East African Community (1999 EAC Treaty), art 1.

[239] East African Community, 'Overview of the EAC' http://www.eac.int/about/overview (accessed 29 September 2016). South Sudan has recently acceded to the Treaty on 15 April 2016. It will become full member once the instrument of accession is deposited with EAC Secretary General

[240] 1999 EAC Treaty, art 5(1).

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Court of Justice (EACJ).[241] The Court was formally inaugurated at Arusha on 30 November 2001.[242]

The EACJ was established as a judicial body in terms of the EAC Treaty and its primary role is to ensure 'adherence to law in the interpretation and application of and compliance with the Treaty.'[243] The Court consists of two chambers: First Instance Division and Appellate Division.[244] The First Instance Division has original jurisdiction on matters to which the Court has jurisdiction subject to a right of appeal to the Appellate Division.[245]

At inception, the Court composed of six Judges, two from each of the three founding state parties.[246] With the accession of Rwanda and Burundi to the EAC Treaty in 2007, the membership of the Court was expanded to ten; five of which serve in each division of the Court. The EAC Treaty allows for a maximum of 15 Judges appointed by the 'Summit' from among persons recommended by state parties referred to as 'Partner States' in the EAC Treaty.[247] Not more than ten of the Judges serve at the First Instance Division while at least five serve in the Appellate Division.[248] As at the time of writing, only five judges have been appointed to the First Instance Division.

(a) Jurisdiction

The primary jurisdiction of the EACJ is to interpret and apply the EAC Treaty.[249] In addition to ensuring adherence to law in the interpretation and application of the EAC Treaty, the EACJ may exercise such other original, appellate or supervisory jurisdiction as may be

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241 See 1999 EAC Treaty, art 9. The EACJ succeeds the Court of Appeal for East Africa (CAEA) which is the main judicial organ of the defunct EAC. Other organs of the EAC include: The Summit, the Council, the Co-ordination Committee, Sectoral Committees, the East African Legislative Assembly, the Secretariat and such other organs as may be established by the Summit.

242 TO Ojienda 'Alice's adventures in wonderland: Preliminary reflections on the jurisdiction of the East African Court of Justice' (2004) 2 *East African Journal of Human Rights and Democracy* 94, 94; Possi (n 336 above) 115.

243 Treaty for the Establishment of the East African Community, art 23.

244 1999 EAC Treaty, art 23(2).

245 1999 EAC Treaty, art 23(3).

246 East African Court of Justice, 'Establishment' http://eacj.org/?page_id=19 (accessed 29 September 2016).

247 1999 EAC Treaty, art 24.

248 As above.

249 1999 EAC Treaty, art 27(1).

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conferred on it by the Council of Ministers.[250] For this purpose, the EAC Treaty enjoins state parties to conclude a Protocol to operationalise the extended jurisdiction.[251] Ojeinde argues that the original intention of the drafters of the EAC Treaty was to develop the jurisdiction of the EACJ progressively, commencing with interpretation and application of the Treaty, and then to other jurisdictions when the relevant instruments have been adopted.[252] The argument above cannot be faulted because the Treaty states clearly 'the Court shall *initially* have jurisdiction over the interpretation and application of this Treaty'.[253]

However, the above argument misses a very important point. While the EACJ may not qualify as a fully-fledged human right court with competence to receive human rights complaints, it has jurisdiction where actions of the state parties contravene the principles and objectives of the Community. Arguably, the Court has inherent powers to issue redress whenever actions of the Community organs or state parties is inconsistent with agreed principles stipulated in the Treaty. This is not only applicable to human rights but also principles relating to sovereign equality of states, pacific settlement of dispute, and equitable distribution of benefits as enunciated in article 6 of the founding Treaty. In addition to these, the EAC Treaty expressly stipulates that recognition and respect for human rights shall be one of the factors to be considered for admission of new members into the Community.[254]

One of the 'Fundamental Principles' of the EAC is 'good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.'[255] Interestingly, human rights was not just listed as a principle to be followed; state parties actually 'undertake to abide by the principles of good

[250] 1999 EAC Treaty, art 27(2).
[251] 1999 EAC Treaty, art 27(2).
[252] TO Ojienda 'The East African Court of Justice in the re-established East Africa Community: Institutional structure and function in the integration process' (2005) 11 *East African Journal of Peace & Human Rights* 220, 220.
[253] 1999 EAC Treaty, art 27(1).
[254] 1999 EAC Treaty, art 3(3).
[255] 1999 EAC Treaty, art 6(d).

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governance, including adherence to the principles of democracy, the rule of law, social justice *and the maintenance of universally accepted standards of human rights*.'[256] Thus the human rights mandate of the EACJ derives from articles 6(d) and 7(2) of the EAC Treaty.

Despite the clear reference to human rights as a fundamental principle of the EAC in articles 6 and 7 of the EAC Treaty, the EACJ has demonstrated considerable reluctance to rely on the 'human rights clause' as the basis for adjudicating on human rights related cases. Rather, the Court has been more inclined towards the 'rule of law, democracy and good governance' clause. This is perhaps due to the specific restriction placed on the Court's human rights jurisdiction under article 27(2) of the EAC Treaty.[257] As discussed earlier, this provision makes the exercise of 'human rights jurisdiction' conditional on the adoption of a supplementary protocol.

Article 27(2) may be viewed in two ways. In a broad sense, it could imply that the Court is forbidden from entertaining any kind of matter that contains allegations of human rights violations. In a narrow and restrictive sense, it could indicate that the Court could adjudicate on any matter alleging a breach of states' obligations under EAC Treaty but may not develop systematic rules of procedure for handling human rights petitions until a protocol has been adopted for that purpose. The practice of the Court shows that its leans towards the restrictive interpretation to article 27(2). In several cases, the EACJ has held that it will not abdicate its duty of applying and interpreting the EAC Treaty just because there are elements of human rights violation in a matter referred to it.[258] In other words, the Court can hardly escape dealing with human rights.[259]

The EAC Treaty empowers state parties, the Secretary General of the EAC and all legal and natural persons to refer to the Court for determination matters relating to the 'legality of any act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such act, regulation, directive, decision or action is

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[256] 1999 EAC Treaty, art 7(2).
[257] See Possi (n 237 above) 64.
[258] See for instance *James Katabazi and 21 others v Secretary General of the East African Community and Attorney General of the Republic of Uganda* REF NO 1 of 2007, decided on October 31, 2007 (*Katabazi* case) 39; Possi (n 237 above) 98.
[259] See Possi (n 237 above) 119.

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unlawful or is an infringement of the provisions of this Treaty.'[260] In the case of a reference by individuals, the reference must be made within two months of the action or omission complained of.[261] This limitation period was imposed following a failed attempt by the government of Kenya to abolish the EACJ. The proposal to abolish the EACJ was the aftermath of the Court's ruling in the case of *Anyang Nyong'o v Attorney General of Kenya*[262] which nullified the election of a Kenya national into the East African Legislative Assembly.[263] Although the proposal to abolish the EACJ failed, Kenya succeeded in securing a revision of the EAC Treaty. The amended Treaty introduced an appellate chamber, added a new ground for removal of judges, restricted the court's material jurisdiction and imposed, as stated earlier, a limitation period for private litigants intending to submit complaints to the EACJ.[264]

Even though the EACJ has no explicit human rights jurisdiction, the Court has established itself beyond any dispute that it has jurisdiction over matters alleging violation of 'rule of law, democracy and good governance.'[265] Using this catchphrase, the Court relying on the EAC Treaty has resolved cases that are essentially human rights in nature. The Court has decided cases related to the unlawful arrest of some applicants by the Ugandan military after applicants had been granted bail by a High Court;[266] the failure of the government of Kenya to prevent, investigate and prosecute perpetrators of the 2007 post-election violence;[267] and the incommunicado detention of a military officer by the government of Rwanda.[268]

The question whether the EACJ has jurisdiction to entertain human rights cases was first raised in 2007 in the case of *Katabazi and 21 others v Secretary General of the EAC (Katabazi*

260 1999 EAC Treaty, arts 28, 29 & 30.
261 1999 EAC Treaty, art 27(2).
262 Reference No 1 of 2006 & Appeal No 1 of 2009.
263 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293, 300 - 306.
264 As above.
265 Possi (n 237 above) 107; see also S Spelliscy 'The proliferation of international tribunals: A chink in the armor' (2001) 40 *Columbia Journal of Transnational Law* 143, 144.
266 *Katabazi* case.
267 *Independent Medical Unit v Attorney General of Kenya* (*Independent Medical Unit* case) Reference No 3 of 2010.
268 *Rugumba v Attorney General of Rwanda* (*Rugumba* case) Reference No 8 of 2010.

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case).[269] In that case, the Court asked: 'Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No, it does not have.'[270] In that case, the applicants alleged that sometimes in 2004, they were charged with treason before the High Court of Uganda. On 16 November 2006, the High Court granted them bail. While their counsel was preparing documentations for their release, armed security personnel surrounded the courtroom and re-arrested them. The applicants claimed before the Constitutional Court of Uganda that this interference with judicial proceedings was unconstitutional. The Constitutional Court agreed with the applicants. Despite the decision of the Constitutional Court, the government of Uganda refused to release the applicants; thus, the reference to the EACJ.

Before the EACJ, the applicants claimed that the refusal of the respondent state to respect and enforce the decisions of the High Court and the Constitutional Court amounted to violation of articles 6, 7(2) and 8(1)(c) of the EAC Treaty. Because the subject matter of the case relates to human rights violation, the respondent urged the Court to dismiss the case for lack of jurisdiction. The Court held that although it has no human rights jurisdiction, it nonetheless has jurisdiction to interpret and apply the EAC Treaty even if the case involves human rights violations. In the words of the Court: 'While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference involves allegations of human rights violations.'[271]

The Court, in *Mohochi v Attorney General of Uganda* (*Mohochi* case),[272] emphasised that domestic legislation such as the Ugandan Citizenship and Immigration Act cannot be relied upon as excuse for deviating from EAC Treaty obligations.[273] The Court also reiterates its earlier position that the mere inclusion of human rights in a case does not preclude the Court's jurisdiction.[274] In all subsequent cases of the Court in which the jurisdiction of the

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[269] *Katabazi* case.
[270] *Katabazi* Case, 14.
[271] *Katabazi* case.
[272] *Mohochi v Attorney General of Uganda* (*Mohochi* case) Reference No 5 of 2011. Judgment was delivered on 17 May 2013.
[273] See *Mohochi* case (n 272 above) para 130(v).
[274] *Mohochi* case (n 272 above) para 26.

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EACJ in relation to human rights has come to question, the Court has consistently maintained the reasoning in the *Katabazi* case.[275] Importantly, similar reasoning was adopted in the case of *African Network for Animal Welfare v Attorney General of Tanzania* which will be discussed in Chapter 3 of this thesis.

Most of the earlier 'human rights related decisions' of the EACJ originated from the First Instance Division. However, in the recent case of the *Democratic Party v The Secretary General of the EAC and others* (*Democratic Party* case),[276] the Appellate Division reaffirmed the limited human rights jurisdiction of the EACJ. The applicant in the case is a political party in Uganda. The applicant essentially challenged the failure of the governments of four East African states, namely Uganda, Kenya, Rwanda and Burundi to make the article 34(6) declaration accepting individual access to the African Court. The argument of the applicant is that such failure violates provisions of the EAC Treaty and the African Charter.[277] It was while the case was pending before the East African Court that Rwanda made the necessary declaration under article 34(6) of the African Court Protocol on 22 January 2013.[278] It would be recalled that the government of Rwanda had on 24 February 2016 sent a *note verbale* to the AU Commission officially withdrawing its article 34(6) declaration.[279]

The First Instance Court rejected the argument of the Democratic Party stating that states have a discretion on if, and when, to make the article 34(6) declaration. It further held that it lacked jurisdiction to find a violation of the African Charter. On appeal, the Appellate Court held that the Court of First Instance erred in law when it declined jurisdiction over

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[275] See the cases of *Masenge v Attorney General of Burundi* Reference No 9 of 2012; *Ndorimana v Attorney General of Burundi* Reference No 2 of 2013. See also Open Society Justice Initiative, 'Case digest: Human rights decisions of the West African Court of Justice' (2015) https://www.opensocietyfoundations.org/sites/default/files/case-digests-eacj-20150521.pdf (accessed 11 October 2016).

[276] Appeal No 1 of 2014 (*The Democratic Party* Appeal case) http://eacj.org/wp-content/uploads/2014/02/REFERENCE-NO-2-of-2012-Democratic-party-VS-SG-and-4-Others.pdf (accessed 11 October 2016).

[277] The provisions alleged to have been violated are articles 6, 7(2), 8(1)(c), 126 & 130 of the EAC Treaty as well as articles 1, 2, 7, 13, 26, 62, 65 & 66 of the African Charter.

[278] *The Democratic Party* Appeal case, para 6.

[279] See Centre for Human Rights 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court.html (accessed 11 October 2016).

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interpretation of the African Charter. The EACJ Appeal Division, on 28 July 2015 dismissed the appeal but held that the EACJ has jurisdiction to ensure adherence to the African Charter and its supplementary Protocols.[280]

The EACJ Appellate Division stated as follows:

> … nothing can preclude the East African Court of Justice from referring to the relevant provisions of the Charter, its Protocol and the Vienna Convention on the Law of Treaties in order to interpret the Treaty. In as far as the Articles quoted above especially Article 6(d) recognize the Charter's relevance in promotion and protection of human and peoples' rights, then compliance with those provisions of the Charter become, ipso jure, an obligation imposed upon the Partner States under the Treaty.[281]

The Court clearly maintains that the EACJ has jurisdiction to interpret the African Charter in the context of the EAC Treaty. It has been argued that the reasoning in the *Democratic Party* case demonstrates a further and clear decision by the EACJ to establish for itself a fully-fledged human rights jurisdiction.[282] Since about 90 percent of the cases in the EACJ's docket are human rights related, it is only logical for the Court to progressively adjust its stance regarding its human rights jurisdiction if it wants to stay relevant in the sub-region.[283]

(b) States' obligation to comply with judgments of the EACJ

Once a dispute has been referred to the EACJ, states are required to refrain from actions which may aggravate the dispute or detract from the dispute resolution process.[284] Judgments of the EACJ are binding on states; in order words, states have a legal obligation to implement them. As soon as the judgment of the Court has been communicated to the

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280 *The Democratic Party* Appeal case, para 79(II).

281 *The Democratic Party* Appeal case, para 71.

282 See A Possi 'It's official: The East African Court of Justice can now adjudicate human rights cases' *AfricLaw* 1 February 2016 https://africlaw.com/2016/02/01/its-official-the-east-african-court-of-justice-can-now-adjudicate-human-rights-cases/ (accessed 11 October 2016).

283 As above. As at July 2017, the Draft Protocol extending the jurisdiction of the EACJ to cover human rights violations has been prepared by the EAC Secretariat, but it has not yet been adopted. See also A Possi 'Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice' (2015) 15 *African Human Rights Law Journal* 192, 209; SB Bossa 'Towards a Protocol extending the jurisdiction of the East African Court of Justice' (2006) 4 *East African Journal of Human Rights and Democracy* 31, 31.

284 EAC Treaty, art 38(2).

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state, state officials must take measures without delay to give effect to it.[285] As the Court does not 'execution machinery' to compel the implementation of its judgments, responsibility for implementation of the Court's judgments rests on member states of the EAC.[286] State compliance therefore depends largely on the political willingness of member states. The procedure for the execution of judgments of the Court which impose financial obligations on states are governed by the rules of civil procedures applicable in each state.[287] Upon receipt of the judgment of the EACJ, duly certified by the Court's registrar, the state affected by the judgment is required to proceed to execute the judgment. Neither the EAC Treaty nor the Rules of Procedure of the EACJ provides for ways by which implementation of the Court's decisions is monitored.[288]

2.4.3 SADC Tribunal

The Southern African Development (SADC) is a regional economic community comprising 15 southern African states.[289] It was established in 1992 to replace the Southern African Development Coordination Conference (SADCC).[290] The Treaty establishing the Community was adopted on 17 August 1992.[291] The Treaty established the following principal institutions for the Community: the Summit of Heads of State and Government, the Council of Ministers, Commission, the Standing Committee of Officials, the Secretariat, and the Tribunals.[292] The focus of this section is on the Tribunal.

(a) Jurisdiction

The role of the SADC Tribunal (now defunct) was threefold: ensuring adherence to the SADC Treaty, ensuring proper interpretation of the SADC Treaty and other subsidiary

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285 EAC Treaty, art 38(3).
286 See Possi (n 237 above) 178.
287 EAC Treaty, art 44.
288 See, for instance, Possi (n 237 above) 178.
289 Southern African Development Community 'About SADC' http://www.sadc.int/about-sadc/ (accessed 10 October 2016).
290 E de Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' (2013) 28 *ICSID Review* 1.
291 Southern African Development Community 'Documents and publications: Declaration & treaty of SADC (1992)' http://www.sadc.int/documents-publications/show/Declaration__Treaty_of_SADC.pdf (accessed 10 October 2016).
292 1992 SADC Treaty, art 9.

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instruments, and adjudicating on disputes referred to it.[293] The material jurisdiction of the Tribunal covered disputes relating to the interpretation and application of the SADC Treaty and other protocols as well as subsidiary instruments adopted by SADC institutions.[294] The Tribunal was first inaugurated on 18 November 2005.[295] Its seat was in Windhoek, Namibia.[296]

As a result of the rulings, especially the *Campbell* decisions, made by the Tribunal against the government of Zimbabwe, the Tribunal was suspended in 2010.[297] On 18 August 2014 during a SADC Summit at Victoria Fall, Zimbabwe, a new Protocol on the SADC Tribunal was adopted.[298] When the new Protocol eventually come into force, the jurisdiction of the SADC Tribunal will be limited to inter-state disputes, and only member states of SADC will be competent to refer a dispute to the Tribunal.

(b) States' obligation to comply with judgments of the suspended SADC Tribunal

Decisions of the SADC Tribunal are final and binding on state parties, and enforceable in all state parties of the Community.[299] The law and rules of procedure for the enforcement of foreign judgment in the respective member states are applicable to the enforcement of the Tribunal decisions. It is the responsibility of all state parties as well as institutions of the Community to take all measures to ensure the judgments of the Tribunal are executed and complied with.[300] Where a state party fails or delays in executing a judgment of the Tribunal, any state concerned shall bring such non-compliance to the attention of the Tribunal and the Tribunal shall report the non-complying state to the Summit for appropriate action.[301]

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[293] 1992 SADC Treaty, art 16(1).
[294] 2000 SADC Tribunal Protocol, art 14.
[295] Southern African Development Community 'SADC Tribunal' http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 10 October 2016).
[296] Southern African Development Community 'SADC Tribunal' http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 12 October 2016).
[297] As above.
[298] Mike Campbell Foundation, 'New Protocol on SADC Tribunal', http://www.mikecampbellfoundation.com/page/new-protocol-on-sadc-tribunal (accessed 27 August 2015).
[299] 2000 SADC Tribunal Protocol, art 24.
[300] 2000 SADC Tribunal Protocol, art 32(2).
[301] 2000 SADC Tribunal Protocol, art 32(5).

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Notwithstanding the disbandment of the Tribunal and the closure of the Tribunal to private individuals, the obligations of member states of SADC to execute, implement and comply with all the existing 19 decisions of the defunct SADC Tribunal remain active. It will thus be interesting to investigate in chapter 3 of the thesis the extent to which the government of Zimbabwe has complied with the existing judgments of the Tribunal, and whether there is a consistent pattern between the 'behaviour' of Zimbabwe's officials to the decisions of the SADC Tribunal and those of the African Commission.

2.4.4 Emerging architecture of sub-regional tribunals in Africa

In addition to the three main sub-regional HRTs whose jurisprudence form the basis of the analysis in this thesis, there are other less known sub-regional tribunals in Africa. The founding treaties of each of the following sub-regional intergovernmental organisations established at least one judicial body: the Common Market for Eastern and Southern Africa (COMESA), Organisation for the Harmonisation of Business Law in Africa (OHBLA or OHADA), West African Economic and Monetary Union (UEMOA),[302] Economic Community of Central African States (ECCAS),[303] Economic and Monetary Community of Central African States (CEMAC), Southern Africa Custom Union (SACU),[304] and the Economic Community of Great Lake Countries (CEPGL).[305]

Although several sub-regional courts exit in the African judicial landscape, only three of them – the ECCJ, EACJ and the SADC Tribunal – have decided significant human rights related cases.[306] Of these three, only the ECCJ has clear and unlimited jurisdictional mandate to adjudicate human rights cases.[307] The other two – the EACJ and the SADC Tribunal (before its suspension in 2010) – repurposed their mandate and did craft a 'limited human rights mandate' for themselves through creative interpretive strategies. It is expected that as African RECs grow in size and sophistication, more sub-regional tribunals

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302 See 1996 WAEMU Treaty, art 16 <http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=203554> (accessed 12 October 2016).

303 ECCAS '*Organes de la CEEAC*' http://www.ceeac-eccas.org/index.php/fr/a-propos-de-la-ceeac/organes-de-la-ceeac (accessed 12 October 2016).

304 2002 SACU Agreement, arts 7(f) & 13.

305 1976 CEPGL Treaty, arts 5 & 24-30.

306 See JT Gathii 'Saving the Serengeti: Africa's new international judicial environmentalism' (2016) 16 *Chicago Journal of International Law* 391.

307 As above.

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will be established and operationalised. As these tribunals find a niche for themselves to justify their existence, they could as well take on limited human rights jurisdiction like the EACJ and the SADC Tribunal.

2.5. Chapter conclusion

This chapter set out to investigate the first research question: 'what constitutes regional and sub-regional HRTs in Africa, and to what extent do states have obligations to comply with their decisions?' For this purpose, the chapter provides background information about the mandate, jurisdiction and jurisprudence of regional and sub-regional courts in Africa as well as the legal status and methods of enforcing their decisions and judgments. The background information on the *modus operandi* of the various HRTs in Africa is useful before discussing the status of compliance with decisions of the tribunals or how and why states comply with those decisions. It is difficult to fully appreciate why a state may or may not comply with the decisions of a tribunal without some working understanding about the institutional designs of the tribunals, and the political milieu in which the tribunals are situated.

The chapter argues that Africa currently has three main bodies that perform primarily the function of adjudicating human rights complaints at the continental level, namely: The African Commission, the African Court and the African Children's Rights Committee. While two of these tribunals – the African Commission and the African Children's Rights Committee – are quasi-judicial in nature, the African Court has the full character and powers of a court. As at July 2017, discussions are focused on how to restructure the African human rights architecture through the establishment of a multi-chamber court; however, the Protocols containing these reforms are yet to enter into force.

The chapter notes that decisions and reparation orders of the African Commission and those of the African Children's Rights Committee are generally considered as 'non-binding'. For instance, states usually argue that decisions of the Commission are no more than 'mere recommendations' which they may or may not implement. The chapter argues that, contrary to the proposition above, the legal status of the findings of the African Commission changes once the Activity Reports embodying the decisions have been

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approved by the AU Assembly or very recently, the Executive Council. The chapter also argues that international human rights law has grown beyond the level where only binding instruments create legal obligations. States have an obligation to implement decisions of the duly constituted human rights bodies, regardless of the legal status of those decisions. The obligation to comply with decisions of HRTs is based in part on the principle of *pacta sunt servanda*. Obligations arising especially from individual communications are not new obligations created by the HRTs' decisions; they are 'subsidiary obligations' assumed by states as a consequence of ratifying various human rights instruments. Human rights treaties usually give HRTs the mandate to interpret and apply provisions of the treaties. All that a HRT does when it decides an individual communication is to interpret and define a state's obligation in relation to a given set of facts. Relying on the principles of *res interpretata,* I argue in the chapter that states' obligation to implement decisions of HRTs cannot be separated fully from the existing obligation of states to implement provisions of relevant human rights treaties which they have ratified.

Although there are several sub-regional judicial bodies in Africa, only three of them – the ECCJ, EACJ and the SADC Tribunal – have decided significant human rights-related cases to be regarded as HRTs for the purpose of this study. Of the three sub-regional tribunals regarded as HRTs in this thesis, the chapter concludes that only the ECCJ has a clear and unlimited jurisdictional mandate to adjudicate human rights cases. With respect to the SADC Tribunal, the chapter argues that notwithstanding the disbandment of the Tribunal and the 'proposed' closure of the Tribunal to private individuals, the obligations of member states of SADC to execute, implement and comply with all the existing 19 decisions of the defunct SADC Tribunal remain active.

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Chapter 3

Status and categories of state compliance: The interplay between the regional and sub-regional HRTs

3.1. Introduction

3.2 Case selection and categorisation of compliance

3.3 Status of compliance

3.4 The interplay between the regional and sub-regional HRTs

3.5. Chapter conclusion

3.1. Introduction

This chapter examines the interplay between human rights judgment compliance (HRJC) in three *regional* HRTs, on the one hand, and three *sub-regional* HRTs, on the other hand, using five African states – Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe – as case studies. The chapter answers the second research question: *What is the status of compliance with reparation orders of HRTs in the studied countries, and how does it compare with respect to the selected regional and sub-regional HRTs?* The regional HRTs selected for the compliance analysis in the chapter are: The African Commission on Human and Peoples' Rights (African Commission), African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee). The three sub-regional HRTs selected are the ECOWAS Community Court of Justice (ECCJ), the East African Court of Justice (EACJ) and the Tribunal of the Southern African Development Community (SADC Tribunal).

The analysis in the chapter provides insights into one of the main assumptions that have long underlined literature on compliance with decisions and judgments of regional HRTs in Africa. One widespread assumption, which is usually based on an ideational logic of 'regional contagion', is that states have stronger incentives to commit to human rights regimes that are closer to them, and which neighbouring states are committed to, than

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regimes that are situated far away and which proximate states are not committed to.[1] Scholars such as Simmons and Cardenas have argued in favour of regional contagion, defined as emulation by other states within a defined geographical proximity, as one of the main factors that explain why states commit to, or comply with human rights obligations.[2] Cardenas, for examples, found that states' behariours are regionally driven and that regional contagion was far more significant to state compliance than global contagion.[3] One general assumption derived from the 'regional contagion theory' is that reparation orders issued by sub-regional HRTs, being closer to states and limited to states that are closer to each other, are expected to be better complied with than those issued by regional HRTs.[4] The above assumption has led to the formulation of the following hypothesis*: States comply better with decisions of sub-regional HRTs than regional HRTs.* Using data from the five states that have cases at both regional and sub-regional level, this chapter tests whether the hypothesis above is valid. Provided other factors or circumstances remain the same, if sub-regional HRTs generate higher compliance pull than regional tribunals, the findings at the end of the chapter ought to be that most of the

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[1] See BA Simmons *Mobilizing for human rights: International law in domestic politics* (2009) 13; OA Hathaway 'Why do countries commit to human rights treaties?' (2007) 51 *Journal of Conflict Resolution* 588, 597 & 613; S Cardenas *Conflict and compliance: State responses to international human rights pressure* (2007) 19; IL Claude *Swords into plowshares: The problems and progress of international organization* (1971) 103. While the 'regional contagion theory' is more about why states commit to human rights treaty obligations, von Stein, has found that the same conditions that cause states to commit to human rights treaty also cause them to comply. See JV Stein 'Do treaties constrain or screen? Selection bias and treaty compliance' (2005) 99 *American Political Science Review* 611, 620. Many scholars have found that there is a correlation between factors that cause states to commit to human rights treaties and those that cause them to comply with obligations imposed by those treaties. See, for instance, YM Dutton 'Commitment to international human rights treaties: The role of enforcement mechanisms' (2012) 34 *University of Pennsylvania Journal of International Law* 31, 55 - 56; CM Wotipka & K Tsutsui 'Global human rights and state sovereignty: State ratification of international human rights treaties, 1965 - 2001' (2008) 23 *Sociological Forum* 724, 744 - 747.

[2] Simmons (n 1 above) 13; Cardenas (n 1 above) 110. JP Trachtman 'Who cares about international human rights?: The supply and demand of international human rights law' (2012) 44 *International Law and Politics* 851, 858.

[3] Cardenas (n 1 above) 110 - 111.

[4] F Viljoen 'The African human rights system and domestic enforcement' in M Langford, C Rodriguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 365. See HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: compliance and influence' unpublished LLD thesis, University of Pretoria, 2013, vi (stating that the compliance rate of the ECCJ, as at November 2013, was 66 percent). This is in sharp contrast to the findings of Viljoen & Louw that the compliance rate of the African Commission, as at December 2004, is 14 percent. See also F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1993 - 2004' (2007) 101 *American Journal of International Law* 1, 5.

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studied countries have demonstrated stronger commitment to comply with reparation orders of the various sub-regional HRTs than reparation orders issued by regional HRTs.

In terms of structure, part 3.2 of this chapter provides insights into the cases selected for the analysis in the study and explains why some cases and not others were selected. Part 3.2 also conceptualises human rights judgment compliance (HRJC) as conformity between a specific reparation order of a HRT and the observable behaviour of state actors at the domestic level. It further divides HRJC into three broad categories: full compliance, partial compliance and non-compliance. Further, part 3.2 discusses the problems with interpreting human rights judgment compliance data, especially when comparing compliance status of different HRTs. It argues that the accurate compliance rating for each tribunal is not the rate of 'full compliance' alone but the aggregate of full and partial compliance. The problem with using the full compliance rates alone is that it treats all reparation orders as equal in terms of complexity and disregards sometimes enormous progress recorded in certain partial compliance cases. It assumes that the state has done nothing until it has done everything. While the approach adopted in this study is far from perfect, it nonetheless depicts an attempt to integrate partial compliance into the computation of the overall compliance rating of HRTs in Africa.

Part 3.3 provides brief narratives of the status of compliance with the 75 reparation orders contained in the 32 selected decisions of the regional and sub-regional HRTs that are relevant to the study. The full narratives are presented in Appendices I and II of the thesis.[5] The chapter approaches the compliance narrative from the point of view of each reparation orders. This implies that each reparation order, instead of each decision, is coded as either fully complied with, partially complied with or not complied with. The chapter argues that this methodological shift, though challenging, has particular significance for the computation of the overall compliance rates for the selected states as well as the selected regional and sub-regional HRTs in Africa.

[5] An *appendix* contains data that cannot be placed in the main document and has references in the original copy or file. An *annex*, on the other hand, is usually a standalone document that offers additional information than contained in the main document.

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Part 3.4 provides a snapshot of the study results in each of the studied countries. The purpose is to describe how the compliance data available for each country relates to the study hypothesis. In addition, part 3.5 presents the overall compliance status analysis comprising all the studied states and all the selected HRTs. It compares 39 reparation orders issued by three regional HRTs with 36 reparation orders issued by three sub-regional HRTs with a view to ascertaining whether the selected states have demonstrated any willingness to comply with reparation orders of a particular type of HRT at the expense of the other. Overall, the purpose of the analysis in the chapter is to investigate the extent to which the stated study hypothesis is supported by empirical evidence from five studied countries and six HRTs in Africa.

3.2. Case selection and categorisation of compliance

This section justifies the cases selected for the study and describes the methods adopted for the categorisation of the respective compliance status of states and HRTs. This exposition is important because not all decisions of regional and sub-regional HRTs relating to the five case-study countries have been considered for the analysis in the chapter. It is, thus, appropriate to provide brief background information on the criteria for the selection of the cases.

3.2.1 Case selection

Although it began its operations in 1987, the African Commission initially did not publish its findings under the individual communication procedure.[6] To ensure that the reparation orders of the African Commission in respect of the selected African states coincide as much as possible within the same period with reparation orders of other HRTs selected for the study, only African Commission cases decided between 1 January 2000 and 31 December 2015 are included in the analysis in this chapter.

6 Viljoen & Louw (n 4 above) 4 - 5.

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Between 1994 and 2015, the African Commission found Nigeria in violation of the African Charter in 20 individual communications.[7] During the study period, 2000 to 2015, the Commission found Nigeria in violation of the African Charter only in six cases.[8] Due to the criteria for case selection in this study, two of the six cases, namely *HURILAWS v Nigeria*[9] and *Access to Justice v Nigeria,*[10] are excluded from the analysis in the chapter. The decision of the Commission in *Access to Justice v Nigeria* has not been published,[11] while the Commission did not issue any reparation order for the government of Nigeria to implement in *HURILAWS v Nigeria*.[12] As set out earlier in chapter 1, only merits decisions in which a HRT makes a finding of violation and issues specific reparation orders are included in the study. This leaves Nigeria with a total of four African Commission cases for the study.[13]

From 2000, the number of individual communications filed at the African Commission against the government of Zimbabwe increased significantly due to the deteriorating human rights situation in the country.[14] During the study period (2000 - 2015), a total of 17 communications were submitted against Zimbabwe and decided by the African Commission.[15] Of these 17 communications, seven were declared inadmissible, one was struck out for lack of diligent prosecution, and another one was voluntarily withdrawn by the complainant.[16] Only eight individual communications involving Zimbabwe have been decided on the merits by the African Commission.[17] Of the eight merit decisions, the

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7 African Commission 'Nigeria' http://www.achpr.org/states/nigeria/ (accessed 7 April 2017). This figure is based on an analysis of the communications decided by the African Commission (on file with the author).

8 As above.

9 *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).

10 Communication 270/03 *Access to Justice v Nigeria*, decided by the African Commission at its 13th extraordinary session in February 2013.

11 See M Killander & B Nkrumah 'Recent developments: Human rights developments in the African Union during 2012 and 2013' (2014) 14 *African Human Rights Law Journal* 275, 286. See also VO Ayeni 'The impact of the African Charter and the Maputo Protocol in Nigeria' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 198.

12 See *Huri-Laws v Nigeria* (n 9 above).

13 See list of cases appended to the thesis as Annexure I.

14 See T Mutangi 'The impact of the African Charter and the Maputo Protocol in Zimbabwe' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 291.

15 African commission 'Zimbabwe' http://www.achpr.org/states/zimbabwe/ (accessed 19 April 2017).

16 As above. This figure is based on an analysis of the communications decided by the African Commission (on file with the author).

17 As above.

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Commission found no violation in two, and in the remaining six cases, the Commission found various violations of the African Charter and issued reparation orders for the government of Zimbabwe to implement. These are the six African Commission cases discussed in this chapter in relation to Zimbabwe.[18]

The African Commission has found The Gambia in violation of the African Charter only in two cases.[19] The two cases – *Jawara v The Gambia*,[20] and *Purohit and Moore v The Gambia*[21] – were decided during the study period. During the study period, no individual communication was decided by the African Commission against Tanzania and Uganda.[22] In total, 12 decisions of the African Commission involving three countries – Nigeria, The Gambia and Zimbabwe – are discussed in this chapter.

Since its inauguration on 2 July 2006, and subsequent operationalisation in November of that year, up to 31 December 2016, the African Court under its jurisdiction in contentious cases has finalised 34 cases, transferred four to the African Commission, while 90 cases are pending.[23] Of the five African states selected for the study, only Tanzania has been a subject of an African Court judgment, which resulted in a finding of violation. As at July 2017, the time of writing, the Court has issued four merits judgments against Tanzania but only two of the judgments, namely, *Mtikila v Tanzania* and *Alex Thomas v Tanzania*, fall within the study period (2000 - 2015).[24] The case of the African Children's Rights Committee is quite straightforward. As at July 2017, the Committee has finalised four communications,[25] one of which involves Uganda, an African state selected for this

[18] See list of cases appended to the thesis as Annexure I.
[19] African Commission 'Gambia' http://www.achpr.org/states/gambia/ (accessed 24 April 2017).
[20] *Sir Dawda Jawara v The Gambia* (*Jawara* case) (2000) AHRLR 107 (ACHPR 2000).
[21] *Purohit and Another v The Gambia* (*Gambian Mental Health* case) (2003) AHRLR 96 (ACHPR 2003).
[22] For the only inter-state communication finalised by the African Commission against Uganda and other states, see Communication 227/99 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).
[23] See report on the activities of the African Court on Human and Peoples' Rights (2016) 5; African Court 'List of all cases' http://en.african-court.org/index.php/cases (accessed 16 October 2016).
[24] The other two decisions decided at the time of writing (July 2017), but which do not form part of the cases selected for the study are: Application 006/2013 - *Wilfred Onyango Nganyi & 9 Others v Tanzania*, decided on 18 March 2016, and Application 007/2013 - *Mohamed Abubakari v Tanzania*, decided on 3 June 2016.
[25] See ACERWC 'Communications: Table of communications' http://www.acerwc.org/communications/table-of-communications/ (accessed 2 June 2017).

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study.[26] These figures make a total of 15 decisions of regional HRTs discussed in this chapter.

Starting from its inception in 1993 to September 2015, the ECCJ received 271 cases, and delivered 136 judgements.[27] The focus of this study, however, is not the entire jurisprudence of the ECCJ. Between 2005 when the Court assumed its new human rights jurisdiction and 2012, Adjolohoun reported that the Court finalised 50 cases in respect of human rights violations involving at least 12 of the 14 member-states of ECOWAS.[28] During this period (2005 - 2012), the ECCJ made findings of violations and issued specific remedial order in nine human rights cases.[29] Five of the nine cases covered in Adjolohoun's study relate to the Nigeria and the Gambia, two countries selected for this study. However, the ECCJ has delivered a significant number of human rights judgments that were not covered in the Adjolohoun's study. The new decisions delivered by the ECCJ, which relate to Nigeria and The Gambia, are as follows: *SERAP v Nigeria* (*Niger Delta environmental pollution* case),[30] *Modupe Dorcas Afolalu v Nigeria,*[31] *Alimu Akeem v Nigeria,*[32] *SERAP v Nigeria (Bundu Waterfront* case) and *Deyda Hydara v The Gambia.*[33] This list brings to a total of ten the number of ECCJ human rights cases involving Nigeria and the Gambia; seven of the cases involve Nigeria and three involve The Gambia.[34]

Due to the criteria set for selection of cases in chapter 1, the case of *Ugokwe v Nigeria,*[35] one of the nine ECCJ cases involved in a previous study on state compliance in the ECCJ, is not selected for this study.[36] In chapter 1, this study clarifies that cases in which only interim measures were issued are not selected for the study. The Adjolohoun study indicates that

[26] See Communication 001/Com/001/2005 *Michelo Hunsungule and others (on behalf of children in northern Uganda) v Uganda*.
[27] 'ECOWAS Court holds 89 sessions, delivers 34 judgements in 2015/2016 legal year' *Premium Times* 28 September 2016 http://www.premiumtimesng.com/foreign/west-africa-foreign/211540-ecowas-court-holds-89-sessions-delivers-34-judgements-20152016-legal-year.html (accessed 1 December 2016).
[28] Adjolohoun (n 4 above) 11.
[29] See Adjolohoun (n 4 above) 38 & 45.
[30] ECW/CCJ/JUD/18/12 *SERAP v Nigeria* (*Niger Delta Environmental Pollution* case).
[31] ECW/CCJ/JUD/15/14 *Modupe Dorcas Afolalu v Nigeria*.
[32] ECW/CCJ/JUD/01/14 *Alimu Akeem v Nigeria*.
[33] ECW/CCJ/APP/30/11 *Deyda Hydara v The Gambia*.
[34] See J Ukaigwe *ECOWAS law* (2016) 195.
[35] ECW/CCJ/JUD/03/05 *Jerry Ugokwe v Nigeria*.
[36] See *Jerry Ugokwe* case (n 35 above).

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the government of Nigeria complied fully with the interim measure issued by the ECCJ in the *Ugokwe* case.[37] This fact, notwithstanding, selecting an interim measure decision of the ECCJ would require also the inclusion in the study all provisional measures of the African Commission and other relevant HRTs. Accordingly, only nine human rights decisions of the ECCJ, involving Nigeria and the Gambia, are selected for this study. These nine cases selected were decided within the cut-off dates for the study (2000 - 2015).

The EACJ has adjudicated on the merits a total of 14 human rights related cases, and some of these cases have been decided further on appeal.[38] Uganda is involved in seven of these cases.[39] However, due to the criteria for case selection in this study, three of the seven cases - *Mohochi v Attorney General of Uganda* (*Mohochi* case),[40] *Awadh and Six Others v Attorney General of Kenya and Attorney General of Uganda* (*Awadh* case) and the *Democratic Party v S-G of the EAC, AG Uganda and & 3 Others* (*Democratic Party* case)[41] - are excluded from this study. The EACJ did not make a finding of violation in the *Awadh* case. Although it found violations in both *Mohochi* case and the *Democratic Party Case*,[42] the Court did not issue any reparation order for the state to implement. This leaves Uganda with a total of four EACJ cases for the study: *James Katabazi and 21 others v The S-G of EAC and AG Uganda*,[43] *Sitenda Sibalu v S-G of EAC, AG Uganda and Others*,[44] *Democratic Party and Mukasa Mbidde v S-G of EAC and A-G Uganda*,[45] and *Anita v A-G Uganda and Another.*[46]

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37 Adjolohoun (n 4 above) 164 - 165.

38 See OSJI *Case digest: Human rights decisions of the East African Court of Justice* (2013); OSJI *Case digest: Human rights decisions of the East African Court of Justice* (2015) The two reports above listed 12 merits decisions. One human rights related EACJ decision which seem to be missing from the two reports is *Democratic Party & Another v Secretary General of EAC and Attorney General of Uganda*, Reference Number 6 Of 2011, decided by the First Instance Division of the EACJ on 10 May 2012.

39 As above.

40 *Mohochi v A-G Uganda*, Reference No 5 of 2011, decided by the First Instance Division of the EACJ on 17 May 2013.

41 Democratic Party v S-G of EAC and others, Reference Number 2 of 2012, decided on 29 November 2013.

42 As above.

43 *Katabazi and Others v S-G of EAC and A-G Uganda* (2007) AHRLR 119 (EAC 2007).

44 *Sitenda Sibalu v S-G of EAC & A-G Uganda, Honorable Sam Njumba, and the Electoral Commission of Uganda*, Judgment of 30 June 2011.

45 *Democratic Party & Mukasa Mbidde* v S-G of EAC and A-G, Reference Number 6 of 2011.

46 *Among Anita v A-G Uganda and S-G of EAC*, Reference No 2 of 2012.

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The only merits decision of the EACJ against Tanzania is *African Network for Animal Welfare (ANAW) v Tanzania*, decided by the EACJ on 20 June 2014.[47] The reference was submitted by ANAW, a charitable Pan-African animal welfare and community-centred organisation' based in Nairobi, contesting plan of the government of Tanzania to build a 'super highway' cross the Serengeti National Park. ANAW contended that the development would be hazardous to the environment generally and animals. The Court issued a permanent injunction restraining the government of Tanzania from 'operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park.' This decision was appealed. The Appellate Division partly upheld the judgment of the First Instance Division, including its powers to grant a permanent injunction.[48]

Possi has argued that the *Serengeti* case was not decided under the 'rule of law, democracy and good governance' mandate of the EACJ, and as such it is not a human rights case.[49] This argument is valid as there is no mention of article 6(d) of the EAC Treaty in the judgment of the Court nor in the Applicant' submission. The reference was brought under 'articles 5(3)(c), 8(1)(c), 112(1) (e), 114(1)(a) of the EAC Treaty'.[50] Since the Court has no explicit human rights jurisdiction, and the Court itself has stated severally that it does not exercise a 'human rights jurisdiction',[51] the 'article 6(d) test' should only be a rule of the thumb, and not the 'be all and end all' of attempts to relate decisions of the EACJ to human rights. Gathii also stated that it is not clear whether the single reparation order issued by the First Instance Division of the EACJ in the *Serengeti* case was subsequently confirmed by the Appeal Division.[52] Since no part of the Appellate Division's judgment expressly revoked the permanent injunction issued by the First Instance Division, I argue that the injunction has not been vacated. It is further argued that whenever a situation arises where a court decision may give rise to two interpretations: one protecting human rights and the

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47 *African Network for Animal Welfare (ANAW) v Tanzania* (*Serengeti* case), Reference No 9 of 2010.
48 *African Network for Animal Welfare (ANAW) v Tanzania* (*Serengeti* case) (Appellate Division) para 80.
49 Email from A Possi on 30 March 2017.
50 *Serengeti* case (First Instance Division) (n 47 above) para 13.
51 See BP Kubo 'Overview of human rights dealt with by the East African Court of Justice', Colloquium of the African Human Rights and Similar Institutions (Arusha 4-6 October 2010) 6 referred to in Adjolohoun (n 4 above) 117.
52 See JT Gathii 'Saving the Serengeti: Africa's new international judicial environmentalism (2016) 16 *Chicago Journal of International Law* 386, 413.

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other weakening human rights protection, until the court decides otherwise, the presumption should be in favour of the interpretation that strengthens human rights protection. It is because of these arguments that the *Serengeti* case is included in the cases selected for this study. Obviously, other studies may not categorise the *Serengeti* case as a human rights related case.

The SADC Tribunal delivered a total of 19 judgments by the time it was suspended in 2010.[53] Of the 19 judgments delivered by the Tribunal, five concerns labour and employment disputes between Southern Africa Development Community (SADC) and its employees.[54] Another three relate to the Democratic Republic of Congo (DRC),[55] Tanzania[56] and Lesotho.[57] The remaining 11 judgements related to Zimbabwe. Eight of the 11 Zimbabwean cases were about *Mike Campbell and others v Zimbabwe*, which has been described as perhaps the most controversial litigation before any sub-regional court in Africa.[58] Two of the remaining three cases are *Luke Tembani v Zimbabwe* and *Gondo v Zimbabwe*. The last decision of the SADC Tribunal concerning Zimbabwe is *United People's Party of Zimbabwe (UPPZ) v SADC and Others,* where UPPZ alleged exclusion from the power-sharing process in Zimbabwe that was mandated by the SADC Authority in March 2007.[59] The *UPPZ* case was dismissed because the party was properly excluded from the power-sharing process. This analysis thus leaves the study with only three SADC Tribunal cases related to Zimbabwe: *Mike Campbell* case, *Luke Tembani* case and *Gondo* case.[60]

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53 E de Wet 'Reactions to the backlash: Trying to revive the SADC Tribunal through litigation' http://www.ejiltalk.org/reactions-to-the-backlash-trying-to-revive-the-sadc-tribunal-through-litigation/ (accessed 10 October 2016).

54 See de Wet (n 53 above).

55 *Bach's Transport (PTY) LTD v Democratic Republic of Congo* Case No SADC (T) 14/2008 (11 June 2010).

56 *The United Republic of Tanzania v Cimexpan (Mauritius) LTD and Others*, Case No SADC (T) 01/2009 (11 June 2010).

57 *Swissbourgh Diamond Mines and Others v The Kingdom of Lesotho*, Case No SADC (T) 04/2009 (11 June 2010).

58 See RF Oppong 'Enforcing judgments of the SADC Tribunal in the domestic courts of member states' (2010) *Monitoring regional integration in Southern Africa Yearbook* 115.

59 de Wet (n 53 above).

60 See Southern African Legal Information Institute "United Peoples' Party of Zimbabwe v SADC and Others" (SADC (T) 12/2008) [2009] SADCT 4 (14 August 2009)' http://www.saflii.org/sa/cases/SADCT/2009/4.html (accessed 23 April 2017).

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Table 3.1: Number of cases by country and HRT (2000 - 2015)61

Number of cases by country	African Commission	African Court	ACERWC	ECCJ	EACJ	SADC Tribunal
Nigeria	4	-	-	6	-	-
The Gambia	2	-	-	3	-	-
Tanzania	-	2	-	-	1	-
Uganda	-	-	1	-	4	-
Zimbabwe	6	-	-	-	-	3
Total	**12**	**2**	**1**	**9**	**5**	**3**
Group total	**Regional: 15 cases**			**Sub-regional: 17 cases**		

A total of 32 decisions and judgments are discussed in this chapter. Of the total selected cases, 12 relate to the African Commission, two to the African Court, and nine to the ECCJ. The EACJ and the SADC are represented in the study with five and three cases, respectively. The African Children's Rights Committee (ACERWC) is the only HRT with only one case represented in the study.[62] All the selected cases were decided during the case selection period adopted for the study (2000 - 2015).

Table 3.2: Number of reparation orders by country and HRT (2000 - 2015)[63]

Number of cases by state	African Commission	African Court	ACERWC	ECCJ	EACJ	SADC Tribunal
Nigeria	9	-	-	13	-	-
The Gambia	4	-	-	8	-	-
Tanzania	-	7	-	-	1	-
Uganda	-	-	5	-	6	-
Zimbabwe	14	-	-	-	-	8
Total	27	7	5	21	7	8
Group total	Regional HRTs: 39 reparation orders			Sub-regional: 36 reparation orders		

61 The full List of cases containing the specific case titles, reference number and date of decision of each case is appended to the thesis as Annexure I.

62 Auspiciously, the lone case of the African Children's Rights Committee selected for the study has at least 5 specific reparation orders.

63 As above.

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The focus of the analysis in the chapter is not on the cases *per se* but the reparation orders contained in the cases. Most human rights cases contain multiple reparation orders and some of these orders are multi-layered, thus making it especially difficult to monitor the implementation status of the many different layers of each reparation order. The 32 selected cases contain a total of 75 reparation orders issued by the various HRTs for the selected states to implement. The 75 reparation orders are divided between the selected regional and sub-regional HRTs at 39 and 36 reparation orders, respectively.

3.2.2 Categorisation of compliance

Scholars previously conceptualised state compliance with reparation orders of HRTs in binary terms: compliance or non-compliance.[64] Expectations about compliance have 'clustered around two extremes of high compliance and low compliance'.[65] International law optimists such as Henkin, Checkel as well as Chayes and Chayes suggest that compliance happen almost habitually,[66] while sceptics argue that non-compliance is more commonplace, and international law compliance, at best, is epiphenomenal.[67] The middle ground has rarely been thoroughly conceptualised, until Hawkins and Jacoby emphasised the role of partial compliance, in understanding the phenomenon of state compliance.[68] Before Hawkins and Jacoby, partial compliance was viewed mostly as a transitional state or a form of 'way station on the path to full compliance'.[69]

There are many ways to categorise state compliance with human rights judgments, described occasionally in this thesis as human rights judgment compliance (HRJC). The two dominant methods of categorisation are: categorisation according to the degree or extent

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[64] See D Hawkins & W Jacoby 'Partial compliance: Comparison of the European and Inter-American courts of human rights' (2010-2011) 6 *Journal of International Law and International Relations* 35, 35 - 36.

[65] As above.

[66] See L Henkin *How nations behave: Law and foreign policy* (1979) 47; A Chayes & AH Chayes 'On compliance' (1993) 47 *International Organization* 175, 178; A Chayes & AH Chayes *The new sovereignty: Compliance with international regulatory agreements* (1995); J Checkel 'International institutions and socialisation in Europe: Introduction and framework' (2005) 59 *International Organisation* 801, 801.

[67] See JL Goldsmith & EA Posner *The limits of international law* (2005) 262. See also G Downs, DM Rocke & P Barsom 'Is the good news about compliance good news about cooperation?' (1996) 50 *International Organisation* 379, 379; E Hafner-Burton & K Tsutsui 'Human rights in a globalising world: The paradox of empty promises' (2005) 110 *American Journal of Sociology* 1373, 1373.

[68] Hawkins & Jacoby (n 64 above) 36.

[69] As above.

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of implementation; and categorisation according to the pace, or other circumstances, of implementation. This study is concerned mainly with the former. Whenever HRJC is categorised based on the degree of implementation, three outcomes are usually recognised – full compliance, partial compliance and non-compliance.[70] In their seminal study, Viljoen and Louw divide HRJC outcomes into five broad categories: full compliance, partial compliance, situational compliance, non-compliance and unclear cases.[71] Adjolohoun adopts a tripartite categorisations: full compliance, non-compliance and situational compliance.[72] Non-compliance, according to Adjolohoun, has two sub-categories, namely 'in-progress' and 'application for review'.[73] As alluded to earlier, HRJC may also be categorised according to the pace, and other circumstances, of implementation. This type of categorisation may produce the following additional compliance categories: immediate compliance, slow motion compliance, eventual compliance, situational compliance and non-situational compliance. These HRJC categories are however not the primary focus of this study.

For the analysis in the present study, the focus is on the degree of implementation, not the pace or other circumstances of implementation. In this study, HRJC outcomes are divided into three categories: full compliance, partial compliance and non-compliance.[74] Accordingly, 'situational compliance', 'in progress' or 'application for review' – are not used as distinct compliance categories in this study. Situational compliance has been defined as *sui generis* cases of full or partial compliance that occur following a regime change at the domestic level.[75] Just as the definition indicates, situational compliance is a form of full or partial compliance. Adjolohoun also admits that 'in-progress' and 'application for review' may be sub-categories of non-compliance.[76] In this thesis, compliance is defined as conformity between the legal obligations imposed by specific reparation orders of a HRT and observable behaviour of state actors at the domestic

[70] See, for instance, C Hillebrecht *Domestic politics and international human rights tribunals: The problem of compliance* (2014) 3; J Donnelly *International human rights* (2007) 11 - 13 & 64 - 65.
[71] Viljoen & Louw (n 4 above) 4 - 6.
[72] Adjolohoun (n 4 above) 159 - 164.
[73] Adjolohoun (n 4 above) 163 - 164.
[74] See Viljoen & Louw (n 4 above) 26.
[75] As above.
[76] Adjolohoun (n 4 above) 163 - 164.

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level.[77] Whatever caused the conformity is a question for determination when assessing the factors responsible for compliance, which is the preoccupation of chapter 4 of this thesis.

(a) Full compliance

A state is considered to have 'fully complied' with a reparation order if it has implemented every element of that order as contained in the decision of the tribunal. Human rights decisions usually contain one or more reparation orders for states to implement. Each of these orders also may have multiple layers. For examples, in the *Ogonialnd* case,[78] the African Commission requested the government of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by '(i) stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory.' This reparation order has two components: stopping all attacks on Ogoni communities and leaders; and allowing citizens and independent investigators access to Ogoniland. Full compliance with this reparation order requires stopping the attacks *and* allowing access to Ogoniland.

In *Purohit v The Gambia*,[79] the African Commission recommended that the government of The Gambia should '(1) Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter.' This order contains at least three elements: the repeal of the LDA, its replacement, and a condition that the new legislation ought to be compatible with the African Charter. In cases where the African Commission recommended payment of 'adequate compensation', the fact that a sum is paid as compensation is only one element of the reparation. Both the government and the victims or at least the victim must consider the sum paid as adequate before the case is categorised as 'full compliance'.[80]

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[77] K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International* Law 387, 388 - 391.

[78] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*Ogoniland* case) (2001) AHRLR 60 (ACHPR 2001).

[79] *Purohit and Another v The Gambia* (*Gambian Mental Health* case) (2003) AHRLR 96 (ACHPR 2003).

[80] Where the victims or victims' representatives are not satisfied with what is objectively 'adequate', the reparation order is categorized still as full compliance, though this study did not have such cases. For

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(b) Partial compliance

Generally, for case level categorisation, partial compliance describes a situation where the state concerned has implemented at least one of the remedial orders of the HRT in a particular case or has taken some steps but the steps taken fall short of fully implementing at least one remedial order.[81] Hawkins and Jacoby conceptualised the following types of partial compliance, at the case level: split decision, state substitution, slow motion and ambiguous compliance.[82] In a 'split decision' kind of partial compliance, the state implements some reparation orders and does not implement others.[83] For instance, the state could pay compensation but fail to adopt measures of non-repetition. Hillebrecht describes this form of partial compliance as '*a la carte* compliance'.[84] In partial compliance by way of state substitution, the state ignores the specific remedial action required of it but takes a different course of action to redress the violation.[85] Hawkins and Jacoby refers to this form of partial compliance as 'obeying the general spirit of the compliance order, but not the letter of the order'.[86] In 'slow motion' compliance, the state takes one or more steps to implement the reparation orders but the steps taken fall short of fully implementing at least one remedial order. The last sub-category of partial compliance, according to Hawkins and Jacoby, is caused by the ambiguity or complexity of the reparation order.[87] Here, the reparation order is so complex, ambiguous or complicated that it is nearly impossible to ascertain when a state has fully complied with it.[88]

In the present study, partial compliance is not used in the case-specific sense as used by Hawkins and Jacoby above. This is because the analysis and categorisations done in this study are specific to each reparation order. The 'partial compliance' category in this study

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case level categorisation, full compliance is achieved whenever the state implements all the reparation orders contained in a case. See Viljoen & Louw (n 4 above) 4 - 6; Adjolohoun (n 4 above) 160. The *Ogoniland case* for instance, has five reparation orders. Full compliance with the case requires implementation of all the five reparation orders. See *Ogoniland* case (n 79 above).

[81] See Louw (n 6 above) 53; Viljoen & Louw (n 4 above) 4 - 6; Adjolohoun (n 4 above) 162 - 163.
[82] Hawkins & Jacoby (n 64 above) 77 - 81.
[83] Viljoen & Louw (n 6 above) 6 - 7; Hawkins & Jacoby (n 64 above) 77.
[84] Hillebrecht (n 70 above) 11 - 13 & 64 - 65.
[85] Hawkins & Jacoby (n 64 above) 78.
[86] As above.
[87] Hawkins & Jacoby (n 64 above) 81.
[88] As above.

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therefore refers to instances where the state concerned has implemented at least one element of the specific remedial order. It also includes instances where the state has taken some steps, but the steps taken fall short of fully implementing any of the components of the specific reparation order.

(c) Non-compliance

For case-level categorisation, a case is categorized as 'non-compliance' if the state that has responsibility to implement the remedial orders in the case has failed to implement all the remedial orders contained in the case and has not made any public commitment to comply.[89] The 'non-compliance' category also include cases where the state is challenging or contesting the findings or rulings of the HRT on legal or factual grounds. For the present study, the non-compliance category refers to instances where the state has failed to implement any of the constituent elements of a reparation order, has not taken any steps towards its implementation and has not made any explicit commitment to implement the order. This category also includes instances where the steps taken are only remotely connected to the reparation order.[90]

The data presented in the compliance status analysis below draws mainly from desk research and 'field work' carried out in the studied countries between 2015 and 2017, including interviews with government officials, civil society organisations, human rights lawyers, litigants, and legal academics.[91] In 1990, after nearly a decade of following up states' implementation of its Views, the Human Rights Committee stated that 'attempts to categorise follow up replies are necessarily imprecise.'[92] Admittedly, the categorisations and compliance status analysis in this chapter are, by no means, precise reflections of state compliance for all purposes. Compliance analysis involves interpretation of data as well as

[89] Viljoen & Louw (n 4 above) 26 - 27; Louw (n 6 above) 54; Adjolohoun (n 4 above) 162.
[90] See compliance narrative of Reparation Order No 2 in the *Gambian Mental Health* case under Appendix I. Although some initial steps have been taken towards a draft legislation to establish a mental health authority, these steps are yet inchoate and only remotely connected to the reparation order above.
[91] The list of interview participants is appended to the thesis as Annexure VIII.
[92] See Official Records of the United Nations General Assembly, 45th Session, Supplement No 40 (A/45/40), annex XI. With reference to the difficulties in categorising follow-up replies, see Report of the Human Rights Committee, Official Records of the General Assembly, 54th Session, No 40 (A/54/40), para 459 referred to in Louw (n 6 above) 52.

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exercise of judgment.[93] It is possible that data interpreted in this study as constituting full or partial compliance of a reparation order may be interpreted more strictly in any future study to produce a different compliance outcome.

(d) Aggregate compliance

In Table 3.3 below, the thesis discussed the compliance status of the 75 reparation orders contained in the 32 decisions selected for this study. However, making a sense of that data is not as simple as it was presented in Table 3.3. Summing up the numbers of full compliance, partial compliance and non-compliance for each HRT is one of the easiest aspects of human rights judgment compliance analysis. Beyond the summation, how is the compliance ratings of states or HRTs to be compared? Which of the compliance categories – full compliance, partial compliance and non-compliance – is best suited for comparing compliance across states and HRTs? To demonstrate the complexity of cross-regional comparison of compliance ratings of HRTs, consider the following *hypothetical cases*.

A tribunal records 10 percent full compliance, 50 percent partial compliance and 40 percent non-compliance. Another tribunal records five percent full compliance, 90 percent partial compliance and five percent non-compliance. Which of the two 'hypothetical tribunals' above has a better compliance record? The scenario above (Scenario A) demonstrates that the percentage of 'full compliance' alone does not provide an accurate representation of the compliance rating of a HRT. The fact that a tribunal has a higher rate of full compliance, without more, does not make it better than others. Conversely, the fact that a tribunal has a higher rate of non-compliance also does not make it worse than others. For instance, a tribunal records 10 percent full compliance, 35 percent partial compliance and 55 percent non-compliance. Another tribunal records 25 percent full compliance, 15 percent partial compliance and 60 percent non-compliance. Which of the two tribunals in the scenario above (Scenario B) has a better compliance record? The two scenarios above demonstrate the complexity of cross-regional comparison of human rights judgment compliance.

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[93] R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 40 - 41.

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In Scenario A above, the better HRT is arguably the tribunal that has a lower rate of full compliance whereas in scenario B, the better tribunal is the one with a higher rate of non-compliance. Because of these complexities, this study argues that the aggregate of full and partial compliance is a better basis for comparing compliance records of two or more HRTs where none of the tribunal has a higher full compliance and lower non-compliance rates. The argument of this thesis is twofold. The thesis argues that for a HRT to be regarded as having a higher compliance rating than other tribunals, the tribunal ordinarily should have a higher rate of full compliance and a lower rate of non-compliance; but that is rarely the case. In most of the cases presented in this chapter and throughout this study, the tribunal that has a higher full compliance rate usually also has a higher non-compliance rate. However, the concept of aggregate as developed in the thesis has not been fully established, and further research may be required in the future to assess its full potentials and relevance to cross-regional comparison of human rights judgment compliance.

In their work on the European and Inter-American human rights systems, Hawkins and Jacoby, and later Hillebrecht, treaty compliance at the remedial order level as a dichotomous variable comprising only two categories: full compliance or non-compliance.[94] Thus, only the rate of full compliance was used in the two studies above to compare compliance in the ECtHR and the IACHR. In other words, the two studies treat 'pending compliance' or partial compliance at the remedial order level as basically non-compliance.[95] This 'all or nothing approach', it is argued, conflates 'pending compliance' with 'non-compliance' and thus overstates the rate of non-compliance of both the IACtHR and the ECtHR.[96] For this thesis, the 'all or nothing approach', for instance, would imply that every reparation order issued by the African Commission in the *Ogoniland* case would be coded as 'non-compliance' since in each of the reparation order full compliance is still 'pending'. Such characterisation is not only unfair to the states but also inaccurate as far

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94 See Hillebrecht (n 70 above) 44, 45 & 47. See also Hawkins & Jacoby (n 64 above) 49.

95 As above.

96 The 'all or nothing approach' is based on the method of categorisation of the IACtHR which considers all reparation orders as 'pending' unless the state has completely implemented the order. See Hillebrecht (n 70 above) 43 - 47. However, 'pending compliance' is not the same thing as 'no compliance'. The 'pending compliance' category according to the Court includes both 'partial compliance' and 'non-compliance'. See for instance Annual report of the IACtHR (2016) http://www.corteidh.or.cr/tablas/informe2016/ingles.pdf (accessed 30 August 2017).

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as the actual rate of non-compliance is concerned. The concept of aggregate compliance has been developed in this study to avoid a situation whereby non-compliance is overstated, or aggregate compliance is understated.

This study treats compliance both at the case-level and remedial-order level as an ordinal variable that has at least three categories: full compliance, partial compliance and non-compliance. A tribunal is considered to have a higher rate of compliance if it has a higher rate of full compliance and a lower rate of non-compliance. Where no HRT meets this condition, the compliance rating of the selected tribunals is calculated through their aggregate compliance rates. To determine the aggregate compliance rating of a HRT, the approximate value of partial compliance for the tribunal must be determined. Theoretically, it is possible to argue that partial compliance has no value of its own; partial compliance, as the name implies, is partly full compliance and partly non-compliance. Thus, splitting the value of partial compliance between full compliance and non-compliance is one way to arrive at the proximate value for partial compliance. It must be noted however that partial compliance as a compliance category does not always imply that implementation is half-way to completion.[97] In some instances, what is categorised as partial compliance is only an inchoate or a preliminary measure taken by the state. In many cases however, partial compliance is only a little less than full compliance. As argued by Murray and Long, full compliance with a relatively simple reparation order may make a lesser contribution to the realisation of human rights than partial implementation of a detailed or innovative reparation order.[98]

Admittedly, all partial compliance is not *half of compliance*. However, if we assume that compliance is 1 and non-compliance is 0, the continuum between the two (0.1 to 0.9) all represent partial compliance. In a way, all cases are on this continuum. Identifying the specific value of each case of partial compliance on the continuum would involve a great deal of speculation. While this thesis is aware of the contestation that may arise from assigning the mean value of the continuum to partial compliance, this approach it is argued is better than representing partial compliance entirely as 'non-compliance'. The key is to

97 See Hawkins & Jacoby (n 64 above) 79 - 80.
98 Murray & Long (n 93 above) 40.

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integrate partial compliance into HRTs' compliance analysis. While the approach adopted in this study is imperfect, it nonetheless signifies an attempt to integrate partial compliance into the computation of the aggregate compliance records of HRTs. The formula is written as Aggregate Compliance (AC) = Full compliance (FC) + ½ Partial Compliance (PC).[99] Throughout this thesis, the formula 'AC = FC + ½ PC' is used. Accordingly, the Aggregate Non-compliance (AN) rate of a HRT may also be calculated using AN = NC + ½ PC. This formula produces accurate results even in cases that would otherwise have been difficult to determine such as the various scenarios given above.

3.3. Status of compliance

The goal of this section is to highlight the status of compliance with the 75 reparation orders selected for this study. To do this, the thesis in the section immediately above develops a framework for cataloguing human rights judgment compliance in the selected states into three distinct categories, namely *full compliance*, *partial compliance*, *non-compliance* and *aggregate compliance.* This framework was used to categorise the implementation and compliance status of the selected reparation orders.[100]

Of the five selected states, Uganda recorded the highest aggregate compliance rate (68%), followed by Nigeria (48%) and then Tanzania (19%). The two countries with the lowest rates of compliance are The Gambia (13%) and Zimbabwe (11%). A factor common to the two least complying states in the study, as will be demonstrated in chapter 4, is lack of commitment to compliance and the poor system of governance. The lack of commitment to compliance by these two states was demonstrated, during the study, either through direct attacks on the HRTs as in the case of Zimbabwe in relation to the SADC Tribunal or through indirect more subtle attacks to delegitimise the tribunal's findings and roll back its powers as in the case of The Gambia in relation to the ECCJ.[101]

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[99] The average of partial compliance is taken because every reparation order coded as partial compliance comprises a little of compliance and a little of non-compliance. It is both unfair to treat partial compliance either as full compliance or non-compliance.

[100] See Appendices I & II of the thesis.

[101] See discussions on backlash to HRTs in Africa in chapter 6. See also KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293, 297 - 298.

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Table 3.3: Status of compliance with reparation orders of HRTs in five states (2000 - 2015)

HRTs	Aggregate compliance rate	Full compliance	Partial compliance	Non-compliance	Total of orders
Nigeria	**48%**	**n = 7**	**n = 7**	**n = 8**	**22**
African Commission	61%	n = 3	n = 5	n = 1	9
ECCJ	38%	n = 4	n = 2	n = 7	13
The Gambia	**13%**	**n = 0**	**n = 3**	**n = 9**	**12**
African Commission	38%	n = 0	n = 3	n = 1	4
ECCJ	0%	n = 0	n = 0	n = 8	8
Zimbabwe	**11%**	**n = 2**	**n = 1**	**n = 19**	**22**
African Commission	18%	n = 2	n = 1	n = 11	14
SADC Tribunal	0%	n = 0	n = 0	n = 8	8
Tanzania	**19%**	**n = 0**	**n = 3**	**n = 5**	**8**
African Court	14%	n = 0	n = 2	n = 5	7
EACJ	50%	n = 0	n = 1	n = 0	1
Uganda	**68%**	**n = 4**	**n = 7**	**n = 0**	**11**
ACERWC	50%	n = 0	n = 5	n = 0	5
EACJ	83%	n = 4	n = 2	n = 0	6
Overall	**31%**	**n = 13**	**n = 21**	**n = 41**	**75**

Overall, full compliance was recoded in only 13 of the 75 reparation orders, representing just about 17 percent. Partial compliance was recorded in 21 reparation orders, representing 28 percent. Non-compliance was more prevalent; it was recorded in 41 reparation orders, representing 55 percent of the 75 reparations orders selected for the study. The major factor which explains the various compliance outcomes is the lack of commitment to compliance by some of the selected states. The Gambia and Zimbabwe, two countries that demonstrated the least commitment to compliance in the study, both contributed 68 percent of the overall non-compliance found in the study.

Of the 27 reparation orders issued by the African Commission in the study, the three studied countries against whom these orders were issued, namely Nigeria, The Gambia

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and Zimbabwe, complied fully with only five, representing only 19 percent of the total number. It is noteworthy that the African Commission cases constitute a form of *situational* compliance;[102] nonetheless, they are regarded as full compliance for the purpose of this study. As defined in chapter 1 of the thesis, compliance is conformity between a reparation order and state actions at the domestic level, and this conformity need not to have happened the same way a twist to the hand causes pain.[103] Sometimes, compliance may be the results of sheer coincidence, inadvertence or reasons extrinsic to the reparation order.[104]

The cases in which full compliance was recorded are briefly summarised here. In *Kazeem Aminu v Nigeria,*[105] *Media Rights Agenda v Nigeria*[106] and *Civil Liberties Organisation & 2 Others v Nigeria,*[107] the complainants essentially alleged violation of human rights through military decrees. The African Commission in the three cases issued four reparation orders, three of which essentially requested the government of Nigeria to bring its laws in conformity with the African Charter by repealing the offending decrees, especially Treason and Other Offences (Special Military Tribunal) Decree No 1 of 1986 (as amended by the Treason and Treasonable Offences Decree No 29 of 1993). The transition from military rule to civilian administration in 1999 helped to resolve some of the complaints raised in the cases.'[108] The Treason and Other Offences (Special Military Tribunal) Decree No 1 of 1986 and other draconian decrees that formed the bases of the complaints were repealed.[109]

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102 For a discussion of situational compliance, see Viljoen & Louw (n 4 above) 3 & 7.

103 See OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 116 - 117.

104 Raustiala (n 77 above) 391 - 392. Any analysis which disputes the fact that state compliance can happen through coincidence or inadvertence is not about compliance but implementation, which is not the primary focus of this study.

105 Kazeem *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000).

106 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

107 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (2001) AHRLR 75 (ACHPR 2001).

108 As one of the complainants put it, in relation to the *Kazeem Aminu* case: 'circumstances and events have overtaken the case. By the time the decision was delivered by the African Commission, a new government was already in power.' See Interview with A Ameen (the victim in this case) on 11 May 2016. See also interview with K Aminu (the complainant in this case) on 11 May 2016.

109 See the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999.

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Political prisoners, including complainants in the last two cases above, were granted presidential pardon and released.[110]

The case of *Scanlen & Holderness v Zimbabwe*[111] deals with various aspects of the Information and Protection of Privacy Act (AIPPA), a national law in Zimbabwe. Sections 79 and 80 of the AIPPA require journalists to be accredited by the Media and Information Commission (MIC), now Zimbabwe Media Commission (ZMC), prior to practicing journalism. The complainants in the communication which was submitted to the African Commission in 2005 alleged that compulsory accreditation of journalists interferes with freedom of expression. The African Commission issued four reparation orders for the government of Zimbabwe to implement, two of which have been fully complied with. The Commission recommends that Zimbabwe should: (i) 'Repeal sections 79 and 80 of the AIPPA.' The provisions were repealed by the Access to Information and Protection of Privacy (Amendment) Act of 2007.[112] The Commission also requested Zimbabwe to 'decriminalize offences relating to accreditation and the practice of journalism.'[113] Section 83 of the AIPPA, which criminalised activities relating to accreditation and the practice of journalism, has been repealed.[114] The section was repealed outright, without any replacement.[115]

There was no case of full compliance recorded with any of the reparation orders issued by the African Court in relation to Tanzania and the African Children's Rights Committee in relation to Uganda.[116] While the government of Tanzania did not comply with four of the six reparation orders issued against it by the African Court in the *Mtikila* case; it complied partially with two of the orders.[117] As ordered by the Court in its reparation ruling of 13 June

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110 See Appendix I of the thesis.

111 Communication 297/2005 *Scanlen & Holderness v Zimbabwe*.

112 Email from B Chinowawa (Zimbabwe Lawyers for Human Rights) on 4 April 2017. See also Zimbabwe's Access to Information and Protection of Privacy (Amendment) Act of 2007. The amendment was adopted while this communication was pending before the Commission. The Amendment Act was gazetted and became effective on 11 January 2008.

113 According to the *Ejusdem generis* rule of interpretation of statutes, the phrase 'practice of journalism' ought to be interpreted in relation to 'accreditation'.

114 Chinowawa (112 above).

115 See Zimbabwe's Access to Information and Protection of Privacy (Amendment) Act of 2007, sec 18.

116 See Appendix I of the thesis.

117 See Appendix I of the thesis

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2014, the merits judgment in the *Mtikila* case was published on the official website of the government of Tanzania on 18 January 2016 (although after 18 months of the reparation ruling), and has remained on the government website since then.[118] Also as requested by the Court, an overdue report on status of implementation of the *Mtikila* decision was submitted to the Court by the government of Tanzania on 17 April 2015.[119]

Space constraints do not allow for full exposition of the implementation narrative on a case by case basis. Nonetheless, the implementation narrative and compliance status analysis of each of the 75 reparation orders selected for the study is appended to the thesis as Appendices I and II. In majority of the cases involved in the study, the five states either completely ignored reparation orders of the selected HRTs or partially complied with them. For instance, the African Commission issued five reparation orders for the government of Nigeria to implement in *SERAC v Nigeria* (*Ogoniland* case),[120] yet the government complied partially with four.[121] In *Purohit & Moore v The Gambia* (*The Gambian Mental Health* case)[122] where the African Commission issued three reparation orders for The Gambia, the government complied partially with two.[123] Similar pattern of *a lar carte* compliance was observed in other cases decided by the African Commission and the African Children's Rights Committee.[124] One theme common to most of the cases of partial compliance, is the formulation of the reparation orders, which mostly are very broad and open-ended. In certain cases, it is unclear exactly what the government needs to do and whether government has in fact done it.[125]

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[118] 'Rev. Mtikila TLS & LHRC vs URT (Application No: 009& 011/2011' 18 January 2016 http://sheria.go.tz/index.php?option=com_docman&task=cat_view&gid=44&Itemid=68 (accessed 22 July 2017). See also Report of the activities of the African Court on Human and People's Rights (January - June 2016) 8, submitted to the Executive Council, thirtieth ordinary session, 22 - 27 January 2017 in Addis Ababa, Ethiopia.

[119] Report of the activities of the African Court on Human and People's Rights (January - June 2015), submitted to the Executive Council, Twenty-Seventh ordinary session, 7 - 12 June 2015 in Johannesburg, South Africa (EX.CL/922(XXVII) 10 - 11.

[120] *Ogoniland* case.

[121] See Appendix I of the thesis. While some investigations have been carried out following the Commission's decision in the Ogoniland case, no member of the now defunct Rivers State Internal Security Task Force (RSISTF) or any other security agency that formed the RSISTF are known to have been prosecuted for atrocities committed against the Ogoni people.

[122] *Gambian Mental Health* case.

[123] See Appendix I of the thesis

[124] As above.

[125] A good example is Communication 292/04 *Zimbabwe Lawyers for Human Rights & IHRDA v Zimbabwe*, where the African Commission urged Zimbabwe to take urgent steps to ensure that (domestic) court

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Of the 36 reparation orders issued by the three selected sub-regional HRTs, full compliance was recorded only in eight instances, representing 22 percent. The cases in which full compliance was recorded are briefly summarised below. In *SERAP v Nigeria (Nigerian Right to Education* case*)*,[126] it was reported by the Independent Corrupt Practices Commission (ICPC) in October 2007 that more than 488 million Naira was looted from the state and national headquarters of the Universal Basic Education Commission (UBEC), the government agency responsible for implementing basic education programme in Nigeria. An additional sum of 3.1 billion Naira was also reportedly looted by officials of UBEC. Based on this report, SERAP, an NGO based in Lagos, approached the ECCJ arguing that the corrupt practices in UBEC, of which government is complicit, violates the right to free and compulsory basic education under the African Charter. In its judgment delivered on 30 November 2010, the Court dismissed the objections of the government of Nigeria that education is a mere directive policy and not a legal entitlement of citizens. The ECCJ accordingly held that it will enforce the right to education. The ECCJ thus ordered the government of Nigeria to take necessary steps to provide the money to ensure a smooth implementation of the education programme. The UBE programme has continued uninterrupted.[127] Previously unassessed grants were released once the states concerned provide their counterpart contribution.[128] Because of the limited nature of the reparation order in this case, this study concludes that the specific reparation order in this case has been fully complied with.[129]

The complainant in *Alimu Akeem v Nigeria*[130] alleged arbitrary arrest and detention since 13 November 2006. He was detained from the date of the arrest in 2006 to 15 May 2009 when

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decisions are respected and implemented. How is state compliance to be measured in this case? Another example is the *Ogoniland* case where the African Commission requested the government of Nigeria to provide 'information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.' One wonders how the Commission intends to confirm whether this order has been complied with. Who determines which communities are likely to be affected by oil operations?

[126] *SERAP v Nigeria* (*Right to Education case*), Suit No ECW/CCJ/APP/12/07; Judgment No ECW/CCJ/JUD/07/10.

[127] See Adjolohoun (n 4 above) 177 - 179.

[128] As above.

[129] See J Ukaigwe *ECOWAS law* (2016) 196; Telephone communication with T Adewale (SERAP) on 6 April 2017.

[130] *Alimu Akeem* case.

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he was formally arraigned before a Court Martial. In its judgment of 28 January 2014, the ECCJ found that the detention was unlawful and ordered the immediate release of the complainant and payment to him of the sum of 5 million Naira for the harms done. The complainant was released soon after the judgment,[131] and the sum of 5 million Naira was paid to the complainant by the government of Nigeria.[132] In another Nigerian case, *Modupe Dorcas Afolalu v Nigeria,*[133] the applicant argued that the post-election violence that took place in Kaduna on 18 April 2011 caused her husband's death who was at the time a lecturer at the Nuhu Mamali Polytechnic in Nigeria. The applicant alleged discrimination in the process of payment of compensation of victims of the post-election violence as her family and other families who were victims of the violence were excluded from the payment process. The ECCJ agreed with the complainant and ordered the government of Nigeria to pay the complainant 10 million Naira for all the harm caused. The sum of 10 million Naira was paid to the complainant, by the government of Nigeria.[134]

In the case of *James Katabazi and 21 others v The S-G of EAC and AG Uganda,*[135] the applicants in 2004 were charged with treason, and remanded in custody. However, on 16 November 2006, a High Court in Uganda granted them bail. Immediately after the bail was granted, the courtroom was surrounded by heavily armed security operatives who interfered with preparation of bail documents, and rearrested the applicants. It is based on this interference that the applicants approached the EACJ. The Court held that the interference by the armed security agents amounted to a violation of the principle of the rule of law. Following the Court's judgment, the 22 applicants were released without facing further charges.[136] On 8 May 2008, the Taxation Registrar of the EACJ assessed the costs payable to the applicants at US$70,185 only.[137] The cost order has been fully complied with by government of Uganda.[138]

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131 Interview with S Egbeyinka on 20 May 2016.
132 As above.
133 *Modupe Dorcas Afolalu* case.
134 Egbeyinka (n 131 above).
135 *Katabazi and Others v S-G of EAC and A-G Uganda* (2007) AHRLR 119 (EAC 2007).
136 A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' unpublished LLD thesis, University of Pretoria, 2014, 181.
137 As above.
138 Email from S Tweny (EACJ Sub-Registry in Uganda) on 29 May 2017.

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In other cases decided by the EACJ, namely *Sitenda Sibalu v S-G of EAC, AG Uganda and Others,*[139] *Democratic Party and Mukasa Mbidde v S-G of EAC and A-G Uganda,*[140] and *Among Anita v A-G Uganda and others,*[141] various sums of money ranging from 14,787 to 52,534.10 United States Dollars were ordered, and the government of Uganda complied fully with the costs orders.[142] It is interesting to note that the various sums paid as costs by the government of Uganda in the cases above exceed the amounts which the ECCJ requires the government of The Gambia to pay as compensations, for example, in the case of *Deyda Hydara v The Gambia,*[143] yet compensation has not been paid.[144] Again, the above comparison of Uganda and The Gambia demonstrates how state-level characteristics and variation in government commitment to compliance could impact state compliance with the same type of reparation orders. It could be argued, in the above case, that perhaps The Gambia, being a relatively poor state, was unable and not unwilling to pay. In *SERAP v Nigeria (Bundu Waterfront* case*),*[145] the ECCJ ordered the government of Nigeria to pay the sum of 11 million Naira (nearly US$70,000) to 10 residents of waterfront settlements in Bundu Ama area of Rivers state. The government made to the victims an initial payment of 6.5 million Naira (over US$30,000).[146] A state that is committed to a particular human rights regime, even though poor, when faced with a reparation order of herculean nature will at least take some steps to acknowledge its obligations and to meet those obligations within the limits of its resources.

Overall, the three regional HRTs selected for the study recorded full compliance in only five reparation orders, that is 13 percent of the 39 reparation orders they issued during the study period, while the three sub-regional HRTs recorded full compliance in eight

[139] *Sitenda Sibalu v S-G of EAC, A-G Uganda and others*, Judgment of 30 June 2011 (*Sitendu Sibalu* case).
[140] *Democratic Party and Mukasa Mbidde* case.
[141] *Among Anita* case.
[142] Tweny (n 138 above). See also email from B Ntihinyurwa (EAC Secretariat) on 2 June 2017.
[143] *Deyda Hydara* case.
[144] See Appendix II of the thesis.
[145] *SERAP v Nigeria* (*Bundu Waterfront* case), decided by the ECCJ on 10 June 2014. See Amnesty International "Nigeria: Slum-dwellers' victory over government in international court a triumph against impunity" 10 June 2014 https://www.amnesty.org/en/press-releases/2014/06/nigeria-slum-dwellers-victory-over-government-international-court-triumph/ (accessed 27 April 2017).
[146] Egbeyinka (n 131 above); See also 'Bundu waterfront shooting: SERAP faults FG's N6.5m compensation' *Vanguard News* 1 July 2015 http://www.vanguardngr.com/2015/07/bundu-waterfront-shooting-serap-faults-fg-n6-5m-compensation/ (accessed 25 March 2017).

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reparation orders, representing 22 percent. Despite having a higher rate of full compliance, the selected sub-regional HRTs also recorded a higher rate of non-compliance. The question can be asked: Which of the two groups of HRTs recorded better human rights compliance during the study period? Is it the group with the higher rate of full compliance, in this case the sub-regional HRTs or the group with the lower rate of non-compliance, in this case the regional HRTs? The answer, it is argued below, lies in the analysis of the aggregate compliance for the two human rights systems.

3.4. Comparing state compliance in the selected states

In this section, the thesis discusses the status of compliance with reparation orders of the selected HRTs in each of the case study countries. The objective of the analysis is to describe how the compliance data available for each country relates to the hypothesis set out earlier in the chapter by interesting how each of the five countries responded to decisions of the various regional and sub-regional HRTs. The discussion below follows the following order: Nigeria, The Gambia, Zimbabwe and 'other countries'. Tanzania and Uganda are taken together as 'other countries' because of the limited number of cases involving these two countries.

3.4.1 Nigeria

A total of 22 reparation orders were issued for Nigeria to implement during the study period by the African Commission and the ECCJ. Of the 22 reparation orders, 13 were issued by the ECCJ and the remaining nine by the African Commission. These reparation orders are contained in five decisions of the African Commission and six judgments of the ECCJ, decided during the study period.

Table 3.4: Compliance with reparation orders of the African Commission and the ECCJ in Nigeria (2000 - 2015)

HRTs	Aggregate compliance rate	Full compliance	Partial compliance	Non-compliance	Total of reparation orders
African Commission	61%	n = 3	n = 5	n = 1	9
ECCJ	38%	n = 4	n = 2	n = 7	13

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As Table 3.4 above indicates, the aggregate rate of compliance for the African Commission's decisions which involved Nigeria during the study period is 61 percent while the aggregate for the ECCJ is 38 percent. Breaking down the figures, the analysis shows that Nigeria, in relation to decisions of the African Commission, recorded a higher full compliance rate and a lower non-compliance rate than the ECCJ. At the African Commission, Nigeria recorded 33 percent full compliance, 56 percent partial compliance, and only 11 percent non-compliance. At the ECCJ, it recorded the following: 31 percent full compliance, 15 percent partial compliance and 54 percent non-compliance. The results show that during the study period, Nigeria complied much better with decisions of the African Commission (a regional quasi-judicial HRT) than decisions of the ECCJ (a sub-regional judicial HRT). This implies that the dichotomy between regional and sub-regional HRTs, though relevant, has not been significant in defining Nigeria's response to decisions of the selected HRTs during the study period.

3.4.2 The Gambia

A total of 12 reparation orders were issued by the African Commission and the ECCJ for The Gambia during the study period.[147] In the case of The Gambia, the figures above represent the total number of reparation orders so far issued against the government by the African Commission and the ECCJ in human rights cases, as at 31 December 2015. As a result, the analysis in relation of The Gambia is not based a sample like the case of Nigeria above. Of the 12 reparation orders, eight were issued by the ECCJ and the remaining four by the African Commission. These reparation orders are contained in two decisions of the African Commission, and three judgments of the ECCJ.[148]

Table 3.5: Compliance with reparation orders of the African Commission and ECCJ in The Gambia (2000 - 2015)

HRTs	Aggregate compliance rate	Full compliance	Partial compliance	Non-compliance	Total No. of reparation orders
African Commission	38%	n = 0	n = 3	n = 1	4
ECCJ	0%	n = 0	n = 0	n = 8	8

[147] See the list of cases appended to the thesis as Annexure I.
[148] As above.

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The data in Table 3.5 above confirms that, just like in the case of Nigeria, the government of The Gambia complied better with the reparation orders issued by the African Commission, a regional quasi-judicial HRT than those issued by the ECCJ, a sub-regional judicial tribunal. While The Gambia recorded 38 percent aggregate compliance in relation to reparation orders of the African Commission, it recorded zero percent aggregate compliance in relation to those of the ECCJ. One major limitation of the analysis regarding The Gambia is the lack of sufficient data as the conclusion above was made based on the four reparation orders issued by the African Commission in the *Jawara* case[149] and *The Gambian Mental Health* case[150] as well as the eight reparation orders issued by the ECCJ in the following cases: *Ebrimah Manneh* case,[151] *Musa Saidykhan* case[152] and *Deyda Hydara* case.[153]

In its limited form, the finding above challenges the *study hypothesis* that sub-regional HRTs produce better state compliance than regional HRTs. Several reasons may be advanced for the results. I argue that the three reasons that are most compelling are: state-level characteristics, the lack of commitment to the ECCJ by the government of The Gambia which was demonstrated during the study period through subtle attacks on the human rights mandate of the tribunal; and the nature of the reparation orders issued by the ECCJ in the three cases, which if implemented could embolden opposition to the regime.[154] With the change of government in January 2017, it is expected that the new government would be more likely to comply with the ECCJ judgments.[155] Media Foundation for West Africa (MFWA) in March 2017 discussed the non-implementation of the cases with the new Gambian President, Adama Barrow.[156] However, as at 31 July 2017, none of the reparation orders in the three ECCJ cases have been complied with by the government of The Gambia.

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149 *Sir Dawda Jawara v The Gambia* (*Jawara* case) (2000) AHRLR 107 (ACHPR 2000).
150 *Purohit and Another v The Gambia* (*Gambian Mental Health* case) (2003) AHRLR 96 (ACHPR 2003)
151 *Chief Ebrima Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008).
152 ECW/CCJ/JUD/08/10 *Musa Saidykhan v The Gambia* (*Musa Saidykhan* case).
153 ECW/CCJ/APP/30/11 *Deyda Hydara v The Gambia* (*Deyda Hydara* case).
154 See discussions on backlash to HRTs in Africa in chapter 6. See also Alter, Gathii & Helfer (n 95 above) 297 - 298.
155 Email from D Mawutor (Media Foundation for West Africa) on 3 April 2017.
156 'MFWA holds discussions with Gambian President Adama Barrow' http://www.mfwa.org/mfwa-holds-discussions-with-gambian-president-adama-barrow/ (accessed 24 March 2017).

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3.4.3 Zimbabwe

A total of 22 reparation orders were issued for the government of Zimbabwe to implement during the study period by the African Commission and the SADC Tribunal.[157] Of the 22 reparation orders, eight were issued by the SADC Tribunal and the remaining 14 by the African Commission. These reparation orders are contained in six decisions of the African Commission and three judgments of the SADC Tribunal, delivered by the two HRTs during the study period.[158] As demonstrated in Tables 3.6 below, it emerges that compliance with HRTs' decisions in Zimbabwe, during the study period, has been better at the regional than the sub-regional level. Zimbabwe complied fully with two (or 14 percent) and partially with one (or 7 percent) of the 14 reparation orders issued by the African Commission. None of the reparation orders of the SADC Tribunal against the government of Zimbabwe have been complied with. The aggregate compliance rate for Zimbabwe in relation to judgments of the SADC Tribunal is zero percent, compared to the aggregate rate of compliance in relation to all decisions of the African Commission against the government of Zimbabwe, which is 18 percent.

Table 3.6**: **Compliance with reparation orders of the African Commission and the SADC Tribunal in Zimbabwe (2000 - 2015)

HRTs	Aggregate compliance rate	Full compliance	Partial compliance	Non-compliance	Total of reparation orders
African Commission	18%	n = 2	n = 1	n = 11	14
SADC Tribunal	0%	n = 0	n = 0	n = 8	8

I argue that the same set of factors are responsible for non-compliance in Zimbabwe as in The Gambia. The government of Zimbabwe clearly was not committed to complying with the judgments of the SADC Tribunal and decisions of the African Commission. This was evident through constant attacks on the SADC Tribunal,[159] and opposition to decisions and reports of the African Commission.[160] Secondly, the nature of the reparation orders of the

[157] For Zimbabwe, the figures above represent the total number of reparation orders so far issued against the government by the African Commission and the SADC Tribunal in human rights cases.
[158] See the list of cases appended to the thesis as Annexure I.
[159] See Appendix I of the thesis.
[160] See discussions on backlash against HRTs in chapter 6.

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two HRTs are such that if implemented could embolden opposition to the Mugabe regime. The SADC Tribunals judgments, especially in the *Campbell* case, are in stark contrast to the ideological position of the government, and most of the African Commission's decisions were submitted by NGOs representing those the government regarded as its 'enemies'. Thus, it was the lack of commitment to compliance by the government, fuelled by the normative and political costs of implementation, that was responsible primarily for the poor compliance records of Zimbabwe. The system of governance in place in Zimbabwe, arguably also played a role, as democracy is known to create positive incentives for state compliance. The relevance of each of these factors is examined in chapter 4 of the thesis.

Overall, in Nigeria, The Gambia and Zimbabwe, decisions of the African Commission, a regional quasi-judicial HRT, have produced more compliance than judgments of the ECCJ and the SADC Tribunal, two sub-regional judicial HRTs selected for the study. As will be argued subsequently, the above does not imply that regional HRTs are the ideal forum for realising compliance; it only confirms the existence of certain compliance-enhancing factors in the cases decided by the regional HRTs selected for the study. The finding of this study, based on the state-specific analysis above, is that compliance is not so much determined by the type of the tribunal, whether it is a regional or sub-regional tribunal, but rather the existence of other factors as discussed in chapter 4 of the thesis.

3.4.4 Other countries: Tanzania and Uganda

Tanzania has the least number of cases of the states selected for this study: two judgments of the African Court and one judgment of the EACJ.[161] A total of five reparation orders were issued for Tanzania to implement in the three cases. Although new cases have been decided by the African Court against Tanzania, especially *Onyango v Tanzania*[162] and *Abukakari v Tanzania*,[163] these cases were not decided within the study period (2000 - 2015). Notwithstanding the limited number of cases, Tanzania brings a unique perspective

[161] See the list of cases appended to the thesis as Annexure I.
[162] See Application 006/2013 – *Wilfred Onyango Nganyi & 9 Others v Tanzania* (18 March 2016).
[163] See Application 007/2013 – *Mohamed Abubakari v Tanzania*, decided by the African Court on 3 June 2016. The government of Tanzania has reported to the African Court on measures taken to implement this decision. However, following the report, the government filed a request at the Court seeking interpretation of the decision. See Skype communication with E Chijarira (PALU) on 5 May 2017.

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to the study; it is the only country selected for this study that has been involved in cases at the African Court and the EACJ, two judicial HRTs that issue decisions that are legally binding. One would expect that, if issuance of binding corresponds to high rate of state compliance, the government of Tanzania ought to comply promptly with reparation orders of the African Court and the EACJ.

The data in relation to Uganda also brings a certain uniqueness to the study; it provides an opportunity to compare two quasi-judicial HRTs, the African Commission and the African Children's Rights Committee, whose decisions are perceived to be recommendatory in nature. The inclusion of the African Children's Rights Committee's decision in *Hansungule and Others v Uganda*[164] brings the total number of reparation orders issued by quasi-judicial HRTs in the study to 32. This figure is comparable to the 43 reparation orders issued overall by the four judicial HRTs selected for the study.

***Table 3.7*: Compliance with reparation orders of the African Children's Rights Committee, African Court and EACJ in Tanzania and Uganda (2000 - 2015)[165]**

HRTs	Aggregate compliance rate	Full compliance	Partial compliance	Non-compliance	Total of reparation orders
African Court (Tanzania)	14%	n = 0	n = 2	n = 5	7
EACJ (Tanzania)	50%	n = 0	n = 1	n = 0	1
ACERWC (Uganda)	50%	n = 0	n = 5	n = 0	5
EACJ (Uganda)	83%	n = 4	n = 2	n = 0	6

Due to the limited number of cases, it is difficult to draw far reaching conclusions. Overall, Tanzania's aggregate rates of compliance in relation to the African Court and the EACJ are 14 and 50 percent, respectively whereas Uganda's aggregate compliance rates for the African Children's Rights Committee is 50 percent, and 83 percent for the EACJ. Clearly, Uganda recorded better compliance with reparation orders issued by the EACJ, a sub-regional judicial tribunal, than those issued by the African Children's Rights Committee; 67 percent of reparation orders issued by the EACJ in human rights cases selected for this

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164 Communication 2/2009 *Michelo Hansungule and Others (on behalf of children in Northern Uganda) v Uganda*, decided by the African Children's Rights Committee on 10 April 2013.

165 See the list of cases appended to the thesis as Annexure I.

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study have been fully complied with by Uganda. None of the reparation orders issued by the African Children's Rights Committee have been fully complied with. This piece of data implies that not only has human rights judgment compliance in Uganda, during the study period, been better at the sub-regional than the regional level, but that Uganda responded more promptly to reparation orders of the EACJ, a sub-regional judicial tribunal, than to reparation orders of the African Children's Rights Committee, a regional quasi-judicial tribunal. This is a complete departure from the results from Nigeria, the Gambia and Zimbabwe, where the African Commission, a regional quasi-judicial tribunal, has recorded better compliance than both the ECCJ and the SADC Tribunal.

One important lesson learned from the country-specific analysis above is that at least in three states – Nigeria, The Gambia and Zimbabwe – regional quasi-judicial HRTs, in terms of aggregate compliance ratings, out-performed sub-regional judicial HRTs. However, the results from Tanzania and Uganda turned the table in favour of sub-regional HRTs. The variation in state compliance between regional and sub-regional HRTs arguably is due to many factors such as differences in number of cases selected for each tribunal, differences in the maturity of the HRTs and differences in the length of years since the decisions were issued. However, in each of the cases examined, the analysis indicates that human rights judgment compliance does not depend on the nature of the tribunal, whether regional or sub-regional. In the three studied countries where the African Commission outperformed two sub-regional HRTs, the success of the Commission in each case is closely linked to the domestic-level characteristics of the states, the nature of the respective reparation orders and the degree of follow up by various actors. These factors also seem to be responsible for the modest success of the EACJ in Uganda and Tanzania, two countries where regional HRTs have fared less favourably.

3.5. Overall compliance status analysis: Regional versus sub-regional HRTs

Hypothesis: States comply better with decisions of sub-regional HRTs than regional HRTs.

In 2004, Louw found that African states fully complied with 'views' of the United Nations Human Rights Committee (HRC) in 29 percent of the cases; non-compliance rate was

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estimated at 52 percent.[166] With respect to the African Commission, Viljoen and Louw found in 2004 that full compliance rate was 14 percent while non-compliance was 66 percent.[167] This led Louw to conclude that decisions of the HRC enjoyed better compliance among African states than those of the African Commission.[168] Louw however noted that as between countries that have cases at both the HRC and African Commission, the compliance rate does not seem to differ from system to system.[169] Adjolohoun added a new dimension to the data set.[170] With a 66 percent full compliance rate for the ECCJ, Adjolohoun's study prompts the question whether state compliance is better at the sub-regional level than the regional and global levels. Interpreted in the light of the 'regional contagion theory',[171] the modest accomplishments of the ECCJ and EACJ in human rights protection as recently studied by Adjolohoun[172] and Possi,[173] tend to lead to a general assumption that perhaps states take more seriously their obligations under sub-regional human rights regimes. In this study, the assumption above has been tested by comparing the human rights judgment compliance records of five African states at both regional and sub-regional level.

The question was posed to all the respondents selected for this study on their perception about state compliance with reparation orders of regional and sub-regional HRTs in Africa: Whether they believed state compliance with decisions of HRTs was better at the sub-regional than the regional level.[174] Respondents that believed regional HRTs are better at inducing state compliance than sub-regional HRTs argued that the three regional HRTs selected for the study are specifically created to deal with human rights issues, unlike the sub-regional tribunals which are only established for a number of tasks including trade disputes and integration matters.[175] It was argued that the lack of clear human rights mandate could make sub-regional HRTs to be 'caught up in two minds' in choosing

[166] Louw (n 6 above) 82.
[167] As above.
[168] Louw (n 6 above) 82.
[169] As above.
[170] Adjolohoun (n 4 above) vi.
[171] Simmons (n 1 above) 13; Cardenas (n 1 above) 110.
[172] See Adjolohoun (n 4 above) 1 - 382.
[173] See Possi (n 136) 1 - 351.
[174] See list of interview respondents attached to the thesis as Annexure VIII.
[175] See, for instance, email from A Possi (Advocate of the High Court of Tanzania) on 30 March 2017.

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between their primary responsibility and the assumed mandate of human rights protection.[176] The lack of specific human rights jurisdiction for sub-regional HRTs may also affect or compromise their effectiveness in dealing with human rights matters. The other set of respondents argued that compliance rates strictly or broadly construed is about the same at both level, because state compliance takes different forms and is often affected by considerations other than legal.[177] Table 3.8 below clarifies the status of compliance with the 75 reparation orders selected for the study, with a view to demonstrating how the two groups of HRTs faired.

***Table 3.8*: Compliance with reparation orders of the three regional and three sub-regional HRTs in five states in Africa (2000 - 2015)**[178]

List of the HRTs	Aggregate compliance rate	Full compliance	Partial compliance	Non-compliance	Total No. of orders
Regional HRTs	**33%**	**13% (n = 5)**	**41% (n = 16)**	**46% (n = 18)**	**39**
ACERWC	50%	n = 0	n = 5	n = 0	5
African Commission	35%	n = 5	n = 9	n = 13	27
African Court	14%	n = 0	n = 2	n = 5	7
Sub-regional HRTs	**29%**	**22% (n = 8)**	**14% (n = 5)**	**64% (n = 23)**	**36**
EACJ	79%	n = 4	n = 3	n = 0	7
ECCJ	24%	n = 4	n = 2	n = 15	21
SADC Tribunal	0%	n = 0	n = 0	n = 8	8

Overall, three of the selected states – Nigeria, the Gambia and Zimbabwe – performed better, in terms of aggregate compliance, at the regional than sub-regional level. Table 3.8 above puts the aggregate compliance rates of the selected regional HRTs at 33 percent and the aggregate compliance rate for the selected sub-regional HRTs at 29 percent. On a closer look, however, Table 3.8 shows that there is no significant correlation between human rights judgment compliance, on the one hand, and the regional or sub-regional

[176] As above.
[177] See email from S Ibe (Open Society Justice Initiative) on 25 May 2016. See also email from OC Okafor (York Research Chair in International and Transnational Legal Studies and Member, UN Human Rights Council Advisory Committee) on 5 May 2016.
[178] See the list of cases appended to the thesis as Annexure I.

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character of a HRT, on the other hand. State compliance is not necessarily better at one level than the other. As clearly indicated in Table 3.8, sub-regional HRTs recorded 22 percent full compliance as compared to the regional HRTs' aggregate of 13 percent full compliance. What do we make of these seemingly conflicting results? On the one hand, the compliance records of Nigeria, the Gambia and Zimbabwe show that human rights judgment compliance may be better at the regional level. On the other hand, empirical analysis of state behaviours in Tanzania and Uganda shows the contrary; the two states recorded better compliance during the study period at the sub-regional level. I argue that the compliance variation observed above does not depend on the regional or the sub-regional character of the tribunals; it depends rather on state-level characteristics and the nature of the reparation orders issued by the HRTs.

If, for instance, all the decisions of the ECCJ against The Gambia or those of the SADC Tribunal against Zimbabwe had been issued by regional HRTs against the same set of countries under the same circumstances, the compliance outcome most likely would have been the same. As discussed later in chapter 4, the major cause of non-compliance in those cases relate to the domestic characteristics of the two states and the nature of the reparation orders issued in the cases. If the assumption is to be valid that human rights judgment compliance is better at one level than the other, it means that irrespective of state-level characteristics and the nature of the reparation orders issued, the compliance record of a HRT at one level would still be better than a HRT at another level. This study finds no evidence to support such hypothesis. Thus, the *study hypothesis* has not been supported by the data analysis. The finding above however has limited application beyond this study due to the limited number of states selected for the study.

3.6. Chapter conclusion

This chapter compares human rights judgment compliance in three regional and three sub-regional human rights regimes in Africa, and assesses the interplay, in terms of the rates of state compliance, between regional and sub-regional HRTs in Africa, using five states – Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe – as case studies. The chapter responds to the second research question – *what is the status of compliance with decisions*

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of HRTs in the studied countries, and how does it compare with respect of regional and sub-regional HRTs? To answer this question, the chapter formulated the following hypothesis: *States comply better with decisions of sub-regional HRTs than decisions of regional HRTs.* Drawing from the various analysis in the chapter, the hypothesis was found not to have been supported by empirical evidence arising from the study. In other words, compliance with decisions of regional and sub-regional HRTs in the selected states is not so much about the type of the tribunal but rather the existence of other factors, which are explored further in chapter 4 of the thesis.

One major problem with the compliance status analysis and implementation narratives in the chapter is establishing a causal connection between the reparation orders of the selected HRTs and the implementation efforts of governments at the domestic level. As noted in many of the cases, states seldom make explicit reference to decisions of the relevant HRTs when taking measures that conform to the reparation orders of HRTs. This disconnection between state actions and decisions of HRTs highlights how peripheral these decisions are in the way African governments approach human rights issues at the domestic level.

One of the significant contributions of this chapter to the thesis and human rights judgment compliance literature in Africa is the concept of 'aggregate compliance'. The chapter develops the concept of 'aggregate compliance' as a framework for comparing human rights judgment compliance across tribunals and states. It argues that in order to compare human rights judgment compliance across various tribunals and states, it is imperative to integrate partial compliance into the overall compliance analysis, using the formula Aggregate Compliance is equal to the summation of the rates of full compliance and half the rate of partial compliance. The chapter puts the formula mathematically as follows: AC = FC + ½ PC. The traditional approach in many studies has been to describe the compliance rate of a HRT is terms of the rate of full compliance only. This 'all or nothing approach', the chapter argues, conflates 'partial compliance' with 'non-compliance' and thus understates the significant contributions of partial compliance and many ongoing efforts to give effect to decisions of HRTs.

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Overall, the findings of the chapter, based on the various analyses in charts and Tables, is that human rights judgment compliance is not necessarily better at the sub-regional than the regional level. In each of the cases examined in the chapter, compliance has depended almost entirely on state-level characteristics and the nature of reparation orders issued by the tribunal. Again, the hypothesis formulated for analysis in the chapter was not supported by the evidence. However, additional research may be needed to subject this finding to further rigorous analysis. A good starting point is a larger sample of cases as well as more cross-national comparisons. In the next chapter, the thesis interrogates the primary factors that are predictive or indicative of state compliance in the light of the data available in the study.

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Chapter 4

Factors influencing compliance with reparation orders of HRTs in the selected African states

4.1. Introduction
4.2. Theories of compliance with international law
4.3. Identifying factors that facilitate compliance with HRTs' decisions
4.4. The five primary factors indicative of state compliance
4.5. Analysis of the applicable compliance theories
4.6. Chapter conclusion

4.1. Introduction

International human rights law scholarship is gradually shifting from asking whether human rights treaties make a difference at the domestic level to interrogating the factors and mechanisms responsible for domestic human rights change.[1] If the African regional and sub-regional human rights systems are to have significant effects at the domestic level, understanding the mechanisms that cause such effects is crucial. Identifying the factors that facilitate state compliance enables compliance partnerships to channel their resources appropriately to produce optimal results. In this chapter, the thesis examines the specific factors responsible for state compliance and variation in the level of compliance by the selected states. At least four variations in the pattern of compliance by states have been observed in the empirical data presented in the previous chapters: variations in compliance between HRTs, variations in compliance between states, variations in compliance within a state; and variation in compliance with respect to the reparation orders.[2] The preoccupation of this chapter is to explain the primary factors

[1] D Anagnostou & A Mungiu-Pippidi 'Domestic implementation of human rights judgments in Europe: Legal infrastructure and government effectiveness matter' (2014) 25 *European Journal of International Law* 205, 205.

[2] See, for instance, C Hillebrecht *Domestic politics and international human rights tribunals: The problem of compliance* (2014) 11; See generally D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American Courts of human rights' (2010 - 2011) 6 *Journal of International law and international relations* 35, 57 - 75.

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responsible for these variations, and provide a theoretical frame from which the politics of state compliance with reparation orders of the selected HRTs may be understood, analyzed and if possible predicted.

The chapter begins in part 4.2 with a discussion of the various theories of compliance with international law which form the basis for the analysis of the factors that influence state compliance with HRTs' decisions. In part 4.3, the study reviews the specific factors which leading experts consider relevant to human rights judgment compliance, and based on this information, the chapter develops a checklist of 15 factors that are generally postulated as influencing states to comply with decisions of HRTs in Africa. These factors are divided into five broad but related categories. The five categories relate to the following thematic areas: institutional design of the tribunal, the working practices adopted by the tribunal, the nature of cases submitted to the tribunal, the domestic characteristics of the state required to implement the tribunal's decisions, and the extent to which civil society and transnational actors are involved in the case. Part 4.3 also contains analyses of the data from the selected states with a view to indicating the likely contributions of each of the 15 factors to judgment compliance in the selected states.

In part 4.4, the thesis argues, rather intuitively and based on limited descriptive statistical analysis carried out in respect of the five studied countries, that for compliance with reparation orders of international HRTs to happen, a minimal degree of compliance commitment at supranational, national and sub-national level is necessary. Secondly, the thesis argues the existence of a stable, open and democratic system of government in a state can provide important clues about the likelihood of human rights judgment compliance by a state. Third, the thesis argues that the nature of the reparation orders of HRTs is a significant factor to understanding why states comply or do not comply with reparation orders of HRTs. Three aspects of the nature of the reparation orders of HRTs identified in the study are cost, specificity and limited remedies. For instance, the study argues that the lower the cost of implementing a reparation order, the higher the chances of compliance. In other words, the higher the cost of non-compliance, the lower the incidence of non-compliance. This implies that the rate of judgment compliance is related to the cost of compliance and the cost of non-compliance. The thesis further argues that

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the other two factors that are most predictive of judgment compliance in the selected states are regime change or political transition following the decisions and effective follow-up by HRTs and NGOs. These five factors, the thesis argues, are responsible primarily for the variations in the rate of state compliance with reparation orders of the selected HRTs.

In part 4.5, the chapter examines whether the findings above are consistent with existing theories of compliance with international law. The chapter argues that the theories of compliance with international law most consistent with its findings are the management theory,[3] the transnational legal process theory,[4] and the domestic politics theory.[5] The chapter concludes that there are four *underlying reasons* why the selected states complied with decisions of HRTs in Africa, namely: to signal human rights commitment, to signal commitment to a specific treaty regime, to signal commitment to the rule of law more broadly, and to advance domestic political reforms.[6]

4.2. Theories of compliance with international law

Theories of compliance with international law may be divided into two broad perspectives, namely instrumental and normative perspectives.[7] These theoretical perspectives are also sometimes referred to as rational choice theory and constructivism, respectively.[8] On the

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[3] See, for instance, A Chayes & AH Chayes 'On compliance' (1993) 47 *International Organization* 175, 175 - 205; A Chayes & AH Chayes *The new sovereignty: compliance with international regulatory agreements* (1995) 1 - 417.

[4] HH Koh 'The 1994 Roscoe Pound Lecture: Transnational legal process' (1996) 75 *Nebraska Law Review* 181, 181 - 207 (Koh 'Transnational legal process'); HH Koh, 'The 1998 Frankel Lecture: Bringing international law home' (1998) 35 *Houston Law Review* 623, 623 - 681 (Koh 'Bringing international law home'); HH Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1397, 1397 - 1417 (Koh 'How is international human rights law enforced').

[5] BA Simmons *Mobilizing for human rights: International law domestic politics* (2009) 1 - 472; BA Simmons 'From ratification to compliance: Quantitative evidence on a spiral model' in T Risse, SC Ropp & K Sikkink (eds) *The persistent power of human rights: From commitment to compliance* (2013) 43 - 60; S Cardenas *Conflict and compliance: State responses to international human rights pressure* (2007) 1 - 200.

[6] See Simmons *Mobilizing for human rights* (n 5 above); Hillebrecht (n 2 above) 3.

[7] For a comprehensive annotated bibliography of the most relevant literature on compliance with international law, see WC Bradford 'International legal compliance: An annotated bibliography' (2004) 30 *North Carolina Journal of International Law and Commercial Regulation* 379, 379 - 423; D Kapiszewski & MM Taylor 'Compliance: Conceptualizing, measuring, and explaining adherence to judicial rulings' (2013) 38 (4) *Law & Social Inquiry* 803, 819.

[8] ES Bates 'Sophisticated constructivism in human rights compliance theory' (2015) 25 *European Journal of International Law* 1169, 1170.

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one hand, rational choice theorists see compliance as the result of rational cost-benefit calculations, driven by states' self-interests. In other words, states comply with international law based on materialist or strategic reasons. Constructivist theorists on the other hand treat states as 'social entities',[9] and argue that states comply with international law because of normative considerations such as 'repeated interactions, argumentation and exposure to norms.'[10] Specific approaches to the rational choice theory include realism, institutionalism, liberalism, reputational and enforcement theory.[11] Each of these theories does not operate in isolation of others.[12] They are, to use the words of Koh 'complementary conceptual lenses to give a richer explanation of why compliance with international law does, or does not, occur in particular cases.'[13] Put differently as David Moore has done 'no one theory has a corner on the explanation for compliance'.[14] Below is an overview of some of the dominant theories of compliance with international law.

4.2.1 Rational choice approaches

The central argument of all rational choice approaches, also referred to as 'rationalism', is that material incentives, hegemonic power, sanctions and self-interests are the primary drivers of states' compliance with international law.[15] Proponents of this theoretical model believe that the state, like an individual, is driven principally by its self-interest.[16] Decisions

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[9] A Alkoby 'Theories of compliance with international law and the challenge of cultural difference' (2008) 4 *Journal of International Law and International Relations* 151, 155.

[10] As above.

[11] See generally, OR Young 'The effectiveness of international institutions: Hard cases and critical variables' in JN Rosenau & E-O Czempiel (eds) *Governance without government: Order and change in world politics* (1992) 160; OR Young *Compliance and public authority: A theory with international applications* (1979); L Henkin *How nations behave* (1979); HJ Morgenthau *Politics among nations: The struggle for power and peace* (1978); H Simon *Models of man: Social and rational - Mathematical essays on rational human behavior in a social setting* (1957) 200 - 204.

[12] TE Sainati 'Divided we fall: How the International Criminal Court can promote compliance with international law by working with regional courts' (2016) 49 *Vanderbilt Journal of Transnational Law* 191, 215.

[13] Koh 'How is international human rights law enforced?' (n 4 above) 1406.

[14] DH Moore 'Signaling theory of human rights compliance' (2003) 97 *Northwestern University Law Review* 879, 881.

[15] Bates (n 8 above) 1170; VO Ayeni 'Introduction and preliminary overview of findings' in VO Ayeni *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 3.

[16] For a general discussion of the rational choice model, see RO Keohane 'International relations and international law: Two optics' (1997) 38 *Harvard International Law Journal* 487, 495; B Kingsbury 'The concept of compliance as a function of competing conceptions of international law' (1998) 19 *Michigan Journal of International Law* 345, 349; A Sen 'Rational fools: A critique of the behavioural foundations of economic theory' in H Harris (ed) *Scientific models and man* (1979) 1, 5 - 6; EA Posner *Law and social norms*(2000) 46; HA Simon *Models of man: Social and rational* (1957).

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of a state to comply with human rights judgments are egoistic actions, taken to advance the material self-interest of the state as may be determined by individuals who represent the state.[17] Based on this, rational choice theorists believe states comply with international law only when compliance will give the state some material benefits at the time of compliance or in the near future. In other words, states comply with international including decision of HRTs based on materialist and strategic considerations. This implies that states have no altruistic intent for complying with international law.[18] If a state stands to gain more by complying, then it would comply; but if it would gain less by complying, then it would not comply.[19]

This theoretic perspective comes in different shades depending on what aspect of self-interest the proponents are focusing on. Realists have focused on hegemonic powers while institutionalists focused on state cooperation. Enforcement theorists have emphasised sanctions and other coercive measures while a handful of instrumental theorists have stressed reputational concerns as the primary incentive for compliance with international law. Below is an overview of some of the variants of the rational choice model.

(a) The realist theory

Realist theorists argue that the international system is anarchy.[20] States are the 'sole relevant actors', and that international law and politics depend on the maximization of the self-interests of states.[21] The central argument of the realists is that states do not comply with international law for the sake of the law but because of what they stand to gain. The roles of individuals, sub-state actors and international institutions are usually taken for granted. International law is seen simply as a means of pursuing power by hegemonic states. For realist scholars, compliance with international law depends on power. Powerful

[17] See PH Huang 'International environmental law and emotional rational choice' (2002) 31 *Journal of Legal Studies* 237, 241 - 243; BB de Mesquita *The war trap* (1981) 19 - 23.

[18] As above.

[19] *See* JL Goldsmith & EA Posner 'A theory of customary international law' (1999) 66 *University of Chicago Law Review* 1113, 1114 - 15.

[20] As above.

[21] HJ Morgenthau *Politics among nations: The struggle for power and peace* (1960) 27 - 35; HJ Morgenthau 'Positivism, functionalism, and international law' (1940) 34 *American Journal of International Law* 260, 269.

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states are less likely to comply with international law, unless the content of international law serves their interest.[22] While norms may influence the cost-benefit estimates of states, realists argue that norms do not have independent cause effects on state actions.[23] International law thus is an epiphenomenon.[24] Realism has developed along two theoretical variants: classical and structural realism.

The central idea in classical realism is that international law exists because powerful states benefit from their existence.[25] Less powerful states comply with international law simply because they are required to do so by the more powerful states. Classical realism thus construes hegemonic power as the magic wand that pull states towards compliance with international law. Developments in the 1970s and 1980s have shifted the focus of realist theorists from hegemonic power to a more nuanced explanation.[26] This new approach to realism, also called neorealism or structural realism, argues that compliance with international law is the result of convergence of state interests with rules of international law.[27]

Like classical realism, proponents of neorealism believe the state is a unitary actor but disagree with the exclusive focus on power relations as the ultimate predictor of compliance with international law.[28] In place of power relations, neorealist scholars argue that states comply with international law whenever it is in their interest to do so.[29] Convergence of state interest with legal rules is the reason states comply with international law.[30] Neorealist scholars construe the international environment as one of anarchy, thus rejecting the role of international institutions in bringing about compliance with international law.[31] The realist idea that international law is epiphenomenal and

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22 S Hoffman *The role of international organization: Limits and possibilities* (1956) 364.

23 BA Simmons 'Compliance with international agreements' (1998) 1 *Annual Review of Political Science* 75, 80.

24 See OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935, 1945; AT Guzman 'A compliance-based theory of international law' (2002) 90 *California Law Review* 1823, 1837.

25 HJ Morgenthau *Politics among nations* (1966); EH Carr *The twenty years' crisis 1919 - 1939* (1946).

26 For an explanation of some of these developments, see Hathaway (n 24 above) 1945.

27 See JL Goldsmith & EA Posner 'A theory of customary international law' (1999) 66 *University of Chicago Law Review* 1113, 1114.

28 Hathaway (n 24 above) 1945.

29 See Goldsmith & Posner (n 27 above) 1114 - 1115.

30 As above.

31 Hathaway (n 24 above) 1946.

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irrelevant has been severely criticised. Critics have asked why states devote so much resources into the negotiation of international treaties if those treaties have no constraining effect on state behaviour. It has also been asked why states alleged of violation of international law would expend human and material resources to prove its innocence if international law does not command compliance, as the realist scholars have argued.[32]

(b) The institutional theory

The institutionalists believe states are rational actors that act on the basis of self-interests.[33] They also believe the international system is anarchical and that power relations play a significant role in determining who does and who does not comply with international law.[34] They however differ from the realist theorists in that they believe cooperation is possible, and that membership of various international institutions shapes how states perceive their self-interests.[35]

Institutionalism takes international institutions very seriously.[36] Proponents of the theory believe rules and norms developed by international institutions or 'regimes' could alter the process of decision making in a state, thereby creating incentives for compliance with international law.[37] Through international cooperation, states give up short term goals to reap long term benefits'.[38] International law is complied with by states because it is in the interest of states to do so within the framework of international cooperation. Certain outcomes, such as securing development assistance, negotiating trade relations with other countries, addressing climate change, promoting environmental protectionism, and other transnational issue areas, may be achieved only through cooperation with other

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32 Hathaway (n 24 above) 1946 - 1947; Guzman (n 24 above) 1837 - 1838.
33 See RO Keohane *After hegemony, cooperation and discord in the world political economy* (1984) 65 - 84; J Goldsmith 'Sovereignty, international relations theory, and international law' (2000) 52 *Stanford Law Review* 959, 962 - 63; S-A Elvy 'Theories of state compliance with international law: Assessing the African Union's ability to ensure state compliance with the African Charter and Constitutive Act' (2012 - 2013) 41 *Georgia Journal of International and Comparative Law* 78, 78; C Powell 'United States human rights policy in the 21st century in an age of multilateralism' (2002) 46 *Saint Louis University Law Journal* 421, 425.
34 Hathaway (n 24 above) 1946.
35 Elvy (n 33 above) 79.
36 Hathaway (n 24 above) 1948.
37 Elvy (n 33 above) 79.
38 As above; Hathaway (n 24 above) 1948.

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states. According to institutionalist theorists, the desire to realise these outcomes may provide necessary incentives for states not only to pursue international cooperation but also to comply with international law.

One important consequence of institutionalism as a theory of compliance with international law is that it draws the attention of many scholars to the role of two important mechanisms of international cooperation: reputation and reciprocity.[39] Scholars have long argued that reputational concerns account for most acts of compliance with international law by states.[40] Downs and Jones described reputational theory as 'the linchpin of the dominant neoliberal institutionalist theory of decentralized cooperation'.[41] Joel Sobel is one of the few scholars to first establish a connection between reputation and cooperative relationships among states.[42] Writing in 1984, Robert Keohane stated 'for reasons of reputation, as well as fear of retaliation and concerns about the effects of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interest counsels them not to.'[43] Under the rubric of institutionalism, Guzman developed a reputational theory arguing that compliance with international law is as a result of reputational concerns and fear of sanctions.[44] Hathaway theorised that compliance with international law is as a result of enforcement and collateral consequences such as reputation, development assistance and trade interests.[45] According to Hafner-Burton, compliance with human rights obligations is more imminent when the obligations are tied to some economic benefits.[46]

[39] Ayeni (n 15 above) 3; AM Slaughter 'International relations, principal theories' (2011) 4 *Max Planck Encyclopaedia of Public International Law* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e722?prd=EPIL (accessed 2 March 2017).

[40] See GW Downs & MA Jones 'Reputation, compliance, and international law' (2002) 31 *Journal of Legal Studies* 95, 95; Keohane (n 309 above) 105 - 108.

[41] Downs & Jones (n 316 above).

[42] See J Sobel 'A theory of credibility' (1985) 52 *Review of Economic Studies* 557, 557; Downs & Jones (n 316 above) 98.

[43] Keohane (n 33 above) 106.

[44] Guzman (n 33 above) 1849.

[45] OA Hathaway 'Between power and principle: An integrated theory of international law' (2005) 72 *University of Chicago Law Review* 469, 506.

[46] EM Hafner-Burton 'Trading human rights: How preferential trade agreements influence government repression' (2005) 59 *International Organization* 593, 633.

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While scholars differ on the actual significance of reputation, most agree that reputational concerns by states play a crucial role in promoting compliance with international law.[47] One attribute common to all traditional reputational theory of compliance is the perception that states possess a single, unitary and fixed reputation.

(c) The liberal theory

Liberalism shifts attention from balance of power as the ultimate determinant of state behaviour in the international system. For liberal scholars, compliance depends on domestic politics, and they focus more on domestic political processes and domestic actors.[48] Unlike realist and institutionalist scholars, liberal theorists do not see the state as a unitary entity; rather they argue that domestic politics by the various domestic actors determine whether or not a state would comply with an international norm. Thus, according to liberal scholars, the political nomenclature of states or the regime type in place in a particular state may influence the state's compliance decisions.[49] One obvious consequence of the premise is that democracies are assumed more likely to honour their international obligations and comply with international law than authoritarian regimes.[50]

Liberal theorists like Moravcsik and Slaughter believe the distinction between liberal and non-liberal states is the primary predictor of how states behave in the international system.[51] Consequently, they argue that liberal states are likely to comply with international law than non-liberal states because liberal states habitually operate in what they called a 'zone of law'.[52] Helfer and Slaughter have adopted similar argument in

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[47] GW Downs & MA Jones 'Reputation, compliance, and international law' (2002) 31 *Journal of Legal Studies* 95, 99.

[48] See A-M Slaughter 'The liberal agenda for peace: International relations theory and the future of the United Nations' (1994) 4 *Transnational Law and Contemporary Problems* 377, 397 - 400; A Moravcsik 'Taking preferences seriously: A liberal theory of international politics' (1997) *International Organisation* 513, 513.

[49] See PR Trimble 'International law, world order, and critical legal studies' (1990) 42 *Stanford Law Review* 811, 842.

[50] OA Hathaway 'The cost of commitment' (2003) *John M Olin Center for Studies in Law, Economics, and Public Policy Working Papers* Series No 273, 14 - 17; E Alvarez 'Do liberal states behave better? A critique of slaughter's liberal theory' (2001)12 *European Journal of International Law* 183, 184 - 190.

[51] See Moravcsik (n 48 above) 513; A-M Slaughter 'International law in a world of liberal states' (1995) 6 *European Journal of International Law* 503, 503.

[52] As above.

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relation to the effectiveness of supranational tribunals.[53] They argued that one of the distinctive features of the European Court of Human Rights system that account for its success is the near democratic homogeneity of member states of the Council of Europe.[54] They argue further that liberal democratic states are more likely to comply with judgments of supranational tribunals than illiberal and authoritarian governments.[55] For instance, they may lose the support of significant domestic constituencies should they fail to comply with their international obligations. The argument of liberal theorists therefore is that governments that are committed to rule of law and separation of powers have more incentives to comply with international human rights judgments.[56]

4.2.2 Constructivism

Constructivism is based on identity formation through the process of social construction. The main argument of constructivist scholars is that the various elements advanced by rationalist theorists, such as 'military power, trade relations, international institutions, or domestic preferences' are objective facts that derive their real meaning from social construction.[57] In other words, state identities, belief, values and norms are socially constructed.[58] Constructivism emphasises the role of non-state actors, legal rules and norms in constituting how states interact and shaping national identities.[59] Unlike the rational actor approaches which argue that states create legal rules and norms, constructivist scholars maintain that, rules and norms 'constitute' state identity and the functioning of the international system.[60] It is because of the emphasis of constructivist scholars on identity, beliefs that the constructivist theories are regarded as ideational.[61]

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53 LR Helfer & A-M Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273, 335 - 336.
54 As above.
55 Helfer & Slaughter (n 53 above) 333.
56 Helfer & Slaughter (n 53 above) 331-335.
57 Slaughter (n 39 above).
58 FN Kabata 'Impact of international human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, 2015, 305; Slaughter (n 39 above); HH Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2603, 2633 - 2634.
59 As above.
60 Koh 'Why do nations obey international law?' (n 58 above) 2634.
61 Slaughter (n 39 above).

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Like rationalism, constructivism has many individual strands or theories. Some of the main theories under constructivism are reviewed below.

(a) The legitimacy and fairness model

One of the earliest theoretical explanations for why states comply with international law came from Thomas Franck who argue that legitimacy is what makes states comply with international law.[62] Hurd, like Franck, also proposed a theory of legitimacy.[63] According to Franck, legitimacy is an element of a law or law making institution that exerts compliance pull on those the rule is addressed.[64] Franck identify four properties of a legitimate rule, namely 'determinacy, symbolic validation, coherence and adherence'.[65]

Determinacy relates to clarity of the rule. Franck believes the clearer the rules, the higher the degree of legitimacy enjoyed by the rule. He argues that rules which are not open to any exceptions, what he referred to as the 'idiot rules', have the highest degree of determinacy. By symbolic validation, Franck refer to rituals and pedigree. Franck believes rules that embody rituals, ceremonies or symbols have greater chance at legitimacy. Franck's concept of coherence is similar to Ronald Dworkin's idea of integrity.[66] Dworkin identified two branches of integrity: integrity in legislation and integrity in adjudication. While integrity in legislation limits legislators in how far they can go in altering public standards, integrity in adjudication constrains judges while interpreting public standards by treating like cases alike.[67] To be legitimate, rules of international law must treat like cases alike. By 'adherence', Franck implies that the rule 'must be closely connected or adhere to the secondary rules of process used to interpret and apply rules of international obligation'.[68] Another scholar, Phillip Trimble has argued that the persuasiveness of

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62 T Franck *The power of legitimacy among nations* (1990) 24.
63 I Hurd 'Legitimacy and authority in international politics' (1999) 53 *International Organization* 379, 381.
64 Franck (n 62 above).
65 As above. See generally M Burgstaller *Theories of compliance with international law* (2004) 13 - 140.
66 See R Dworking *Law's empire* (1986) 217.
67 As above; Burgstaller (n 65 above) 113 - 140.
68 T Franck *Fairness in international law and institutions* (1995) 41 - 46. See also Hathaway (n 24 above) 959.

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international law depends on its legitimacy.[69] How is legitimacy determined? Trimble stated that legitimacy depends on the process of formulating the rules, its consistency with accepted norms, and whether or not the rules are perceived to be fair and transparent.[70]

In a subsequent attempt, Franck developed a theory of fairness wherein he argues that in addition to legitimacy, the perception whether a rule or a system of rules is fair encourages voluntary compliance.[71] Franck argue that the right question to ask is not whether nations comply with international law but whether international law is fair.[72] This latter question is central to understanding compliance with international law because rules that states consider unfair exerts little or no compliance pull.[73] Thus within the framework of the fairness model, it is not the threat of sanctions or cost benefit calculations that generate compliance with international law but the perception that the rules are fair 'substantively' and 'procedurally'.[74]

(b) The managerial model

Another normative theory of compliance, based on a 'managerial model', was proposed by Chayes and Chayes.[75] They argue that non-compliance is an endemic problem rather than a deliberate decision based on cost-benefit calculation.[76] As a result, Chayes and Chayes contend that non-compliance is due to ambiguity and indeterminacy of treaty language, lack of capacity, and the temporal dimension of the obligations imposed by treaties.[77] Why then do states comply with international law? Chayes and Chayes argued that states generally have a propensity to comply with international law. They advanced three arguments to justify their claim: the first argument is efficiency.[78] Compliance

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69 See PR Trimble 'International law, world order, and critical legal studies' (1990) 42 *Stanford Law Review* 811, 833.

70 As above.

71 Franck (n 68 above).

72 Franck (n 68 above) 7.

73 TM Franck 'Legitimacy in the international system'(1988) 82 *American Journal of International Law* 705, 712.

74 Franck (n 68 above) 7.

75 Chayes & Chayes 'On compliance' (n 3 above) 204.

76 As above.

77 Chayes & Chayes 'On compliance' (n 3 above) 204.

78 Chayes & Chayes 'On compliance' (n 3 above) 178 - 179.

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reduces transaction costs by removing the need to continuously recalculate the costs and benefits of every policy decision.[79] The second reason for compliance, according to Chayes and Chayes, is interest. Treaty obligations sometimes embody the interests of states that are parties to it. Thus, commitment, compliance and state interests are not always unrelated.[80] Finally, they contend that compliance occur because international law generates normative obligations.[81] A fundamental principle of international law is *pacta sunt servanda* (treaties must be obeyed).[82] They argued that this principle is well ingrained in the common understanding of international law so much that it may be a sufficient basis for compliance by states with or without the threat of sanctions or cost-benefit calculations.[83]

The managerial approach relies largely on cooperative problem-solving.[84] According to its proponents, 'sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used.'[85] In other words, sanctions are typically too costly politically and economically, and thus ineffective. In order to improve state's compliance with international law, Chayes and Chayes proposed that the 'enforcement model', in which compliance is achieved through coercion and sanctions, must be replaced with a 'managerial model'. The managerial model involves the use of 'iterative process of justificatory discourse' similar to Jurgen Habermas' theories of communicative action and public spheres.[86] Chayes and Chayes also identified four instruments of active management, namely 'transparency, reporting and data collection, verification and monitoring, dispute settlement, and strategic reviews and assessment.'[87] These

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79 As above.
80 Chayes & Chayes 'On compliance' (n 3 above) 179.
81 Chayes & Chayes 'On compliance' (n 3 above) 185.
82 Vienna Convention on the Law of Treaties, art 26.
83 Chayes & Chayes 'On compliance' (n 3 above) 185.
84 Chayes & Chayes *The new sovereignty* (n 3 above) 3.
85 Chayes & Chayes *The new sovereignty* (n 3 above) 32 - 33.
86 In communicative action theory, Habermas talks about a society in which actors reach common understanding and coordinate actions by reasoned arguments, consensus and cooperation rather than strategic actions strictly in pursuit of their own goals. See J Habermas *Between facts and norms: Contributions to a discourse theory of law and democracy* trans W Rehg (1996); J Habermas *Theory of communicative action: reason and rationalization of society* trans T McCarthy (1984); J Habermas *Theory of communicative action: Lifeworld and system: A critic of functionalist reason* trans T McCarthy (1987); J Habermas *The structural transformation of the public sphere: an inquiry into a category bourgeois society* trans T Burger (1989).
87 Chayes & Chayes *The new sovereignty* (n 3 above) 135.

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mechanisms exerts persuasive force on states, and it is this persuasion that is central to compliance with international law.[88]

(c) The transnational legal process theory

The transnational legal process (TLP) theory is a relatively recent addition to the constructivist perspective.[89] The theory was developed Harold Koh.[90] Koh agreed with Franck and the Chayeses that the pathway to greater 'enforcement' of international law is through voluntary obedience and not through coercion or sanctions. Koh however disagree with Franck and Chayes and Changes on the mechanism that trigger voluntary compliance by states. He argues that 'transnational legal process' (TLP) is vital to understanding why nations behave the way they do.[91] Koh defined TLP as 'the theory and practice of how public and private actors – nations-states, international organisations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalise rules of transnational law.'[92]

The TLP is non-traditional, non-statist, dynamic and normative.[93] It is non-traditional because it does not distinguish between private and public or domestic and international. Transnational actors are not only nation states but also non-state actors.[94] According to Koh, neither interests nor identity theory is capable of fully explaining why states comply with international law; rather it is repeated interactions with transnational actors that constitutes a state's identity and interests, and induces it to obey international law.[95] Koh argue that it is not the 'liberal label' that accounts for compliance. As transnational actors interact, patterns of behaviours are created which subsequently generate norms. Obedience to international law occurs as these norms are internalised.

[88] See also Hathaway (n 24 above) 1957.
[89] Hathaway referred to it as 'the most recent addition to the normative theoretical framework'. See Hathaway (n 24 above) 1960.
[90] Koh 'Transnational legal process' (n 4 above) 181; Koh, 'Bringing international law home' (n 4 above) 626; Koh 'How is international human rights law enforced?' (n 4 above) 1398.
[91] Koh 'Transnational legal process' (n 4 above) 181.
[92] Koh 'Transnational legal process' (n 4 above) 183 - 184.
[93] Koh 'Transnational legal process' (n 4 above) 184.
[94] As above.
[95] Koh 'Transnational legal process' (n 4 above) 203.

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The transnational legal process is a three-part process of *interaction, interpretation,* and *internalization.*[96] In this process, international law is interpreted through the interactions of transnational actors, and then internalized into the legal system at the domestic level.[97] Koh distinguished between three types of internalisation: legal, social and political internalisation.[98] Political internalisation occurs when political elites accepts an international norm.[99] When these norms are incorporated into domestic legal instruments whether legislative, administrative or judicial, this constitutes legal internalisation. Social internalisation occurs when norms of international law have acquired public legitimacy, and widespread support and adherence.[100]

The process of legal, political and social internalisation does not occur in a vacuum. Koh identified six actors or transnational agents that help bring home norms of international law: transnational norms entrepreneur, norm sponsors at national level, transnational activist networks, interpretive communities, bureaucratic communities and issue linkages.[101] Koh also identified at least five mechanisms which may be involved in TLP, namely coercion, self-interest, rule-legitimacy, communitarian impulse, and internalization.[102] Koh's argument is that these five mechanisms correspond to the five theories of compliance with international law – realism, rationalism, liberalism, comminitarianism, and constructivism.[103] For Koh, the reasons for non-compliance include vagueness of norms, toothless mechanisms, weak regimes, and lack of economic interest and political will.[104]

4.2.3 Hybrid models

More recent approaches to the domestic effects of human rights instruments tend to integrate the instrumental, rational choice perspectives with the normative, constructivist

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[96] Koh 'Transnational legal process' (n 4 above) 203 - 205; Koh 'Bringing international law home' (n 4 above) 626.
[97] Koh 'Bringing international law home' (n 4 above) 626.
[98] Koh 'Bringing international law home' (n 4 above) 642.
[99] Ayeni (n 15 above) 11; Koh 'Bringing international law home' (n 4 above) 642.
[100] As above.
[101] Koh 'Bringing international law home' (n 4 above) 647 - 655.
[102] Koh 'Bringing international law home' (n 4 above) 634.
[103] Koh 'Bringing international law home' (n 4 above) 635.
[104] See Koh 'How is international human rights law enforced' (n 4 above) 1398.

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model. This new approach is described in some studies as modern or sophisticated constructivism.[105] Below is an overview of some of the major theories under the hybrid model.

(a) Spiral model of human rights change

Risse, Ropp and Sikkink in 2009 proposed a spiral model of human rights change.[106] The spiral model was built on previous works on 'principled issue', 'transnational advocacy networks', and the 'boomerang effect'.[107] The boomerang effect describes the process whereby domestic opposition groups including civil society organisations bypass the state and reach out directly to transnational advocacy networks. The transnational advocacy networks in turn mount pressure on donor agencies and powerful states to pressurize the norm violating state to comply with human rights norms.[108] Under the rubric of the spiral model, Risse, Ropp and Sikkink identified three kinds of socialisation processes or causal mechanisms – instrumental adaptation, argumentation, and institutionalisation. They argue that the socialisation process usually begins with instrumental adaptation, followed by argumentation or persuasion, and much later, institutionalisation or habitualization.[109]

The spiral model is a five-phased process involving state repression, denial, tactical concessions, prescriptive status and rule-consistent behaviour. State repression activates transnational advocacy networks that use information politics to pressure the repressive governments. At first, the government denies repression before making tactical concessions, for instance by releasing political prisoners, allowing domestic protests and embracing basic human rights norms such as freedom of association and assembly.[110] These concessions, which are made reduce international isolation or gain some form of foreign assistance, embolden domestic civil society organisations. Relying on the tactical

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105 Bates (n 8 above) 1181.

106 T Risse, SC Ropp & K Sikkink 'The socialisation of international human rights norms into domestic practices: Introduction' in T Risse, SC Ropp & K Sikkink (eds) *The power of human rights: International norms and domestic change* (1999) 19 - 20; T Risse & SC Ropp 'Introduction and overview' in T Risse, SC Ropp & K Sikkink (eds) *The persistent power of human rights: From commitment to compliance* (2013) 5.

107 See ME Keck & K Sikkink *Activists beyond borders* (2008); M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organization* 887, 892.

108 As above.

109 Risse, Ropp & Sikkink *The power of human rights* (n 106 above) 12 & 13.

110 Risse, Ropp & Sikkink *The power of human rights* (n 106 above) 25.

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concession, activist networks push for more concession by asking governments to recognise and embrace more human rights and democratic governance standards.[111]

The third stage of the 'spiral model' is the 'prescriptive state', where domestic actors regularly refer to human rights norms in describing their own behaviours, and the validity of the norms are no longer disputed even though actual state practice continues to violate the norms.[112] At this stage, states ratify human rights treaties, domesticate treaty norms in the Constitution and other national laws, and set up national institutions for the operationalisation of human rights norms and obligations. The final stage of the spiral model is the rule-consistent behaviour phase, here the state begins to internalise human rights norms through behavioural change and sustained obedience.[113]

(b) Domestic politics theory

Simmons proposed a 'domestic politics' theory of compliance. According to Simmons, 'treaties are causally meaningful to the extent that they empower individuals, groups, or parts of the state with different rights preferences that were not empowered to the same extent in the absence of the treaties.'[114] She identified three mechanisms or channels through which treaties may have effects in domestic politics: setting the national agenda, inspiring and facilitating litigations, and galvanizing popular social or political mobilization.[115] She argues that treaties though they have significant effect, they do not have the same effects everywhere, and that international human rights system will have its greatest impact in transitioning regimes.[116] This is because in stable democracies, citizens have the means to employ social mobilization but the motive is usually absent. In stable autocracies, on the other hand, citizens have the motive to use international human rights treaties to demand change, but they generally lack the means to do so.[117]

111 Risse, Ropp & Sikkink *The power of human rights* (n 106 above) 29.
112 As above.
113 Ayeni (n 15 above) 5.
114 Simmons *Mobilising for human rights* (n 5 above) 25.
115 Simmons *Mobilising for human rights* (n 5 above) 4 & 19.
116 Simmons *Mobilising for human rights* (n 5 above) 16 - 17.
117 As above. In stable autocracies, even though citizens have reasons to mobilise using international human rights instruments, the means, that is, the rights and institutional protection necessary to realise social mobilisation are usually unavailable for them.

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Cardenas approached the compliance question – why states comply with international law – by looking at the conflict between international pressure to respect human rights norms and domestic pro-violation constituency.[118] She argues that compliance is not an 'all or nothing' or one-dimensional concept but complex and multidimensional phenomenon involving collage of choices and actions.[119] She contends that irrespective of the rate of international pressure, a state will continue to violate human rights norms if certain domestic conditions are present in the state, namely – significant national threats, powerful pro-violation constituencies, and rules of exception.[120] She also noted that the battle for compliance will be won not by the group most committed to the human rights norms but by the constituency that has the greatest institutional power.[121]

The domestic politics theory has also been advanced by scholars such as Hillebrecht,[122] Goodman and Jinks,[123] Alter[124] and Hafner-Burton.[125] This body of scholarships all construe compliance with human rights treaties as a function of domestic political processes. Another important theme common to all domestic politics theories is the integration of rational choice perspectives with normative explanations. In discussing how member states of the Council of Europe respond to adverse decisions of the European Court of Human Rights, Von Staden argued that states demonstrate a normative sense of obligation to comply while at the same time exploring various instrumental and cost-saving possibilities to comply as little as possible.[126]

Despite the avalanche of theories, international legal scholarship still lacks a satisfactory theory of compliance with international law.[127] The problem, as previously noted in chapter 1, is that none of the theories discussed above adequately address why there is variation

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118 Cardenas (n 5 above) 1.
119 As above.
120 Cardenas (n 5 above) 12.
121 Cardenas (n 5 above) 13.
122 Hillebrecht (n 2 above).
123 R Goodman & D Jinks *Socialising states: Protecting human rights through international law* (2013).
124 K Alter 'Tipping the balance: International courts and the construction of international and domestic politics' (2011) 12 *Cambridge Yearbook of European Legal Studies* 1, 1.
125 E Hafner-Burton *Making human rights a reality* (2013).
126 A von Staden 'Rational choice within normative constraints: Compliance by liberal democracies with the judgments of the European Court of Human Rights' *SSRN eLibrary* 6 February 2012.
127 See AT Guzman 'A compliance-based theory of international law' (2002) 90 *California Law Review* 1826, 1826.

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in the pattern of states' compliance with decisions of HRTs across cases, over time and even across HRTs. Also, the theories are far from providing practical guides on the specific actions HRTs need to take to ensure states comply with their decisions. Although scholars mostly agree that coercion, persuasion and acculturation are the pathways to state compliance, there is little or no agreement regarding which of the pathways play the most significant role in pulling states towards compliance. Most scholars also tend to agree that state compliance is underpinned by either normative considerations or instrumental rationale, [128] yet it is not clear which of the two approaches accounts for most acts of compliance by states. The consensus among scholars tends to be that multiple factors, ranging from enforcement, management and domestic politics, are responsible for state compliance, [129] yet it is not clear which of these broad factors is the best predictor of state compliance in the context of regional and sub-regional HRTs in Africa.

Without a coherent theory of compliance and practical guidelines on why states comply with HRTs' decisions in Africa, scholars may be unable to provide useful policy advice to HRTs and state actors. While findings in relation to the European and the Inter-American human rights systems may provide useful insights for Africa, they should not substitute for specific studies on factors that enhance state compliance with decisions of HRTs in Africa.

4.3. Identifying factors that facilitate compliance with HRTs' decisions

Based on the various theories of compliance with international law, discussed above, Helfer and Slaughter proposed a checklist of 13 factors which they believe improved the effectiveness of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).[130] The authors discussed the 13 factors under three categories.[131] The first

[128] For the instrumental or rational actor theory, see generally J Goldsmith & EA Posner *The Limits of International Law* (2005) 1; AT Guzman *How international law works: A rational choice theory* (2010) 1. For the normative or constructivist theory, see JT Checkel 'Norms, institutions, and national identity in contemporary Europe' (1999) 43 *International Studies Quarterly* 83, 83 - 114; J Brunée & SJ Toope 'Constructivism and international law' in JL Dunoff & MA Pollack (eds) *Interdisciplinary perspectives on international law and international relations: The state of the art* (2012) 119; Risse, Ropp & Sikkink (n 106 above). For approaches combining rational actor theory with constructivism, see Hillebrecht (n 2 above); Bates (n 8 above) 1169 - 1182.

[129] See Kapiszewski & Taylor (n 7 above) 803 - 835; Dawkin & Jacoby (n 2 above).

[130] Helfer & Slaughter (n 53 above) 298 - 337; LR Helfer & A-M Slaughter 'Why states create international tribunals: A response to Professors Posner and Yoo' (2005) 93 *California Law Review* 899, 906.

[131] Helfer & Slaughter (n 53 above) 298 - 336.

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set of factors are those within the control of state parties that set up the tribunal. These include the composition of the tribunal, its caseload and fact-finding capability, and the perceived legal status of the treaty the tribunal is required to interpret.[132] The second set of factors are those within the tribunal's control such as the quality of its legal reasoning, neutrality and autonomy from political interests, judicial cross-fertilisation and dialogue, incrementalism and acceptance of dissenting opinions.[133] The third set of factors are those beyond the control of state parties to the tribunal. These include the nature of violation alleged, presence of autonomous domestic institutions who are committed to the rule of law, and relative cultural and political homogeneity of states subject to the tribunal.[134]

Legal scholarships on factors that influence compliance with decisions of HRTs in Africa have included in their analyses the institutional legitimacy of the tribunal and the perceived legal status of its decisions, quality of legal reasoning, nature of the right complained about in the case, and the presence of domestic implementing structure.[135] Louw, for instance, identified the following factors that influence states to comply with decisions of the African Commission: sound and substantial reasoning, clarity of remedial orders, nature of violations found, type of obligations imposed on states, nature of remedies formulated by HRTs, the degree of domestic and international mobilization around the case, the type political system in place in the states concerned, the perceived legal status of the findings, and follow up activities by domestic NGOs and HRTs.[136]

In addition to the factors identified by Louw above, Viljoen and Louw also identified certain factors inherent in the institutional architecture of the African Commission, which cause states not to comply with the Commission's decisions. These factors include the recommendatory character of the decisions of the Commission, the Commission's

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[132] Helfer & Slaughter (n 53 above) 300 - 304.
[133] Helfer & Slaughter (n 53 above) 307 - 327.
[134] Helfer & Slaughter (n 53 above) 328 - 335.
[135] See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1993 - 2004' (2007) 101 *American Journal of International Law* 1, 1 - 33; L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005; HS Adjolohoun ´Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: Compliance and influence' unpublished LLD thesis, University of Pretoria 2013; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015).
[136] Louw (n 136 above) 100; 311 - 327.

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perceived legitimacy deficit, and the fact that AU organs demonstrate general lack of commitment to human rights.[137] These factors may be considered together as 'institutional design' factors. Viljoen and Louw argued that the two most important factors through which compliance with recommendations of the African Commission may be predicted are: the presence of stable, open and democratic system of government in the state concerned, and the involvement of NGOs in submitting and following up of cases.[138] This conclusion shares significant similarity with the liberal theory of compliance with international law. A subsequent study by Adjolohoun also emphasised the political environment of the case and the nature of the remedy as the two most important compliance factors.[139] In addition to the above, Adjolohoun identified other compliance factors such as the low-cost remedies imposed by ECCJ, and the application of international pressure on states.[140]

Recently, Hillebrecht identified the following human rights judgment compliance factors: the nature of violation involved in the case, type of obligation imposed by a ruling, the level of executive constraint in the state concerned, the GDP per capital of the state, the number of treaty ratified by the state concerned, and overall level of democracy in the state.[141] Hillebrecht, however, singles out executive constraint as the most statistically significant factor that drives compliance.[142] The type of obligations imposed on states by a ruling and the GDP per capital of states are relevant but have little or no statistical effect on compliance, according to Hillebrecht.[143] More recently, Murray and Long highlighted the following as factors that influence states to comply with the decisions of international HRTs, especially the African Commission: the legal or moral authority of the tribunal, the quality of its findings, the process of arriving at the decision, and the added-value of the decision to existing human rights standards.[144] Importantly, the authors argued that the

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[137] Viljoen & Louw (n 136 above) 12.
[138] F Viljoen 'The African human rights system and domestic enforcement' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 360.
[139] Adjolohoun (n 136 above) 321 - 323.
[140] As above.
[141] See Hillebrecht (n 2 above) 41 - 65.
[142] As above.
[143] Hillebrecht (n 2 above) 60 - 61.
[144] Murray & Long (136 above) 10 - 26.

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dichotomy between binding and non-binding decisions is not a decisive factor in determining or predicting human rights judgment compliance.

During this study, each of the factors featured in existing literature was enumerated and analysed. Some of the factors could not be verified using the descriptive methodology adopted in this study. While, for instance, the composition, political neutrality and independence of a HRT may have some effects on how states respond to decisions of the selected HRTs, there is not an easy way to determine which tribunal in Africa is independent and which one is not. In fact, many scholars do not agree on whether independence of a tribunal produces less or more compliance.[145] Hafner-Burton has suggested that compliance happens whenever treaty obligations are tied to economic benefits such as trade and foreign aid.[146] It is however unclear the extent to which the economic benefit theory is applicable to human rights judgment compliance. Guzman, Brewster and Hathaway have written much on reputational concerns and reputational costs as important factors that determine compliance outcomes.[147] The question is: how is reputational cost calculated? States have multiple reputations across different issues areas.[148] Some studies refer to institutional legitimacy of the tribunal as an important factor that drives human rights judgment compliance.[149] While institutional legitimacy could be linked to compliance, this study considers institutional legitimacy a proxy for 'commitment to compliance by the inter-governmental body that sets up the tribunal'.

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145 For arguments that judicial independence impedes compliance and effectiveness, see EA Posner & JC Yoo 'Judicial independence in international tribunals' (2005) 93 *California Law Review* 1, 1, 7 & 28; AT Guzman 'International tribunals: A rational choice analysis' (2008) 157 *University of Pennsylvania Law Review* 171, 210. For arguments that judicial independence leads to more compliance and effectiveness, see Helfer & Slaughter (n 53 above) 312 - 14.

146 EM Hafner-Burton & K Tsutsui 'Human rights in a globalizing world: The paradox of empty promises' (2005) 110 *American Journal of Sociology* 1373, 1373 - 1411.

147 See generally O Hathaway 'Between power and principle: An integrated theory of international law' (2005) 72 *University of Chicago Law Review* 469, 469 - 536; R Brewster 'The limits of reputation on compliance' (2009) 1 *International Theory* 323, 323 - 333; R Brewster 'Unpacking the state's reputation' (2009) 50 *Harvard International Law Journal* 231, 231 - 261; AT Guzman 'Reputation and international law' (2008) *University of California Berkeley Public Law Research Paper No. 1112064* http://dx.doi.org/10.2139/ssrn.1112064 (accessed 5 October 2017);

148 RA Posner 'Some economics of international law: Comment on conference papers' (2002) 31 *Journal of Legal Studies* 321, 321.

149 Viljoen & Louw (n 136 above) 12.

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Regardless of the specifics, a survey of the relevant literature reveals that the factors that influence state compliance may be divided into five broad categories, namely: (a) Institutional design factors; (b) factors related to the working practices of the tribunal; (c) case related factors; (d) state related factors; and (e) factors related to civil society and international pressure. In some literature, the civil society and international pressure factors are treated as separate categories.[150] The 'spiral model of human right change' have demonstrated that activities of domestic civil society and pressure from the international community are more often interconnected.[151] Domestic civil society activists do reach out to transnational actors who in turn mount pressure on the state in what has been described as 'the boomerang effect'.[152]

At least in two studies, – Viljoen and Louw,[153] and then Adjolohoun[154] – institutional design factors and factors related to the working practices of the tribunal have been treated as one closed category - 'treaty body related factors'. In this study, the institutional design factors are considered separately from the factors related to the working practices of the tribunal. This bifurcation is consistent with the categorisation adopted by Helfer and Slaughter.[155] While factors in the institutional design category are relatively fixed and beyond the control of the tribunal, factors related to the working practices of the tribunals are well within the tribunal's control, and therefore adjustable by the tribunal. This fine distinction is every so often missed when factors within the tribunal's control are lumped up with factors outside the tribunal's control. The other two categories of judgment compliance factors; case related factors and state-related factors; have featured consistently in most of the previous studies.[156] Below, the chapter discusses these categories of compliance factors in the light of the data gathered during the study. A total of 15 specific factors divided into five categories are selected for analysis in this study. The five categories are: institutional design factors, factors related to working practices of HRTs, case related factors, state related factors and factors related to civil society and

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[150] Adjolohoun (n 136 above) 247 & 258.
[151] T Risse, SC Ropp & K Sikkink (eds) *The power of human rights* (n 106 above) 17 - 19.
[152] As above.
[153] Viljoen & Louw (n 136 above) 12 - 17.
[154] Adjolohoun (n 136 above) 190 - 219.
[155] Helfer & Slaughter (n 53 above) 300 - 307 & 307 - 327.
[156] See Viljoen & Louw (n 136 above) 17 - 23; Adjolohoun (n 136 above) 230 - 241.

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transnational actors. The categorisation is inspired mainly by studies conducted by Helfer and Slaughter, Viljoen and Louw, and Adjolohoun.[157]

Before discussing the results of the analysis, it is pertinent to briefly describe the methods used in investigating the various factors selected for the study. The methodology adopted involves an in-depth study of the 32 cases selected for the study. This approach was supplemented by extensive review of the most relevant literature to document compliance factors related to each of the 32 cases. Information relevant to factors that influenced states to comply with some of the cases selected were also extracted from previous studies by Viljoen and Louw,[158] Murray and Long,[159] Alter, Gathii and Helfer,[160] Alter, Helfer and McAllister,[161] Adjolohoun,[162] Mutangi[163] and Possi.[164] Further information relating to possible compliance factors was obtained through in-depth interviews involving government representatives, NGO representatives and complainants. The list of interview participants is attached to the thesis as Annexure VIII. The information obtained through the various sources was used to develop several Tables, where the 75 reparation orders were checked against each of the 15 compliance factors selected for the study.[165] Each factor was coded 1 or 0. A '1' response implies that the factor was present; A '0' response means that the factors is either absent or irrelevant. The result of the analyses is described below.

4.3.1 Institutional design of the tribunal

One of the critical issues often raised in any conversation about compliance with decisions of international HRTs more generally is the extent to which the treaties setting up the

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157 See generally Helfer & Slaughter (n 53 above); Viljoen & Louw (n 136 above); Adjolohoun (n 136 above).

158 Viljoen & Louw (n 136 above).

159 Murray & Long (n 136 above).

160 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) *European Journal of International Law* 297, 297 - 298.

161 KJ Alter, LR Helfer & JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737, 737 - 779.

162 Adjolohoun (n 136 above).

163 T Mutangi 'An examination of compliance by states with the judgments of the African Court on Human and Peoples' Rights: prospects and challenges' unpublished LLD thesis, University of Pretoria, 2009.

164 A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' unpublished LLD thesis, University of Pretoria, 2014.

165 The tables used for this analysis are appended to the thesis as Appendix III.

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various tribunals incorporate compliance obligations into the institutional design and overall architecture of the tribunal. This foundational issue has far-reaching consequences for the effectiveness of the tribunal, notwithstanding how the tribunal decides to frame remedies or follow-up on its decisions. Certain cues relevant for human rights judgment compliance are embedded in the composition, structure, and general functioning of the tribunal.[166] Arguably also, the criteria for admissibility of cases, especially the exhaustion of domestic remedy requirement, the communication procedures, the fact finding capacity of the tribunal, the legal effects of the tribunal's decisions, the presence of a robust promotional mandate as well as the overall commitment to compliance of the supranational body that created the tribunal, among other factors, may affect the extent to which states are willing to comply with decisions of the tribunal.

Viljoen and Louw are of the view that institutional design factors, otherwise described as the 'the permanent features of the African human rights system' are responsible for the general trend towards non-compliance.[167] These features include the African Commission's quasi-judicial nature, the recommendatory nature of its findings, and the overall lack of commitment to compliance by the African Union (AU).[168] However, they maintained that these factors, because they are permanent, do not account for variation in the level of compliance by states. Within a tribunal, it is understandable why institutional design factors may not affect compliance variations.[169] However, when comparing the compliance rates of two or more HRTs, institutional design factors may play significant roles in human rights judgment compliance variations. In discussing factors that led to the effectiveness of the ECtHR and the ECJ, Helfer and Slaughter emphasised the role of institutional design factors which they described as 'factors within the control of states party to an agreement establishing a supranational tribunal'.[170] Three institutional design factors are selected for analysis in this thesis: the nature of the tribunal,[171] the perceived

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166 Helfer & Slaughter (n 53 above) 300 - 304
167 Viljoen & Louw (n 136 above) 12.
168 As above.
169 If the institutional design is faulty, it is faulty for all states, so it cannot explain why some states comply and others do not.
170 Helfer & Slaughter (n 53 above) 30.
171 In this thesis, the 'the nature of the tribunal' refers to whether the tribunal is situated at the regional or the sub-regional level.

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legal status of the tribunal's decision, and the degree of commitment to compliance by the supranational body that sets up the tribunal.

(a) Nature of the tribunal: Regional versus sub-regional HRTs

In chapter 3 of the thesis, this factor has been thoroughly interrogated. With respect to the nature of a HRT, it was found in the previous chapter that the regional or sub-regional character of a HRT has little or no significant consequence for human rights judgment compliance in the studied countries. Three of the five states selected for the study – Nigeria, The Gambia and Zimbabwe – performed better, in terms of aggregate compliance, at the regional than sub-regional level. Uganda is the only country selected for the study that demonstrated clear evidence of compliance at the sub-regional than the regional level. In order to demonstrate briefly the relevance of this factor, the study codes sub-regional HRTs as '1' and regional HRTs as '0'. Correlation would be demonstrated if the top three HRTs are all '1' coded, and the lower three coded as '0'.

Table 4.1: Compliance with reparation orders of regional and sub-regional HRTs in five states in Africa (2000 - 2015)[172]

List of the HRTs	Aggregate compliance	Indicators
EACJ	79%	1
African Children's Rights Committee	50%	0
African Commission	35%	0
ECCJ	24%	1
African Court	14%	0
SADC Tribunal	0%	1

Table 4.1 above shows no correlation between the aggregate state compliance rates and the regional or sub-regional character of the selected HRTs, indicated as '0' and '1'. The top three HRTs are mostly regional tribunals, and the bottom three are mostly sub-regional HRTs. Overall, sub-regional HRTs (ECCJ, EACJ and the SADC Tribunal) recorded 29 percent aggregate compliance with respect to the five studied states, while regional HRTs (African

172 See the List of cases appended to the thesis.

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Commission, the African Court and the African Children's Rights Committee) recorded 33 percent aggregate compliance. These findings are at best ambiguous and do not reveal a clear tendency by the selected states to favour a particular human rights regime over the other. Based on the analysis above, this study concludes that the distinction between regional and sub-regional HRTs did not play a significant role in defining how the five states respond to decisions of HRTs in Africa; if anything, more states during the study period have responded positively to decisions of regional HRTs, contrary to postulations that sub-regional HRTs would produce more compliance.[173]

(b) The perceived legal status of the tribunal's decision

The dominant assumption in human rights judgment compliance literature is that binding decisions of HRTs generally command the respect of states, and so are more likely to attract greater compliance.[174] Helfer and Slaughter argue that the perception that the decision of a HRT is legally binding is relevant and has significant consequences for the effectiveness of the tribunal.[175] Other commentators have noted that when enumerating the advantages of the European human rights system, the fact that the European Court of Human Rights (ECtHR) renders legal binding decisions must be emphasised.[176] Helfer and Slaughter, however, admit that the effects of a binding decision of a HRT vary from state to state, depending on whether or not the state has domesticated the treaty interpreted by the tribunal.[177] Writing about the Inter-American human rights system, Cassel suggested

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[173] See Viljoen (n 139 above) 365; Adjolohoun (n 136 above) vi.

[174] See Murray & Long (n 136 above) 9; Viljoen & Louw (n 136 above) 1 - 2, 12 - 15 & 33; L Oette 'Bringing the enforcement gap: Compliance of states parties with decisions of human rights treaty body' (2010) 16 *Interights Bulletin* 51, 51 51; Viljoen (n 139 above) 364; GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465, 488; F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1, 2; For arguments on the relationship between 'hard' and 'soft' law, see generally J Klabbers 'The redundancy of soft law' (1996) 65 *Nordic Journal of International Law* 167, 168; I Blutman 'In the trap of a legal metaphor: International soft law' (2010) 59 *International and Comparative Law Quarterly* 605, 606; C Chinkin 'The challenge of soft law: Development and change in international law' (1989) 38 *International and Comparative Law Quarterly* 850, 865.

[175] Helfer & Slaughter (n 53 above) 304 & 307.

[176] See M Pentikainen & M Scheinm 'A comparative study of the monitoring mechanisms and the Important institutional framework for human rights protection within the Council of Europe, the CSCE and the European Community' in A Bloed *et al* (eds) *Monitoring human rights in Europe* (1993) 93, 104.

[177] Helfer & Slaughter (n 53 above) 305.

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that 'Court-ordered hard law seems to generate better compliance than Commission-recommended soft law'.[178]

Questions about the legal status of the findings of the African Commission have been raised by a wide range of scholars and state actors.[179] Some states have even questioned the competence of the African Commission to receive individual communications, and further that findings of the Commission in those communications are not legally binding on states.[180] The government of Botswana, for instance, following the African Commission's decision in *Kenneth Good v Botswana* stated that 'the Government has made its position clear; that it is not bound by the decision of the Commission.'[181] Some state officials believe the Commission's decisions need to be domesticated or embedded in national legislation for it to binding on states.[182] The African Commission itself has not been consistent regarding its approach on the legal status of its decisions.[183] For instance, the Commission has described its mandate as follows: 'the mandate of the Commission is quasi-judicial and as such, its final recommendations are not in themselves legally binding on the States concerned'.[184] It has been argued that the establishment of the African Court is a further evidence that decisions of the African Commission are non-binding.[185] The African Court in one of its documents clarified its view of the legal status of the

[178] D Cassel 'Inter-American human rights law, soft and hard' in D Shelton *Commitment and compliance: The role of non-binding norms in the international legal system* (2000) 417. See also Viljoen & Louw (n 136 above) 32.

[179] Murray & Long (n 136 above) 50; D Juma 'Access to the African Court on Human and Peoples' Rights: A case of the poacher turned gamekeeper' (2007) 4 *Essex Human Rights Review* 1, 1; G Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights (2006) 6 *African Human Rights Law Journal* 442, 442 - 462.

[180] Murray & Long (n 136 above) 50. See also African Commission 'Account of the internal legislation of Nigeria and the dispositions of the Charter of the African Human and Peoples' Right', 2nd extraordinary session, Kampala, 18 - 19 December 1995.

[181] Communication 313/05 *Kenneth Good v Botswana*, decided at the 47th ordinary session of the African Commission on 26 May 2010. See also response of the government of Botswana in *Good v Botswana* as reported in the Combined 32nd and 33rd Activity Report of the African Commission (2012) para 24.

[182] See Murray & Long (n 136 above) 54.

[183] Murray & Long (n 136 above) 50-53.

[184] Murray & Long (n 136 above) 53. See for instance, African Commission information sheet on the communication procedure, section on recommendations or decisions http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf (accessed 23 August 2017).

[185] See M Ssenyonjo *The African regional system: 30 years after the African Charter* (2011) 463; Murray & Long (n 136 above) 53.

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Commission's decisions as follows: 'The Commission, being a quasi-judicial body can only make recommendations while the Court makes binding decisions.'[186]

As a result, decisions of the African Commission are generally perceived as not legally binding.[187] The consensus among scholars is that once a decision of the Commission has been approved by the AU Assembly or the Executive Council on behalf of the Assembly, the decision becomes legally binding on member states.[188] Even this view has been severely criticised; it could have the unintended consequence of 'making the approval of the African Commission's Activity Reports by the AU more difficult, lengthy and politicised.'[189] Viljoen and Louw nonetheless noted that the perceived legal status of a tribunal's decision could play a role in how states respond to the findings of the tribunal.[190] In another study, Viljoen and Louw found that the recommendatory nature of the decisions of the African Commission has in part been responsible for the general trend of non-compliance by states.[191]

Respondents interviewed during this study are divided on whether human rights decisions which are legally binding are more likely to be complied with than non-binding or recommendatory decisions.[192] A respondent for instance, stated that issuance of binding decisions 'takes away an important and plausible rationale for non-compliance.'[193] Governments can no longer simply say they are not bound to comply; this makes it harder for states to justify their non-compliance. Another respondent disagreed, arguing that issues such as lack of political will, unspecificity of recommendations, weak state institutions, cost of implementation, poor communication and non-existent follow-up

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[186] African Court 'Frequently asked questions' http://www.african-court.org/en/index.php/2012-03-04-06-10-45/2012-03-27-19-11-07/111-head-of-finance-and-administration-division (accessed 23 August 2017).

[187] See N Enonchong 'The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197, 197; I Osterdahl *Implementing human rights in Africa – The African Commission on Human and Peoples' Rights and individual communications* (2002) 154 - 155.

[188] Viljoen & Louw (n 175 above) 9. See also Wachira & Ayinla (n 175 above) 469; F Viljoen *International human rights law in Africa* (2012) 339; Murray & Long (n 136 above) 55-56. It is noteworthy that decisions of the African Commission are no longer included in the Commission's activity reports to the AU Assembly or the Executive Council.

[189] Murray & Long (n 136 above) 56.

[190] Viljoen & Louw (n 175 above) 2.

[191] Louw (n 136 above) 119.

[192] See the list of interview respondents attached to the thesis as Annexure VIII.

[193] See email from S Ibe on 25 May 2016. See also email from A Possi on 30 March 2017.

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mechanisms as well as the absence of technical expertise to implement decisions, are far more critical to state compliance than the legal status of a human rights decision.[194]

Except for the African Commission and the African Children's Rights Committee, all the HRTs investigated in this study – the African Court, ECCJ, EACJ and the SADC Tribunal – are empowered to issue legally binding decisions. In order to demonstrate the relevance of this particular factor to human right judgment compliance in the selected states, the first set of data presented in the Table below represents the extent of compliance experienced by a particular HRT, expressed in aggregate compliance rates. The second set of data relates to indicators suggestive of the role of a particular factor, coded as either '1' or '0'. HRTs that issue legal binding decisions are coded '1' while those that issue decisions perceived to be recommendatory are coded '0'. Correlation would be demonstrated if the top three HRTs are all '1' coded, and the lower three coded as '0'.

Table 4.2: Compliance with reparation orders of judicial and quasi-judicial HRTs in five states in Africa (2000 - 2015)[195]

List of the HRTs	Aggregate compliance	Indicators
EACJ	79%	1
African Children's Rights Committee	50%	0
African Commission	35%	0
ECCJ	24%	1
African Court	14%	1
SADC Tribunal	0%	1

Table 4.2 above showns no correlation between HRTs that issued legally binding decisions and the rates of state compliance in the studied countries. All the top three HRTs, except the EACJ, are qausi-judicial tribunals; and the lower three HRTs are all judicial HRTs. In each of the studied countries, except for Tanzania and Uganda, quasi-judicial HRTs generally recorded higher rates of full compliance and aggregate compliance than judicial HRTs. It is possible to argue that the poor compliance records of the selected judicial HRTs is due to

194 See email from OC Okafor on 5 May 2016.
195 See the list of cases appended to the thesis as Annexure I.

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the peculiar nature of some of the cases and states. This fact is not disputed as it only lends credence to the view that the factors that primarily determine human rights judgment compliance relate mostly to the nature of the case and domestic characteristics of the state, and not whether the tribunal's decisions are perceived as binding or recommendatory. While there certainly have been instances where state officials directly raised the perceived legal status of a decision as justification for non-compliance, it is usually the case that other factors especially the financial, political or normative costs of compliance and a general lack of political will or lack of commitment to compliance, underlie such arguments.[196]

In terms of aggregate compliance, the selected judicial HRTs overall recorded 27 percent aggregate compliance by the studied countries as compared to quasi-judicial HRTs that recorded 38 percent aggregate compliance. The findings of this study, therefore, is that the fact that the African Court, the ECCJ and the EACJ issue legally binding decisions does not in itself guarantee improved compliance.[197] The focus on the legal status of HRTs' decisions or the dichotomy between binding and recommendatory decisions is an unhelpful distraction that 'obfuscates other more significant factors'.[198] The assumption that quasi-judicial HRTs cannot deliver as much state compliance as judicial HRTs draws from long-standing 'exaggerated expectations of what a court can achieve in terms of compliance'.[199] In other regional systems such as the European and Inter-American Courts, it has been found that while the rate of compliance for binding decisions are higher, the increase in compliance is not significantly higher than those for non-judicial decisions.[200]

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[196] The SADC Tribunal's decisions against Zimbabwe are no doubt difficult to implement due to the huge political costs associated with implementing the decision. As such, it really does not make a difference whether the decision was made by a quasi-judicial or a judicial HRT. The same argument is true for The Gambia. The judgments of the ECCJ against The Gambia have far more political consequences on the government of The Gambia than the two decisions of the African Commission.

[197] Murray & Long (n 136 above) 16. See also Viljoen & Louw (n 136 above) 33.

[198] See Murray & Long (n 136 above) 56; 58.

[199] Murray & Long (n 136 above) 15; D Anagnostou 'Does European human rights law matter? Implementation and domestic impact of Strasburg Court judgments on minority-related politics' (2010) 14 *International Journal of Human Rights* 721, 725.

[200] Murray & Long (n 136 above) 16. See also F Basch, L Filippini, A Laya, M Nino, F Rossi & B Schrieber 'The effectiveness of the Inter-American system of human rights protection: A quantitative approach to its functioning and compliance with its decisions' (2010) 12 *Sur-International Journal of Human Rights* 9, 9 - 35.

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While binding decisions may undoubtedly lead to harder sanctions in case of non-compliance, non-binding recommendatory decisions of quasi-judicial HRTs carry 'softer, more conciliatory mechanisms of compliance'.[201] These mechanisms include amicable settlement, constructive dialogue and other communicative approaches. I argue that the non-binding dialogical nature of decisions of quasi-judicial HRTs makes it easy for states to buy into them. The dichotomy between judicial or quasi-judicial nature of HRTs arguably is 'too simplistic' to predict or explain variation in human rights judgment compliance across states and across cases. While the perceived legal status of the decisions of a HRT undoubtedly remains relevant to the implementation process at the domestic level, it is not a useful predictor of whether and when states would comply with decisions of HRTs in the selected states.[202]

(c) Commitment of intergovernmental organisations to compliance

One of the factors that may influence human rights judgment compliance is the degree of commitment to compliance demonstrated by the intergovernmental organisation that sets up a HRT. It would be recalled that when the Organisation of African Unity (OAU) was formed in 1963, human rights was essentially relegated to the side-lines.[203] The pan-continental organisation was more interested in decolonisation, territorial integrity and state sovereignty.[204] Thus, when the African Charter was adopted in 1981, many commentators argued it was a form of 'window dressing'.[205] Some point at 'opaque language of the Charter',[206] the claw-back clauses, its minimalist content and the weak

[201] Murray & Long (n 136 above) 16.

[202] See Murray & Long (n 136 above) 15. See also M Barelli 'The role of soft law in the international legal system: The case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 957, 972.

[203] See F Viljoen & E Baimu 'Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 241, 241.

[204] Centre for Human Rights 'Celebrating the African Charter at 30: A guide to the African human rights system' (2011) 8 http://www.achpr.org/files/pages/about/african-hr-system-guide/human_rights_guide_en.pdf (accessed 22 February 2017).

[205] See JD Boukongou 'The appeal of the African system for protecting human rights' (2006) 6 *African Human Rights Law Journal* 268, 271.

[206] See CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law and Contemporary Problems* 358, 406

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enforcement mechanism,[207] as evidence of a lack of commitment by the OAU to ensure compliance with provisions of the Charter and the recommendations of the African Commission.

How does an intergovernmental body demonstrate commitment to compliance? Is it possible to measure or compare the degree of commitment to compliance by the various intergovernmental bodies that set up the selected HRTs in Africa? This study argues that an intergovernmental body may signal commitment to human rights judgment compliance in any of the following ways; by (a) urging states to implement the decisions; (b) adopting a treaty that provides expressly that decisions of the HRT are legally binding on states; (c) setting up a dedicated body to monitor the execution and implementation of decisions of the HRT and clear evidence that the body is functioning as such; (d) incorporating in a relevant treaty a specific provision for sanctions on states in the case of non-compliance; and (e) in actual fact, imposing sanctions on non-complying states.

Commitment is measured as a dichotomous variable with a score of 1 or 0. A score of 0 indicates limited commitment to compliance by the intergovernmental organisation that sets up the tribunal and a score of 1 indicates substantial commitment to compliance. HRTs whose 'parent organisations' demonstrate at least three of the five indicators are coded as 1 while those demonstrating two, one or none of the indicators of commitment are coded as 0.[208] The data gathered during the study indicates 'limited commitment' for the

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[207] Boukongou (n 206 above) 285.

[208] (a) *States urged to comply*: Nearly all the intergovernmental organisations that set up the various tribunals have at different occasions urged their member states to comply with decisions of the relevant tribunals. The only outlier is the SADC, which instead of urging Zimbabwe to comply with judgments of the SADC Tribunal, suspended the tribunal essentially for issuing adverse judgments against Zimbabwe.
(b) Decisions are legally binding: The legal instruments establishing the African Court, ECCJ, EACJ and the SADC Tribunal provide that the decisions of these bodies are in principle binding on states. The treaties setting up the African Commission and the African Children's Rights Committee refer to their decisions only as 'recommendations'. See the various analysis in chapter 2 of the thesis.
(c) Existence of a 'functional' monitoring body: None of the selected HRTs has a functional monitoring body similar to the Committee of Minister of the Council of Europe and the Department for the Execution of Judgments of the European Court of Human Rights. Even though some political bodies exist within the AU with similar mandate, such as the PSC and PAP, none of these bodies could be regarded as 'functioning'.
(d) Provision for sanctions: The legal instruments setting up the ECCJ, EACJ and SADC Tribunal provide for the imposition of sanctions on states in case of non-compliance. The case of the African Court is not so clear as the AU Constitutive Act indirectly provides that sanctions may be imposed. See chapter 2 of the thesis.
(e) Sanctions imposed: None of the intergovernmental organisations have imposed sanctions on any state for non-compliance.

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SADC Tribunal, the African Commission and the African Children's Rights Committee; and 'substantial commitment' for the African Court, ECCJ and EACJ.[209] While decisions of the African Commission and the African Children's Rights Committee are in principle merely recommendatory, the SADC Summit has shown little or no commitment in urging states especially Zimbabwe to comply with the SADC Tribunal's decisions. If the hypothesis is true that the degree of commitment to compliance by intergovernmental bodies influences compliance outcomes by states, the analysis ought to indicate poor compliance records in relation to HRTs coded '0' and a positive trend towards compliance in HRTs coded 1.

Table 4.3: Commitment of intergovernmental organisations to compliance

List of the HRTs	Aggregate compliance	Indicators
EACJ	79%	1
African Children's Rights Committee	50%	0
African Commission	35%	0
ECCJ	24%	1
African Court	14%	1
SADC Tribunal	0%	0

Based on Table 4.3 above, the data does not seem to show direct correlation. Correlation would have been if the three highest aggregate compliance rates are linked to '1' and the HRTs with the lowest aggregate compliance rates are linked to '0', but this was not the case. So, correlation was not clearly demonstrated. The above notwithstanding, I argue that commitment to compliance by the intergovernmental organisation that sets up a tribunal is not only relevant but crucial for state compliance. Evidence from the SADC Tribunal, for instance, shows that the failure of the intergovernmental organisation to hold the defaulting state to account may lead to dangerous consequences including the suspension of the tribunal. Both the ECCJ and EACJ suffered similar political backlash as reported by Alter, Gathii and Helfer but due to the limited commitment of member states of ECOWAS and the EAC, respectively, the two tribunals were saved![210]

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[209] See Possi (n 165 above) 178 - 182.

[210] See KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293, 297 - 298.

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Due to limited dataset available for this study, a general insight and far-reaching conclusions could not be drawn. Further studies will still be required to investigate the extent to which supranational commitment to compliance influence compliance outcomes at the national level. However, I argue that the most relevant form of supranational commitment is 'strong commitment to compliance', where all the five, or at least four of the indicators earlier outlined are present. Tribunals whose 'parent organisations' meet the threshold of 'strong commitment to compliance' are more likely to have high compliance records.

4.3.2 Working practices adopted by the tribunal

In addition to the more permanent features discussed above, the working practices adopted by a tribunal have significant consequences for state compliance. The working practices of a tribunal may be observed from its rules of procedures, jurisprudence, activity reports, and other reports. The faulty institutional designs of many HRTs in Africa makes it imperative for HRTs in Africa, if they want to see high rates of compliance with their decisions, to adopt working practices that are goal-driven and result-oriented. Since the African Commission's decisions are mostly considered 'recommendatory', it is how the Commission executes its mandate that gives moral force to its decisions.[211] Even for those tribunals that issue legally binding decisions, the legitimacy deficits of these institutions couple with the lack of commitment to compliance by the respective 'parent intergovernmental organisations' make the working practices of these tribunals the ultimate decider of human rights judgment compliance.

This study interrogates only those aspects of the working practices of the selected tribunals that relate to their communication procedure, style of formulating remedies and follow up procedure. In some studies, it was assumed initially that the length of time it takes a tribunal to complete a case may impact on compliance.[212] However, Viljoen and Louw, and Adjolohoun (reference studies) found that there is no correlation between state compliance, on the one hand, and the length of time it takes a tribunal to complete

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[211] Viljoen & Louw (n 136 above) 34. See also Viljoen & Louw (n 175 above) 19.
[212] Viljoen & Louw (n 136 above) 13; Adjolohoun (n 136 above) 195.

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a particular case, on the other hand.[213] Another factor also not interrogated in this study is the degree of maturity of the respective HRTs. This factor was found to be relevant but not decisive for state compliance in the reference studies.[214] Even if a positive relationship exists between state compliance and the relative maturity of a HRT, the African the ECCJ and the EACJ are still young for such conclusion to be made.[215] Three aspects of the working practices of the selected HRTs considered in this study are: the quality of legal reasoning, style of formulating remedies, and the follow up procedures of the HRTs.

(a) Quality of legal reasoning

The assumption here is that states are more inclined to comply with decisions that are well reasoned. It is also assumed that states, before deciding to comply with a decision, may request their officials to scrutinise the decision. If states do scrutinise decisions of HRTs, there is a reasonable expectation that they will more likely comply with those decisions that are well reasoned. As Judge Mancini of the European Court of Justice (ECJ) noted 'rulings must be convincing in order to evoke obedience'.[216] Polakiewicz and Jacob-Foltzer argued that the ECtHR has never before been defiled by a domestic court. The authors attributed this effectiveness to 'the weight of the Court's arguments.'[217] There is no doubt that the authority of a judgment 'derives from its intrinsic rationality'.[218] Franck identified four factors necessary for compliance with a legal rule: determinacy, symbolic validation, coherence and adherence'.[219] A well-reasoned decision resonates with Franck's idea of 'coherence' and 'adherence'.[220] Helfer and Slaughter advanced four arguments in favour of a reasoned decision: it dignifies the opposing argument, provides insights as to the circumstances under which the opposing arguments may prevail, bolsters a court's

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[213] As above.
[214] Viljoen & Louw (n 136 above) 12 - 13; Adjoulohoun (n 136 above) 192 - 195.
[215] As above.
[216] GF Mancini 'The making of a constitution for Europe' (1989) 26 *Common Market Law Review* 595, 605.
[217] J Polakiewicz & V Jacob-Folizer 'The European Human Rights Convention in domestic law: The impact of the Strasbourg case-law in states where direct effect is given to the Convention' (1991) 12 *Human Rights Law Journal* 141, 141.
[218] F Ost 'The original canons of interpretation of the European Court of human rights' in M Delmas-Marty & C Chodkiewicz (eds) *The European Convention for the protection of human rights* (1992) 284.
[219] As above. See generally Burgstaller (n 65 above) 13 - 140.
[220] See Franck (n 62 above) 24.

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legitimacy, and presents the art of law not as linear reasoning but as 'carefully woven tissue of opposites'.[221]

In an empirical analysis of 44 merits decisions of the African Commission, Viljoen and Louw found that well-reasoned decisions do not have better chance at compliance.[222] In a similar study of judgments of the ECCJ, Adjolohoun found that the quality of reasoning of the ECCJ, even though relevant, is not predictive of the pattern of state compliance.[223] In this study, decisions of HRTs are divided into three categories based on the nature of the legal reasoning contained in each case: brief reasoning, limited reasoning, and substantial reasoning.[224] A legal reasoning is categorised as 'brief' if the decision as a whole is short and contains little or no references to jurisprudence of other national or international human rights regimes. While the length of a decision is not an indicator of its quality, it is a useful guide to assess the quality of time and efforts put into writing the decision. A limited legal reasoning is relatively long and contains some references to comparable provisions of international human rights instruments and jurisprudence of other tribunals. Substantial legal reasoning is not only very long and contains significant references to works of other tribunals, it also develops legal principles which are novel to that human rights system. It should be noted, however, that this explanation is only a rough guide for categorising the quality of legal reasoning in the cases selected for this study.

Using the guides provided above, this study concludes that the African Court and the African Children's Right Committee both have a reputation for lengthy and well-reasoned judgments, most of which may be categorised as either limited or substantial legal reasoning. The two decisions of the African Court and lone decision of the African Children's Rights Committee selected for this study are relatively long in length and contain notable references to the jurisprudence of other HRTs. All the nine judgments of the ECCJ, five judgments of the EACJ and three judgments of the SADC Tribunal selected for this study contain at least limited legal reasoning, in terms of the definition earlier provided. Only the African Commission delivered what may be described as brief legal

[221] Helfer & Slaughter (n 53 above) 321 - 322.
[222] Viljoen & Louw (n 136 above) 15 - 16.
[223] Adjolohoun (n 136 above) 210.
[224] See Viljoen & Louw (n 136 above) 15 - 16.

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reasoning in a few cases such as *Kazeem Aminu v Nigeria* and *Jawara v The Gambia*. Thus, the majority of the 32 cases selected for this study contain either limited or substantial legal reasoning, yet this distinction did not influence state compliance in any notable way as shown in Table 4.4 below.

Table 4.4: Quality of legal reasoning

List of the HRTs	Aggregate compliance	Indicators
EACJ	79%	1
African Children's Rights Committee	50%	1
African Commission	35%	0
ECCJ	24%	1
African Court	14%	1
SADC Tribunal	0%	1

Based on Table 4.4 above, no statistically significant correlation was established because even in low level of compliance do we find good quality legal reasoning, and the African Commission recorded some degree of state compliance even though a few of its decisions selected for this study have limited legal reasoning. So, the quality of legal reasoning of a decision is not a factor predictive of state compliance, based on study data. Some of the cases with substantial legal reasoning in the study include the *Ogoniland* case, *Mtikila* case, *Campbell* case and *SERAP v Nigeria* (Environment), yet this fact did not reflect any positive trend in the compliance tables in Appendices I and II. Most of the reparation orders issued in these cases were categorised as either partial compliance or non-compliance.[225] The reason for such compliance outcomes, I argue, is due mostly to state-level characteristics and the broad and open-ended nature of the reparation orders issued in those cases. State-level characteristics include the lack of commitment to compliance by the respective states and sometimes the political sensitivity of the issues covered in those cases. The conclusion of this study, based on the limited analysis above is that the quality of legal reasoning is relevant to state compliance, but it is not a predictive factor of compliance.

[225] See Appendices I & II.

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(b) Formulation of remedy

One important supposition that is linked to earlier theories of compliance with international law is that clarity and specificity of the reparation order improves state compliance. The basis of this assumption is that if reparation orders are vague and ambiguous, states could have challenges interpreting and implementing them. The reference studies share this assumption.[226] Viljoen and Louw, for instance, found that in majority of the cases where compliance was reported with decisions of the African Commission, clear and specific remedies were articulated.[227] Adjolohoun also found that clarity of remedial order is closely linked with state compliance at the ECCJ.[228] Both studies, however, doubt if the specificity of a reparation order could be a useful tool for predicting human rights judgment compliance.[229]

Helfer and Slaughter did not include specificity of reparation order in their checklist of 13 factors that improves the effectiveness of supranational tribunals.[230] One possible explanation for this omission is that the ECtHR, one of the two HRTs modelled in the study, adopts a 'delegative approach' to formulating reparations.[231] The primary role of the ECtHR is to establish whether or not a member state has violated the European Convention on Human Rights and Fundamental Freedom (ECHR).[232] Even though the ECtHR is empowered to order states to pay specific monetary sums as 'just satisfaction', it generally lacks power to make other remedial orders.[233] The responsibility falls on the Committee of Ministers, working closely with the states, to outline plans to give effect to the decision.[234] This most likely explains why specificity of remedies does not come out

[226] Viljoen & Louw (n 136 above) 13.
[227] Viljoen & Louw (n 136 above) 16 - 17.
[228] Adjolohoun (n 136 above) 210 - 214.
[229] Viljoen & Louw (n 136 above) 16 - 17; Adjolohoun (n 136 above) 214.
[230] Helfer & Slaughter (n 53 above).
[231] See Hawkins & Jacoby (n 2 above) 43 - 44; Hillebrecht (n 2 above) 45 - 47.
[232] C Hillebrecht 'Implementing international human rights law at home: Domestic politics and the European Court of Human Rights' (2012) 13 *Human Rights Review* 279, 281.
[233] Hawkins & Jacoby (n 2 above) 44. See also T Barkhuysen & ML van Emmerik 'A comparative view on the execution of judgments of the European Court of Human Rights' in T Christou & JP Raymond (eds) *European Court of Human: Remedies and execution of judgments* (2005) 1 - 24.
[234] Hillebrecht (n 233 above) 282. See generally P Carozza 'Subsidiarity as a structural principle of international human rights law' (2003) 97 *American Journal of International Law* 38, 38 - 79.

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clearly in the checklist proposed by Helfer and Slaughter.[235] In order to assess whether specificity of remedies relates to state compliance in Africa, this study categorised the various reparation orders of the selected HRTs into two categories: vague or ambiguous reparation orders, and specific orders.

To be regarded as a specific reparation order in this study, there should normally be no ambiguity about the boundaries of what is required to be done by the HRT. For instance, reparation orders requesting the repeal of specific legislation or a specific provision of an identified legislation is considered 'specific'. Similarly, a reparation order which requires the release of a named detainee or specifies payment of a stated amount as compensation is considered 'specific'. However, a reparation order requesting payment of 'adequate compensation' is considered vague and ambiguous, and this practice is quite common with the African Commission.[236] Reparation orders which are open-ended or lack clarity about the exact action required of the state are regarded as vague and ambiguous. For instance, in the *Jawara* case, the African Commission requested the government of The Gambia to 'bring its laws in conformity with the provisions of the African Charter.' The question may be asked: Which law needs to be brought in conformity with the African Charter? Similar recommendations were issued by the African Commission in *Kazeem Aminu v Nigeria, Media Rights Agenda v Nigeria, Civil Liberties Organisation & 2 Others v Nigeria*.[237] In the *Mtikila* case, the African Court requested the government of Tanzania to 'take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations'. How does a state official determine all the constitutional, legislative and all other necessary actions that need to be taken in order to implement this reparation order?[238] Similar reparation order was issued for Tanzania to implement in the *Alex Thomas* case.[239]

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235 Helfer & Slaughter (n 53 above).

236 See *SERAC v Nigeria*, *Zimbabwe Human Rights NGO Forumv Zimbabwe*, *Zimbabwe Lawyers for Human Rights & ANZ v Zimbabwe*, *Noah Kazingachire & Others v Zimbabwe* and *Gabriel Shumba v Zimbabwe*.

237 See Appendix III.

238 See generally Appendix III for the categorisation of each of the 75 reparation orders in terms of vagueness and specificity.

239 See Appendix I.

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Each of the 75 reparation orders selected for the study were categorised as either specific or vague, based on the descriptions above. Reparation orders that are specific are coded '1' while vague reparation orders are coded '0'. A tribunal is coded '0' if the reparation orders of the tribunal, selected for this study, are predominantly vague and ambiguous, and '1' if the reparation orders of the tribunal are mostly specific. Clear correlation is established if the top three HRTs are coded '1' or if the bottom three HRTs are coded '0'.

Table 4.5(a): Analysis of the HRTs based on specificity of remedies

List of the HRTs	Aggregate compliance	Indicators	Specific orders	Vague orders
EACJ	79%	1	n = 7	n = 0
African Children's Committee	50%	0	n = 2	n = 3
African Commission	35%	0	n = 13	n = 14
ECCJ	24%	1	n = 12	n = 9
African Court	14%	1	n = 5	n = 2
SADC Tribunal	0%	0	n = 2	n = 6

Based on Table 4.5(a) above, no direct correlation was established between state compliance and specificity of reparation orders. However, the final analysis shows aggregate compliance of 38 percent for all the reparation orders categorised as 'specific', and 24 percent for reparation orders coded as 'vague or ambiguous'. Secondly, 24 percent of reparation orders that are specific were fully complied with by the selected states while only nine percent of reparation orders that are vague or ambiguous were fully complied with. Further, 62 percent of the reparation orders categorised as vague in the study are recorded as non-compliance while only 49 percent of reparation orders categorised as specific' are recorded as non-compliance.

While no clear correlation has been established, the above analysis indicates at least some correlation between the rates of full compliance and non-compliance on the one hand and the specificity of reparation orders on the other hand. Even though the argument has been made in favour of using aggregate compliance rates for state compliance comparison, the

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analysis below finds some correlation between full compliance rates of HRTs and the specificity of reparation order, and this observation ought not to be ignored.

Table 4.5(b): Analysis of the rates of full compliance of HRTs based on specificity of remedies

List of the HRTs	**Full compliance**	Indicators	Specific orders	Vague orders
EACJ	57%	1	n = 7	n = 0
ECCJ	19%	1	n = 12	n = 9
African Commission	19%	0	n = 13	n = 14
African Court	0%	1	n = 5	n = 2
ACERWC	0%	0	n = 2	n = 3
SADC Tribunal	0%	0	n = 2	n = 6

Every respondent interviewed during this study agreed that specificity of reparation order is crucial for state compliance. Some respondents, however, noted that specificity is a minor, not a major factor.[240] One of the respondents that argued in favour of specificity as a major state compliance factor stated that it is 'extremely important for human rights bodies to make clarity and specificity touchstones on which their decisions rest.'[241] Obviously, specificity of remedies is not the only factor that explains state compliance. As a result, it is possible to find some outlier cases of state compliance, especially partial compliance, inspired primarily by other factors such as state-level characteristics. For instance, in Table 4.5(a), the African Commission and the African Children's Rights Committee, even though they issued higher numbers of reparation orders that are categorised as vague and ambiguous, nonetheless recorded a relatively higher aggregate compliance rates. However, what the aggregate compliance figures did not reveal is that state compliance in the African Commission and the African Children's Rights Committee are mostly partial compliance; 100 percent in the case of the Children's Committee and 33 percent in the case of the Commission. Thus, while the data does not support clear-cut correlation between state compliance in the selected states and specificity of reparation orders, there is evidence indicating that the rates of full compliance in HRTs that issue higher number of specific reparation is much higher than those that issue lower number

[240] See Ibe (n 194 above).
[241] See Okafor (n 195 above).

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of specific reparation orders. The top two HRTs with highest full compliance rates have issued mostly reparation orders that are specific, while the lowest two HRTs in terms of full compliance issued reparation orders that are mostly vague and ambiguous.

Clarity and specificity of reparation orders is the bedrock of human rights judgment compliance. When reparation orders are vague and ambiguous, victims are left uncertain of what to expect after the decision; even government officials are confused about what to do; and pro-compliance actors do not have a yardstick by which to assess government compliance. Clearly, it is counter-productive for HRTs to expect compliance from states, yet they issue reparation orders which make compliance difficult or impossible. It is difficult if not impossible to attain full compliance in cases coded as vague and ambiguous.

(c) Degree of follow up

The treaties that set up most HRTs in Africa do not envisage an active follow-up role for the tribunals. For instance, neither the ECCJ nor the African Commission has express mandate to follow up its decisions.[242] This literally means that, from a literalist view point, their functions end as soon as a decision is rendered. This is in sharp contrast to the practice in the ECtHR. The Council of Ministers of the Council of Europe (COE) monitors implementation of ECtHR's decisions.[243] It could even commence infringement proceedings against non-complying states.[244] Unlike the ECtHR, the Inter-American Court of Human Rights (IACtHR) monitors its owns decisions.[245] The IACtHR directs states to report on their compliance efforts within set dates, summons parties to a compliance hearing, and issues its own compliance reports.[246]

The Protocol establishing the African Court (African Court Protocol) assigns to the AU Executive Council the responsibility of monitoring implementation of African Court's

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242 Adjolohoun (n 136 above) 217.
243 Hillebrecht (n 233 above) 283.
244 As above.
245 See A Huneeus 'Court resisting court: Lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 493, 501.
246 As above. See also JL Cavallaro & SE Brewer 'Reevaluating Regional human rights litigation in the twenty-first century: The case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, 768. The paper is also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404608 (accessed on 23 February 2017).

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decisions, on behalf of the Assembly.[247] A similar function is also performed for the Court by the Specialised Technical Committees.[248] However, there is little in practice to show for the performance of this mandate by either the Executive Council or the Specialised Technical Committees. The EAC Treaty confers no express mandate on the EACJ to follow-up its own decision. The Treaty only provides that decisions of the EACJ shall be executed in accordance with rules in force in the respective member states.[249] The Protocol setting up the SADC Tribunal urges member states and the institutions of the Community to ensure execution of the decisions of the Tribunal.[250] The Protocol further mandates the Tribunal to report to the SADC Summit any failure by states to comply with its decision7s.[251] How does a tribunal know when its decisions have not been complied with unless it has a robust follow up mechanism? By the same token, the African Court is mandated to report to the AU Assembly; how can the Court report if it does not have a monitoring mechanism in place? As at July 2017, none of the four judicial tribunals investigated in this study has forged a follow up procedure similar to the IACtHR.

Even though the African Charter does not expressly give the African Commission a mandate to follow up its findings, the Commission has developed a limited follow-up mandate for itself. The Commission periodically sends correspondence to states requesting update on the status of implementation of decisions. On many occasions, the Commission has used the opportunity of promotional and on-site missions to stress the importance of state compliance, and follow-up on decisions against specific states.[252] The Commission also uses the opportunity of examination of periodic reports of state parties to probe into the extent of implementation of communications it decided against the state whose report is being reviewed.[253] In addition to these *ad hoc* practices, Rule 112 of the

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[247] African Court Protocol, art 29(2).
[248] AU Constitutive Act, art 15(b).
[249] EAC Treaty, art 44.
[250] SADC Tribunal Protocol, art 32(2).
[251] SADC Tribunal Protocol, art 32(5) of the SADC Tribunal Protocol. The SADC Tribunal referred the matter to the Summit in in terms of Article 32(5) of the SADC Tribunal Protocol.
[252] Viljoen & Louw (n 136 above) 17. See, for example, Report of the African Commission's Promotional Mission to Burkina Faso, Objectives, 22 September - 2 October 2001, Doc./OS/(XXXIII)/324b/I http://www.achpr.org/states/burkina-faso/missions/promo-2001/ (accessed 20 February 2017).
[253] Similar questions were posed to state delegation during the consideration of initial reports of Cameroon and Mauritania at the 31st ordinary session of the Commission in May 2001. See Viljoen & Louw (n 136 above) 37.

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Rules of Procedure of the African Commission prescribes a comprehensive procedure for following up recommendations of the Commission in individual communications.[254] Despite the provisions of the rules of procedure, follow-up activities of the Commission has been largely inconsistent, and has not developed into an established practice.

In 2004, Viljoen and Louw found that in 4 of the 6 cases in which full compliance was recorded with decisions of the African Commission, the Commission took some steps to follow up the decisions.[255] The authors also observed that in the majority of the cases where non-compliance was recorded, no similar follow up activities by the Commission was recorded.[256] This made the study conclude that follow-up or a lack of it is relevant to human rights judgment compliance.[257] Adjolohoun highlights the various judicial and political follow-up and monitoring mechanisms put in place under the ECOWAS human rights regime. As these mechanisms are yet to be operationalised, Adjolohoun noted that it would be premature to conclude that follow-up is or is not relevant to state compliance under the ECOWAS human rights regime.[258]

This study is unable to systematically assess the degree of follow-up by the various HRTs in the selected cases. This is due to lack of coordinated follow-up procedure by any of the selected HRTs. Any attempt to code the follow-up efforts of HRTs in the selected cases will involve conjecture and could underrepresent the actual steps taken by the respective HRTs since there are no written records in many cases. While there is no absolute way to compare follow-up activities of HRTs across the regional and sub-regional systems, this

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254 After adoption by the relevant AU organ of the Activity Report containing a decision, the Commission's Secretariat notifies the parties to disseminate the decision. The parties have up to 180 days within which to notify the Commission of measures taken by the state to implement the decision. As soon as the notification is received from the state, the Commission 'may' give the state additional 90 days within which to furnish the Commission with further information on the measures it has taken to implement the decision. Where no response is received from the state, a reminder may be sent giving the state an additional 90 days within which to provide the necessary information on implementation. The rapporteur for the communication or any other member of the Commission may be appointed at this stage to monitor and report on measures taken by the state to implement the Commission's decision. Based on the rapporteur's report, the Commission is obliged to draw the attention of the Sub-Committee of the Permanent Representatives Committee (PRC) and the Executive Council to any situation of non-compliance.

255 Viljoen & Louw (n 136 above) 17.

256 As above.

257 Viljoen & Louw (n 136 above) 16 - 17.

258 Adjolohoun (n 136 above) 299 - 230.

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study finds substantial evidence indicating that a minimum degree of follow-up by HRTs and NGOs is crucial for human rights judgment compliance.

In the cases where some form of compliance has been recorded such as *Alimu Akeem v Nigeria*, *Modupe Dorcas Afolalu v Nigeria*, *SERAP v Nigeria* (*Bundu Waterfront* case), *Katabazi* case, *Sitenda Sibalu* case, *Democratic Party and Mukasa Mbidde* case, *Among Anita* case and ANAW case, there was limited follow-up by the complainants, their legal counsels and civil society organisations that represented the complainants.[259]

Follow-up increases the visibility of HRTs' decisions, thus increasing the cost of non-compliance. I argue that for reparation orders of HRTs to be implemented, a minimum degree of follow-up, by a designated government institution, civil society organisations or the relevant HRT, is usually a prerequisite. However, the data presented in Appendix I, shows that follow-up is most impactful only if the defaulting state demonstrates some commitment to compliance. For example, in the three ECCJ cases involving The Gambia, namely**;** *Manneh v The Gambia, Musa Saidykhan v The Gambia* and *Deyda Hydara v The Gambia***,** the reparation orders are reasonably specific and there was significant follow-up by the ECCJ, civil society organisations and transnational actors, yet there was no compliance recorded because the government of The Gambia was not committed to compliance. Despite its supplemental role in the three ECCJ cases involving The Gambia, it will be argued later in this chapter that follow-up by HRTs and NGOs is one of the five primary factors for judgment compliance because every case of domestic implementation of HRT's decisions in this study involves at least one form of follow-up activity by either the relevant HRT or a domestic NGO.

4.3.3 Nature of cases submitted to the tribunal

The general hypothesis here is that case-related factors could contribute in one way or another to either making human rights judgment compliance attractive or unattractive for states. The factors related to the case which are considered relevant for state compliance

[259] See Appendix I & II.

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include: the type of right violated, the scale of the violation, nature of obligation imposed on states, and the type of reparation order issued by the HRT.

(a) Type of right violated

Previously, human rights were categorised into first, second and third generations. This form of categorisation has long been discarded, and replaced with the alternative typology of 'respect, protect and fulfil.'[260] Long before the new typology became popular in the late 1980s and early 1990s, the African Charter had somewhat 'undone this categorisation' by guaranteeing as much rights as possible from all three 'generations'. The African Charter provides for justiciable socio-economic rights in addition to people's rights - the very first international human rights treaty to do so. While generations-based categorisation of human rights has lost its currency among scholars, some national jurisdictions are very much obsessed with the categorisation. In many national constitutions in Africa, socio-economic rights remain non-justiciable in theory and practice.

The argument has earlier been made in previous studies that the legal characterisation of a case as either civil and political rights (CPRs) or economic, social and cultural rights (ESCRs) is irrelevant in predicting states' compliance.[261] Viljoen and Louw, for instance, found that the majority of the cases in which the African Commission found violation relates to civil and political rights, especially fair hearing right.[262] All six cases of full compliance in the Viljoen and Louw's study concern CPRs, while all three cases relating to ESCRs were coded as full non-compliance.[263] This may suggest that some states still consider socio-economic rights as less justiciable.[264] However, any conclusion that CPRs judgments are better complied with than ESCRs will be problematic because the majority of the cases of non-compliance in the Viljoen and Louw's study also concern CPRs. Likewise, Adjolohoun found recently that CPRs cases decided by the ECCJ are equally shared between compliance and non-compliance.[265]

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[260] Viljoen (n 189 above) 214.
[261] See Viljoen & Louw (n 136 above) 18; Adjolohoun (n 136 above) 231-237; Viljoen (n 139 above) 358.
[262] Viljoen & Louw (n 136 above) 38.
[263] As above.
[264] Viljoen & Louw (n 136 above) 39.
[265] Adjolohoun (n 136 above) 232.

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I argue that any distinction that is observed between CPRs and ESCRs cases, in terms of compliance, has very little to do with the identities of the cases as either CPRs or ESCRs. States do not comply with cases; they comply with discrete obligations contained in cases, referred to in this study as reparation orders. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines) stipulate that reparations for gross violations of human rights may take the form of 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'.[266] Nearly every reparation order of international HRTs fits into one or more of the five reparation types. Thus, regardless of the legal characterisation of individual *cases* as either ESCRs or CPRs, the *reparation orders* are usually not so different, and the obligations imposed on states are mostly identical.[267]

To test the argument above, this study analysed 34 reparation orders contained in 15 decisions and judgments of the African Commission and the ECCJ in respect of Nigeria and The Gambia. At first, this thesis acknowledges that it is inaccurate to designate a case simply as a CPRs or ESCRs case because often times, cases usually have more than one elements; some steering toward CPRs and others towards ESCRs. For the purpose of the analysis in this study, cases involving predominantly elements of CPRs are categorised as CPRs cases while cases having stronger elements of ESCRs are regarded as ESCRs cases. The 32 cases selected for this study contain two African Commission's decisions that are traditionally regarded as ESCRs cases, namely *SERAC and Another v Nigeria* (*Ogoniland* case)[268] and *Purohit and Moore v The Gambia (Gambian Mental Health* case).[269] In relation to the ECCJ, only three of the 32 selected 'decisions' may be regarded as ESCRs cases, namely *SERAP v Nigeria* (*Nigerian Right to Education* case),[270] *SERAP v Nigeria* (*Niger Delta*

[266] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the UN General Assembly resolution 60/147 of 16 December 2005.

[267] See Viljoen (n 139 above) 358 (arguing that CPRs and ESCRs decisions alike impose on states obligations to *respect*, *protect* and *fulfil*).

[268] Communication 155/96 *SERAC and Another v Nigeria* (*Ogoniland* case).

[269] Communication 241/2001 *Purohit and Moore v The Gambia* (*Gambian Mental Health* case). See generally Viljoen (n 139 above) 370 - 388.

[270] ECW/CCJ/JUD/07/10 *SERAP v Nigeria* (*Nigerian Right to Education* case).

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environmental pollution case)[271] and *SERAP v Nigeria* (*Bundu Waterfront* case).[272] It must be noted, however, that each of the 'so-called' ESCRs cases above undeniably has some elements of CPRs issues. Thus, the purpose of the analysis below is not only to show that the characterisation of cases as CPRs or ESCRs does not correlate to state compliance but also that it is pointless to categorise human rights cases into water-tight compartments like CPRs or ESCRs cases advocates often do.

Table 4. 6(a): Nigeria's compliance with reparation orders of the African Commission and the ECCJ in CPRs and ESCRs cases (2000 - 2015)

HRTs	Aggregate compliance	Full compliance	Partial compliance	Non-compliance	Total of orders
African Commission					
CPRs[273]	88%	n = 3	n = 1	n = 0	4
ESCRs[274]	40%	n = 0	n = 4	n = 1	5
ECCJ					
CPRs[275]	43%	n = 3	n = 0	n = 4	7
ESCRs[276]	33%	n = 1	n = 2	n = 3	6

Clearly, Table 4.6(a) shows that reparation orders of the African Commission and the ECCJ in CPRs cases attracted greater aggregate compliance than those issued in ESCRs cases. At the African Commission, Nigeria recorded 88 percent aggregate compliance for CPRs cases and 40 percent for ESCRs cases. Similarly, at the ECCJ, Nigeria recorded 43 percent aggregate compliance for CPRs cases and 33 percent aggregate compliance for ESCRs cases. A similar trend was observed in Table 4.6(b) below in relation to The Gambia. One important feature of the analysis in relation to the ECCJ is that while CPRs cases clearly have a higher rate of 'full compliance', they also have a higher rate of non-compliance than

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[271] ECW/CCJ/JUD/18/12 *SERAP v Nigeria* (*Niger Delta environmental pollution* case).

[272] *SERAP v Nigeria* (*Bundu Waterfront* case), decided by the ECCJ on 10 June 2014.

[273] The African Commission's decisions categorised as CPRs cases are as follows: 205/97 *Kazeem Aminu v Nigeria*, 224/98 *Media Rights Agenda v Nigeria*, 218/98 *CLO & 2 Others v Nigeria*.

[274] The African Commission's decision categorised as ESCRs case for this purpose is the 155/96 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*Ogoniland* case).

[275] The ECCJ's decisions categorised as CPRs cases include: ECW/CCJ/JUD/01/09 *Talbia v Nigeria*, ECW/CCJ/JUD/01/14 *Akeem v Nigeria* and ECW/CCJ/JUD/15/14 *Afolalu v Nigeria*.

[276] The ECCJ decisions categorised as ESCRS cases include: ECW/CCJ/APP/12/07 *SERAP v Nigeria* (Nigerian *Right to Education case*); ECW/CCJ/JUD/18/12 *SERAP v Nigeria (Niger Delta Environmental Pollution* case) and *SERAP v Nigeria (Bundu Waterfront* case), decided by the ECCJ on 10 June 2014. See the list of cases appended to the thesis as Annexure I.

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ESCRs cases. This kind of situation reveals the futility of the binary classification of decisions as CPRs and ESCRs in order to explain state compliance.[277] The same type of case that produces higher full compliance can also produce higher non-compliance.

Table 4.6(b): The Gambia's compliance with reparation orders of the African Commission and ECCJ in CPRs and ESCRs cases (2000 - 2015)

HRTs	Aggregate compliance	Full compliance	Partial compliance	Non-compliance	Total of orders
African Commission					
CPRs	50%	n = 0	n = 1	n = 0	1
ESCRs	33%	n = 0	n = 2	n = 1	3
ECCJ					
CPRs	0%	n = 0	n = 0	n = 8	8
ESCRs	-	-	-	-	-

Overall, most of the cases of non-compliance also concern CPRs; thus, any conclusion that CPRs judgments are better complied with than ESCRs will be problematic. At best, this data shows that compliance and non-compliance are equally shared between CPRs and ESCRs cases. Reparation orders contained in cases categorised as CPRs have no better chance at compliance than reparation orders issued in ESCRs cases. States do not comply with cases; they comply with reparation orders contained in cases, which unfortunately do not discriminate between CPRs and ESCRs. All the types of reparations, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition can be issued in CPRs and ESCRs cases.[278] Some cases such as the *Ogoniland* case and *Campbell* case tend also to have elements of CPRs and ESCRs, and so, these cases are difficult to categorise as either CPRs or ESCRs decisions. While there is some correlation between state compliance and CPRs cases, the dichotomy between CPRs or ESCRs is not a useful tool to predict human rights judgment compliance in Nigeria and The Gambia, the two states selected for

[277] Using the formula AC = FC + ½ PC, the aggregate rate of compliance for ESCRs-related cases is 33.5 percent while the aggregate for CPRs-related cases is still 43 percent. This implies also that Nigeria has complied more with reparation orders of the ECCJ issued in judgments classified as CPRs cases than those issued in judgments classified as ESCRs cases.

[278] See the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the UN General Assembly resolution 60/147 of 16 December 2005.

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this analysis.[279] While in both states CPRs recorded relatively higher aggregate compliance and full compliance rates, in these states even much higher rates of non-compliance in ESCRs cases were recorded.

(b) Scale of the violation

The assumption here is that human rights violations that occurred on a massive scale may be more challenging for states to redress than violations that happened at the individual level. Viljoen and Louw, for instance, found that majority of the cases of clear non-compliance with the African Commission's decisions concern human rights violations on a massive scale.[280] None of the cases of full compliance with decisions of the Commission relate to massive violations; they are either individual cases or multiple violations cases.[281] Of the ECCJ cases investigated by Adjolohoun, the study found that majority of the cases in which full compliance was recorded relate to individual violations. The author linked wide scale violation of human rights to political instability, civil war or the system of governance in place at the domestic level.[282]

Table 4. 7: Analysis of the study cases using the scale of violation[283]

Scale of violations	Aggregate compliance	Full compliance	Partial compliance	Non-compliance	Total No. of orders
Individual	27%	n = 7	n = 1	n = 20	28
Multiple	26%	n = 3	n = 5	n = 13	21
Massive or large-scale	40%	n = 3	n = 15	n = 8	26

In order to assess the relevance of the scale of violations to human rights judgment compliance, this study categorised human rights violations as follows: Individual violation cases which involves one complainant; multiple violations cases which involve two or more victims or complainants; and massive or large-scale violations cases which involve a large

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[279] While all the five studied countries have CPRs cases, only the two states have cases that are frequently regarded as involving ESCRs issues.
[280] Viljeon & Louw (n 136 above) 20 - 21.
[281] As above.
[282] Adjolohoun (n 136 above) 239. See also Viljeon & Louw (n 136 above) 21.
[283] The Table containing the categorisation of the 75 reparation orders is appended to the thesis as Appendix III.

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population of people. Based on the characterisation above, the 32 cases selected for this study are categorised as follows: 13 individual violations, 10 multiple violations and 9 large-scale or massive violations cases.[284] The results of the analysis in Table 4.7 indicate that full compliance is highest in individual violations cases, while multiple and large-scale violation cases mostly result in partial compliance. One way to explain the rates of full compliance is that reparation orders in individual violation cases, such as *Alimu Akeem v Nigeria* and *Modupe Dorcas Afolalu v Nigeria* are usually specific. However, there are a few individual violation cases such as *Deyda Hydara v The Gambia, Musa Saidykhan v The Gambia* and *Manneh v The Gambia* where non-compliance was recorded due to state-related factors. As Table 4.7 indicates, non-compliance is highest also in individual violation cases, and reparation orders in massive or large-scale violations cases recorded the highest aggregate compliance rate. Thus, the scale of violation, it is argued, is not a useful predictor of human rights judgment compliance in the selected states.

(c) Nature of the obligation imposed on the state

Regardless of the type of right or the scale of violations, human rights decisions impose three types of obligations on states, namely; respect, protect, and fulfil.[285] The obligation to 'respect' requires that states should not interfere with the enjoying of rights, and should refrain from taking actions that could result in human rights violation. The obligation to 'protect' requires that states take steps and measures to protect their right-holders from human rights violations by a third party such as multinational oil companies and private businesses. The obligation to fulfil is more in the nature of positive expectations and encompasses the duty on states to provide basic needs for the enjoyment of all human rights.[286] This typology of state obligations has been approved by the African Commission and the UN Committee on Economic, Social and Cultural Rights.[287]

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284 See Appendix III.

285 See H Shue *Basic rights: Subsistence, affluence and US foreign policy* (1996); UN Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, para 33; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*, Communication 155/96, 2001 AHRLR 60 (ACHPR) 2001) (*Ogoniland* case).

286 See *Ogoniland* case, paras 44 - 47.

287 As above. See also UN Committee on Economic, Social and Cultural Rights (n 286 above) para 33.

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In the study by Viljoen and Louw on compliance with recommendations of the African Commission, it was found that states generally consider it easier to comply with the obligation to 'respect' than the obligations to protect or fulfil.[288] The study, however, noted that there were insufficient cases where the African Commission imposed the obligation to fulfil on states. As a result, it is premature to state conclusively whether the nature of obligation plays any significant roles in influencing state compliance.[289] In a study of nine judgments of the ECCJ, Adjolohoun expressed doubt whether the nature of obligation imposed on the state influences judgment compliance. Even though majority of the merit decisions of the ECCJ concern the obligation to respect, most cases of non-compliance are also related to the obligation to respect.[290]

I argue that any attempt to compartmentalise cases into 'respect, protect or fulfil' obligations may be misleading. A human right case may implicate all the layers of state obligations at the same time. The *Ogoniland* case,[291] The *Gambian Mental Health* case,[292] *Nigerian Right to Education* case,[293] *Niger Delta Environmental Pollution* case,[294] *Children in Northern Uganda* case[295] and the *Mike Campbell* case, for instance, speak to obligations to respect, protect and fulfil.[296] These 'all-inclusive cases' pose significant methodological challenge in terms of categorisation. In addition, there are insufficient cases in which the selected HRTs specifically imposed the obligations to fulfil on states. The limited data on obligations to fulfil couple with the fact that in many cases all the three layers of obligations are implicated make a prediction on the basis of nature of obligation less attractive. The basic understanding that emerges from the limited analysis of the studied cases is that most of the instances of compliance and non-compliance involve the obligation to respect. Accordingly, the nature of the obligation imposed on the state is not considered predictive of state compliance in the selected states.

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288 Viljoen & Louw (n 136 above) 18 - 19.
289 Viljoen & Louw (n 136 above) 18 - 20.
290 Adjolohoun (n 136 above) 238.
291 *Ogoniland* case.
292 *Purohit & Moore v The Gambia* (*Gambian Mental Health* case).
293 *SERAP v Nigeria* (*Nigerian Right to Education* case).
294 *SERAP v Nigeria* (*Niger Delta Environmental Pollution* case).
295 *Hansugule & Others (on behalf of children in Northern Uganda) v Uganda*.
296 See, for instance, Adjolohoun (n 136 above) 378.

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(d) Nature of the reparation order

One factor that has featured prominently in almost all studies on human rights judgment compliance is the nature of reparation measure required of the state.[297] It is a resource-constrained world. Naturally, reparation orders that require significant financial outlays or massive political mobilisation stand a lesser chance of being implemented when compared with orders which are relatively easier to implement. The 'resource problem' is also compounded by the problem of lack of control over the implementation process. This procedural hurdle makes some reparation orders more difficult to implement than others.[298] Some reparation orders require public consultation and approval of constituent bodies before implementation. These requirements constitute major hurdles to human rights judgment compliance. Accordingly, it is assumed that the easier an order is to implement, the higher the likelihood of compliance. Viljoen and Louw found this to be true with respect to 44 recommendations of the African Commission.[299] The authors found that recommendations which require amendment of laws or the constitution are associated with lengthy legislative and consultation procedures.[300] States tend to comply more with reparation orders requiring administrative measures than orders requesting payment of compensation, adoption of legislation, or investigation and prosecution of perpetrators of violations.[301]

The majority of the reparation orders issued by the ECCJ relate to monetary compensation or administrative remedy. Adjolohoun found that states comply more with reparation orders requesting administrative actions than those requiring payment of compensation.[302] A study of compliance by states with judgments of the ECtHR reveals that states complied 82 percent with remedial orders on financial reparations while they

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[297] See generally Hillebrecht (n 2 above); Hawkins & Jacoby (n 2 above); Viljoen & Louw (n 136 above); Adjolohoun (n 136 above).

[298] For instance, the ruling party in all the selected states needed some form of majority representation in parliament to push legislation through. While this requirement may be easily attained in some of the states such as The Gambia and Zimbabwe due to the over-whelming control their respective ruling parties have in parliament, it was not so in at least Nigeria and Tanzania.

[299] Viljoen & Louw (n 136 above) 20 - 23.

[300] As above.

[301] Adjolohoun (n 136 above) 240.

[302] As above.

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complied only 31 percent with measures requiring accountability.[303] In the IACtHR, the compliance rate for remedial orders on financial reparations was 55 percent, and 14 percent for measures of accountability.[304] These findings demonstrate substantial variation in compliance pattern based on the type of reparation order issued. The hypothesis that human rights judgment compliance is dependent on the nature of remedial order issued by the tribunal has been tested true in at least four previous studies.[305]

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN basic Principles and Guidelines) stipulates that reparations for gross violations of human rights may take the form of 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'.[306] Nearly every reparation order of international HRTs fits into one or more of the five reparation types. However, for the purpose of this study, a slightly different categorisation of reparation orders is adopted. The 75 reparation orders selected for the study generally require the selected states to: (a) pay compensations to victims; (b) take some administrative measures such as freeing prisoners or returning travel documents; (c) hold perpetrators accountable through investigation and prosecution; (d) take legislative measures such as repealing a law or amend provisions of the constitution; and (e) take other general measures that will guarantee non-repetition. These are the reparation types adopted for this study, and the result of the analysis is presented below.

Table 4.8 below indicates that aggregate compliance is lowest in measures of accountability and other general measures and highest in legislative, compensatory and administrative remedies. The results demonstrate some correlation between state compliance and the nature of reparation order issued especially if the reparation order is

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[303] Hillebrecht (n 2 above) 13.

[304] As above.

[305] Viljoen & Louw (n 136 above); Adjolohoun (n 136 above); Hillebrecht (n 2 above); Hawkins & Jacoby (n 2 above).

[306] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the UN General Assembly resolution 60/147 of 16 December 2005.

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compensatory or administrative in nature. However, the assumption that compensatory or administrative remedies, as a rule, are more likely to be complied with than every other form of remedies may be circumstantial than real. Overall, the African Commission issued four 'administrative remedies' during the study period and none of these have been fully complied with; only one was partially implemented.[307] The African Court issued five 'administrative remedies', during the study period, and only two have been partially implemented. Except for Tanzania, most of the administrative remedies involved in this study are issued against The Gambia and Zimbabwe, two of the least compliant states in the study. First, the study sample demonstrates that, with respect to compliance, state level characteristics are far more important that the typology of the reparation order. Secondly, the study finds that it is the financial, political or normative costs of implementation, rather than the typology of the reparation order as such, that determines which reparation order is complied with.

Table 4.8: Analysis of the study cases based on the nature of reparation orders[308]

HRTs	Aggregate compliance	Full compliance	Partial compliance	Non-compliance	Total of orders
Legislative	58%	n = 4	n = 6	n = 2	12
Compensation	29%	n = 7	n = 3	n = 19	29
Administrative	25%	n = 1	n = 5	n = 8	14
Other general measures	23%	n = 1	n = 5	n = 9	15
Accountability	20%	n = 0	n = 2	n = 3	5

Sometimes, an administrative or a compensatory remedy may be difficult to implement because of the political sensitivity of the case whereas a legislative measure may easily be taken because of the political gains implicated in compliance. During the study period, the African Commission issued nine reparation orders which are legislative in nature; at least four of these orders have been fully implemented as a result of domestic political reforms, three are partially implemented while only two have not been complied with in any way.

[307] See Appendix III.
[308] The Table containing the categorisation of the 75 reparation orders is appended to the thesis as Appendix III.

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It must be noted however that some of these cases involving the African Commission are 'situational compliance', and not deliberate implementation by the affected states.[309] The majority of the 'legislative remedies' issued by the EACJ in this study were fully complied with by the government of Uganda because compliance allows the state to present its representatives to the East African Legislative Assembly (EALA). The complexity occasionally associated with administrative measures is underscored by the *Mtikila* case; at least five of the six reparation orders in the case are administrative in nature; yet the government of Tanzania is yet to comply fully with any of them. While this study finds evidence that administrative and compensatory remedies may sometimes be easy to implement and so have relatively high compliance rates, the study finds no evidence elevating that finding to the status of a general rule. The study data points towards the cost – financial, political or normative – implicated in each reparation order as the determinant factor.

4.3.4 Domestic characteristics of the state

The proposition that state-level characteristics are responsible for variation in judgment compliance between states have been made by a number of scholars. Hillibrecht, for instance, has argued that implementation of international human rights decisions is essentially a domestic affair, facilitated by domestic pro-compliance partnerships which includes executives, legislators, judges and members of the civil society.[310] The impressive compliance rate of the ECtHR, for example, has been attributed primarily to the 'relative cultural and political homogeneity' of states that interact with the Court.[311] In addition to this, Helfer and Slaughter also identified the existence of 'autonomous domestic institutions committed to the rule of law and responsive to citizen interests' as an important factor that improves human rights judgment compliance in Europe.[312] In their study of 44 decisions of the African Commission, Viljoen and Louw identified the presence

[309] See Appendices I & II.
[310] Hillebrecht (n 2 above) 39.
[311] Helfer & Slaughter (n 53 above) 335.
[312] Helfer & Slaughter (n 53 above) 331.

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of stable, open and democratic system of government in the state concerned as one of the two primary factors that drives human rights judgment compliance.[313]

In order to interrogate the relationship between human rights judgment compliance and the domestic characteristics of the state, this study considers the following aspects: (a) the system of governance in operation in the state, the state's involvement and participation in proceedings of the selected HRTs, whether there has been regime change since the reparation orders were issued against the state, and lastly the extent of the state's commitment to international law compliance, particularly human rights judgment compliance.

(a) Regime type

Viljoen and Louw support the view that the system of governance in a particular state is a significant factor that influences compliance with decisions of the African Commission.[314] They argue that the extent of freedom, openness and democracy in a state correlates to the degree of human rights judgment compliance in the state.[315] The assumption is that a democratic system of governance that supports multiparty elections, separation of powers, judicial independence and freedom of the press is much more likely to have 'domestic incentives' to comply with human rights judgments than authoritarian regimes. Paulson, however, holds an opposing view. He argues following a study of state compliance with final judgment of the International Court of Justice (ICJ) that 'autocratic states were no more likely to disregard a judgment than democracies.'[316]

In the last seven years (2011 - 2017), Tanzania and Nigeria have been rated 'Partly free' by the Freedom House, while The Gambia and Zimbabwe have mostly been rated 'Not free'.[317] During the reference period above, The Gambia was rated 'Partly free' only in 2011, while Zimbabwe has been rated 'Partly free' only more recently in 2016 and 2017.[318] Uganda has

313 Viljoen (n 139 above).
314 Viljoen & Louw (n 136 above) 25 - 26.
315 As above.
316 C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434, 460.
317 See Freedom House https://freedomhouse.org/ (accessed 25 February 2017).
318 As above.

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been rated 'Not free' from 2015 - 2017 and 'Partly free' from 2011 - 2014. The Economic Intelligence Unit (EIU)'s Democratic Index report which ranks democracies in the world, in 2016 and 2015 ranked Nigerian, Tanzania and Uganda as 'Hybrid regimes' while the Gambia and Zimbabwe are rated as 'Authoritarian regimes'.[319] In 2013 and 2014, however, only Tanzania and Uganda were ranked 'Hybrid regimes'; other countries including Nigeria were rated 'Authoritarian regimes'.[320] If regime type matters significantly for state compliance among the selected states, based on the ranking by the Freedom House and the Economic Intelligence Unit, the level of judgment compliance ought to be highest in Tanzania and Uganda, followed by Nigeria, and then Zimbabwe and The Gambia.

Below, an analysis is carried out to determine the correlation between state compliance and the system of governance in place at the domestic level, based on Freedom House ranking of the selected states during a period of seven years (2011 - 2017). Countries ranked 'partly free' in a particular year were given a score of '1' while those ranked 'not free' were scored '0'. In aggregate, countries that were ranked partly free in the majority of those years were given the score '1' under the indicators, and those ranked mostly 'not free' received the average score of '0'. The result of the analysis, based on Table 4.9 below, demonstrates a clear correlation between state compliance and the system of governance in place at the domestic level. The top three states, in terms of compliance, are mostly ranked 'partially free' while the two least complying states have also been rated mostly 'not free' by the Freedom House.

The analysis in Table 4.9 below indicates that the degree of freedom, stability, openness and democratic system of government in a state can provide important clue about overall state compliance and widespread non-compliance by states. It is argued, however, that the degree of stability, openness and democratic system of government in a state has only limited predictive capacity on whether the reparation orders in a particular case will be

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[319] The Economist Intelligence Unit (EIU) *Democracy Index 2016* http://pages.eiu.com/rs/783-XMC-194/images/Democracy_Index_2016.pdf' (accessed 25 September 2017); The Economist Intelligence Unit (EIU) *Democracy Index 2015* https://www.yabiladi.com/img/content/EIU-Democracy-Index-2015.pdf (accessed 25 February 2017).

[320] The Economist Intelligence Unit *Democracy Index 2015* http://www.sudestada.com.uy/Content/Articles/421a313a-d58f-462e-9b24-2504a37f6b56/Democracy-index-2014.pdf (accessed 25 February 2017).

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complied with. This is because human rights judgment compliance is influenced by a multiplicity of factors. Cases differ both in complexity and cost of implementation, and states generally have mixed motives and incentives for complying with human rights judgments.[321] In some cases, even advanced democracies may fail to comply with human rights judgments for a variety of reasons. For example, the state with the highest Freedom House and EUI ratings in this study, Tanzania, has failed to comply with five of the seven reparation orders issued by the African Court in the *Mtikila* and *Alex Thomas* cases; Tanzania complied only partially with the two remaining reparation orders.[322] Uganda complied fully with four of the six reparation orders issued by the EACJ during the study period even though it has been rated 'not free' in 2014, 2015 and 2016.

Table 4.9: Freedom House ratings of the selected countries (2011 - 2017)

Countries	Aggregate compliance	Indicators	2017	2016	2015	2014	2013	2012	2011
Uganda	68%	1	0	0	0	1	1	1	1
Nigeria	48%	1	1	1	1	1	1	1	1
Tanzania	19%	1	1	1	1	1	1	1	1
The Gambia	13%	0	0	0	0	0	0	0	1
Zimbabwe	11%	0	1	1	0	0	0	0	0

The regime type analysis is relevant for understanding widespread compliance, or what Koh referred to as 'habitual obedience'.[323] This study finds that authoritarian regimes such as The Gambia and Zimbabwe, were not habitual compliers while relatively stable democracies or hybrid regimes such as Tanzania and Nigeria, are not habitual defaulters. This fact explains why the two states least likely to comply with reparation orders of HRTs in this study, Zimbabwe and The Gambia, also have the lowest 'freedom ratings'. Regime type is one of the most significant factors that may help to explain the distinction between habitual and non-habitual compliance. Regime type, however, offers only limited guide

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321 Hawkins & Jacoby (n 2 above) 41.
322 See Appendix I.
323 See generally Koh 'How is international human rights law enforced?' (n 4 above) 1400 & 1410. See also HH Koh 'Why do nations obey international law?' (n 58 above) 2646 & 2654 - 2655.

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regarding whether a state in a specific case will comply with the reparation orders of a HRT. Even though regime type has limited predictive ability in individual cases, this study finds that it is one of the few significant factors that contribute positively to state compliance. Table 4.9 above shows that open, stable and democratic states are by far more likely to comply with decisions of HRTs than authoritarian states.[324]

One notable advantage of an open, free and democratic system in relation to human rights judgment compliance analysis is that it strengthens domestic pro-compliance partnerships. An open, free and democratic system of governance may however be counterproductive when it empowers pro-violation constituencies. A strong democracy may suffer setbacks in international law compliance generally if it experiences significant national threats such as the 9/11 attacks in the United States, powerful pro-violation constituencies, and the existence of constitutional rules of exception.[325] Ultimately, as Cardenas noted, the battle for compliance will be won not by the group most committed to human rights norms but by the constituency that has the greatest institutional power.[326]

(b) Political transition or change of regime following a decision

This factor is closely linked to the governance system in place at the domestic level. It is assumed that regime change could bring about human rights judgment compliance. Regime change provides a favourable climate for state compliance, and could reduce the political and normative costs of compliance. Viljoen and Louw found that regime change led to significant judgment compliance in Nigeria; many military decrees were repealed including decrees which had been the subject of communications before the African Commission.[327] Similar trend has been observed in other countries such as Niger; the judgment of the ECCJ, requesting the release of a former President of Niger, was not implement until the country transitioned to civilian rule in March 2001.[328]

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[324] See Hawkins & Jacoby (n 2 above) 37 - 38; D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American American Courts for Human Rights' (2008) 5 http://stevendroper.com/ECHR%20Hawkins%20and%20Jacoby%20APSA%202008.pdf (accessed 8 October 2017).

[325] Cardenas (n 5 above) 13.

[326] As above.

[327] Viljoen & Louw (n 136 above) 26 - 27.

[328] Adjolohoun (n 136 above) 244.

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There have been political transitions in Nigeria and Tanzania between January 2000 and July 2017, the cut-off dates for this study. Until January 2017, The Gambia was under an authoritarian regime for the remaining part of the study period. As at July 2017, Uganda and Zimbabwe have not experienced any form of regime change since 1986 and 1980, respectively.[329] If the assumption is true that regime change contributes significantly to human rights judgment compliance, states where there have been both regime change and frequent transfer of power such as Nigeria and Tanzania are expected to have higher compliance records than those where political transitions have not taken place since more than two decades.

In order to test for this factor, the study codes as '1' states where at least one form of regime change or political transition has taken place during the study period (January 2001 – July 2017), and '0' states where no form of political transition or regime change took place. The analysis in Table 4.10 below demonstrates a close correlation between state compliance on the one hand and political transition or regime change on the other hand. The correlation, however, is not conclusive. The outlier is Uganda, where there has been no regime change or political transition in the last three decades, yet the rate of state compliance is relatively high. As argued previously, the Uganda exceptionalism is explained by the limited nature of the reparation orders of the EACJ and the limited commitment of the government of Uganda to providing leadership for other member states of the East African Community (EAC).

Table 4.10: Regime change and political transition in the selected states (2001 – 2017)

Countries	Aggregate compliance	Indicators
Uganda	68%	0
Nigeria	48%	1
Tanzania	19%	1
The Gambia	13%	0
Zimbabwe	11%	0

329 On 21 November 2017, Zimbabwe's Robert Mugabe resigned, thus ending his 37-year rule. However, he was succeeded by his former Vice-President, both of whom come from the ruling party, ZANU-PF.

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Even though regime change and political transition caused some decisions of the African Commission to be complied with in Nigeria, it has not been shown to have any predictive value in individual human rights cases selected for this study. In the *Mtikila* case, for example, political transition slowed down the process of implementation. The process of amending the Constitution of Tanzania has slowed down since the inauguration of a new President. The constitutional reform and referendum was the idea of former President Jakaya Kikwete. Since the change in leadership on 5 November 2015, the referendum has not been one of the priorities of the new President, Dr John Magufuli.[330] The new government, according to information obtained during this study, is decidedly non-committal to implementing the *Mtikila* decision.[331] Even though there has been no political transition or regime change in Uganda in the last three decades, this has not impeded compliance with reparation orders issued by the EACJ.

The problem with the regime change narrative is that it is too broad; not every type of regime change or political transition leads to improved human rights judgment compliance. The evidence in this study tends to support military to civilian transition such as in the case of Nigeria. There is little evidence that civilian to civilian transition leads to significant judgment compliance. In order to make a modest impact on state compliance, civilian to civilian transfer of power ought to entail a transfer of power to the opposition party or at least an inter-party transition. Arguably also, when a civil rule country regresses into military dictatorship, that is a regime change, but it is not the type of change that leads to better human rights judgment compliance.

Regime change is a significant compliance factor because it has the potential to reduce the political and normative costs of compliance. Decisions of HRTs are more likely to align with the ideological views of a new opposition regime than the regime that caused the violations; and political prisoners ordered to be released by HRTs are more likely to be former members or supporters of the opposition, which is now in power.[332] The new

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[330] Email from O Windridge on 4 May 2017; email from FMchomvu on 24 April 2017; N Branson 'Forty years of Tanzania's constitution: Is the 1977 *katiba* still fit for purpose?' *African Research Institute* 25 April 2017 https://www.africaresearchinstitute.org/newsite/blog/forty-years-tanzanias-constitution-1977-katiba-still-fit-purpose/ (accessed 5 May 2017).

[331] Windridge (n 331 above).

[332] See Viljoen (n 139 above) 360.

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government may take delight in prosecuting perpetrators of human rights violations under the 'old regime' as doing so enables the new regime to punish its own 'political enemies'. The conclusion, therefore, is that at least two types of regime change and political transition may lead to improved human rights judgment compliance, namely a change from a military or civilian dictatorship to a more open and democratic system, or transfer of power from one political party to another; even so the effects of change of regime, though significant, have limited predictive value in individual human rights cases.

(c) State involvement in the proceedings of HRTs

This factor was treated as a HRT-related factor in some previous studies.[333] This study finds no evidence to support the categorisation of the degree of state involvement in the proceedings of HRTs as a HRT-related factor. The decision whether to participate in the proceedings of a HRT is usually made freely by the state. All HRTs are under obligation to give an opportunity to the state to present a defence to the allegations submitted; HRTs have no discretion on this. So long a HRT has discharged this obligation, responsibility to participate in the proceeding is there and then transferred to the state. No tribunal can validly issue a decision if it fails to notify the state of the complaint, give the state an opportunity to be heard and give the state adequate notice of the proceedings. In fact, a state could challenge the validity of a human rights decision where the above is not done. Wherever a state refuses to participate in a proceeding, a common practice by most, if not all, HRTs is to decide the communication based on the information and evidence submitted by the complainant.[334]

The assumption is that a state that participates in the proceedings of a HRT may be more inclined to comply with the decision of the tribunal than states that do not participate. Viljoen and Louw, however, found no link between human rights judgment compliance and state's involvement in the proceedings of HRTs.[335] The selected states participated in

333 Viljoen & Louw (n 136 above) 15; Adjolohoun (n 136 above) 198.

334 If states' non-involvement is treated as a HRT-related factor, why then is NGO involvement also not treated as a HRT-related factor? This study argues that every tribunal has an obligation to provide states a reasonable opportunity to be heard, and this includes notifying states about complaints submitted against them, and giving them ample opportunity to provide their response. It is on this basis that this study considers state involvement in proceedings of HRTs as a state-related factor.

335 Viljoen & Louw (n 136 above) 15.

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the proceedings of the six HRTs in 27 of the 32 selected cases. This implies that there was no state involvement in only five cases. To test the relevance of this factor to state compliance, the involvement of a state in all or the majority of the cases pertaining to the state was coded '1' while no involvement at all or involvement in less than majority of the cases was coded '0'. The result of the analysis as per the selected cases is provided in Table 4.11 below.

***Table 4.11: Degree of state participation in HRTs' proceedings*[336]**

Countries	Aggregate compliance	Indicators	Involved	Not involved	Total of cases
Uganda	68%	1	n = 5	n = 0	5
Nigeria	48%	1	n = 8	n = 2	10
Tanzania	19%	1	n = 3	n = 0	3
The Gambia	13%	1	n = 4	n = 1	5
Zimbabwe	11%	1	n = 7	n = 2	9

The results in Table 4.11 above shows no correlation between state compliance and state involvement in the proceedings of HRTs, because even in cases of low level of compliance, the selected states mostly participated in the proceedings of the HRTs. In other words, states were mostly involved in the proceedings of the selected HRTs; yet the percentage of full compliance in cases where states participated actively in HRTs' proceedings is not significantly higher than cases where the state was less involved at all. Thus, any conclusion that the degree of state participation correlate to state compliance will be inaccurate and misleading. There is substantial compliance variation even within a case where the state participated or did not participate; and there is no evidence that reparation orders issued in cases in which states are involved have been better complied with than those in which states are not involved. While state involvement during the hearing of a case may give the state more information about the case, it is not a factor predictive of state compliance, based on the data.

[336] The Table containing the categorisation of the 75 reparation orders is appended to the thesis as Appendix III.

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(d) Domestic commitment to compliance

One factor that contributes to human rights judgment compliance which is so often missed in previous studies is states' commitment to compliance. The reason for this omission is that the existence of stable, open and democratic system of governance is mostly mistaken for strong national commitment to human rights judgment compliance, and vice versa. I argue that the system of governance practised in a state may not be an accurate indicator of the commitment of a state to human rights judgment compliance. Domestic commitment to judgment compliance has two layers: national and sub-national. While national commitment is unitary in nature, subnational commitment is constitutive.

States signal their national commitment to human rights judgment compliance in any of the followings ways: incorporating judgment compliance obligations into the constitution; making a specific law guaranteeing judgment compliance; establishing institutions that monitor and facilitate implementation of HRTs' decisions; and by sending out strong political signals that are consistent with their human rights judgment obligations. Thus, a state's national commitment to human rights judgment compliance may have constitutional, legal, institutional and political dimensions. These dimensions of commitment sometimes have little to do with the democracy rating of the country. A truly committed state may incorporate human rights judgment compliance obligations into the national constitution or pass legislation to give effect to it. States generally make laws on issues they are strongly committed to. When a state claims to be committed to human rights judgment compliance and has not enacted a specific law on the subject, the commitment is at best political. States that are committed to judgment compliance may also set up 'permanent', 'independent' and 'well-resourced' body with the responsibility of implementing or coordinating implementation of decisions of HRTs. When a state is committed to judgment compliance, its top-level officials may make unequivocal public statements not only to comply but also to support the tribunal and the norms advanced by the tribunal.

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This thesis interrogates the four layers of national commitment to judgment compliance: constitutional, legal, institutional and political.[337] The assumption is that the existence of one or more of these indicators of national commitment could provide useful cues on human rights judgment compliance.[338] States' commitment is coded as '1' or '0'; the former representing limited commitment and the latter standing for weak commitment. A state is catgeorised as having weak commitment where none of the four indicators of national commitment is present in the state; and 'limited commitment' where at least one indicator is present.

There is no express provision in the constitutions of the five states selected for the study for the enforcement of decisions of international HRTs, and there is no specific legislation on human rights judgment implementation in any of the selected states. Only *ad hoc* institutions exist for state reporting which also double as monitoring bodies for human rights judgment compliance. In Tanzania, enforcement of foreign judgments is regulated by the Reciprocal Enforcement of Foreign Judgments Act No 8 of 2002.[339] Judgments of foreign courts are enforceable in The Gambia in terms of the Foreign Judgments Reciprocal Enforcement Act 6 of 1936.[340] The import of this law is similar to the Tanzania's law; it is based on inter-state reciprocity. Nigeria has the Foreign Judgments (Reciprocal Enforcement) Act.[341] The enforcement of foreign judgment legislation of the various states is however limited, in principle, to judgments of 'foreign courts', and applies to the courts of a limited number of states based on reciprocity.[342] In principle, the legislation is inapplicable to the judgments of the African Court, the EACJ or any other HRT selected for this study.[343]

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337 See generally DH Moore 'Constitutional commitment to international law compliance?' (2016) 102 *Virginia Law Review* 367, 367 - 445.

338 The analysis in this section excludes sub-national commitment to human rights judgment compliance. It is assumed that the commitment to international law compliance of sub-national actors in a state has a relationship with the state's democracy rating, which already has been discussed.

339 Coalition for an Effective African Court on Human and Peoples' Rights *Booklet on the implementation of decisions of the African Court on Human and Peoples' Rights* (2017) 26.

340 See Adjolohoun (n 136 above) 133.

341 CAP F35 Law of the Federation of Nigeria 2004.

342 See Section 11 of the Reciprocal Enforcement of Foreign Judgments Act of The Gambia, Cap 8, 2002.

343 Coalition for an Effective African Court on Human and Peoples' Rights (n 171 above).

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However, in the case of the SADC Tribunal, there is a provision in the Protocol setting up the Tribunal, which states that the law and rules of procedure for the enforcement of foreign judgment in the respective member states are applicable to the enforcement of the Tribunal's decisions.[344] Thus, a South African High Court sitting in Pretoria in February 2010 ordered that the decision of SADC Tribunal in the *Campbell* case be registered, recognised and enforced in South Africa.[345] The High Court decision has been affirmed by the South African Supreme Court of Appeal,[346] and the Constitutional Court.[347] On 21 September 2015, a property in Cape Town, belonging to the government of Zimbabwe was auctioned off for ZAR 3.76 million to cover the costs order in the *Fick* case (CC).[348] This is the first time in history that the asset of a foreign government is subject to execution for the sole purpose of implementing the judgment of an international HRT.

Table 4. 12: Degree of national commitment to compliance[349]

HRTs	Aggregate compliance	Indicator	*National commitment to compliance*			
-	-	-	Constitutional provision on HRJC	Specific legislation on HRJC	Permanent institution on HRJC	Political commitment
Uganda	68%	1	0	0	0	1
Nigeria	48%	1	0	0	0	1
Tanzania	19%	1	0	0	0	1
The Gambia	13%	0	0	0	0	0
Zimbabwe	11%	0	0	0	0	0

[344] SADC Tribunal Protocol, art 32.

[345] *Government of the Republic of Zimbabwe v Fick and Others* [2011] ZAGPPHC 76 ('Fick High Court').

[346] *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122 ('Fick SCA').

[347] *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22, 2013 (5) SA 325 (CC). See also H Woolaver 'Domestic enforcement of international judicial decisions against foreign states in South Africa: *Government of the Republic of Zimbabwe v Fick*' (2015) 6 *Constitutional Court Review* 219.

[348] J Evans 'Zim govt property in Cape Town sold for R3.7m' *News24* 21 September 2015 http://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921 (accessed 1 May 2017).

[349] *Constitutional provision on HRJC:* None of the selected states has specific constitutional provisions specifically guaranteeing compliance with judgments of regional and sub-regional HRTs. *Specific legislation on HRJC:* None of the selected states has yet adopted specific legislation on compliance with judgments of regional and sub-regional HRTs. *Permanent institution on HRJC*: None of the selected states has a dedicated permanent institution to implement HRTs' decisions. *Political commitment:* All the selected states except Zimbabwe and The Gambia have expressed some degree of support for the respective regional and sub-regional HRTs. However, Zimbabwe has opposed the SADC Tribunal and The Gambia has mostly criticised the ECCJ. It remains to be seen whether the political transition in The Gambia and Zimbabwe in January and November 2017, respectively would increase political commitment to compliance.

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In Table 4.12 above, the thesis assesses the political commitment to compliance of each of the studied states. A country's political commitment to compliance may be observed from the general support for compliance with international law, especially decisions of HRTs. This form of commitment may also be deduced from declarations of state representatives to comply with their international obligations, the political history of commitment with international norms by the country, and the role played by leaders of the country in setting up and sustaining the norm which they are required to obey. The Gambia and Zimbabwe scored '0' in terms of political commitment because both countries at various times expressed serious oppositions to jurisprudence of the ECCJ and SADC Tribunal, respectively.[350]

The Table above shows clear correlation between the degree of political commitment and state compliance. As demonstrated previously, the two least complying countries in this study, The Gambia and Zimbabwe, also have the least political commitment to human rights judgment compliance. I argue, later in this chapter, that states that have constitutional or legislative provisions guaranteeing human rights judgment compliance together with a permanent institution to monitor implementation of human rights decisions are far more likely to comply with human rights decisions than states without these domestic infrastructures.

4.3.5 Involvement of NGOs

Finally, this study interrogates factors related to civil society and international pressure. The factors examined here include the involvement of NGOs and the existence of international pressure requiring the violating state to comply. Viljoen and Louw found that NGOs involvement in the submission of communication and follow-up significantly impacts on human rights judgment compliance.[351] They also found that press involvement and pressure from various transnational actors play major role in persuading states to implement decisions of the African Commission.[352] The study by Adjolohoun, however, does not provide clear and definite picture of the role of NGOs in state compliance. Of the

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[350] See Appendices I & II.
[351] Viljoen & Louw (n 136 above) 28 - 29.
[352] As above.

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six cases of ECCJ that were reported to have been fully complied with, only two revealed specific NGO involvement, and of the three non-compliance cases, NGOs were clearly involved in two.[353] This indicates that human rights judgment compliance is not solely dependent on NGO involvement; some factors related to the case, the state and the HRT are equally relevant. While media involvement sometimes correlates to greater human rights judgment impact, the involvement of the media does not necessarily lead to compliance. Of the nine cases that were investigated by Adjolohoun, the two that attracted the most media attention fall in the non-compliance category.[354] This also indicates that the effect of press involvement depends largely on other factors such as the cost of compliance and the domestic characteristics of the state.

Table 4.13: Degree of NGOs involvement in HRTs' proceedings[355]

Countries	Aggregate compliance	Indicators	Involved	Not involved	Total of cases
Uganda	68%	0	n = 2	n = 3	5
Nigeria	48%	1	n = 6	n = 4	10
Tanzania	19%	1	n = 3	n = 0	3
The Gambia	13%	1	n = 3	n = 2	5
Zimbabwe	11%	1	n = 5	n = 4	9

The results of the analysis in Table 4.13 above indicates that there is no direct correlation between compliance in the selected states and NGOs involvement in the proceedings of the selected HRTs. This finding should cause no alarm as it does not by any stretch underrate the role of NGOs in human rights litigations. The finding is limited to the selected states and does not represent the situation for all African states. Further research is required to test the impact of NGOs' involvement in HRTs' proceedings on state compliance. The point, for the purpose of this study, is that in order to improve compliance in the selected states, the degree of state commitment to compliance, regime type and the nature of the reparation orders issued take precedence over the involvement of NGOs

[353] Adjolohoun (n 136 above) 248.
[354] Adjolohoun (n 136 above) 250.
[355] The Table containing the categorisation of the 75 reparation orders is appended to the thesis as Appendix III.

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in the proceedings of HRTs. It is not enough for NGOs to be involved in the proceedings of HRTs; what is needed even more is their involvement in follow up of the decisions. The state that recorded the highest aggregate compliance during the study, Uganda, had fewer cases involving NGOs, and the two least complying states had relatively higher number of cases involving NGOs. Overall, in cases where NGOs are directly involved, 49 reparation orders were issued for the respective states to implement; only six reparation orders, representing just 12 percent of these orders have been fully implemented and 30 reparation orders, representing 61 percent have not been complied with. Conversely, 27 percent of the total reparation orders, which are not associated with any NGO during the HRTs' proceedings, have been fully implemented. The overall compliance ratings for NGO involvement is significantly lower because of cases from The Gambia and Zimbabwe. Nearly all cases involving these two countries benefited from the support of NGOs and civil society. However, due to issues related 'regime type' and absence of domestic commitment to compliance in the two countries, NGO involvement did not lead to a significant state compliance in the two states.

It should be noted that the analysis above is limited to direct involvement of NGOs in submission of communication and in the proceedings of the HRTs. There certainly are cases in which some NGOs and civil society actors were indirectly involved in the proceedings of HRTs but due to lack of data, these cases were not captured in the analysis above. What is clear from the analysis above is that NGO involvement, though a crucial compliance factor, is dependent on other factors such as domestic-level characteristics of the state and the nature of the reparation orders for its effects. While NGOs' involvement in the submission of communications and the HRTs' proceedings certainly has a significant impact on the quality of the decisions issued by the HRTs, it was observed during this study that it is the effectiveness of NGOs' involvement in follow-up, rather than in submission of communications, that has a direct impact on state compliance.

4.4. The five primary factors indicative of state compliance

In the various analyses above, the factors which are found to have no correlation whatsoever to human rights judgment compliance in the selected states include: the type

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of right violated, the scale of the violation, the nature of obligation imposed on the state, the degree of state involvement in the proceedings of HRTs, the quality of legal reasoning in a case, the involvement of NGOs in the submission of the complaints, the perceived legal status of the tribunal's decision and the fact that the tribunal is situated at the sub-regional instead of the regional level. These factors, though not entirely irrelevant, have not been found in the study to have significant correlation to state compliance in the selected states. Their presence in relation to a case may 'slightly' or 'significantly' improve state compliance but they are not preconditions for compliance. For this reason, they are regarded as the relevant factors in this study.

The influence of a relevant factor on human rights judgment compliance is slippery, and this fluidity explains the inconsistencies sometimes found in compliance literature. In a particular case, one or more of the relevant factors may produce remarkable compliance results, and yet in another case, the same set of factors may produce abysmal results.[356] While the contributions of each of the relevant factors may lack statistical correlation to compliance and so appear inconsequential individually, the influence of these factors, when combined, may actually produce significant compliance outcomes. This study finds that compliance scholars have been asking the wrong questions. The right question is not 'what factors are relevant for compliance' because just any factor may be relevant for compliance in a given situation; but 'what factors determine whether the relevant factors would produce significant or inconsequential compliance outcomes'. The analysis in this study reveals that whenever any of the relevant factors listed above appears to have played a 'significant' role, as they often do, in shaping a compliance outcome, they do so due to certain preconditions. When these preconditions change or are non-existent, the effects of the relevant factors change also.

Before discussing the five preconditions which this study finds to be most significant in influencing states to comply with decisions of HRTs, it is important to do a brief survey of what other scholars consider as the primary factors for state compliance. In their study on status of compliance with recommendations of the African Commission, Viljoen and Louw

[356] For instance, the ECCJ issued very specific reparation orders in its three judgments involving The Gambia and civil society actors were involved in all the three cases yet, there was zero compliance.

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concluded that open, stable and democratic system of government and the involvement of NGOs in relation to a decision are two primary factors likely to influence compliance.[357] Adjolohoun studies compliance with judgments of the ECCJ and finds that the political environment of the case and the nature of the remedy are the two most important compliance factors.[358] These are followed by low cost remedies and the application of international pressure on states.[359] No empirical study has yet been carried out on factors that influence states to comply with decisions of the African Court, EACJ and the SADC Tribunal.

Based on the analysis of the data presented in the previous section and a review of the most relevant literature, this thesis identifies the following primary compliance factors as the preconditions that determined the compliance outcome in any given case presented in the study: limited commitment to compliance by states, the nature of the reparation order, the presence of democratic system of government at the domestic level, regime change and frequent political transition, and effective follow-up by the HRTs, NGOs and other actors. In the empirical analysis carried out in the previous section, the study established clear correlation between state compliance and domestic commitment to compliance. It also established clear correlation between compliance and the system of governance in place at the domestic level. The data finds close correlation between compliance and regime change and frequent political transition also at the state level. Importantly, the analysis indicates some correlation between the nature of the reparation orders and state compliance. Finally, the thesis argues that effective follow up by HRTs, NGOs and other actors featured prominently in most cases where significant compliance outcome have been recorded. These factors constitute the primary factors for human rights judgment compliance in each of the selected states.

4.4.1 Degree of commitment to compliance by states

Based on the analysis in the study, the most important factor that leads to compliance is strong commitment to compliance by states. Even where all other compliance factors are

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357 Viljoen (n 139 above).

358 Adjolohoun (n 136 above) 321 - 323.

359 As above. See also Adjolohoun (n 136 above) 240.

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absent, a strong commitment by states is sufficient to produce judgment compliance. The stronger the commitment of supranational, national and subnational actors to judgment compliance, the higher the chances of compliance. The question may be asked: Are there no states with weak commitment that have complied with human rights decisions? Responding to this question requires an elaboration of the three-layered dimensions of human rights judgment compliance commitment. Commitment to compliance has supranational, national and sub-national dimensions. Each of these layers of commitment contributes to state compliance in different but related ways. Decisions of human rights regimes that involve the three layers of commitment are almost always complied with.

(a) Commitment to compliance by states at the supranational level

Compliance commitment at the supranational level entails the commitment of states that constitute the intergovernmental organisation that sets up the tribunal. This type of commitment is manifested in the overall institutional design of the tribunal, and the political support given to the tribunal from time to time. With reference to best practices from the European, Inter-American, African and the UN human rights systems, states demonstrate commitment to compliance at the supranational level by urging fellow states to implement the decisions of the HRT; adopting a binding treaty that provides expressly that decisions of the HRT are legally binding on states; setting up a dedicated body to monitor the execution and implementation of decisions of the HRT and there is clear evidence the body is functioning as such; incorporating in treaty a specific provision for sanctions on states in the case of non-compliance; and imposing sanctions on non-complying states. When a human rights regime responds 'negative' to the list above, it is safe to conclude that the commitment of the supranational organisation is weak, and this has implication for human rights judgment compliance.

(b) National commitment to compliance

The second layer of compliance commitment is national. This, however, does not mean 'domestic'; as domestic commitment to compliance comprises both national and sub-national systems. National commitment to human rights judgment compliance may take

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any of the following four dimensions, namely constitutional, legal, institutional and political, and each of these dimensions contributes to state compliance in different ways.

(i) Constitutional commitment to compliance: This form of commitment is manifested in constitutional provisions that place international law above national law or puts an obligation on domestic courts and public officials to align application of domestic law with principles of international law. These provisions are examples of strong constitutional commitment to international law compliance. In South Africa, for instance, the Constitution places an obligation on courts to consider international law while interpreting the Bill of Rights.[360] In Côte d'Ivoire, ratified international treaties have a higher status than the Constitution.[361] These examples, however, fall short of the type of constitutional commitment being discussed here. The brand of constitutional provision that meets the standard of constitutional commitment to human rights judgment compliance is a specific provision in the constitution that places an obligation on all authorities and persons within a specific state to comply with and implement decisions of international adjudicatory bodies including HRTs.[362] Rarely do countries put such provisions in the constitution without some willingness to give effect to them. Countries that bind themselves constitutionally to obey decisions of international adjudicatory bodies including HRTs are in a special league; it is a higher level of commitment. While there are several ways a country could signal commitment to human rights judgment compliance, a special constitutional clause securing compliance is nearly the highest level of commitment.

(ii) Legal commitment to compliance: The second layer of national commitment to judgment compliance is legal or legislative in nature. It presupposes the existence of

[360] See Constitution of South Africa, sec 39(1).

[361] KA Some & A Tanoh 'The impact of the African Charter and the Maputo Protocol in Côte d'Ivoire' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 47.

[362] For example, in Peru, the Special Commission to Follow-Up on International Procedures was created in April 2001 through a presidential decree. The decree charges the Commission with the responsibility to supervise and monitor the implementation of decisions of international human rights bodies. In Paraguay, the President issued an executive decree establishing an inter-institutional commission to organise implementation of IACHR's decisions. In Poland, the is a Special Inter-Ministerial Task Force, approved in 2006, to increase the efficiency of execution of ECHR's judgments. Guatemala has a Presidential Commission on Human Rights which coordinate human rights activities in the country. See generally Open Society Justice Initiative *From rights to remedies: Structures and strategies for implementing international human rights* decisions (2013) 32 - 48.

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specific laws, policies, court decisions, administrative guidelines and clear-cut rules of procedures for the enforcement and implementation of decisions of international HRTs. Viljoen, for example, has argued that countries that have justiciable guarantees of ESCRs in their national constitutions are more likely to implement ESCRs decisions of international HRTs.[363] States such as Italy, Poland, Russia and Turkey have adopted specific legislation aimed at providing effective remedies in relation to violations of the European Convention on Human Rights (ECHR) found by the European Court of Human Rights (ECtHR).[364] In 2006, Ukraine passed a specific national law governing implementation of judgments of the ECHR.[365] No state in Africa, and definitely none of the selected states, has adopted such legislation.[366]

Legal commitment to human rights judgment compliance may be legislative, judicial or administrative. A state may enact legislation on judgment compliance merely to pay 'lip service' to human rights and lock in gains in form of improved trade relations and to satisfy foreign aid conditionality. Legal commitment to compliance may be expressed as a specific legislation, a provision or set of provisions in legislation which compels states officials including national judges to give effect to decisions of international adjudicatory bodies including HRTs. Judicial pronouncements from the highest court in a country may also suffice as legal commitment. In cases where there are no specific laws or judicial decisions, duly issued administrative guidelines which prescribes the procedure for implementation of decisions of international adjudicatory bodies including HRTs may suffice as legal commitment to compliance.

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[363] Viljoen (n 139 above) 365.

[364] See Oette (n 175 above) 52. See, for instance, Russian federal law on Compensation to Citizens for Violation of the Right to a fair Trial within a Reasonable Time or the Right to Execution of Judgment within a Reasonable Time. The law was enacted and entered into force on 4 May 2010 in compliance with the judgment of the ECtHR in *Burdov v Russia*, decided by the ECtHR on 15 January 2009, where the ECtHR recommended that Russia should 'set up an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgements in line with the Convention principles as established in the Court's case-law'. See *Burdov v Russia*, para 6; A Burkov 'Improvement in compliance of the Russian judicial system with international obligations undertaken by the Russian Federation' http://sutyajnik.org/1/29.html (accessed 11 April 2017).

[365] Open Society Justice Initiative *From rights to remedies: Structures and strategies for implementing international human rights* decisions (2013) 33

[366] Viljoen (n 139 above) 365.

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(iii) Institutional commitment to compliance: The third indicator of national commitment to human rights judgment compliance is the establishment of a permanent, independent and well-resourced body with the responsibility of implementing or coordinating implementation of decisions of HRTs.[367] An *ad hoc* body that meets infrequently without any statutory authority to implement HRTs' decisions does not suffice as a strong institutional commitment. The presence of one or more national human rights institutions (NHRIs) in a country may not demonstrate strong institutional commitment to human rights judgment compliance unless the NHRI has an express mandate to implement decisions of international HRTs, and has all the resources to do so. A dedicated mechanism for judgment compliance ought to have direct mandate to implement decisions of HRTs in the same way decisions of domestic courts are implemented. In order to carry out its mandate, the mechanism should receive budgetary allocations for its day to day administration and for settling minor judgment debts. The state may have a dedicated Human Rights Fund from which the financial costs of implementing international human rights decisions are defrayed.

(iv) Political commitment to compliance: The last form of national commitment to compliance is political. This type of commitment may be spontaneous to lock in some gains or improve the country's overall reputation. Even though there are no laws or institutions in place guaranteeing human rights judgment compliance, a country's political commitment may be observed from the general support for compliance with international law, especially decisions of HRTs. This form of commitment may also be deduced from declarations of state representatives to comply with their international obligations, the political history of commitment with international norms by the country, and the role played by leaders of the country in setting up and sustaining the norm which they are required to obey. Countries which stood in the front line during the development of a norm and that have played key roles in sustaining the norms usually have a higher political

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[367] In Austria, for example, implementation of judgments of the European Court of Human Rights rests with the Constitutional Service (Division V) of the Austrian Federal Chancellery, in conjunction with other relevant government departments. See Anagnostou & Mangiu-Pippidi (n 1 above) 221. In the United Kingdom, the Human Rights Division of the Ministry of Justice is the main actor on domestic implementation of 'Strasburg judgments', working closely with the Joint Committee of Human Rights (JCHR), which comprises representatives from the House of Lords and the House of Commons. See Anagnostou & Mangiu-Pippidi (n 1 above) 222.

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commitment to comply with international obligations imposed on it as a result of the norm.

The Gambia is an example of a country that played a key role in the development of a norm, in this case the Banjul Charter, but has not played any significant role in sustaining that norm.[368] It is mainly for its role during the process of drafting the African Charter that the Charter is famously described as 'The Banjul Charter', and The Gambia was rewarded with the Secretariat of the African Commission.[369] However, apart from begrudgingly playing host to the Commission, The Gambia has not played any significant role in sustaining the norms of the African Charter; instead it has undermined the Charter's norms.[370] Hosting a HRT is a low threshold of political commitment to human rights judgment compliance. Merely hosting a tribunal is no evidence of a strong political commitment to comply with decisions of the tribunal, as illustrated also by Tanzania in relation to the African Court and the EACJ, and Nigeria in relation to the ECCJ. The actual test is the contributions of the host country relative to other countries to the sustenance of the norms creating the tribunal.

Political commitment to compliance is the weakest of the various forms of national commitment to human rights judgment compliance. It is spontaneous, and subject to the whims of the political leader, the ruling party and other government officials. The political commitment of a state to compliance may also be confirmed by checking whether the state is an early ratifier of human rights treaties, has made declarations accepting individual communication procedure for all relevant UN and AU HRTs, and participates actively in the activities of the intergovernmental body that created the tribunal. The compliance history of the state and its immediate neighbours may also provide useful hint on political commitment to human rights judgment compliance.

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[368] For a discussion of the role of the government of The Gambia in the development and final adoption of the African Charter, see Centre for Human Rights *Celebrating the African Charter at 30: A guide to the African human rights system* (2011) 9 - 10.

[369] See Viljoen (n 189 above) 291 - 292.

[370] F Viljoen 'A call to shift the seat: The Gambia is not a suitable seat for the African Commission on Human and Peoples' Rights' *AfricLaw* 27 May 2013 https://africlaw.com/category/contributors/frans-viljoen/ (accessed 8 October 2017).

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(c) Sub-national commitment to compliance

In addition to national commitment, another form of commitment that significantly influences human rights judgment compliance comes from sub-national actors. This layer of compliance commitment is often ignored in studies that portray states as unitary entities. A state-centric model of compliance prioritises state reputation, the political will of the head of state and the role of government agencies in facilitating state compliance. The national commitment analysis above is an example of a state-centric compliance narrative. The problem with state centrism with regards to human rights judgment compliance is not that it is untrue but that it is incomplete. Human rights judgment compliance is facilitated by a wide range of domestic actors including judges, members of parliament (MPs), cabinet members, civil society organisations, the press and the academia who form pro-compliance partnership to hold government accountable.[371] The real domestic pressure that makes states comply with human rights decisions usually comes from outside of the formal government establishments. The pathways for signalling subnational commitment to compliance differs substantially from national commitment. Compliance commitment of subnational actors may be signalled through judicial activism, social mobilisation, information politics which involves naming and shaming, and sometimes through legislative lobbying. When sub-national actors mobilise in partnership using the various tools described above, they are able to bypass national barriers to bring about significant human rights change.[372]

Human rights judgment compliance is inherently a domestic-level political process that requires resilient domestic institutions, independent judiciary, strong legislature, vibrant civil society, unbiased press and conscientious academia. Any state that has these internal configurations may be categorised as having strong subnational commitment to compliance. This distinction is very important. A state may constitutionalise and legalise human rights judgment compliance, set up a permanent body to oversee judgment implementation, and make strong political statements about compliance without possessing any of the distinctive internal configurations described above. The analysis of

[371] See Hillebrecht (n 2 above) 3; Hillebrecht (n 233 above) 280.
[372] See Risse, Ropp & Sikkink *The power of human rights* (n 106 above) 17 - 19.

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the data in this study reveals that while strong national commitment is more effective for implementing reparation orders that relate to compensation, restitution and satisfaction, the internal domestic configurations described above is required for implementing structural remedies that relate to guarantee of non-repetition.

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law categorises human rights reparations into the following: compensation, restitution, rehabilitation, satisfaction and guarantee of non-repetition.[373]The analysis in this study reveals that structural remedies, mainly measures to guarantee non-repetition, require far more than having a law and an institution responsible for implementing human rights decisions. The adoption of legislation as well as investigation and prosecution of perpetrators, for instance, require multiple domestic actors working in synergy towards a desired goal. No Head of State or national implementation body, however committed to human rights judgment compliance, may pull that off single-handedly. For implementation of structural remedies, it is nearly impossible for compliance to happen without significant domestic pro-compliance coalition.

This view – that broad based pro-compliance partnerships is key for the implementation of structural remedies – has been echoed in major studies on state compliance. Cavallaro and Brewer, for instance, found in their recent study that the effectiveness of international tribunals may be linked to the ability of the tribunal to create ways to connect with relevant domestic groups.[374] Hathaway argues that domestic institutions are the channels through which norms of international law are incorporated into the domestic sphere.[375] According to Dai, compliance is contingent on the existence of a core group of constituents willing

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[373] See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (arts 15 - 23), adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[374] JL Cavallaro & SE Brewer 'Re-evaluating regional human rights litigation in the Twenty-First Century: The case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, 768.

[375] O Hathaway 'The promise and limits of the international law of torture' in S Levinson (ed) *Torture: A collection* (2004) 199 - 212.

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and able to lobby for compliance.[376] Helfer observes that 'compliance with international law increases when international institutions – including tribunals – can penetrate the surface of the state to interact with government decision-makers.'[377]

Pro-compliance partnerships are in every country. They include the strong domestic constituents that mount pressure on government in strong democracies,[378] and the activist NGOs that reach out to transnational activist networks in authoritarian regimes.[379] They include also the courageous judges that give purposive interpretation to the Bill of Rights in the face of domestic legal constraints; the legal academics that introduce jurisprudence of international HRTs into university curricula and legal discussions; the press crew that give visibility and coverage to activities of HRTs; and the cabinet members that take frontline roles in securing cabinet approval for human rights judgment compliance policies and actions. The argument here is that some resilient domestic institutions and sub-national actors such as activist judges, strong legislature, vibrant civil society, unbiased press and conscientious academia play key role in pulling states towards compliance, especially when the reparation order is structural in nature.

In order to consolidate the argument for sub-national commitment to compliance, this study draws lessons from Rosenberg in his controversial book: *The hollow hope: Can courts bring about social change.*[380] Rosenberg questioned whether courts can bring about significant social reforms, and presents overwhelming evidence in relation to school desegregation and women's abortion rights in the United States to support his claims.[381] *Brown v Board of Education* is usually regarded as a watershed in the process of racial desegregation in the US school system and a major proof of the transformative role of

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[376] X Dai 'International institutions and national policies' (2007) https://www.princeton.edu/~pcglobal/conferences/institutions/papers/dai_T500.pdf. (accessed 8 October 2017).

[377] LR Helfer 'Redesigning the European Court of Human Rights: Embedded-ness as a deep structural principle of the European human rights regime' (2008) 19 *European Journal of International law* 125, 132.

[378] See Helfer & Slaughter (n 53 above) 363.

[379] Risse, Ropp & Sikkink (n 106 above).

[380] See GN Rosenberg *The hollow hope: Can courts bring about social change?* (1991) 1 - 425; GN Rosenberg *The hollow hope: Can courts bring about social change?* (2008) 1 - 534.

[381] As above.

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courts in social reform.[382] Rosenberg challenged this orthodoxy, and argued instead that racial desegregation in the US was achieved not through the court system but primarily through social mobilisation by local organisers and congress.[383] Rosenberg's thesis can be summed up as follows: courts cannot bring about significant social change without the support of other arms of government and in the face of widespread public opposition.[384] While courts may be part of the process of social transformation, they are not the active force or the only key players in the process.[385] Achieving social transformation requires far more than litigation. Mobilisation is the key to social transformation. Unless litigation is part of an ongoing process of social mobilisation, court victories are in the end hollow victories.

In a study conducted by Gauri and Brinks, the authors found that even though social rights litigation is capable of producing significant social reforms, it does not do so without the right political and social conditions such as a well-developed policy infrastructure, a constituency on the particular issue with substantial legal capacity, and substantial support for the claims being made from politically consequential actors, either governmental or social.[386] Norms of social transformations are constructed 'bottom up', not 'top down'.[387] Courts cannot enforce social reforms 'top down'.[388] While courts are spaces for validation of claim, social mobilisation create 'spaces' and 'incentives' for court-backed reforms. At best, courts are partners in social transformation, not the sole agent. The argument above applies to users of HRTs. Cases such as the *Ogoniland* case and the *Campbell* cases require much more social mobilisation to pull them off than the litigants

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382 See HK Gerken 'The Supreme Court is a partner in transformation, not the sole agent' *The New York Times* 7 July 2015.

383 A year after *Brown v Board of Education* was decided, a little over 0.001 percent of black school children, roughly 1 in every 100,000, attended integrated schools. This figure rolled to 0.13 percent in 1958, and 0.45 percent in 1962. Nearly 10 years after *Brown* decision, less than one-half of one percent of black school children attended integrated schools. See Rosenberg (n 217 above). See alsohttp://www.librarything.com/work/69351 (accessed 8 October 2017).

384 As above. See also Rosenberg (n 381 above).

385 See Gerken (n 383 above).

386 DM Brinks & V Gauri 'A new policy landscape: Legalizing social and economic rights in the developing world' in V Gauri & DM Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 303 - 306.

387 See Gerken (n 383 above). See also Y Zhu 'Norms, laws, political accountability and China's legal reform: The cases of all and Xinfang (L & V)' in B Guo & D Hickey *Toward better governance in China: An unconventional pathway of political reform* (2010) 105.

388 As above.

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thought about. Social mobilisation is the prerequisite for any significant human rights change;[389] though HRTs are integral parts of that process. Activist judicial intervention without sufficient background mobilisation could either lead to a powerful backlash or retard social reforms. Thus, a minimal degree of commitment to compliance by the various sub-national entities that constitute a state is necessary for compliance, especially where the reparation order is structural in nature.

4.4.2 Nature of the reparation order

The second primary factor that determines state compliance is the nature of the reparation order the state has been required to implement. Three aspects of the nature of the reparation order came out quite clearly in the empirical analysis carried out in the previous sections, namely: cost, specificity and limited remedies. Of these three aspects of the nature of the reparation orders of HRTs, the most important for state compliance is cost; that is, the cost of compliance or non-compliance.

(a) Cost of compliance or non-compliance

Two types of cost affect compliance outcomes: cost of compliance and cost of non-compliance.[390] Unfortunately, the latter has been under-theorised. Most of the time, the focus has been on cost of compliance only.[391] The argument of this thesis is that the lower the cost of implementing a decision, the higher the chances of compliance; alternatively, the higher the cost of non-compliance, the lower the likelihood of non-compliance. The analysis of cases in this study reveals that state compliance is generally higher when the reparation order is less costly to implement. States generally comply with decisions of HRTs when the 'net cost of compliance is less than the net cost of non-compliance' or when the 'net benefits of compliance outweigh the net benefits of non-compliance'.[392]

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389 See Simmons *Mobilizing for human rights* (n 5 above) 114 - 115.

390 See DM Brinks 'Solving the problem of (non)compliance in social and economic rights litigation'in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 480 - 491.

391 Adjolohoun (n 136 above) 321.

392 Brinks (n 391 above) 476.

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Whenever the benefits of not implementing a decision outweighs the cost of implementing it, non-compliance is almost always the consequence.[393]

Three types of costs are associated with human rights judgment compliance: financial, political and normative, and each of these costs has different consequences for state compliance.[394] States generally tend to quickly implement three kinds of reparation orders, namely; symbolic, administrative and compensatory measures.[395] One major feature common to these three remedial measures is cost effectiveness. States tend to struggle to implement reparation orders requiring adoption of new legislation, amendment of national constitution, investigation and prosecution of perpetrators, ensuring independence of judiciary and other measures aimed at guaranteeing non-repetition. One feature common to these second category of reparation orders is that they are structural in nature, and so costly and difficult to implement. The costlier or broader the actions required of states, the more likely they will not comply or comply only partially.[396] Low aiming tribunals that issue minimalist reparation orders tend to attract higher compliance than tribunals that issues broad structural remedies.[397] This clearly is the case when the compliance rates of the African Commission and the ECCJ are compared in this study. Stating that a reparation order is costly to implement is not the same thing as stating that it is financially costly.

***(i) Financial cost*:** The financial cost of compliance or non-compliance relates to the monetary value of implementing or not implementing a human rights decision. In terms of state compliance, the argument is that states usually assess, though by a way of conjecture, the financial implication of implementing a decision in relation to the financial cost of not implementing it; and they tend to implement human rights decisions when the cost of compliance is low, and lower than the cost of non-compliance. It must be noted that the financial cost of compliance is relative. A reparation order that constitutes low

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393 AT Guzman 'A compliance-based theory of international law' (2002) 90 *California Law Review* 1823, 1860.

394 See Brinks (n 391 above) 480.

395 See Hillebrecht (n 2 above); Adjolohoun (n 136 above); Viljoen & Louw (n 136 above).

396 Hawkins & Jacoby (n 2 above) 4 - 5.

397 Y Shany 'Assessing the effectiveness of international courts: A goal-based approach' (2012) 106 *American Journal of International Law* 225, 227.

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cost remedy for a rich country may not be a low-cost remedy for a poor country. What is low cost remedy during years of surplus may become high cost remedy during a recession, and vice versa. One rule of the thumb used in this study for determining whether the financial cost of a decision is high or low is whether implementation of that reparation order would require special budgetary allocation or special capital outlay. If that is the case, the reparation order is considered financially costly. For instance, in the *Ogoniland* case, the recommendation for the clean-up of Ogoniland is considered costly financially.

(ii) Political cost: The political cost of compliance is measured in terms of the political capital to be gained or the public disapproval to be suffered because of state compliance. Every government, whether democratic or authoritarian, thrives on some degree of public support.[398] The relevant question to ask in assessing the political cost of compliance is whether the reparation order requires the government to adopt an unpopular policy or take a decision opposed or likely to be opposed by majority of the people in the country, or a majority of the power brokers in the country. If that is the case, the implementation of the reparation order has high political cost. The political cost of compliance may manifest in various forms including electoral loss, loss of political power, negative public opinion and loss of goodwill.[399] States generally are rational self-interested actors, drawn to compliance if it will give them some political or social capital. In other words, if compliance would help them win the next election, maintain their hold on political power or gain public support and goodwill, then compliance for them is attractive.

The political cost of compliance may also be measured in terms of the overall political relevance of the litigants and whether the subject matter of the litigation, if addressed, would increase the government's popularity or electability. If the litigants are politically relevant and the subject matter of the litigation could make a difference to government popularity or electability, then the political cost of non-compliance is high. This is one of the mechanisms that make advanced democracies seem more likely to comply with human rights decisions. Compliance gives them significant political capital; they could suffer negative public opinion, and ultimately lose an election if they fail to comply over a period

398 See W Tang *Populist authoritarianism: Chinese political culture and regime sustainability* (2016) 1 - 256.
399 Brinks (n 391 above) 486 - 487.

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of time. The political capital of compliance could be an incentive to comply. Things do not work like that in authoritarian regimes. Human rights judgment compliance gives authoritarian regimes limited political capital; instead compliance may involve significant political cost. Public opinion is controlled by state media, opposition media is repressed, and elections, if any, are won not by popular mandate. The analysis of political cost versus political capital plays a major role in the politics of compliance in each of the selected states.

(iii) Normative cost: The normative cost of compliance relates to the ideological implication of implementing a decision. An ideology is 'a set of beliefs or principles, especially one on which a political system, party, or organization is based.'[400] Whenever the implementation of a reparation order is inconsistent with the ideological position of government or compliance will significantly benefit members of the opposition groups, such reparation order is normatively costly. An example is a reparation order that requires a military junta to pursue more democratic objectives or a conservative party to undertake liberal-leftist actions. Normative cost explains why regime change is relevant for state compliance.[401] This is because regime change may bring about change in the ideological position of government. A reparation order that previously had high normative cost may very well fit into the reform agenda of a new administration. The analysis of data in this study indicates that governments tend to quickly comply with remedial orders based on violations by their predecessors than those based on their own violations.

Sometimes, a decision may impose both normative and political costs at the same time. The more costs are implicated in a case, the higher the likelihood of non-compliance. The most important cost consideration is normative cost. In a great number of cases, normative costs trump political and financial costs.[402] Whenever the normative cost of implementing a reparation order is high, it does not matter whether the remedy has little or no financial cost implication. This explains why some symbolic, compensatory and

[400] *Cambridge advanced learner's dictionary* (2017) http://dictionary.cambridge.org/dictionary/english/ideology (accessed 9 October 2017).
[401] See also Brinks (n 391 above) 461.
[402] As above.

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administrative remedies, even though easy to implement, are not implemented by the government of The Gambia and Zimbabwe.

High cost remedies may still be implemented. The problem with high cost remedies is that they are usually implemented only when the cost of non-compliance is higher. HRTs may increase the cost of noncompliance by imposing a penalty on states for the duration of non-compliance. The supranational body that sets up the tribunal may also impose sanctions for non-compliance. Information politics, naming and shaming, development assistance with human rights conditionality, and domestic social mobilization are some of the ways to raise the cost of non-compliance. As a rule, whatever raises the cost of non-compliance or reduces the compliance cost is likely to improve human rights judgment compliance.

(b) Specificity of remedies

It has long been recognised that courts exercise significant control over implementation of their decisions by the way they craft or formulate their decisions.[403] Nearly every study on compliance with international law identifies rule ambiguity as a major cause of non-compliance by states either with treaty regimes or decisions of HRTs.[404] Non-specific remedial orders are not only hard to monitor; they are difficult for states to implement. They not only leave victims of human rights violation with absolutely no idea of what to expect from the state after the decision, they also provide no clue for assessing whether or not the state has implemented the decision. Clear and specific reparation orders 'speeds up and facilitates the process of domestic implementation'.[405]

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[403] See, instance, E Lambert-Abdelgawad 'Is there a need to advance the jurisprudence of the European Court of Human Rights with regard the award of damages' in A Seibert-Fohr & ME Villiger *Judgments of the European Court of Human Rights - Effects and implementation* (2017) 115 - 136; JK Staton & A Romero 'Clarity and compliance in the Inter-American Human rights system' (2011) 2 http://paperroom.ipsa.org/papers/paper_26179.pdf (accessed 29 March 2017); JF Spriggs 'Explaining federal bureaucratic compliance with Supreme Court opinions' (1997) 50 *Political Research Quarterly* 567, 567; L Baum 'Implementation of judicial decisions' (1976) 4 *American Politics Research* 86, 86 - 114.

[404] See, for instance, Chayes & Chayes (n 3 above) 204; See Koh 'How is international human rights law enforced' (n 4 above) 1398; Louw (n 136 above) 102.

[405] Viljoen (n 139 above) 364.

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State officials are more likely to faithfully implement decisions of HRTs when the decisions contain clear and specific instructions to states.[406] Clarity generates pressure for proper implementation of human rights decisions, and it is beyond question that ill-designed reparation orders are counter-productive. In a study of the Inter-American human rights system, Staton and Romero found that clarity lowers resistance to decisions of the Inter-American Court.[407] Staton and Romero have asked the important question: 'If we assume that, all else equal, judges prefer their authority to be respected, why are they frequently vague?'[408] They concluded that judges are sometimes vague to make non-compliance with their decisions less visible or to delegate authority to the state to adopt the appropriate remedial measures. Gauri, Staton and Cullell also found that 'vague orders, and order issued without definite time frames for compliance, were associated with delayed implementation'.[409] Whatever is the reason for the adoption of vague reparation orders, whether it is a delegative strategy or to cover-up noncompliance, what is clear is that a tribunal that issues a vague reparation orders indirectly encourages non-compliance or partial compliance with its decisions.

Clarity is the quality of being clear. To be clear is to be easy to perceive, understand or interpret. Specificity relates to precision, which is the quality of being exact. A reparation order may be clear but not precise. For example, a reparation which requires a state to 'bring all its laws into conformity with the African Charter' is clear but not precise.[410] Also, the instruction to the government of Zimbabwe to ensure compliance with domestic court decisions is clear but not specific.[411] Another situation closely associated with clarity of remedy is lack of remedy. Sometimes HRTs make findings of violation without issuing any remedial orders for states to implement. These three aspects of the remedial orders of HRTs are discussed below.

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406 Staton & Romero (n 404 above).
407 As above.
408 Staton & Romero (n 404 above).
409 V Gauri, JK Staton & JV Cullell 'The Costa Rican Supreme Court's compliance monitoring system' (2015) 3 *Journal of Politics* 774, 774; BM Wilson & OA Rodríguez 'Costa Rica: Understanding variations in compliance' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 122.
410 See, for instance, *Sir Dawda Jawara v The Gambia* (*Jawara* case) (2000) AHRLR 107 (ACHPR 2000).
411 Communication 292/04 Zimbabwe *Lawyers for Human Rights & Institute for Human Rights and Development in Africa (IHRDA) v Zimbabwe.*

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(i) No remedy: Here, the HRT issues no reparation for the state to implement; only a finding of violation. None of the cases selected for this study falls in this category because of 'selection bias or effect'. The cases without reparation orders have been screened out at the start of the research. The African Commission, for instance, did not issue any reparation orders for states to implement in a number of communications.[412] The use of open ended, dialogical or deliberative remedies by the ECtHR has been linked to high rate of effectiveness of the European system.[413] There is however a clear distinction between dialogical remedies and the 'no remedy' decisions. In addition to making a finding of violation, a dialogical remedy imposes on the state an obligation to come up with lower cost ways to remedy the violation, and to report to the Court or the Council of Ministers within a stipulated time.[414] This is clearly not the case in the African Commission cases highlighted above.

(ii) Vague, ambiguous and open-ended remedy: This is about the most common type of remedy issued by HRTs. Here, the tribunal issues a reparation order, but the order is unclear and imprecise. This includes remedies that require Nigeria, for instance, to 'respect the judgment of its courts.'[415] In *Jawara v The Gambia*, the African Commission requested the Gambia to 'bring its laws into conformity with the provisions of the African Charter'.[416] In *Kazeem Aminu v Nigeria*, the Commission asked the government of Nigeria to 'take necessary measures to comply with its obligations'.[417] These cases may be contrasted with the case of *Civil Liberties Organisation, Legal Defence Centre, and Legal Defence and Assistance Project v Nigeria*, where the African Commission modified its remedy as follows: 'The Commission (i) urges the Government of the Federal Republic of Nigeria to bring its

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[412] See communication 64/92, 68/92, 78/92 *Krischna Achutan (On behalf of Aleke Banda) & Amnesty International on behalf of Orton and Vera Chirwa v Malawi*; communication 47/90 *Lawyers Committee for Human Rights v Zaire*; communication 74/92 *Commission Nationale des Droits de l'Homme et des Libertes v Chad*; communication 129/94 *Civil Liberties Organization v Nigeria*. In communication 71/92 *Rencontre Africaine pour la Defence des Droits de l'Homme v Zambia*, the Commission merely stated its resolve 'to continue efforts to pursue an amicable resolution in this case'.

[413] M Langford, C Rodríguez-Garavito & J Rossi 'Introduction: From jurisprudence to compliance' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 26.

[414] See Langford, Rodríguez-Garavito & Rossi (n 414 above) 26 - 29 & 32 - 33.

[415] Communication 148/96 *Constitutional Rights Project v Nigeria*.

[416] *Jawara* case.

[417] Kazeem *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000).

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laws in conformity with the Charter *by repealing the offending Decree*'.[418] The Commission seems to have relapsed into the practice of issuing vague remedies when in *Noah Kazingachire and others v Zimbabwe*, it recommended as follows: 'The African Commission recommends that the Respondent State should: (i) Undertake law reform to bring domestic laws on compensation in case of wrongful killings into conformity with the African Charter and other international standards, especially in respect to effective and satisfactory compensation as outlined above.'[419] In *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, the Commission recommended to Nigeria to 'preserve the traditional functions of the court by not curtailing their jurisdiction'.[420]

In *Mtikila v Tanzania*, the African Court requested the government of Tanzania to 'take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations' found by the Court and to inform the Court of the measures taken.[421] In *SERAP v Nigeria* (*Niger Delta Environmental Pollution* case), the ECCJ ordered Nigeria to 'take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta.'[422] In *Mike Campbell & Others v Zimbabwe,* for instance, the SADC Tribunal directed the government of Zimbabwe to 'take all necessary measures to protect the possession, occupation and ownership of the lands of the Applicants' and 'to take all appropriate measures to ensure that no action is taken, to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants.'[423] While the reparation orders above give an idea what the government should

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418 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (2001) AHRLR 75 (ACHPR 2001).

419 Communication 295/04 *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*. Also noteworthy is communication 39/90 *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon* where the Commission requested the government of Cameroon to 'draw all the necessary legal conclusions to reinstate the victim in his rights'. In communication 103/93 *Alhassan Abubakar v Ghana*, the Commission urged the Government to take steps to repair the prejudice suffered. In communication 159/96 *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme au Angola v Angola*, the Commission urged the Angolan government and the complainants to 'draw all the legal consequences arising from the present decision'.

420 Communication 102/93 *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*.

421 Application 009&011/2011 *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (*Mtikila* case).

422 See *SERAP v Nigeria* (*Niger Delta Environmental Pollution* case).

423 *Mike Campbell & Others v Zimbabwe*, Case No 2/2008, SADC (T), 28 November 2008; (2008) AHRLR 199 (SADC 2008).

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do, the scope of the orders are so broad that it is unclear where the orders start and where they end.

(iii) Specific remedy: In order to constitute specific remedy, the HRT must impose a reparation measure and the measure requested ought to be clear and unambiguous. Examples of specific reparation orders include payment of specific amount as compensation to the victims; repeal of specific provisions of national legislation, or the release of a named victim. These reparation orders leave no one in doubt as regards what is to be done, and how to assess whether the order has been carried out. The analysis of cases in this study reveals that states tend to respond positively to precise reparation orders such as payment of compensation, repeal of specific legislation and the release of a named victim.[424]

Of the 75 reparation orders investigated in this study, 41 reparation orders were coded as 'specific' while 34 orders were coded as 'vague and ambiguous'. Overall, 24 percent of the reparation orders that are 'specific' have been fully complied with while only nine percent of vague reparation orders were fully complied with. In terms of non-compliance, 62 percent of reparation orders considered vague have not been complied with compared with 49 percent non-compliance in specific reparation orders.[425] In each of the six selected HRTs, the rate of full compliance is higher in reparation orders that are categorised as 'specific' than those categorised as 'vague'. The importance of specificity of remedy is underscored by the analysis of the reparation orders of the two HRTs with highest compliance rates in this study.

All the reparation orders issued by the EACJ in this study are sufficiently specific; and only nine of the 21 reparation orders issued by the ECCJ are considered vague. Contrast this with the SADC Tribunal where at least six of the eight reparation orders issued against Zimbabwe are vague and ambiguous. The figures above demonstrate that the HRTs with

[424] See chapters 3 & 4 of this thesis.

[425] Partial compliance is shared equally between specific and vague reparation at 27 and 29 percent respectively.

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the highest compliance rates in this study equally issued fewer reparation orders that are considered 'vague and ambiguous'.

(c) Limited remedies and incrementalism

By limited remedies, I argue that HRTs ought to exercise a deliberate and purposeful restraint in terms of the number of reparation measures they require states to implement as well as the scope of each measure. It must be realized that fewer remedies do not always mean poor quality remedies. While being specific is good for state compliance, it must also be noted that 'reparation order specificity' has a limit. In other words, reparation orders ought not to be too specific. Limited specificity prevents HRTs from making policy decisions for states and provides flexible tool for social movements and domestic activists. While vague and open-ended remedies may inhibit state compliance, it may also provide a window of opportunity for domestic actors to exercise discretion. It helps HRTs to defer to states on the question of 'who does what and how'. The judicial backlash in Argentina against the decision of the Inter-American Court in 2017 reveals the negative impact of unrestricted specificity on the legitimacy of HRTs.[426] This decision also demonstrates the importance of judicial restraint for HRTs.

Specificity of remedy is closely related to the doctrine of judicial restraint or what Helfer and Slaughter described as judicial 'incrementalism'.[427] Human rights judgments are better complied with when the scope of reparation orders is incremental – from simple to complex and more complex remedies. Incrementalism enables states to slowly and gradually internalize the norms of the tribunal, thereby developing a culture of adherence. Mendelsohn captures the need for judicial restraint by international courts in the following words: 'In order to retain the power to judge controversies in a judicious and largely unbiased manner, the judiciary must retain the respect of all those whom it must judge. If judicial power becomes just another tool in the hands of ideologues, no matter their stripe,

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[426] See J Contesse 'Judicial backlash in Inter-American human rights law?' http://www.iconnectblog.com/2017/03/judicial-backlash-interamerican/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+I-CONnect+%28I-CONnect+Blog%29 (accessed 3 March 2017).

[427] Helfer & Slaughter (n 53 above) 314 - 318.

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it will lose the very power and respect by which societies allow themselves to be judged.'[428]

Posner categorized judicial restraint into two: judicial deference, a form of judicial self-restraint motivated by separation of powers concerns, and prudential self-restraint.[429] The type of judicial self-restraint advocated in this thesis is prudential in nature. Even though commentators are divided on the relative merits of judicial restraint,[430] what is clear from the data obtained during this study is that lack of judicial restraint in formulation of remedies could impact negatively on state compliance. While a reparation order that tends to solve all the human rights problems in a state at once, a one-size-fit-all type of remedy, is admirable, it may be counter-productive in terms of overall state compliance. The argument here is that the more limited, precise and specific a reparation order is, the higher the chances of compliance.

4.4.3 Degree of openness, stability and democratic system of government

This study finds that the degree of openness, freedom and stability in a state correlates to compliance with decisions of HRTs. This position was supported by Viljoen and Louw in their study of state compliance with recommendations of the African Commission.[431] Regime type analysis is relevant for understanding widespread compliance, or what Koh referred to as 'habitual obedience'.[432] This present study finds that authoritarian regimes are not habitual compliers and stable democracies are not habitual defaulters. This explains why the two states least likely to comply with reparation orders of HRTs in this study, Zimbabwe and The Gambia, also have the least 'freedom ratings'.

Strong democracies, unlike authoritarian regimes, tend to have domestic incentives to comply with HRTs' decisions. As discussed previously in the chapter, the degree of stability, openness and democratic system of government in a state can provide important

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428 AI Mendelsohn 'Judicial restraint in international law' (2010) 57 *The Federal Lawyer* 52, 54.
429 R Posner *Loaw, Pragmaiisnui and Democracy* (2003) 232 referred to in P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544, 548.
430 Lenta (n 269 above) 548.
431 Viljoen & Louw (n 136 above) 25 - 26.
432 See generally Koh 'How is international human rights law enforced?' (n 4 above) 1400 & 1410. See also Koh 'Why do nations obey international law?' (n 58 above) 2603, 2646 & 2654 - 2655.

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clue about habitual compliance or widespread non-compliance. It is thus a significant factor in explaining why some states comply and others do not. The importance of regime type analysis is that it correlates with the degree of commitment of sub-national actors to human rights judgment compliance. The compliance commitment of subnational actors may be signalled through judicial activism, social mobilisation, and sometimes through the work of a strong legislature that holds government to account. Studies have found that a strong legislature is the result of strong democracy.[433] As Fish argues 'the presence of a powerful legislature is an unmixed blessing for democratization'.[434] It is nearly impossible for a state to be a strong democracy and not have strong legislature, independent judiciary and vibrant civil society, and these are essential for human rights judgment compliance.

4.4.4 Regime change and political transition

Regime change has significant effect on state compliance. In this study, regime change accounted for some instances of eventual compliance with reparation orders of the African Commission in Nigeria.[435] The study, however, argues that not every form of regime change is relevant for human rights judgment compliance. The evidence in this study supports military to civilian transition or transition from any form of dictatorship to an open, stable and democratic system of governance. The study also argues that inter-party transfer of power, especially from the ruling party to the opposition party usually leads to significant increase in states' commitment to international law compliance. Regime change is a significant state compliance factor because it has the potential to reduce the political and normative costs of compliance.

4.4.5 Effectiveness of follow-up by HRTs and NGOs

A minimum degree of follow-up is necessary for human rights judgment compliance, and the more effective the actions taken towards follow-up, the greater the chances of compliance. As noted by a former president of the International Court of Justice, Judge Robert Jennings, 'it is ironic that the Court's work up to delivery of judgment is published

[433] MS Fish 'Stronger legislatures, stronger democracies' (2006) 17 *Journal of Democracy* 5, 5.
[434] As above. While vibrant civil society is the bedrock of liberal democracy; a strong, independent and activist judiciary is also its ultimate protector.
[435] See also Viljoen & Louw (n 136 above) 26 - 27.

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in lavish details, but it is not at all easy to find out what happened afterwards.'[436] This is an area where HRTs and NGOs must take the lead. Abdelgawad, for instance, has argued in relation to the European human rights system that dialogue between HRTs and national actors 'speed up and improve compliance' with the judgments of the European Court of Human Rights.[437]

The nature of international human rights adjudication is such that follow-up is invariably linked to adjudication. The protective roles of international HRTs should not be construed narrowly as merely 'interpretive'. Every HRT has an inherent albeit limited promotional mandate. Awareness creation through diplomatic visits, implementation monitoring, sensitization workshops, as well as media and civil society engagement is an important prerequisite for effective human rights protection. A body that has a mandate to protect the human rights of human rights victims cannot be said to have fully discharged its responsibility unless and until the rights of the victims have been fully restored and protected. In order word, a protective mandate is not merely adjudicatory; it invariably includes advocacy and multi-level engagement to ensure that the adjudicated rights are secured and protected. This study finds that in a great majority of cases where decisions of HRTs are effectively followed up, the rates of compliance are higher, and in cases where follow up is limited, state compliance is generally low. A minimum degree of follow-up is a necessary condition for state compliance.

Indicators of effective follow-up include: regular monitoring of the status of implementation, consistent engagement with parties to the case, periodic issuance of compliance reports, and the development of up to date database on the status of implementation. Indicators of ineffective follow up include random monitoring, irregular engagement with parties and outdated database on status of implementation. Collation of implementation data from secondary sources without directly inter-phasing with

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[436] Judge Robert Jennings cited in C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *The American Journal of International Law* 434, 434.

[437] E Lambert-Abdelgawad 'Dialogue and the Implementation of the European Court of Human Rights' Judgments' (2016) 34 *Netherlands Quarterly of Human Rights* 340, 340 - 363. See also E Lambert-Abdelgawad 'The execution of the judgments of the European Court of Human Rights: Towards a non-coercive and participatory model of accountability' (2009) 69 *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 397, 397 - 432.

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domestic actors and a general appeal to member states urging them to implement decisions of HRTs are not considered in this study as effective follow-up strategies. This study adopts a multi-prong approach to follow-up. At a minimum, effective follow presupposes that all relevant pro-compliance actors, including the complainants, victims, respondent states, NGOs, the press, the academia, members of HRTs, other state parties, and actors, are engaged in the follow up process.

4.5. Analysis of the applicable compliance theories

This chapter finds that human rights judgment compliance in the selected states may be explained in terms of five primary compliance factors, namely: States' commitment to compliance, the nature of the reparation orders, the extent of stability, openness and democratic system in a state, existence of political transition or regime change following a decision and the effectiveness of follow-up by HRTs and NGOs. The above proposition, I argue, is consistent with at least three the main theories of compliance with international law earlier discussed, namely; management theory, transnational legal process theory and the domestic politics theory. These theories cut across the rationalist and constructivist divide. While the management and the transnational legal process theories belong to the ideational category, the domestic politics theory combines elements of rationalism and constructivism. In other words, this thesis proposes a hybrid theory of state compliance with reparation orders of regional and sub-regional HRTs in Africa. The hybrid theory combines elements of rationalism with constructivism.

First, the analysis of the five primary compliance factors in this chapter points to coercion, persuasion (argumentation, interpretation and interaction) and acculturation as the causal mechanisms that make human rights judgment compliance possible.[438] The first necessary condition for compliance, state commitment to compliance, especially at the supranational level, emphasises the role of coercion, supervision and sanctions in inducing states to comply with HRTs' decisions. The second layer of compliance commitment, national commitment, describes state compliance in terms of self-enforcement, rule consistent behaviours and norm internalisation or acculturation. The third component of

438 Alkoby (n 9 above) 154.

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compliance commitment, sub-national commitment underscores the role of persuasion through social mobilisation, regime type and domestic politics in inducing state compliance. Thus, the three layers of compliance commitment have elements of coercion, persuasion and acculturation.

The second primary compliance factor, the nature of the reparation order, conceptualises state compliance as a management problem which HRTs themselves may address. The first component of the management approach relates to cost. The costs analysis highlights the instrumental nature of human rights judgment compliance and contextualises state actors as rational actors driven by cost-benefit calculations. The second component of the management approach, specificity, further underscores the managerial aspect of human rights judgment compliance. This aspect of the proposition intersects with Thomas Franck's propositions about determinacy. It argues that non-compliance happens not only as a result of rational cost-benefit calculation only but because of the vagueness and ambiguity of many of the reparation orders issued by the selected HRTs. This position resonates also with Thomas Franck's theory of rule legitimacy and fairness where he identified 'determinacy', that is clarity, as a property of legal rules that exerts compliance pull on states.

Another primary compliance factor identified in the study, effective follow up by HRTs and NGOs, situates state compliance in a continuous spectrum of transnational legal process of interaction, interpretation and internalisation. This part of the proposition aligns with the Transnational Legal Process (TLP) theory. The multi-prong approach to follow-up also emphasises the role of multiple actors, domestic and transnational, in the post-judgment elaboration, clarification and interpretation of state obligations with respect to HRT's decisions or judgments.

The various analyses in the chapter reveal that there are four reasons the studied states complied with human rights judgments of the selected HRTs: (1) to signal human rights commitment; (2) to signal commitment to rule of law; (3) to signal commitment to a treaty regime; and (4) to advance domestic reforms or as a result of domestic reforms. While the selected states generally complied with decisions of the HRTs to 'signal' their human rights

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commitment either to domestic constituents or to the international community, the analysis in the chapter demonstrates that there are limited occasions where they complied with human rights decisions not mainly to signal human rights commitment but out of respect for a specific treaty regime or the rule of law more broadly. This happens quite rarely but it does happen, especially when a complying state does not believe the view of the tribunal advances its own human rights agenda. The data analysed in the chapter also shows instances especially in Nigeria and Tanzania where human rights judgment compliance happened in furtherance, or as result, of domestic reforms.

4.6. Chapter conclusion

The main argument in this chapter is that human rights judgment compliance in the selected states is facilitated by five primary factors, namely, (i) some commitment to compliance by states; (ii) low-cost, specific and limited remedies; (iii) the presence of an open, stable and democratic system of government; (iv) regime change or political transition subsequent to the reparation order being issued; and (v) effective follow-up by HRTs and NGOs. Nearly every case of compliance or non-compliance observed in the 75 reparation orders selected for this study may be explained mainly in terms of these five factors. While other factors remain relevant to the process of implementation at the domestic level, the five primary state compliance factors identified above are the underlying conditions that influenced state compliance outcomes in the five selected states during the study period.

In order to arrive at this conclusion, the chapter discusses the various factors relevant to human rights judgment compliance. This discussion integrates factors identified in existing literature with factors suggested during interviews conducted in the course of the study. A total of 15 factors was selected and each of these factors was interrogated using the data obtained from the literature and the interviews conducted. These factors were divided into five broad but related categories, namely, institutional design factors, factors related to the working practices of the tribunal, case-related factors, state-related factors, and factors related to the involvement of civil society and transnational actors.

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The various analyses in the chapter reveal that there is no direct correlation between state compliance and the type of right violated, the scale of the violation, the nature of obligation imposed on the state, the perceive legal status of the tribunal's decisions, states' involvement in the proceedings of the tribunal, NGOs involvement in the submission of complaints to HRTs and the fact that the tribunal is situated at the sub-regional instead of the regional level. However, the presence of these factors in relation to a case may 'slightly' or 'significantly' improve state compliance, depending on the number of those factors that are present in a particular case. State compliance may, however, happen in spite of any of the relevant factors listed above.

The analysis in the chapter demonstrates that whenever any of the relevant factors appears to have played a 'significant' role in shaping a compliance outcome, they do so based on certain preconditions. The preconditions are the *necessary* conditions for state compliance. When these preconditions change or are non-existent, the effects of the relevant factors also change. The chapter identifies five of the preconditions, and argues that a minimum degree of each of the conditions is required for human rights judgment compliance. These conditions are: (a) some commitment to compliance by states; (b) low-cost, specific and limited remedies; (c) the presence of open, stable and democratic system at the domestic level; (d) regime change or political transition following the decision; and finally (e) effective follow up by HRTs and NGOs. The chapter thereafter proceeds to elaborate on the contents of each of these underlying conditions for state compliance. It must be noted that the list of the primary factors for state compliance is non-exhaustive; thus, future research may contribute additional items to the five primary compliance factors identified in the study.

Strong commitment to compliance, for instance, is discussed at three levels: supranational, national and sub-national. The chapter also identifies the indicators of each of these layers of commitment. A state, on the one hand, may demonstrate its national commitment to compliance by incorporating judgment compliance obligations into the national constitution, making a specific law, establishing institutions guaranteeing compliance or by sending out strong political signals that are consistent with its human rights judgment compliance obligations. Sub-national actors, on the other hand, may

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signal their commitment to compliance through judicial activism, awareness creation, legislative lobbying, press coverage, academic writing and other forms of social mobilisation. The chapter also argues that supranational entities may signal their commitment to compliance by creating a tribunal capable of issuing legally binding decisions; setting up a political body to execute, monitor and enforce the decisions of the tribunal; incorporating in a treaty a provision that empowers the body to impose various sanctions on states that fail to comply with decisions of the tribunal; and finally, there must be a at least a limited number of cases in which states have actually been sanctioned for non-compliance.

The second necessary condition for state compliance also discussed in the chapter is cost-related. The chapter argues that states generally comply with human rights decisions whenever the cost of compliance is low, or the cost of non-compliance is high. The contents of each of these cost types is also discussed. The chapter concludes that after strong commitment to compliance, the next most important factor predictive of state compliance is the financial, political and normative cost implications of the decision. The chapter also contends that vagueness and ambiguity accounts for a significant number of non-compliance cases. As a result, it was argued in the chapter that specificity of reparation orders is crucial for state compliance.

Other necessary conditions for state compliance discussed in the chapter are effective follow-up by HRTs and NGOs; exitence of a limited degree of open, stable and democratic system of governace in some selected states and political transition or regime change at the domestic level following a HRT's decision. The chapter argues that the nature of some reparation orders, especially structural measures, requires that they may not be implemented without significant monitoring and follow-up by pro-compliance constituencies located within and outside the state. Follow-up is crucial because reparation orders of HRTs, most often, require time, resources, coordination and consistent social mobilisation for their implementation. The next chapter takes the discussion of the normative consequences of human rights judgments 'beyond compliance' by discussing the impact and broader influence of regional and sub-regional human rights decisions in the selected countries.

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Chapter 5

Beyond compliance: The impact of the decisions of regional and sub-regional HRTs in the selected states

5.1. Introduction

5.2. What constitutes the impact of a human rights decision?

5.3. Examples of the impact of HRTs' decisions in the selected states

- 5.3.1 Amicable settlement and proactive remediation of violations
- 5.3.2 Provision of direct material and non-material benefits for successful applicants
- 5.3.3 Legislative and policy reforms
- 5.3.4 Judicial impact of HRTs' decisions
- 5.3.5 Tool for research, advocacy and social mobilisation
- 5.3.6 Other impact of HRTs' decisions

5.4 Chapter conclusion

5.1. Introduction

Analysis of human rights judgment compliance is one of the fastest growing sub-fields of international legal scholarship.[1] Some scholars have claimed that compliance is a primary test of the adequacy of international law.[2] Oette, for example, argues that compliance and

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[1] R Howse & R Teitel 'Beyond compliance: Rethinking why international law really matters' (2010) 174 *New York University Public Law and Legal Theory Working Papers* 1, 2; OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935, 1935 - 2042. Some of the recent works on human rights judgment compliance include: D Hawkins &W Jacoby 'Partial compliance: comparison of the European and Inter-American courts of human rights' (2010 - 2011) 6 *Journal of International Law and International Relations* 35, 35 - 85; JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, 768 - 827; C Hillebrecht 'The effect of international human rights tribunals on domestic practice and policy' unpublished PhD thesis, University of Wisconsin-Madison, 2010; D Kapiszewski & MM Taylor 'Compliance: conceptualizing, measuring, and explaining adherence to judicial rulings' (2013) 38 *Law & Social Inquiry* 803, 803 - 835. For an annotated bibliography of the major works on compliance with international law, see WC Bradford, 'International legal compliance: An annotated bibliography' (2004) 30 *North Carolina Journal of International Law and Commercial Regulation* 379, 379 - 423.

[2] See, for instance, AT Guzman 'A compliance-based theory of international law' (2002) 90 *California Law Review* 1823, 1826; OA Hathaway 'Between power and principle: An integrated theory of international

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enforcement constitute 'a litmus test for the effectiveness of the international human rights system.'[3] Using compliance as a test of the effectiveness of HRTs implies that without a theory of HRJC, it is impossible to assess the effectiveness of HRTs. Effectiveness, for this purpose, is defined as the extent or degree to which the decision of a HRT induces the desired change at the domestic level.[4] Far too many observers of HRTs evaluate the effectiveness of international human rights regimes from equivalent understandings of domestic legal systems.[5] HRTs that operate much like domestic courts are considered strong and effective while those that operate differently, such as the African Commission and the African Children's Rights Committee, are considered 'weak' or 'ineffective'.[6] For these scholars, the future of HRTs' decisions lies in their similarity to the judicial processes at the domestic level; the closer HRTs are to their domestic equivalent, the more effective they are likely to be.[7]

However, Howse and Teitel have challenged this emerging orthodoxy that is based on an analogy between international HRTs and domestics courts. I argue that, to be effective, HRTs do not have to operate and generate compliance exactly like domestic courts. Too much focus on compliance 'obfuscates the character of international legal normativity', and the concept of compliance, especially viewed as rule observance, is inadequate for understanding how international law has normative effects.[8] The need to reach beyond

law' (2005) *The University of Chicago Law Review* 469, 473; BA Simmons 'Compliance with international agreements' (1998) 1 *Annual Review of Political Science* 75, 75; JV Stein 'Do treaties constrain or screen? Selection bias and treaty compliance' (2005) 99 *American Political Science Review* 611, 611; S Baradaran, M Findley, D Nielson & JC Sharman 'Does international law matter?' (2013) 97 *Minnesota Law Review* 743, 743.

3 L Oette 'Bringing the enforcement gap: Compliance of states parties with decisions of human rights treaty body' (2010) 16 *Interights Bulletin* 51, 51.

4 See R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 29; K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, 393 - 394.

5 See, for instance, Martti Koskenniemi's arguments in M Koskenniemi 'The pull of the mainstream' (1990) 88 *Michigan Law Review* 1946, 1954 - 1955.

6 See R Gittleman 'The African Charter on Human and Peoples' Rights' (1981 - 1982) 22 *Virginia Journal of International Law* 667, 694; HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (2000) 920; J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 72, 72.

7 See, for instance, OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 276.

8 Howse & Teitel (n 1 above) 2.

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the compliance optic, without abandoning it, has been articulated by many scholars.[9] Okafor, for instance, argues that the compliance-focused frame of reference is inadequate as a way of understanding fully the worth or value of international HRTs, and that state compliance does not exhaust the totality of ways decisions of HRTs can matter fundamentally, or have significant effects at the domestic level.[10] Compliance-centric narratives result in near exclusive focus on states, state actors and state actions.[11] While the compliance narrative should admittedly be the starting point of the analysis of the impact and overall effectiveness of HRTs, it should not be the ultimate measure of the efficacy of HRTs' decisions.[12]

The primary shortcoming of the compliance frame is its narrowness. As the analysis in chapters 3 and 4 indicates, the most important aspect of a decision that matters for compliance analysis is the reparation order. Even though the communication procedure of HRTs was established primarily to provide tangible remedies to victims of human rights violations, it also serves the purpose of interpreting provisions of human rights treaties to guide future actions of states.[13] The compliance-focused narrative is ill-designed to evaluate the 'vertical' and 'horizontal' influences of the interpretive enterprise in which HRTs are engaged. Reparation orders constitute only a small, although important, part of the jurisprudence of HRTs. Every part of a tribunal's decision serves a purpose; so is every stage of a tribunal's complaint procedure. Why then should one component of the process be used as the sole determinant of the effectiveness of HRTs' regimes? Why should the effectiveness of a HRT be determined solely by cases won by the complainants? In fact,

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9 See C Rodríguez-Garavito 'Beyond enforcement: Assessing and enhancing judicial impact' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 79 - 108; Howse & Teitel (n 1 above) 2; Okafor (n 7 above) 273; Murray & Long (n 4 above) 69 - 86; VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 1 - 331; HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: compliance and influence' unpublished LLD thesis, University of Pretoria 2013, 264-317; FN Kabata 'Impact of international human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria (2015).

10 Okafor (n 7 above) 33 & 285.

11 Okafor (n 7 above) 31; Murray & Long (n 4 above) 69; D Anagnostou & A Mungiu-Pippidi *Why do states implement differently the European Court of Human Rights judgment? The case on civil liberties and the rights of minorities* (2009).

12 As above.

13 See, for instance, African Charter, art 45(3); African Children's Rights Charter, art 42(c); African Court Protocol, art 3.

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why does a case have to be determined on the merits before it can contribute to HRTs' goal of domestic human rights change? Drawing from these questions and the evidence obtained from document analysis and field interviews conducted during this study, this chapter argues that the compliance optic, though important, is too narrow to evaluate the contributions of HRTs' decisions to domestic human rights change in the selected states.

Another shortcoming of a compliance-focused narrative is 'state-centrism'.[14] Compliance analyses usually focus almost exclusively on states and state institutions.[15] It has been argued that the focus on states and state institutions as the primary actors in international law compliance downplays the transnational processes that lead to domestic human rights change, and the roles of non-state actors, sub-national entities, civil society organisations and social movements in creating the necessary impetus and momentum that produce human rights change.[16] Since compliance analysis is mostly concerned with the correspondence between specific reparation orders and actions of state actors, it usually fails to account for indirect and other unintended contributions of HRTs' decisions to the promotion of human rights at the domestic level. Any contribution of a HRT's decision, no matter how important, that is not directly linked to a reparation order, is statistically insignificant in a compliance analysis.

Like most theories of compliance with international law, human rights judgment compliance theories tend to undertheorize the criticality of 'interpretation, interaction and internationalization' to how decisions and reparation orders of HRTs obtain their meaning.[17] It is generally assumed that reparation orders of HRTs have an agreed meaning. One of the important questions often taken for granted in human rights judgment compliance literature is the nature of international legal obligation and the defining moment when the obligation comes into being. International legal obligations are quite fluid and evolve over time. The adoption of a treaty or the delivery of a decision by a HRT is the beginning of a broad process of norm internalization and adherence.[18] Many legal

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[14] Okafor (n 7 above) 43 & 49.
[15] Baradaran, *et al* (n 2 above) 747.
[16] As above.
[17] See a similar argument in Howse & Teitel (n 1 above) 3.
[18] See A Alkoby 'Theories of compliance with international law and the challenge of cultural difference' (2008) 4 *Journal of International Law and International Relations* 151, 152.

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experts have advocated alternative lenses of looking at law, and in this case a decision, as a process, rather than a finished product.[19] The only way to fully understand international law, whether treaty provisions or reparation orders of HRTs, is to 'situate it within a broader social context'.[20] Koh has articulated the view that international law is complied with through a three-part process of *interaction, interpretation,* and *internalization.*[21] Building on Koh's transnational legal process theory, Alkoby argues that 'even after binding commitments are made, their clarification, interpretation and implementation is constantly renegotiated and reflected upon in light of changing circumstances, new information, or a deepening consensus among the key actors.'[22] The domestic effects of HTRs' decisions may only be understood fully in the light of these transnational processes.

Accounts of the rates of compliance with decisions of HRTs are mostly simplistic and reductionist, and so do not provide an accurate picture of the manifold ways in which decisions and even communication procedures of HRTs are effective at the domestic level. Often, compliance is the result of coincidence, inadvertence or reasons extrinsic to decisions of HRTs.[23] One of the primary shortcomings of existing scholarship and approaches to human rights judgment compliance is that they fail to 'take time to achieve compliance into account'.[24] In some cases, the time taken to respond to a decision can be a matter of life and death for the victims. Thus, a decision that has a high compliance rate may have low positive impact value, and the other way around.

In many cases, African regional and sub-regional HRTs do not issue reparation orders for states to implement. Even in cases where some reparation orders are issued, these orders are clearly inadequate. In landmark decisions, such as the *Jawara v The Gambia* (*Jawara*

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[19] See HH Koh 'The 1994 Roscoe Pound Lecture: Transnational legal process'(1996) 75 *Nebraska Law Review* 181, 181 - 207 (Koh 'Transnational legal process'); Alkoby (n 18 above); M Finnemore & SJ Toope 'Alternatives to 'legalization': Richer views of law and politics' (2001) 55 *International Organization* 743, 750.

[20] Alkoby (n 18 above).

[21] Koh 'Transnational legal process' (n 19 above) 203 - 205; HH Koh 'The 1998 Frankel Lecture: bringing international law home' (1998) 35 *Houston Law Review* 623, 626 (Koh 'Bringing international law home').

[22] Alkoby (n 18 above).

[23] See Ayeni (n 9 above) 9; Raustiala (n 4 above) 391.

[24] C Hillebrecht *Domestic politics and international human rights tribunals: The problem of compliance* (2014) 375 - 376.

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case)[25] and the *Katabazi* case,[26] only one reparation order was issued by the relevant HRTs. A compliance frame of analysis is, no doubt, inadequate to evaluate the contributions of the above listed cases to domestic human rights change in Africa. The point basically is that the notion of compliance is much too narrow an angle of vision to capture the domestic legal effects and influence of the decisions of regional and sub-regional HRTs in Africa.[27]

The impact of the decisions of the selected HRTs obviously can go beyond the selected states. This is because judgments of some of the selected HRTs, such as the African Court, ECCJ, EACJ and SADC Tribunal, arguably have *erga omnes* effects. The International Court of Justice (ICJ), for instance, in the *Barcelona Traction* case distinguished between the obligations of states towards other individual states and obligations towards the international community, as a whole.[28] The latter obligation is referred to as *erga omnes* and all states have a legal interest in its protection. According to Abebe, 'scholars working from this perspective are concerned not only with the *ex post* behavior of the parties in a given case but also with the behavior of all states' subject to the jurisdiction of the HRTs.[29] The impact of the decisions of the selected HRTs may also go beyond the selected states on the basis of the *res interpretata* theory. As argued previously in chapter 2, the interpretive content of decisions given by the selected HRTs binds all state parties to the relevant human right treaty interpreted by the tribunal.[30]

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25 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

26 *Katabazi and Others v Secretary-General of the EAC and Attorney General of Uganda* (2007) AHRLR 119 (EAC 2007) decided by the EACJ on 1 December 2007.

27 Howse & Teitel (n 1 above) 4.

28 See *Barcelona Traction, Light and Power Company Ltd* (Second Phase) [1970] ICJ Rep 32; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Rep 15. See also E de Wet 'Invoking obligations erga omnes in the twenty-first century: Progressive developments since Barcelona Traction' (2013) 38 *South African Yearbook of International Law* 1, 2; K Zemanec 'New trends in the enforcement of erga omnes obligations' (2000) 4 *Max Planck Yearbook of United Nations Law* 1 - 52.

29 D Abebe 'Does international human rights law in African courts make a difference?' (2017) 56 *Virginia Journal of International Law* 527, 533 - 534.

30 See generally A Bodnar 'Res interpretata: Legal effect of the European Court of Human Rights' judgments for other states than those which were party to the proceedings' in Y Haeck & E Brems (eds) *Human and civil liberties in the 21st Century* (2014) 223 - 262. A von Bogdandy *et al* (eds) *Transformative constitutionalism in Latin America: The emergence of a new ius commune* (2017) 401

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Drawing from the above arguments, this chapter examines the various forms of legal effects and impact of the 32 selected decisions of the selected regional and sub-regional HRTs in the selected states. The objective of the chapter is to answer the fourth research question: *What are the various forms of impact of the decisions of regional and sub-regional HRTs in the studied countries, and how significant is such impact relative to compliance*? Throughout the chapter, the terms 'impact', 'effects', and 'influence' are used interchangeably. The conceptualization of 'impact' in the chapter draws from various studies including Heyns and Viljoen,[31] Okafor[32] and Kabata.[33] The chapter is divided into four sections, comprising the introductory and concluding sections as well as two substantive sections. Part 6.2 interrogates the concept of human rights judgment impact (HRJI) by discussing what constitutes the impact of a HRT's decision. The chapter, in part 6.3, provides some examples of the positive impact of the decisions of regional and sub-regional HRTs in the selected states.

The argument made in this section and throughout this chapter is not that HRTs' decisions alone have caused domestic human rights change, but that the relevant decisions of the selected HRTs contributed in a valuable way to the eventual outcome.[34] In other words, the claims made in this chapter with respect to the impact of HRTs' decisions is not one of attribution but contribution. Because correlation does not necessarily mean causation, this study does not attempt to draw causal links but only to establish correlations and contributions. The focus is also not only on the reparation orders but the entire decision, and in a few cases, the communication procedure of the selected HRTs from submission of the communication to issuance of findings.

5.2. What constitutes the impact of a human rights decision?

The impact of a HRT's decision is the totality of effects or influences of the decision in the promotion and protection of human rights at the national, regional and global level.[35]

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[31] C Heyns & F Viljoen (eds) *The impact of the United Nations human rights treaties on the domestic level* (2002) 1.
[32] Okafor (n 7 above).
[33] Kabata (n 9 above).
[34] See Okafor (n 7 above) 116 - 117.
[35] See Heyns & Viljoen (n 31 above) 1. See also Murray & Long (n 4 above) 70.

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Other scholars, such as Swart, define the impact of HRTs' decisions as the influence exerted by the existence and work of international human rights bodies.[36] This influence may be direct or indirect.[37] While the direct effect of a human rights decision is immediate and anticipated, the indirect effect is less immediate, incidental and incremental.[38] Although the decision of a HRT may undoubtedly have effects beyond the domestic arena, the primary focus of the analysis in this chapter is the domestic-level effects of human rights decisions. HRTs' decisions may have effects at the domestic level in a variety of ways. Four distinctions, at least, can be made: positive and negative impact; intended and unintended impact, direct and indirect impact, and *ex ante* and *ex post* impact.[39]

The impact of a HRT's decision may be positive or negative; it is positive if the decision leads to an improvement in human rights condition at the domestic level; and negative if human rights condition in a state deteriorates because of the decision.[40] Negative impact includes cases where a decision is received with violent resistance, opposition or political backlash. The impact of a HRT's decision is intended if the impact is anticipated by the tribunal, and unintended if the impact is merely accidental.[41] A direct impact of a human rights decision is the immediate consequence of the decision whereas the indirect impact is the secondary and other remote, though equally important, effects of the decision.[42] The direct and indirect impact of human rights decisions are sometimes used interchangeably with the intended and unintended impact of the decisions. There is however a fine distinction between them. A direct impact of a human rights decision is not necessarily intended while an indirect impact may be intended; in other words, an unintended effect could result directly from a human rights decision. In the context of decisions of HRTs, intended impact entails the specific instances of state compliance which

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[36] M Swart 'Can regional and sub-regional African courts strengthen the rule of law in Africa? Questions of impact and enforcement' in CC Jalloh & O Elias (eds) *Shielding humanity: Essays in international law in honour of Judge Abdul G Koroma* (2015) 706.
[37] Heyns & Viljoen (n 31 above).
[38] As above.
[39] GD Beco 'Human rights impact assessments' (2009) 27 *Netherlands Quarterly of Human Rights* 139, 143.
[40] As above.
[41] Beco (n 39 above) 144.
[42] As above. See also See P Hunt & G MacNaughton 'Impact assessments, poverty and human rights: A case study using the rights to the highest attainable standard of health' (2006) 6 *Health and Human Rights Working Paper Series* 1, 11.

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are in response to specific reparation orders of HRTs.[43] The indirect impact of a human rights decision may sometimes be obvious and discernible, such as domestic political reforms and judicial reference, or subtle and unobtrusive effects such as attitudinal changes and change in perception.[44] Finally, HRJI may be *ex ante* or *ex post.* An *ex ante* impact relates to the potential or probable effects of a human rights decision, while *ex post* impact relates to the actual and real-world effects of the decision.[45]

There are two main approaches to judicial impact studies: the neorealist and constructivist approaches.[46] On the one hand, neorealist scholars such as Rosenberg, the author of *The hollow hope: Can courts bring about social change?* focus on the direct or tangible effects of court decisions.[47] The constructivist perspective, on the other hand, focuses on change in attitudes, alteration of social actors' perceptions and the legitimation of litigants' worldview.[48] One of the earliest scholars to use the constructivist frame to assess the impact of judicial decisions, McCann, states that 'although judicial victories often do not translate automatically into desired social change, they can help to redefine the terms of both immediate and long term struggles among social groups.'[49] In terms of methodology, the neorealist approach insists on quantitative evidence of direct material effects whereas the constructivist approach encourages qualitative techniques that allow analysis of indirect non-material effects of judicial decisions.[50]

As expected, the traditional neorealist perspectives on the impact of African human rights system, which focused on material effects, described the African Charter and its

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43 F Viljoen 'The impact and influence of the African regional human rights system on domestic law' in S Sheeran & N Rodley (eds) *Routledge handbook of international human rights law* (2016) 447.
44 As above.
45 Beco (n 39 above) 143-144.
46 Rodríguez-Garavito (n 9 above) 83.
47 See GN Rosenberg *The hollow hope: Can courts bring about social change?* (1981) cited in Rodríguez-Garavito (n 9 above) 83 - 84. On the effects of the United States(US) Supreme Court decision in *Brown v Board of Education,* which is generally believed to be a major tipping point in the history of racial segregation in the US, Rosenberg's empirical study found that *Brown* had only little effects, thus attributing the revolution in race relations in the US to the political mobilization of the 1960s and the anti-discrimination legislation resulting from the mobilisation. The crux of Rosenberg's controversial arguments is that courts alone cannot bring about significant social change.
48 Rodríguez-Garavito (n 9 above) 84 - 85.
49 M McCann *Rights to work: Pay equity reform and the politics of legal mobilisation* (1994) 285. See also Rodríguez-Garavito (n 9 above) 84 - 85.
50 As above.

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implementing mechanisms as 'ineffectual and dysfunctional'.[51] The traditional approach, arguably, misses out on the less obvious, subtle and more nuanced effects of the African Commission's decisions and the African human rights norms in general such as changes in attitudes as well as legal and political empowerment of the litigating community. The non-material effects of HRTs' decisions also include the totality of political, organizational, informational and jurisprudential effects and influences of the decision in the promotion and protection of human rights not only at the domestic level but also in other human rights protection systems.

The political effects of a decision may relate to the political empowerment of the litigating community especially in the case of public interest litigation (PIL) by giving the community a voice and platform on issue areas that they have previously neglected. The decision of a HRT, if properly deployed, has the capacity to alter the power relations of sub-national entities and frame political discourses in a limited yet significant way. The organizational impact of a HRT's decision entails the provision of impetus for new social movement groupings to be formed.[52] A human rights decision can empower an existing social movement or trigger a new one.[53] Human rights decisions create informational impact by releasing large amounts of important information to the public about the relevant issue, thereby contributing to transparency and accountability.

As easy as it may sound, establishing any direct causality between a human rights decision and a state of affairs or an observable behaviour of domestic actors is very complex.[54] One major challenge identified in previous studies is that 'unobserved factors limit the ability

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[51] See, for instance, CE Welch 'The African Commission on Human and Peoples' Rights: A five year report and assessment' (1992) 14 *Human Rights Quarterly* 1, 4; Gittleman (n 6 above) 694; E Bello 'The mandate of the African Commission on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* 31, 55.

[52] See, for instance, M Langford, C Rodríguez-Garavito & J Rossi 'Introduction: From jurisprudence to compliance' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 24 - 25; C Albisa & A Shanor 'United states: Education rights and the parameters of the possible' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 280 - 281; M Langford & S Kahanovitz 'South Africa: Rethinking enforcement narrative' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 332 - 346.

[53] As above.

[54] Ayeni (n 9 above) 1.

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to establish causality'.[55] Numerous unobservable factors contribute to domestic human rights change, and this implies that HRTs cannot take sole credit for the change, even if it conforms to a reparation order issued for the state to implement. For instance, the ongoing clean-up of Ogoniland and the building of a new Tanka Tanka Hospital in The Gambia, although relating to various decisions of the African Commission, have not been caused solely or even primarily by the Commission's decisions.[56] Human rights decisions do not operate in isolation; they are a part of a complex web of legal normativity. There is hardly any domestic level human rights change that has been caused solely by the decision of a HRT; success in every case depends on a multiplicity of factors.[57]

The legal basis for assessing the impact of decisions of regional HRTs in Africa derives mainly from article 1 of the African Charter, which obliges states to 'give effect' to the rights contained in the Charter.[58] This obligation is open-ended, thus allowing states to take not only legislative but also administrative and other measures to give effect to their obligations under the Charter. The provisions of article 1 of the Charter imply that states have some leeway with regard to the specific measures to take, unless explicit measures have been prescribed by the relevant HRTs.[59] In some of its resolutions, the African Commission has urged domestic courts to incorporate provisions of the African Charter and decisions of the Commission into their judgments.[60] The Commission has also stated that the duty to give effect to the Charter is not limited to the three arms of government, but also extends to non-state actors, civil society organizations, legal practitioners, legal academics, law societies and judicial associations.[61]

[55] See RA Berk 'An introduction to sample selection bias in sociological data' (1983) 48 *American Sociological Review* 386, 386 - 388; Baradaran *et al* (n 2 above) 767.
[56] The 2011 UNEP report played a key role in the Ogoni clean-up while the series of workshop organised by the World Bank in partnership with local NGOs helped push the situation of persons living with mental disabilities on the national agenda in the Gambia.
[57] See Okafor (n 7 above) 1 - 336.
[58] Viljoen (n 43 above) 446.
[59] As above.
[60] See African Commission 'Resolution on the role of lawyers and judges in the integration of the Charter and the enhancement of the Commission's work in national and sub-regional systems', adopted during the 19th ordinary session of the African Commission, 26 March to 4 April 1996, Ouagadougou, Burkina Faso.
[61] Viljoen (n 43 above).

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It is arguable that the state obligation in article 1 of the African Charter is applicable to decisions of the regional and sub-regional HRTs selected for this study.[62] Besides the fact that all the 55 member-states of the African Union, except Morocco, are state parties to the African Charter,[63] all the selected regional and sub-regional HRTs have established clearly in their jurisprudence that they have competence to interpret provisions of the African Charter.[64] In terms of article 1 of the Charter, states have an obligation, which goes beyond complying with reparation orders, to guarantee the full impact of HRTs' decisions. It is against this background that this chapter examines the domestic level impact of decisions of African regional and sub-regional HRTs in the selected states.

There has been limited studies of the broader impact of decisions of African regional and sub-regional HRTs in Africa.[65] The few available studies have been focused on the direct and intended impact, viewed from the lens of state compliance.[66] These studies mostly conclude that decisions of African HRTs are rarely complied with.[67] In addition to analyzing compliance, Adjolohoun studies the impact of nine decisions of the ECCJ and concluded that human rights judgment impact has been clearer in 'compliant than in noncompliant states'.[68] The study also found that domestic courts have been the 'most productive channels of influence' for decisions of the ECCJ whereas the Executive has been the

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[62] Both the African Commission and the African Court interpret the African Charter. The African Charter is also the primary general human rights treaty of the African Children's Rights Committee. The ECCJ relies mainly on the African Charter for its catalogue of human rights. The recent decision of the Appellate Division EACJ in the *Democratic Party v Uganda* also has clarified the jurisdiction of the EACJ to interpret provisions of the African Charter.

[63] African Union 'List of countries which have signed, ratified/acceded to the African Charter' https://au.int/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_2.pdf (access 31 August 2017).

[64] See n 62 above. See also the discussions on the jurisdiction of the various regional and sub-regional HRTs in chapter 2 of the thesis.

[65] See, for instance, Adjolohoun (n 9 above); Viljoen (n 41 above) 446.

[66] See F Viljoen &L Louw 'State compliance with the recommendations of the African Commission on Human and People's Rights, 1994 - 2004' (2007) 101 *American Journal of International Law* 1, 1 - 34; L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005; Murray & Long (n 4 above); T Mutangi 'An examination of compliance by states with the judgments of the African Court on Human and Peoples' Rights: Prospects and challenges' unpublished LLD thesis, University of Pretoria, 2009; Adjolohoun (n 9 above).

[67] See Viljoen & Louw (n 66 above); Louw (n 66 above); Murray & Long (n 4 above); GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465, 488.

[68] Adjolohoun (n 9 above) 315.

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'poorest driver of influence'.[69] The influence of the decisions of the ECCJ has been made possible through an active civil society and regional Bar association.[70] Aside the above examples, the available scholarship has been focused on the impact of human rights treaties at the domestic level,[71] or the impact of the decisions of domestic courts.[72]

For decades, the default position among international law experts was that human rights treaties had a constraining effect on state behaviour.[73] Empirical evidence of recent years however demonstrated that that the real domestic effect of treaties is almost negligible.[74] In fact, some studies found a negative relationship between human rights treaty ratification and domestic level human rights practice; human rights practice at the domestic level tend to worsen following treaty ratification.[75] Thankfully, qualitative studies -- and more recent quantitative research -- have given some cause for optimism, suggesting that human rights treaties do give rise to positive consequences.[76] Most, if not all, of the studies on the domestic effects of human rights treaties agree that treaty effects are conditional on a multiplicity of factors which includes state level characteristics, the nature of the treaty as well as the extent of interaction, persuasion and pressure applied on national actors by domestic and international compliance networks.[77]

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69 As above.

70 Adjolohoun (n 9 above) 316.

71 Hathaway (n 1 above) 1935 - 2042.

72 See Langford, Rodríguez-Garavito & Rossi (n 52 above) 109 - 350. See, for example, FN Kabata 'Impact of international human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, 2015.

73 BA Simmons & D Hopkins 'The constraining power of international treaties: Theory and methods' (2005) 99 *American Political Science Review* 623, 623; BA Leeds 'Alliance reliability in times of war: Explaining state decisions to violate treaties' (2003) 57 *International Organization* 801, 801; BA Simmons 'International law and state behaviour: Commitment and compliance in international monetary affairs' (2000) 94 *American Political Science Review* 819, 819.

74 EM Hafner-Burton & K Tsutsui 'Human rights in a globalizing world: The paradox of empty promises' (2005) 110 *American Journal of Sociology* 1373, 1373 - 1411; Hathaway (n 1 above); LC Keith 'The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior?' (1999) 36 *Journal of Peace Research* 95, 95 - 118.

75 As above.

76 BA Simmons 'From ratification to compliance: Quantitative evidence on a spiral model' in T Risse, SC Ropp & K Sikkink (eds) *The persistent power of human rights: from commitment to compliance* (2013); E Neumayer 'Do international human rights agreements improve respect for human rights?' (2005) 49 *Journal of Conflict Resolution* 925, 925; BA Simmons *Mobilizing for human rights* (2009); Hillebrecht (n 24 above).

77 See Ayeni (n 9 above) 3; DW Hill 'Estimating the effects of human rights treaties on state behaviour' (2010) 72 *Journal of Politics* 1161, 1161; GW Downs, DM Rocke, & PN Barsoom 'Is the good news about compliance good news about cooperation?' (1996) 50 *International Organization* 379, 379 - 406.

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5.3. Examples of the impact of HRTs' decisions in the selected states

In this section, this study discusses six major ways in which decisions of the relevant regional and sub-regional HRTs in this study have made a difference in the selected states. These instances include amicable settlement of other disputes and proactive remediation of violations even before a regional or sub-regional HRT gets a chance to make a decision on the merits; positive material and non-material benefits for successful applicants in the form of compensation, restitution and overall sense of pride and empowerment (not forming part of the relevant reparations orders); legislative and policy reforms (not forming part of the relevant reparations orders) resulting directly or indirectly from HRTs' decisions; the use of HRTs' decisions as tools for social mobilization, advocacy and research; and, finally, judicial impact of HRTs' decisions. Of course, other less observable impact such as the possible deterrence effects of HRTs' decisions are also captured in an omnibus section on other impact of HRTs' decisions. While the impact of HRTs' decisions may be negative, such as instances of political backlash, which is discussed more extensively in chapter 6 of this thesis, the narrative below focuses on examples of positive impact of HRTs' decisions. The important aspect of the analysis in this chapter is that a significant part of the positive domestic effects of HRTs' decisions may not have been captured in a compliance-focused narrative.

5.3.1 Amicable settlement and proactive remediation of violations

The communication procedure of HRTs in a few cases has served as a catalyst for amicable settlement of disputes and self-initiated redress of human rights violations. International human rights litigation has the potential of exposing states to undesirable negative publicity. This type of publicity could affect the standing of some states before their donors and development partners. In a bid to avoid the 'naming and shaming' and negative publicity associated with having to defend a potentially 'scandalous human rights violations' case, states have been found, in many cases analysed in this study, to exhibit two patterns of behaviour: (a) submitting to amicable settlement of the disputes; and (b) taking proactive measures to redress the violations before the communication is declared admissible or before a decision is made on the merits.

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This study finds clear instances where governments adopted significant proactive measures to remedy alleged violations prior to a finding of violation by HRTs. These measures are significant because most of them were adopted after the complaints that led to the decisions had been submitted to the relevant HRTs. The proactive 'public relations type' remediation is a common trend observed in some of the cases selected for the study. It is noteworthy, however, that none of the 32 cases selected for this study has been settled amicably. This is due to what is regarded in empirical legal studies as 'selection bias or selection effects', in the sense that all cases involving amicable settlement have been excluded from the analysis at the start of the research. It is noteworthy, however, that a few cases involving the studied countries have been resolved by the African Commission and other HRTs through amicable settlement.[78]

While instances of amicable settlement in the African Commission are undeniably few and far between, the few examples however demonstrate that amicable resolution of complaints is a crucial channel through which communication procedure of HRTs make a difference at the domestic level. Although the legal instruments establishing the African Court provide for the possibility of amicable settlement of disputes,[79] the Court has achieved little success in this regard. Despite the low record of achievement on amicable resolution of disputes, a former Judge of the Court, Ouguergouz J, has pointed out that the Court may be in a better position to persuade a state to 'soften its position' in

[78] The very first communication submitted against The Gambia to the African Commission, Communication 44/90 *Peoples' Democratic Organisation for Independence and Socialism v Gambia*, was struck out by the Commission on 31 October 1996 following amicable resolution of the issues raised in the communication. Other cases resolved by the African Commission through amicable settlement include: *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000); *Kalenga v Zambia* (2000) AHRLR 321 (ACHPR 1994); communication 71/92 *Rencontre Africaine pour la Defence des Droits de l'Homme v Zambia*; *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000); *Open Society Justice Initiative (on behalf of Njawe Noumeni) v Cameroon* (2006) AHRLR 75 (ACHPR 2006). Quite recently, on 27 October 2016, the African Children's Rights Committee resolved through amicable settlement the fourth communication submitted to it: communication No 004/Com/001/2014 *Institute for Human Right and Development in Africa v Malawi*. See African Children's Rights Committee 'Amicable Settlement on Communication No. 004' http://www.acerwc.org/amicable-settlement-on-communication-no-004/ (accessed 18 May 2017).

[79] African Court Protocol, art 9 (stating that the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter). This provision derives also from article 52 of the African Charter which empowers the African Commission, whose protective mandate the Court complements, to 'try all appropriate means to reach an amicable solution based on the respect of human and peoples' rights'. This provision, however, relates only to inter-state communications.

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anticipation of an 'unfavorable judicial decision'.[80] Like the African Court, none of the sub-regional HRTs selected for the study has achieved notable amicable resolution of its cases.

Proactive remediation, in the context of the complaint procedure of HRTs, is a process whereby states engage in 'damage control' after complaints have been lodged with a relevant HRT. It may be borne out of a genuine concern for the victims or merely a 'publicity stunt', depending on the nature of the state implementing the remediation. Proactive remediation is slightly different from amicable settlement. Unlike amicable settlement, which is a mutual process that involves both parties to the case, with or without the supervision of the HRT, proactive remediation is mostly a one-sided process controlled by government officials.

One case that clearly demonstrates proactive remediation is the *Ogoniland* case.[81] The case was submitted to the African Commission in 1996, challenging the environmental degradation of Ogoniland, which continues to have severe impact on the means of livelihood and health of the Ogoni people. Prior to the Commission's decision in October 2001, the civilian administration that took over power in May 1999 had taken some 'remedial actions' as an act of acknowledgement of the inappropriate actions of the previous regimes.[82] In a *Note Verbale* submitted to the African Commission in October 2000, the government admitted 'the gravamen' of the complaint and outlined the 'remedial measures' it was taking to redress the violations.[83] The remedial measures stated in the *Note Verbale* include the establishment of a number of national institutions such as the Federal Ministry of Environment, the Niger Delta Development Commission and a Judicial Commission of Enquiry to investigate allegations of human rights violations. In acknowledging the significance of these 'proactive remedial measures', the Commission

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[80] See F Ouguergouz 'The establishment of an African Court of Human and Peoples' Rights: A judicial premiere for the African Union (2005) 11 *African Yearbook of International Law* 79, 130; F Viljoen *International human rights law in Africa* (2012) 440.

[81] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*Ogoniland* case) (2001) AHRLR 60 (ACHPR 2001).

[82] F Viljoen 'The African human rights system and domestic enforcement' in Langford, Rodríguez-Garavito & Rossi (n 52 above) 372.

[83] *Ogoniland* case, para 30.

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urges the government to keep it informed of the 'outcome' of the 'work' of the institutions.[84]

In another communication decided by the African Commission, *Media Rights Agenda v Nigeria,*[85] Niran Malaolu and three other journalists were arrested and detained without trial. The other journalists were released but Malaolu was denied access to his lawyer, doctor and family. Following a secret trial conducted under the Treason and Other Offences (Special Military Tribunals) Decree of 1986, he was convicted to life imprisonment. While the communication was pending before the Commission, on 4 March 1999, the Nigerian government granted clemency to Malaolu alongside 95 others. The law under which he was tried, the Treason and Other Offences (Special Military Tribunals) Decree of 1986, was also repealed, in preparation toward return to civil rule in May 1999.[86] This remediation happened before the Commission's decision which was formally adopted on 6 November 2000.

In 2005, some Zimbabwean NGOs submitted a communication to the African Commission, *Scanlen & Holderness v Zimbabwe,*[87] alleging that a 2002 law of Zimbabwe, the Access to Information and Protection of Privacy Act (AIPPA), contravened various provisions of the African Charter. In its decision adopted on 3 April 2009, the Commission recommended among other things the repeal of sections 79 and 80 of the AIPPA and the decriminalization of offences relating to accreditation and practice of journalism. However, earlier in 2007, while the communication was still pending before the Commission, the government of Zimbabwe adopted the Access to Information and Protection of Privacy (Amendment) Act which repealed sections 79 and 80 of the 2002 Act.[88] The Amendment Act also repealed section 83 of the AIPPA, which criminalised activities relating to accreditation and the practice of journalism. Thus, at the time of the

84 *Ogoniland* case.
85 Communication 224/98 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).
86 See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999, Laws of the Federation of Nigeria. This law repealed not only the Treason and Other Offences (Special Military Tribunals) Decree 1986 but also Treason and Treasonable Offences Decree 1993.
87 Communication 297/2005 *Scanlen & Holderness v Zimbabwe.*
88 Email from B Chinowawa, Zimbabwe Lawyers for Human Rights, on 4 April 2017. See also Access to Information and Protection of Privacy (Amendment) Act of 2007. The Amendment Act was gazetted and entered into force on 11 January 2008.

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Commission's decision, a few of the violations alleged had been redressed. Despite these legislative changes, press freedom in Zimbabwe has not improved significantly as Zimbabwe has been rated consistently 'not free' by the Freedom House since 2002 till 2017.

In the ECCJ case of *Djotbayi Talbia and Others v Nigeria,*[89] 10 applicants, who were aboard a foreign vessel rendering assistance to another vessel in distress at 16 nautical miles off the cost of Nigeria, were arrested and detained by the officials of the Nigerian Navy on the allegation that the applicants were taking crude oil on board. They were paraded before national press as crude oil thieves. On 27 July 2004, a Federal High Court in Nigeria ordered their release as subsequent investigation revealed the cargo being loaded on their vessel was fuel oil, not crude oil.[90] The Nigerian government initially refused to immediately release the applicants; however, they were released soon after a complaint was submitted to the ECCJ.[91]

The earliest impact of the communication procedure of a HRT is either proactive remediation or amicable resolution. As demonstrated in the study cases cited above, both processes constitute an important channel through which decisions or communication procedures of HRTs make a difference or have significant impact at the domestic level. If given sufficient publicity, the process of submitting a communication has the capacity to trigger government into acquiescing to amicable resolution or taking some proactive actions to remedy the violations; and these measures are often missed out in compliance-focused analysis, since the measures are not taken to 'give effect' to any reparation orders of HRTs.

5.3.2. Provision of tangible benefits for victims

As earlier argued, the traditional approach to the domestic effects of the African human rights system focused on the material benefits for the applicants and tangible changes in laws and policies.[92] This approach overlooked other subtle and unquantifiable non-

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89 ECW/CCJ/APP/10/06 *Djotbayi Talbia & 14 Others v Nigeria & 4 Others*.

90 As above.

91 The applicants were later released by the government of Nigeria after this complaint had been filed. See ECW/CCJ/APP/10/06 *Djotbayi Talbia & 14 Others v Nigeria & 4 Others*.

92 See Welch (n 51 above); Gittleman (n 6 above). See generally n 51 above.

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material benefits that successful applicants benefit from an HRT's decisions. Decisions of regional and sub-regional HRTs in the studied countries have resulted in positive changes in the lives of litigants in a few cases.[93] The benefits for the applicants have manifested in various forms including release from prison,[94] obtaining full presidential pardon,[95] payment of compensation,[96] apology from government or a formal acknowledgment of the 'gravamen' of the violation,[97] provision of new public facilities or infrastructure for the benefit of the complainants,[98] reopening of businesses and return of confiscated equipment,[99] payment of costs awarded in favour of complainants,[100] and the protection of wildlife.[101] Some examples of the cases where state actions to implement an HRT's decision resulted in direct material and non-material benefits for the complainants are discussed below. It is noteworthy that in a few of the cases discussed below, the impact analysis coincides with the compliance narrative. However, the focus here is not the status of compliance of each reparation order but rather to highlight instances where the selected states provided tangible benefits for the victims of human rights violations as a consequence of the 32 selected HRTs' decisions. In some of the cases, the benefits provided are not specified in the reparation orders.

Following the judgment of the ECCJ in *Alimu Akeem v Nigeria*[102] where the ECCJ ordered the government of Nigeria to release the applicant and pay him the sum of five million

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[93] See Open Society Justice Initiative (OSJI) 'Conference report: The impacts of strategic litigation on indigenous peoples' land rights' (2016) 3 https://www.opensocietyfoundations.org/sites/default/files/slip-landrights-nairobi-20161014.pdf (accessed 30 May 2017).

[94] See the following cases in Appendix I & II of the thesis: *Media Rights Agenda and Others v* Nigeria (2000) AHRLR 200 (ACHPR 1998); *Djotbayi Talbia & 14 Others v Nigeria & 4 Others* ECW/CCJ/APP/10/06; *Alimu Akeem v Nigeria* ECW/CCJ/JUD/01/14.

[95] See *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (2001) AHRLR 75 (ACHPR 2001) in Appendix I.

[96] See generally in Appendix I: *Ogoniland* case; *Alimu Akeem case*; *Modupe Dorcas Afolalu* case; ECW/CCJ/APP/10/10 *SERAP v Nigeria* (*Bundu Waterfront* case).

[97] See *Ogoniland* case in Appendix I.

[98] See generally in Appendix I: *Gambian Mental Health* case; *Ogoniland* case.

[99] See also in Appendix I: Communication 284/2003 *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe.*

[100] See generally Appendix II: *Katabazi and Others v S-G EAC & A-G Uganda*, Reference Number 1 of 2010, decided by the EACJ on 1 December 2007; *Sitenda Sibalu v S-G EAC, A-G Uganda & others*, Judgment of 30 June 2011.

[101] See in Appendix II *African Network for Animal Welfare v AG Tanzania*, Reference Number 9 of 2010, decided by the First Instance Division on 20 June 2014, and the Appellate Division on 29 July 2015.

[102] *Alimu Akeem* case.

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Naira, the government released the complainant and paid him the money as ordered by the ECCJ.[103] In another case, *Modupe Dorcas Afolalu v Nigeria,*[104] the applicant's husband died due to the post-election violence that took place at Zaria in Kaduna on 18 April 2011. The applicant alleged discrimination in the process of payment of compensation to victims of the post-election violence. The ECCJ ordered the government of Nigeria to pay the applicant 10 million Naira for all the harm caused. This money was paid to the applicant soon after the judgment.[105]

In *Constitutional Rights Project v President Ibrahim Babangida*,[106] a Lagos High Court relied on the African Charter and a decision of the African Commission in *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria* to restrain the government of Nigeria from executing Zamani Lekwot and others who had been sentenced to death.[107] The convicts were not executed and were eventually released from prison.[108] In *Constitutional Rights Project v Nigeria* (*Nigerian Detention* case),[109] five persons accused of armed robbery and kidnapping were arrested and detained for 2 years without trial by the government of Nigeria. Constitutional Rights Project (CRP) submitted the communication to the African Commission on behalf of the detainees. The Commission held the detention as a violation of the African Charter and recommended that government should charge or release the detainees. Soon after the Commission's decision, the complainants were charged.[110] In another communication, *Centre for Free Speech v Nigeria*,[111] four Nigerian journalists were tried and convicted secretly by a military tribunal. A communication was submitted to the African Commission on their behalf. The Commission recommended the

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[103] Interview with S Egbeyinka (legal counsel) on 20 May 2016.
[104] *Modupe Dorcas Afolalu* case.
[105] Egbeyinka (n 102 above).
[106] *Constitutional Rights Project v President Ibrahim Babangida and two Others*, Suit M/102/93, Lagos State High Court, per Onalaja J (unreported). See Okafor (n 7 above) 98 & 124.
[107] Okafor (n 7 above) 278.
[108] As above.
[109] (2000) AHRLR 248 (ACHPR 1999).
[110] Viljoen & Louw (n 66 above)10; VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case study of Nigeria' unpublished LLM dissertation, University of Pretoria, 2011, 25.
[111] *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR1999).

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release of the journalists. Following the Commission's decision, the journalists were released.[112]

In *Constitutional Rights Project (in respect of Wahab Akanmu and Others) v Nigeria*,[113] 100 detainees were tried, convicted and sentenced to death for armed robbery. The Decree under which they were convicted made no provision for appeal. CRP, on behalf of the detainees, submitted a communication to the African Commission. The Commission found that the Decree violated several provisions of the African Charter and recommended compensation for the applicants. At first, the death sentence imposed on the detainees was commuted to terms of imprisonment.[114] CRP used the decision of the Commission to pressure government and eventually secured the release of all the detainees.[115] While the release was not a direct act of compliance with reparation orders of the Commission, the Commission's decision nonetheless played the role of a legitimizing force.[116]

Political prisoners whose complaints were determined by the African Commission in *Media Rights Agenda v Nigeria*[117] *and Civil Liberties Organisation & 2 Others v Nigeria*[118] were granted clemency and released.[119] In relation to the *Ogoniland* case, the infamous Rivers State Internal Securities Task Force (RSISTF) was disbanded. Government subsequently invited the United Nations Environment Programme (UNEP) to undertake an independent scientific assessment of Ogoniland. This invitation culminated in the UNEP report on *Environmental Assessment of Ogoniland*.[120] The Nigerian government also set up the Hydrocarbon Pollution Restoration Project (HYPREP) to lead and co-ordinate the clean-up

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112 Viljoen & Louw (n 66 above) 10; Ayeni (n 109 above).
113 Communication 60/91 *Constitutional Rights Project (in respect of Wahab Akanmu and Others) v Nigeria.*
114 Ayeni (n 109 above).
115 Okafor (n 7 above) 125.
116 Okafor (n 7 above) 125.
117 *Media Rights Agenda and Others v Nigeria (2000) AHRLR 200 (ACHPR 1998).*
118 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (2001) AHRLR 75 (ACHPR 2001).
119 See Appendix I.
120 UNEP *Environmental Assessment of Ogoniland* (2011) http://web.unep.org/disastersandconflicts/where-we-work/nigeria/what-we-do/environmental-assessment-ogoniland-report (accessed 17 March 2017). See M Langford, C Rodriguez-Garavito & J Rossi 'Introduction: From jurisprudence to compliance' in Langford, Rodríguez-Garavito & Rossi (n 52 above) 4.

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of Ogoniland.[121] While all these developments are not directly attributable to the Ogoniland case, there is no doubt the case made some valuable contributions to the processes that resulted in the ongoing reclamation of Ogoniland. Sequel to The *Gambian Mental Health* case, the government of the Gambia has taken limited yet significant steps to formulate a mental health law and policy for the Gambia.[122] In 2009, nearly 6 years after the *Gambian Mental Health* case, a new mental health facility, called the Tanka Tanka Psychiatric Hospital, has been built. According to information received from the Mental Health Leadership and Advocacy Programme (MHLAP), an NGO based in the Gambia, the facility at the new hospital is much better than the Psychiatric Unit of the Royal Victoria Hospital, which was the only facility available when The *Gambian Mental Health* case was decided.[123]

Following the decision of the EACJ in the *Katabazi* case in November 2007, the 22 applicants who had been detained since 16 November 2016, were released without facing further charges even though the reparation order of the EACJ in this case did not expressly require the release of the applicants.[124] Another case that demonstrates how a decision of sub-regional HRTs may results in real-time protection of the rights of applicants is *Hon. Dr JerryUgwoke v Nigeria*.[125] In this case, the applicant, Jerry Ugokwe, in April 2003 was declared winner of a seat in Nigeria's lower legislative house (the House of Representatives). His opponent contested the victory before an Election Tribunal and had his election overturned in November 2004. Dissatisfied, Ugokwe approach the Nigerian Court of Appeal which affirmed the Electoral Tribunal's decision. On May 2009, Ugokwe submitted his application to the ECCJ, arguing that his right to fair hearing had been infringed by the Electoral Commission and the Election Tribunal. The ECCJ, relying on Ugokwe's application, granted a special interim order restraining Nigerian authorities from swearing-in another candidate in place of the applicant. Nigeria's Attorney General, on

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[121] US Chamber of Commerce Foundation 'Hydrocarbon Pollution Restoration Project by Shell Oil Company' https://www.uschamberfoundation.org/hydrocarbon-pollution-restoration-project (accessed 20 March 2017).

[122] See analysis in Appendix I.

[123] Interview with D Samba (Executive Director, MHLAP) on 20 March 2017; Viljoen (n 80 above) 378 - 379.

[124] A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' unpublished LLD thesis, University of Pretoria, 2014, 181.

[125] ECW/CCJ/JUD/03/05 *Ugwoke v Nigeria*.

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receiving the special interim order of the ECCJ, addressed a letter to the Speaker of the House of Representatives stating that no one should be sworn-in to replace the applicant until the ECCJ had decided the case on the merits.[126] Indeed, the Speaker complied with the directive, and no one was sworn-in until the case was finalized by the ECCJ.[127]

The most extensive of the non-material impact of HRTs' decisions on successful applicants have been observed in cases litigated by or on behalf of local communities such as the Ogoni people.[128] The decision of the African Commission in the *Ogoniland* case, for instance, has been praised for framing the environmental degradation of Ogoniland as a human rights issue.[129] The case legitimated the agitations of the Ogoni people and drew international attention to their plights and also the condition of Ogoniland. Various Ogoni groups and movements have been formed around the issues articulated in the decision.[130] The case also helped to build domestic socio-economic rights jurisprudence in Nigeria and bolstered the courage of Nigerian judges on social justice issues.[131] The case has also been credited for setting in motion a train of litigation before domestic courts against the Nigerian government and transnational oil companies operating in Nigeria.[132]

Multinational companies responsible for human rights violations in the *Ogoniland* case have paid various sums as compensation to Ogoni communities.[133] In addition, government has attempted indirectly to compensate Ogoni communities by providing alternate housing, creating jobs and providing special financial support for indigent students of Niger Delta origin.[134] However, these jobs in many cases are 'inappropriate to their lifestyle, poorly paid, menial and not commensurate with their previous income

126 *Ugokwe v Nigeria*, para 10.
127 Adjolohoun (n 9 above) 165.
128 See *Ogoniland* case. See also Communication 276/03 *Centre for Minority Rights Development (Kenya) and Another v Kenya (Endorois Case)*.
129 Viljoen (n 80 above) 375.
130 Viljoen (n 80 above) 375.
131 Viljoen (n 80 above) 375.
132 See, for instance, *Jonah Gbemre v Shell Petroleum Development Company and Others* (Suit no FHC/B/CS/53/05, Nigerian Federal High Court, Benin City, 14 November 2005 (*Nigerian Gas Flaring* case). In the case, the court restrained SPDC and the Nigerian-owned oil corporation from flaring gas, and ordered the Attorney General to set in motion a legislation to put an end to gas flaring in Nigeria. Although the Court referred extensively to provisions of the African Charter, no reference was made to the African Commission's decision in the *Ogoniland* case.
133 See Appendix I.
134 As above.

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level'.[135] It is arguable that the outcome of the *Ogoniland* case may have influenced domestic courts and policy makers to have more consideration and sympathy towards other oil producing communities in the Niger Delta area who have suffered similar environmental degradation because of oil pollution.[136]

In a general sense, cases brought on behalf of local communities have been found to have the effect of empowering local women.[137] Successful human rights litigation has also been linked to complainants' psychological health and sense of identity.[138] A sense of pride and solidarity is common among a winning community while feelings of loss, neglect and exasperation are not uncommon when states delay in complying with decisions of HRTs. Non-compliance could also make successful litigants feel a sense of resentment over lost time and resources.[139] A good example of the capacity of human rights decisions to empower litigants into social mobilization is *Scanlen & Holderness v Zimbabwe.*[140] In this case, the African Commission recommended that the government of Zimbabwe should adopt legislation providing a framework for self-regulation by journalists. Using this decision, various civil society organisations under the aegis of Voluntary Media Council of Zimbabwe (VMCZ), are pushing for the adoption of a Media Practitioners Bill, which would result in self-regulation[141] A zero draft of the Bill has been prepared. At the time of this assessment, VMCZ has been holding consultative meetings in various locations in Zimbabwe to gather the views of journalists on the Bill.[142] The argument, thus far, is that decisions of regional and sub-regional HRTs in Africa, in certain cases, have led to the provision of material and non-material benefits and empowerment to the litigating individual or community.

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[135] See OSJI conference report (n 92 above) 4.
[136] See, for instance, *Jonah Gbemre* case.
[137] OSJI conference report (n 92 above) 6.
[138] OSJI conference report (n 92 above) 6.
[139] OSJI conference report (n 92 above) 6.
[140] Communication 297/2005 *Scanlen & Holderness v Zimbabwe.*
[141] Email from B Chinowawa (Zimbabwe Lawyers for Human Rights) on 4 April 2017.
[142] See B Matendere 'VMCZ drafts bill on media self-regulation' *The Zimbabwean* 21 July 2016 http://thezimbabwean.co/2016/07/vmcz-drafts-bill-on-media-self-regulation/ (accessed 25 April 2017).

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5.3.3 Legislative and policy reforms

In a limited number of cases, decisions of the selected regional and sub-regional HRTs have contributed to legislative processes culminating in the adoption of new laws and policies or the reform of old laws. Legislative reform is one of the clearest evidence of the indirect impact of the decisions of regional and sub-regional HRTs. In majority of the cases studied, legislative processes usually result indirectly from HRTs' decisions, either after an intervening decision by a domestic court or an intense campaign by activist forces at the domestic level, using decisions of HRTs. Some instances where decisions of African regional and sub-regional HRTs have led to domestic legislative reforms include the repeal of draconian military Decrees in Nigeria, amendment of parliamentary rules of procedure in Kenya and Uganda consequent upon various decisions of the EACJ, legislative debates and ongoing amendment of a controversial press law in Burundi and the repeal of certain offending provisions of the Information and Protection of Privacy Act (AIPPA) in Zimbabwe. The legislative impact analysis below is limited mainly to the studied countries, with only a few notable exceptions.

Upon transition from military to civilian rule in 1999, the African Commission's recommendations in at least 10 cases involving Nigeria were to some extent implemented.[143] Many of the military decrees previously declared by the Commission as violating the African Charter were repealed.[144] These include the Treason and Other Offences (Special Military Tribunals) Decree of 1986 which was declared by the Commission as violating the African Charter in *Media Rights Agenda v Nigeria*[145] *and Civil Liberties Organisation & 2 Others v Nigeria*.[146]

Another legislative reform influenced directly or indirectly by decisions of African Commission relates to the Nigerian *Civil Disturbances (Special Tribunal) Decree No 2 of 1987.* This legislation, which was enacted by the military administration of General Babangida,

[143] Ayeni (109 above) 26.
[144] See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree 63 of 1999.
[145] *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).
[146] *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (2001) AHRLR 75 (ACHPR 2001).

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established a special tribunal for the trial of persons alleged to have engaged in acts of civil disturbance. The composition of the 5-member tribunal includes a serving member of the military.[147] Persons convicted by the tribunal have no right of appeal to any superior court; and the Decree abrogated the supervisory jurisdiction of the High Court over proceedings of the tribunal.[148] These features of the tribunal were challenged in several communications before the African Commission such as the *Zamani Lekwot case*[149] *and Civil Liberties Organisation v Nigeria.*[150] In these cases, the Commission found that the Decree violated provisions of the African Charter. Activist forces comprising human rights NGOs, the media and courageous judges relied on the Commission's decisions to 'mount a loud and intense campaign' against the Decree.[151] On 5 June 1996, a new Decree, the Civil Disturbances (Special Tribunal) (Amendment) Decree, was promulgated, thus effectively repealing the 1987 Decree. The new Decree removed the armed forces member of the tribunal and provided for a right of appeal for persons convicted by the tribunal.[152]

In another instance, the *Newspapers Registration Decree 43 of 1993* case,[153] the government of Nigeria promulgated the infamous Decree 43 of 1993 which set out stringent conditions for the operation of media business in Nigeria. Two Nigerian NGOs, Constitutional Rights Project (CRP) and Media Right Agenda (MRA), approached the African Commission to have the Decree set aside. The Commission held that the Decree violated several provisions of the African Charter. Relying on the Commission's decision, some human rights NGOs in Nigeria approached a Lagos High Court requesting the Court to declare the Decree null and void. The Court, per Humponu-Wusu J, held that any national legislation

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147 See Civil Disturbances (Special Tribunal) Decree No 2 of 1987, sec 2.
148 See Civil Disturbances (Special Tribunal) Decree No 2 of 1987, sec 8.
149 Communication 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria*.
150 Communication 129/94 *Civil Liberties Organisation v Nigeria*.
151 Okafor (n 7 above) 129.
152 Okafor (n 7 above) 129.
153 Communications 105/93, 128/94, 130/94, and 152/96 *Media Rights Agenda and Constitutional Rights Project v Nigeria*.

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(including Decree 43 of 1993) that conflicts with the African Charter is void to the extent of such conflict.[154] Decree 43 was subsequently repealed.[155]

The African Commission's decision was also deployed by activist forces in Nigeria to secure an amendment to section 2A of the *State Security (Detention of Persons) Decree of 1994.* The provision precluded any court from issuing a *writ of habeas corpus* for the release of any person detained under the Decree. In *Constitutional Rights Project and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa) v Nigeria*, the African Commission declared the provisions of the Decree to be 'Charter illegal'.[156] This Decree was also condemned by the Commission in the *Zamani Lekwot* case. The incessant criticisms from the Commission together with campaigns mounted by activist forces at the domestic level led to an amendment of the Decree on 7 June 1996.[157] The new Decree, the State Security (Detention of Persons) (Amendment) (No 2) (Repeal) Decree No 18 of 1996, restores the legal capacity of courts to issue the writ of habeas corpus or other writs for the release of any person detained under the Decree. In addition, the military also ordered a comprehensive review of the cases of all persons previously detained under the 1994 Decree.[158] Sequel to this review, about 12 detainees regained their freedom.[159]

The decision of the African Court in *Mtikila & Others v Tanzania*[160] has prompted the inclusion in the Draft Constitution of Tanzania 2014 a proposal for independent candidacy. Section 216 of the Final Draft of the Proposed Constitution as approved by Parliament in October 2014 provides for the right of independent candidates to contest any election in Tanzania.[161] The Minister of Justice and Constitutional Affairs of Tanzania, Dr Harrison Mwakyembe, stated on 21 November 2016, during the 10th anniversary symposium of the

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154 See *Richard Akinola v General Ibrahim Babangida and three others*, Suit M/462/93; *Media Rights Agenda and Another v A-G of the Federation*, Suit FHC/L/CS/908/99 (unreported). Both cases are cited in Okafor (n 7 above) 101.

155 Okafor (n 7 above) 102.

156 See Communications 137/94, 154/96, and 161/97 *Constitutional Rights Project and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa) v Nigeria*.

157 Okafor (n 7 above) 131.

158 As above.

159 Okafor (n 7 above) 131.

160 *Mtikila* case.

161 Proposed Constitution of the United Republic of Tanzania, approved by Parliament in October 2014 http://www.humanrights.or.tz/downloads/proposed%20constitution%20-%20english%20version.docx (accessed 21 April 2017).

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African Court that the government was aware of the *Mtikila* decision and the obligations it imposed on the state.[162] The Minister also stated that the independent presidential candidate issue has not been 'ditched' and had been included in the Proposed Constitution, which awaits a referendum for its adoption.[163] In compliance with the reparation order of the Court, the full judgment of the Court in the *Mtikila* case has been published on the official website of the government of Tanzania since 18 January 2016.[164] The case has also had an unintended impact. The decision has popularized the African Court and has led to a floodgate of litigations submitted against Tanzania at the African Court.[165] According to the Pan African Lawyers Union (PALU), the *Mtikila* case gave applicants from the states that have made the article 34(6) declaration 'more gut' to approach the Court.[166]

Of the six HRTs selected for this study, the decisions of the EACJ have had the most extensive legislative impact at the domestic level in recent years.[167] Some of the cases in which decisions of the EACJ have influenced directly legislative debates and reforms at the state level are discussed below. Even though not a studied country, developments in Kenya in relation to the EACJ has a spill-over effect in Uganda, one of the countries selected for the study. For election of Kenya's representatives in the East African Legislative Assembly (EALA), the Kenyan Parliament in 2001 enacted the East African Community (Election of Members of the Assembly) Rules 2001. In *Peter Anyang' Nyong'o and 10 others v the Attorney General of the Republic of Kenya and 5 others,*[168] the EACJ found the 2001 Rules of Procedure to be in violation of article 50 of the EAC Treaty, since the Rules did not require Parliament to conduct an election as required by the EAC Treaty. Following the decision of the EACJ in the *Anyang' Nyong'o* case, the Kenyan Parliament on

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162 AllAfrica 'Independent Candidacy Not Ditched – Govt' http://allafrica.com/stories/201611230534.html (accessed 20 April 2017).

163 As above. The referendum, which was earlier stated for 30 April 2015, failed to hold due to protests from opposition political parties.

164 'Rev. Mtikila TLS & LHRC vs URT (Application No: 009& 011/2011' 18 January 2016 http://sheria.go.tz/index.php?option=com_docman&task=cat_view&gid=44&Itemid=68 (accessed 6 May 2017).

165 Skype communication with E Chijarira (PALU) on 5 May 2015.

166 Chijarira (n 164 above).

167 See generally V Lando 'The domestic effect of the East African Community's human rights practice' unpublished LLD thesis, University of Pretoria, 2017.

168 *Anyang' Nyongo and 10 others v A-G Kenya & 2 others,* Reference No 1 of 2006.

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23 May 2007 passed new nomination Rules, the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2007, which set out an elaborate procedure for election of Kenya representatives for the EALA.[169]

Influenced by the decision of the EACJ in the *Peter Anyang' Nyong'o* case,[170] domestic actors in Uganda sought similar ruling against the government of Uganda. In *Democratic Party* and *Mukasa Mbidde v S-G EAC & A-G Uganda*,[171] the applicants argued that the Rules of Procedure of the Parliament of Uganda did not give equal opportunity and full participation rights to some interest groups in the election of Uganda's representatives to the EALA as required by the EAC Treaty. According to article 50 of the EAC Treaty, members of the EALA are to be elected by national assemblies of each state, provided all political parties, shades of opinions, gender and other special interests are well represented. Consequently, the EACJ ordered the government of Uganda to amend the Rules of Procedure of the Parliament of Uganda to bring it in line with article 50 of the EAC Treaty. On 18 May 2012, the Parliament of Uganda amended its Rules of Procedure, purportedly to comply with the decision of the EACJ.[172]

Not satisfied with the way the Rules of Procedure has been amended, Anita Among approached the EACJ to set aside the 2012 Parliamentary Rules of Procedure. The EACJ in *Among Anita v A-G Uganda and Another,*[173] a case decided in 2013, ordered the Parliament of Uganda to further amend the 2012 Rules of Procedure to bring it fully in conformity with article 50 of the EAC Treaty. On 9 August 2016, the Parliament of Uganda formally constituted a Standing Committee to review the Rules of Procedure of the Uganda Parliament. One of the four objectives of the Committee are to 'align the Rules to the observations and decisions of the EACJ with respect to the election petition of Uganda's

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[169] See Kenya National Assembly Official Records (Hansard) 23 May 2007, 1583 - 1602.
[170] *Anyang' Nyongo* case.
[171] *Democratic Party and Mukasa Mbidde v S-G EAC and A-G Uganda*, Reference Number 6 Of 2011, decided 10 May 2012.
[172] *Among Anita v A-G Uganda and S-G EAC and A-G Uganda*, Reference No 2 of 2012, decided by the EACJ on 29 November 2013.
[173] *Among Anita case.*

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representatives to the EALA'.[174] The report of the Committee, which expressly referenced the *Anita Among* case, has been submitted to Parliament since January 2017.[175]

There has been limited impact of HRTs' decisions on legislative processes in the Gambia and Zimbabwe. In The *Gambian Mental Health* case,[176] the African Commission requested the government of The Gambia to repeal the Lunatics Detention Act (LDA). Although this legislation has not been repealed as at July 2017, the Gambia's Ministry of Health and some civil society organisations supported by the World Health Organisation (WHO) have been having a series of workshops aimed at enacting a new mental health legislation for the Gambia.[177] A zero draft of the proposed mental health legislation has been produced, but the draft Bill is yet to be presented to either cabinet or parliament.[178] In Zimbabwe, the communication procedure of the African Commission in *Scanlen & Holderness v Zimbabwe*[179] facilitated the repeal in 2007 of sections 79, 80 and 83 of the Information and Protection of Privacy Act (AIPPA).[180]

5.3.4 Judicial impact of HRTs' decisions

Despite the criticisms and widespread characterization of regional and sub-regional human rights regimes in Africa as weak and ineffective,[181] it is undeniable that HRTs' decisions in Africa have had considerable judicial or jurisprudential impact. The 'jurisprudential effect' is perhaps the biggest and most wide-ranging impact of decisions of regional and sub-regional HRTs in Africa. Their decisions have served as a *medium of communication* amongst various tribunals, a *trigger of independent claims* before domestic courts, and an *authoritative source of legal norms*. Construed as a medium of 'transnational judicial communication', there is a plethora of cases where HRTs in Africa have referenced one another to strengthen their arguments and legitimize their decisions. As a trigger of

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174 See Report of the Standing Committee on Rules, Privileges and Discipline on the Amendment of the Rules of Procedure of the Parliament of Uganda (January 2017) 3 https://www.scribd.com/document/337292458/Report-on-the-Amendment-of-the-Rules-of-Procedure-of-the-Parliament-of-Uganda#download&from_embed (accessed 6 May 2017).
175 See Report of the Standing Committee on Rules, Privileges and Discipline (n 173 above) 26.
176 *Gambian Mental Health* case.
177 Samba (n 122 above).
178 Samba (n 122 above).
179 Communication 297/2005 *Scanlen & Holderness v Zimbabwe.*
180 See Appendix I.
181 See Okafor (n 7 above) 41.

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independent claims, decisions of HRTs have been relied upon as a basis for making independent claims in a series of litigations before domestic and international HRTs. Finally, decisions of HRTs serve as a channel for the creation and elaboration of legal norms through authoritative interpretation of treaty provisions.

(a) Transnational judicial communication

There has been extensive jurisprudential correspondence among the various regional, sub-regional and domestic tribunals in Africa.[182] Slaughter describes the process, by which courts from different countries talk to one another, as 'transjudicial communication.'[183] Other scholars have described it as 'transnational judicial dialogue',[184] 'transnational legal communication',[185] or simply transjudicialism.[186] Transnational judicial communication generally takes three forms: horizontal, vertical and mixed vertical-horizontal.[187] Horizontal communication occurs between courts of coordinate status, whether national or supranational.[188] This is the type of communication that takes place where the African Court, in its judgments and other rulings, refers to jurisprudence of the African Commission. Vertical communication takes place between national and international courts, such as where a domestic court refers to the jurisprudence of a regional HRT, or where a regional HRT relies on the decision of a domestic court.[189] The mixed vertical-horizontal communication occurs where supranational courts serve as an avenue for horizontal communication, and vice versa.[190] In other words, best practices in national

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182 See H Lambert 'Transnational judicial dialogue harmonization and the common European asylum system' (2009) 58 *International and Comparative Law Quarterly* 519, 520; JC Hathaway *The rights of refugees under international law* (2005) 1 - 2.

183 A-M Slaughter 'A typology of transjudicial communication' (1994) 29 *University of Richmond Law Review* 99, 99 - 137.

184 Lambert (n 181 above) 519; O Frishman 'Transnational judicial dialogue as an organisational field' (2013) 19 *European Law Journal* 739, 739; MA Waters 'Meeting norms and identity: The role of transnational judicial dialogue in creating and enforcing international law' (2005) 93 *Georgetown Law Journal* 487, 487.

185 M Wagner 'Transnational legal communication: A partial legacy of Supreme Court President Aharon Barak' (2011) 47 *Tulsa Law Review* 437, 437.

186 See E Mark 'General principles of law and transnational judicial communication' in L Pineschi (ed) *General principles of law - The role of the judiciary, Ius Gentium: Comparative perspectives on law and justice* (2015) 46.

187 Slaughter (n 182 above) 103.

188 Slaughter (n 182 above) 103.

189 Slaughter (n 182 above) 106.

190 Slaughter (n 182 above) 111.

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legal systems are incorporated into judgments of supranational tribunals which are in turn assimilated by other states.

The various forms of TJC enhance the effectiveness of HRTs, promotes the acceptance of reciprocal obligations, and enhance the persuasiveness and legitimacy of decisions of HRTs.[191] Because of its capacity to promote cross-fertilisation among national and international legal systems, transnational judicial communication is becoming a common practice among judiciaries in the world.[192] Some instances of vertical and horizontal transnational judicial communication involving the selected sub-regional and regional HRTs in Africa are discussed below.

Even though no systematic searches were carried out, the evidence based on the data gathered during the study demonstrates that there has been more horizontal than vertical transnational judicial communication in Africa. In other words, the number of times regional and sub-regional HRTs in Africa cite each other is relatively higher than the number of times their decisions were cited by domestic courts. The limited use of international legal jurisprudence in domestic courts has been attributed to the lack of knowledge and mistrust of international human rights jurisprudence as 'foreign law'.[193] In the *Campbell* cases, for instance, the SADC Tribunal cited copiously the jurisprudence of the African Commission.[194] The Tribunal referred to the African Commission's cases of *Constitutional Rights Project and Others v Nigeria*,[195] and *Zimbabwe Human Rights NGO Forum v Zimbabwe*.[196] In the *Katabazi* case, the EACJ referred to the decision of the African Commission in *Constitutional rights project v Nigeria*[197] to enrich its own jurisprudence.[198] In the Reparation Ruling in the *Mtikila* case, the African Court referred to the jurisprudence

[191] Slaughter (n 182 above) 112 - 124.
[192] See MA Glenton *Rights talk: The improvement of political discourse* (1988) 158.
[193] M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 3; Murray & Long (4 above) 75.
[194] See Swart (n 36 above) 711.
[195] *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 cited in the *Campbell* case, para 41.
[196] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHRPR 2006) cited in the *Campbell* case, para 43.
[197] *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999).
[198] *Katabazi* case, paras 48 - 50. See also Adjolohoun (n 9 above) 118.

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of the African Commission on right to effective remedy as set out in *Jawara v The Gambia* and *Gabriel Shumba v Zimbabwe*.[199] In the *Children in Northern Uganda* case, the African Children's Rights Committee referenced several decisions of the African Commission including the *Ogoniland* case and The *Gambian Mental Health* case.[200] In the *Talibe* case, the Committee also cited copiously the jurisprudence of the African Commission on admissibility and effective remedy as set out in the *Jawara* case.[201]

Of the six selected HRTs, the only tribunal that rarely cites decisions of other regional and sub-regional HRTs is the ECCJ.[202] In *SERAP v Nigeria* (the *Niger Delta Environmental Pollution* case), a case whose factual circumstances largely overlap with the African Commission's decision in the *Ogoniland* case, the ECCJ failed to reference the *Ogoniland* case, even though the applicant made explicit reference to it in their written submission.[203] The ECCJ tends to mostly rely on jurisprudence of the International Court of Justice (ICJ), European Court of Human Rights (ECtHR) and domestic courts of ECOWAS states, especially Nigeria.[204] The African Commission has however incorporated jurisprudence of the ECCJ in many of its decisions. For instance, in 2008, the Commission issued a resolution requesting the government of The Gambia to comply with ECCJ's judgment in the *Manneh* case.[205] In clarifying the rights to work, particularly the right to equal pay for equal work, the African Commission in *Dabalorivhuwa Patriotic Front v South Africa*[206] borrowed from the ECCJ's judgment in *Etim Moses Essein v The Gambia*.[207] In *Interights and Others v DRC*,[208] the African Commission also referred to the decisions of the ECCJ in *Ebrimah Manneh v The Gambia* and *Koraou v Niger (Niger Slavery* case).[209] Despite not citing decisions of other HRTs, the ECCJ is good at citing itself. For instance, the ECCJ decision in *Federal Republic of Nigeria and*

[199] See *Mtikila v Tanzania* (Reparation ruling) paras 22, 24 & 25.
[200] Children in Northern Uganda case, paras 38 & 73.
[201] See *Centre for Human Rights and la Rencontre Africaine pour la Defense des Droits de l'Homme (on behalf of Senegales Talibés) v Senegal* (*Talibe* case), ACERWC, Communication/001/2012, 15 April 2014.
[202] See Adjolohoun (n 9 above) 209; Viljoen (n 80 above) 496.
[203] See Viljoen (80 above) 374.
[204] Viljoen (n 80 above) 496.
[205] ACHPR/Res.134 (XXXXIIII) 08: Resolution on the human rights situation in the Republic of The Gambia. See also Viljoen (n 80 above) 496-497; Adjolohoun (n 9 above) 209 - 210.
[206] Communication 335/07 *Dabalorivhuma Patriotic Front v South African Communication*, para 133.
[207] ECW/CCJ/APP/05/07 *Etim Moses Essein v The Gambia*.
[208] Communication 274/03 and 282/03 *Interights and Others v DRC*.
[209] ECW/CCJ/JJD/06/08 *Koraou v Niger* (*Niger Slavery* case) (2008) AHRLR 182 (ECOWAS 2008). See *Interights and Others v DRC*, para 70.

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Others v Djot Bayi Talbia (Application for review)[210] was cited in the case of *Dr Rose Mbatomon Ako v The West African Monetary Agency and Others.*[211] The jurisprudence of the ECCJ in the case of *Musa Saidykhan v The Gambia (Application for review)*[212] was also quoted extensively in a subsequent case of *Mbatomon Ako v The West African Monetary Agency and 5 Others.*[213]

Horizontal judicial communication is prevalent not only amongst regional and sub-regional HRTs, it is also the form of communication common to domestic courts. There are however a couple of occasions, relevant to this study, when domestic courts engaged in vertical correspondence with regional and sub-regional HRTs in Africa. For instance, the Uganda High Court in *Birungi and 2 Others v A-G of Uganda and Another* referred to the decision of the EACJ in the *Katabazi* case to clarify the responsibility of the Secretary General of the EAC.[214] In *Constitutional Rights Project v President Ibrahim Babangida,*[215] a Lagos High Court relied on the African Charter and the decision of the African Commission in *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria* to restrain the government of Nigeria from executing Zamani Lekwot and others who had been sentenced to death.[216] The convicts were not executed and were eventually released from prison.[217]

The *Democratic Party and Mukasa Mbidde* case provides an example of a mixed vertical-horizontal transnational judicial communication. The case was submitted to the EACJ following a decision of the Constitutional Court of Uganda in *Jacob Oulanyah v Attorney General,*[218] which was decided based on an earlier decision of the EACJ in *Anyang' Nyong'o* case.[219] The impact of the *Anyang' Nyong'o* case is not limited to Kenya only; the case

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210 ECW/CCJ/APP/10/06 (ECW/CCJ/RUL/04/10) *Federal Republic of Nigeria v Djot Bayi Talbia.*
211 ECW/CCJ/JUD/28/15 *Mbatomon Ako v WAMA and Others.*
212 ECW/CCJ/APP/11/07, Ruling No. ECW/CCJ/APP/RUL/03/12, *Musa Saidykhan v The Gambia* (*Application for review* case), judgment delivered on 7 February 2012.
213 ECW/CCJ/JUD/28/15 *Mbatomon Ako v WAMA and Others.*
214 *Kamurali Jeremiah Birungi and 2 Others v A-G Uganda and S-G EAC,* National Assembly Election Petition No 002 of 2012 (Unreported).
215 *Constitutional Rights Project v President Ibrahim Babangida and two Others,* Suit M/102/93, Lagos State High Court, per Onalaja J (unreported). See also Okafor (n 7 above) 98.
216 Okafor (n 7 above) 278.
217 As above.
218 *Jacob Oulanyah v Attorney General,* Constitutional Petition No 28 of 2006.
219 *Anyang' Nyongo* case.

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triggered two complaints submitted against Uganda in *Democratic Party and Mukasa Mbidde* case and *Among A Anita* case, both of which are part of the 32 cases selected for this study. The vertical transnational judicial communication in the *Jacob Oulanyah* case is significant because it is the first time the apex court of any state referenced the jurisprudence of the EACJ. The *Anyang' Nyong'o* case has subsequently been referred to by Uganda High Court in cases such as *Akidi Margaret v Adong Lilly and the Electoral Commission*[220] and *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission.*[221]

(b) The 'knock-on or spill-over effect'

When an event or a situation has a knock-on effect, it creates a 'ripple effect'. In other words, it causes other events or situation.[222] In addition to transnational judicial communication between domestic and supranational judicial bodies, decisions of regional or sub-regional HRTs have had limited 'knock-on' effects on the work of national and other international tribunals. In other words, the decisions have indirectly, in most cases without any explicit reference, influenced the legal reasoning of other courts or formed the basis of independents claim before domestic courts and other HRTs. This type of 'spill-over' effect is clearly different from instances where courts directly cite each other's jurisprudence to strengthen and legitimize their arguments. The 'knock-on effect' usually happens where domestic courts and other supranational tribunals are used by human rights NGOs as a vehicle for the execution of the reparation orders of regional and sub-regional HRTs.

In 1993, seven Nigerians of the Kataf ethnic minority were arrested, detained, tried and subsequently sentenced to death by a Civil Disturbances Special Tribunal. The Constitutional Rights Project (CRP), a Nigerian NGO based in Lagos, submitted a communication to the African Commission in the *Zamani Lekwot* case[223] seeking to halt the

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[220] *Akidi Margaret v Adong Lilly and the Electoral Commission*, Election Petition No 0004 of 2011 (unreported).
[221] *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission,* High Court Election Petition No 001 of 2011 (unreported).
[222] See the Cambridge English Dictionary http://dictionary.cambridge.org/dictionary/english/knock-on-effect (accessed 1 September 2017).
[223] See *Zamani Lekwot* case (n 148 above).

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execution of the convicts. The African Commission issued an interim measure urging the government of Nigeria to suspend the proposed execution pending the determination of CRP's communication. Armed with this decision, CRP approached a Lagos High Court requesting an order directing the Nigerian government to respect the interim measure of the African Commission. The Court, per Onalaja j, granted the application.[224] The Court argued that the injunction was necessary to prevent the government from executing the applicants, thereby rendering nugatory any anticipated decision of the African Commission.[225]

In *SERAP v Nigeria* (*SERAP Right to Education* case), the ECCJ held that every child of school age in Nigeria has a right to education. Many scholars have postulated that this decision is likely to influence the approach of Nigerian judges to justiciability of the right to education.[226] On 2 March 2017, a Federal High Court in Abuja in *LEDAP v Federal Ministry of Education and Another* (*LEDAP Right to Education* case) held that the right to primary and junior secondary education is justiciable in Nigeria.[227] This is the first time the socio-economic right to education of children has been sanctioned as justiciable by a domestic court in Nigeria. Although the *SERAP v Nigeria (SERAP Right to Education* case) was not specifically referenced in the decision, the reasoning in the case is one of the factors that embolden the judge and the legal counsels in the *LEDAP Right to Education* case.

The 'knock-on effects' of HRTs' decisions have not been positive in all cases. For instance, on 2 February 2016, a High Court in Ghana in the case of *Chude Mba v Ghana*[228] denied an application seeking to enforce a judgment of the ECCJ.[229] According to the Court, judgments of the ECCJ cannot be enforced by domestic courts since Ghana was yet to

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[224] See *CRP v Babangida* (n 214 above). See also EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 72 - 73; IO Smith 'Enforcement of human rights treaties in a military regime: Effects of ouster clauses on the application of the African Charter on Human and Peoples' Rights in Nigeria' (2000) 9 *Review of the African Commission on Human and Peoples' Rights* 192, 194; Okafor (n 7 above) 98.

[225] See Okafor (n 7 above) 98 - 99.

[226] See, for instance, ES Nwauche 'Enforcing ECOWAS law in West African national courts' (2011) 55 *Journal of African Law* 181, 197.

[227] See 'Nigerian Court declares free primary, junior secondary education an enforceable right' *Premium Times* 2 March 2017 http://www.premiumtimesng.com/news/headlines/225057-nigerian-court-declares-free-primary-junior-secondary-education-enforceable-right.html (accessed 29 May 2017).

[228] *Chude Mba v Ghana*, Suit No HRCM/376/15, decided by the Accra High Court on 2 February 2016.

[229] *Chude Mba v Ghana*, ECW/CCJ/APP/01/13, decided by the ECCJ on 6 November 2013.

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domesticate the Protocol establishing the ECCJ.[230] In *Gramara and Another v Zimbabwe,*[231] two of the 77 applicants in the *Mike Campbell* case[232] filed a case at the High Court of Zimbabwe seeking an order for the registration and enforcement of the SADC Tribunal's decision in the *Campbell* case. The Zimbabwean High Court on 26 January 2010 held that the decision could not be registered nor enforced in Zimbabwe as doing so would undermine the authority of the Supreme Court of Zimbabwe and contravene section 16B of the Zimbabwe's Constitution.[233] Another 'knock-on effect' of the *Campbell* case is *Fick and Another v Republic of Zimbabwe.*[234] In that case, six of the original applicants in the *Campbell* case applied to the SADC Tribunal in order that the Tribunal may report the failure of Zimbabwe to comply with the *Campbell* case to the SADC Summit. On 16 July 2010, the Tribunal agreed to report the non-compliance to the Summit and granted costs in favour of the applicants.[235] These processes led to the eventual suspension of the SADC Tribunal.[236]

The SADC Tribunal decision in the *Tembani* case[237] has equally had a limited 'knock-on effect' on the communication procedure of the African Commission. In 2012, a communication, *Luke Tembani and Another v Angola and 13 Others (Luke Tembani* case), was submitted to the African Commission by Norman Tjombe on behalf of Luke Tembani and Benjamin John Freeth.[238] The complainants allege that the decisions of the SADC Summit on 16 - 17 August 2010 and 20 May 2011 to suspend the SADC Tribunal violates the African Charter. The Commission on 5 November 2013 held that the African Charter does not impose on member states of SADC an obligation to ensure access to the SADC Tribunal. The *Luke Tembani* case is the first time in Africa that a HRT established under a regional

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[230] As above.

[231] *Gramara and Another v Zimbabwe* Suit No HC 5483/09, decided on 26 January 2010.

[232] *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* Case No SADC(T) 2/2007.

[233] *Gramara* case.

[234] See *Fick and Another v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8 (16 July 2010).

[235] As above.

[236] See G Erasmus 'The new Protocol for the SADC Tribunal: Jurisdictional changes and implications for SADC community law' https://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf (accessed 27 May 2017). See decision of the High Court of Botswana made after the suspension of the SADC Tribunal in *Maria Ferreira Swart v SADC*, delivered on 11 October 2011 where a Botswana High Court claimed it had jurisdiction in a dispute between SADC and its employees.

[237] *Tembani v Zimbabwe* Case No 7/2008 SADC (T), 5 June 2009.

[238] Communication 409/12 *Luke Tembani and Benjamin John Freeth v Angola and 13 Others*, decided by the African Commission on 5 November 2013.

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treaty was asked to pronounce on the obligations of member states of a sub-regional treaty.

Still determined to make the government of Zimbabwe comply with the decisions of the SADC Tribunal, some of the applicants in the *Mike Campbell* case approached a South African High Court in Pretoria to have the orders of the SADC Tribunal enforced in South Africa.[239] The South African High Court held that the decision of the SADC Tribunal in the *Campbell* case could be registered, recognised and enforced in South Africa.[240] This decision was affirmed by the Supreme Court of Appeal as well as the Constitutional Court of South Africa.[241] On 21 September 2015, a property in Cape Town, belonging to the government of Zimbabwe was auctioned off for ZAR 3.76million to cover the costs order in the *Fick* case (CC).[242] This is the first time in history that the asset of a foreign government is subject to execution for the sole purpose of implementing the judgment of an international HRT.

(c) Norm-setting and creation of authoritative jurisprudence

Another significant impact of HRTs' decisions is norm creation through authoritative interpretation of treaty provisions. Provisions of treaties are not exhaustive; thankfully, the lacuna in the various human rights treaties are continuously filled through the interpretive jurisprudence of HRTs. Norms set by HRTs may never be used in subsequent proceedings of any HRT, yet they represent authoritative interpretations of those norms for all actors. The usefulness of HRTs' interpretive jurisprudence goes beyond the courtroom, thus making it to fall outside the scope of 'transnational judicial communication'. Researchers, policy makers, legislators and civil society have derived inspiration from the authoritative interpretations of HRTs.

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239 See *Government of the Republic of Zimbabwe v Fick and Others* (2011) ZAGPPHC 76.

240 *Government of the Republic of Zimbabwe v Fick and Others* (2011) ZAGPPHC 76 ('Fick High Court').

241 See *Government of the Republic of Zimbabwe v Fick and Others* (2012) ZASCA 122 ('Fick SCA'); *Government of the Republic of Zimbabwe v Fick and Others* (2013) ZACC 22, 2013 (5) SA 325 (CC).

242 J Evans 'Zim govt property in Cape Town sold for R3.7m' *News24* 21 September 2015 http://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921 (accessed 1 May 2017).

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The African Commission, for instance, elaborated on the right to effective remedy in the *Jawara* case.[243] In the *Mtikila* case (Ruling on reparation),[244] the African Court set out the legal framework governing right to reparation under the African human rights system. In the *Djot Bayi Talbia* case,[245] the ECCJ noted that articles 9 and 10 of the ECCJ Protocol do not specifically provide for 'a right to reparation'.[246] The ECCJ used the opportunity presented in the case to expound on the principles of 'just and equitable reparation' under international law.[247] It has been suggested that this decision could influence subsequent cases before ECCJ where no other relief would be appropriate other than just and equitable reparation.[248] In *Musa Saidykhan v The Gambia (Application for review*), the ECCJ elaborated on the general principles guiding application for review.[249] The jurisprudence of the tribunals in the above cases have been cited by judicial and non-judicial actors.[250] The norms are also relied upon by legal counsels and litigants in subsequent cases. In exceptional cases, the jurisprudence may be cited by the tribunal itself or by other similar HRTs.

The case of *James Katabazi and 21 others v The S-G of EAC and AG Uganda*[251] has been instrumental to the development of the limited human rights jurisdiction of the EACJ. The question whether the EACJ has jurisdiction to entertain cases involving human rights violations was first raised in this case.[252] The reasoning of the Court in the *Katabazi* case has remained a recurring feature in subsequent cases that involve allegation of human rights violations.[253] Although all the important jurisprudential contributions of African regional and sub-regional HRTs' decisions cannot be highlighted here, the argument is that

243 *Jawara* case.
244 *Mtikila* case (Ruling on reparation).
245 *Djob Bayi Talbia* case.
246 See J Ukaigwe *ECOWAS law* (2016) 194.
247 As above.
248 Ukaigwe (n 245 above).
249 *Musa Saidykhan v The Gambia* (*Application for review* case).
250 Few examples of this type of references have been highlighted under 'transnational judicial communication'.
251 *Katabazi* case.
252 *Katabazi* case.
253 See *Mohochi v A-G Uganda* (*Mohochi* case) Reference No 5 of 2011; *Independent Medical Legal Unit v Attorney General of Kenya* (*Independent Medical Legal Unit* case) Reference No 3 of 2010; *Sitenda Sebalu v Secretary General of EAC* (*Sebalu* case) Reference No 1 of 2010 (First Instance Division).

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decisions of HRTs create legal norms that affect general understanding and application of legal principles by judicial and non-judicial actors.

5.3.5 Tool for research, advocacy and social mobilization

Decisions of African regional and sub-regional HRTs in many cases have served as an important tool for social mobilization, advocacy and research. There is already a growing body of literature on the case law of regional and sub-regional HRTs in Africa.[254] While all the instances related to this theme cannot not be cited here, one clear example of the use of an HRT's decision for social mobilisation is the *Olajide Afolabi* case, which was instrumental to the human rights jurisdiction of the ECCJ.[255] In that case, a Nigerian businessman who had concluded a business arrangement with his customers in Benin suffered huge losses in his business when the Nigerian government, without any prior notice, closed the *Seme* border; thus, failing to gain entry to Benin to complete his business transactions. Afolabi approached the ECCJ to enforce his right to freedom of movement, free movement of goods and services as well as the right of ingress and egress as guaranteed in the 1993 revised ECOWAS Treaty, as well as article 12 of the African Charter. Painfully, the ECCJ held that only a state party may approach the Court on behalf of its nationals.[256]

After the judgment was delivered in the *Afolabi* case, the judges issued a joint press release lamenting the unfairness of their decision and calling on all member states to allow private litigants access to the Court.[257] To demonstrate their commitment to this campaign, the Court published a booklet where they elaborated on why the ECOWAS laws that produced the *Afolabi* decision must change.[258] This booklet was widely disseminated by the Court. Ultimately, the vibrant advocacy by the ECCJ and other stakeholders together with indirect

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[254] See, for instance, MG Nyarko & HM Ekefre 'Recent advances children's rights in the African human rights system: A review of the decision of the African Committee of Experts on the Rights and Welfare of the Child in the Talibe case' (2016) 15 *Law and Practice of International Courts and Tribunals* 385, 385 - 395; O Windridge 'A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples' Rights' (2015) 15 *African Human Rights Law Journal* 299, 299 - 328.

[255] ECW/CCJ/JUD/01/04 *Afolabi Oladjide v Nigeria*.

[256] See *Olajide Afolabi* case, para 62.

[257] L Okenwa 'ECOWAS Court' *Thisday (Nigeria)* (28 April 2004), referred to in KJ Alter, LR Helfer & JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737, 750.

[258] As above.

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coalition building by the ECOWAS Commission and the West African Bar Association, following the *Afolabi* case, gave rise to the adoption of the 2005 Supplementary Protocol which confers on the ECCJ express human rights jurisdiction.

The *Mtikila* case has also prompted social mobilization around issues of independent candidacy in the electoral process of Tanzania.[259] The *Ogoniland* case has been an important tool for human rights NGOs advocating for socio-economic rights of local communities in Nigeria. The *Gambian Mental Health* case has contributed to advocacy on mental health issues in The Gambia. HRTs' decisions release substantial information to the public, which provide incentive for social mobilization, advocacy and research. The various cases involving the Gambia and Zimbabwe, for instance, released substantial information about human rights violations in the two countries. Some of the human rights violation the two countries are usually criticized for come from the information released through HRTs' decisions.

5.3.6 Other forms of impact of HRTs' decisions

HRTs' decisions have resulted in limited yet significant attempts to hold multinational oil companies (MNCs) and other similar non-state actors accountable for human rights violations in their host communities. In response to the ECCJ judgment in *SERAP v Nigeria* (*Niger Delta Environmental Degradation* case), SERAP stated that the judgment was 'an important step towards accountability for government and oil companies that continue to prioritize profit-making over and above the well-being of the people of the region.'[260] It further stated that the judgment 'laid down minimum standards of operations for government and oil companies involved in the exploitation of oil and gas in the region.'[261] The *Ogoniland* case has also contributed to the limited accountability for human rights violations by non-state actors, especially MNCs operating in Ogoniland.

[259] *Mtikila* case.
[260] Amnesty International 'Ground-breaking ECOWAS Court judgment orders government to punish oil companies over pollution' 16 December 2012 https://www.amnesty.org/en/press-releases/2012/12/ground-breaking-ecowas-court-judgment-orders-government-punish-oil-companie/ (accessed 28 May 2017).
[261] As above.

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The decision of a HRT provides a permanent record of human rights violations in specific contexts; and it usually does so in considerable detail. It is a permanent record of those violations for future references. HRTs' decisions invest in those allegations the status of proven facts. Unlike news reports which are summarized versions of the violations and which trend only for a relatively short period, information contained in judicial decisions are perpetually in the domain of public discourse. The cases are studied in various law schools, year after year and referred to by courts from time to time. Decisions of HRTs also increase the level of awareness about human rights and activities of HRTs. The *Mtikila* case, for example, was singled out by respondents interviewed during this study as a major case that popularized the African Court.[262] The same is true of the *Ogoniland* case of the African Commission, the *Katabazi* case in the EACJ and the *MikeCampbell* case in the SADC Tribunal. One of the most important yet subtle effects of HRTs' decisions is deterrence. Decisions of HRTs generally have a limited constraining effect on future behaviour of state and non-state actors.[263] This effect is however largely unobtrusive and very difficult, if not impossible, to verify. While the full extent of the domestic effects of African regional and sub-regional HRTs' decisions is too broad for an all-encompassing discussion in a single chapter, the various analyses above highlight some of the most important contributions of regional and sub-regional HRTs' decisions in Africa.

5.4. Chapter conclusion

Despite the low level of compliance across the six regional and sub-regional HRTs discussed in the previous chapters, the various cases and themes discussed in this chapter suggest that decisions and individual communication procedures of African regional and sub-regional HRTs have had a modest yet significant impact in each of the five states selected for the study. Some domestic legislation has been repealed, reparation measures have been implemented, resources have been allocated, and some institutions were created in the studied countries as a direct consequence of decisions and communication procedures of African regional and sub-regional HRTs. While the domestic effects of HRTs' decisions are too numerous to itemize or interrogated in great depth in a single chapter,

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262 Skype communication with E Chijarira (PALU) on 5 May 2015.

263 See Simmons & Hopkins (n 73 above); Stein (n 2 above) 611 - 622.

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this chapter identifies five major ways in which decisions of African regional and sub-regional HRTs have made a difference in the selected states.

The examples of state-level impact of HRTs' decisions include amicable settlement of disputes and proactive remediation of violations; provision of positive material and non-material benefits for successful applicants; legislative and policy reforms; the use of HRTs' decisions as tools for social mobilization, advocacy and research; judicial impact of HRTs' decisions which may take the form of 'authoritative norm setting', 'transnational judicial communication' and other 'knock-on effects'; holding multinational oil companies (MNCs) and other similar non-state actors accountable for human rights violations; providing a permanent record of human rights violations; increasing the level of awareness about human rights and activities of HRTs; and creating limited deterrence effects on state actions.

For instance, birth registration for children has greatly improved in Uganda since the African Children's Rights Committee's decision in the *Children in Northern Uganda* case. The government of Nigeria has committed resources to the clean-up of Ogoniland. Mental health patients now live under better conditions in The Gambia, thanks to the advocacy that took off following The *Gambian Mental Health* case. While more certainly needs to be done, even the most critical pessimist can only imagine what the African continent would be like without these communication procedures and decisions.

The evidence and discussions in this chapter demonstrate that the compliance ratings of states may sometimes provide a false reflection of the effectiveness and impact of HRTs' decisions. Tribunals whose decisions have the highest compliance ratings do not necessarily have the most impact in the studied countries. The analysis also shows that human rights decisions do not operate in isolation; they are a part of a complex web of legal normativity. Ascertaining the actual effects of human rights decisions thus requires reaching beyond the state compliance narrative.[264] As noted in chapter 3, there is seldom a reference by states to the decisions of the relevant HRTs when state actors take measure to 'comply' with HRTs' decisions. In many cases, state officials are completely oblivious of

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264 Okafor (n 7 above) 284.

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the HRT's decision with which they are 'complying', as compliance have been induced by other domestic mechanisms or circumstances. This disconnection between state behaviour and human rights decisions, as earlier argued, highlights how peripheral these decisions are in the way African governments approach human rights issues at the domestic level. While state compliance narrative obviously remains one of the most important ways to measure the effectiveness of HRTs, it has not been shown to be the only measure of the effectiveness of a HRT.

One lesson gained from interacting with various domestic actors during this study is that the implementation of HRTs' decisions is not as simple or straightforward as human rights experts generally tend to assume. Even without a HRT's decision involved, the review of a national constitution may take decades to complete due to various competing interests. Although the government of Tanzania has yet to adopt a new constitution in accordance with the orders of the African Court, the *Mtikila* decision has provoked a national conversation. It has pushed national actors from a state of denial to gradual acceptance of the judgment; and that is significant.[265] While there is no systematic way to gather the evidence, the *Mtikila* decision has influenced the perception of state actors across Africa on the issue of independent candidacy. Decisions of HRTs are no more than tools of transnational legal processes.[266] They are not finished products that translate automatically into reality at the domestic level; they are tools that can be used to negotiate certain outcomes. In his rational choice analysis of international tribunals, Andrew Guzman argues that international tribunals are simply 'tools to produce a particular kind of information.' Guzman explained how the type of information produced by an international tribunal may influence state's behaviour towards compliance.[267]

If HRTs' decisions are to have more effects at the domestic level, domestic activist forces and transnational compliance actors must take more seriously the national process of implementation. The evidence in this chapter seems to suggest that HRTs' decisions do

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[265] See AllAfrica (n 161 above).

[266] See Koh 'Transnational legal process' (n 19 above); Koh 'Bringing international law home' (n 21 above).

[267] AT Guzman 'International tribunals: A rational choice analysis' (2008) 157 *University of Pennsylvania Law Review* 171, 180.

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not translate automatically into tangible outcomes without significant social mobilization around the case. Thus, the most important factor predictive of human rights judgment impact is the extent of social mobilization built around a case; this is because social mobilization increases the political cost of non-compliance. It should however be noted that the success of social mobilization depends on other factors such as 'media response, public receptivity and pre-existing understanding of the issues.'[268] It has also been suggested that human rights decisions would have greater impact if HRTs engage in 'dialogical activism'. This approach entails the use of 'reflexive remedies' such as 'broad-brush remedies'. These types of remedies may be given content through consent orders and settlement, delayed declaration of invalidity, and the involvement of state representatives and other relevant stakeholders in the formulation of remedies. Reflexive remedies encourage state actors sometimes to come up with more efficient and lower-cost ways to achieve the goal of the litigation. It also addresses issues of democratic legitimacy and institutional competence of HRTs to adjudicate especially in ESCRs cases. Overall, the use of reflexive remedies tends to deepen democratic participation, promote social mobilization and improve human rights judgment impact.[269]

[268] Langford, Rodríguez-Garavito & Rossi (n 52 above) 30.
[269] See generally Langford, Rodríguez-Garavito & Rossi (n 52 above) 26 - 32.

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Chapter 6

Challenges and hindrances to compliance and influence of reparation orders of HRTs in the selected African states

6.1. Introduction

6.2. Challenges of regional and sub-regional HRTs in Africa

6.3. Hindrances to compliance and influence in the selected states

6.4. Chapter conclusion

6.1. Introduction

This chapter explores the challenges and hindrances to human rights judgment compliance in the selected states. The chapter provides answers to the last research question: *What are the hindrances to compliance with and influence of reparation orders of HRTs in the selected states and how can compliance and overall impact of HRTs' decisions be improved?* Before discussing the hindrances and obstacles to human rights judgment compliance in the studied countries, a brief attempt is made in part 6.2 to discuss some of the challenges facing the selected regional and sub-regional HRTs in Africa. Some of the challenges highlighted in the thesis include lack of effective coordination, jurisdictional overlaps, the problem of forum shopping, hostile responses from government officials and poor funding. While the identified challenges generally impede the work of the selected HRTs, they may in some cases also constitute barriers to state compliance.

Part 6.3 deals with the hindrances to compliance and influence of HRTs' decisions in the selected African states. Five main barriers or hindrances to state compliance are identified, namely; lack of effective supervision mechanisms, weak domestic infrastructures on human rights judgment implementation, lack of strong and independent national institutions, poor system of governance and poor institutional designs of the selected HRTs. Other hindrances to state compliance also discussed in the thesis include unspecificity of reparation orders of HRTs, lack of awareness about international human

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rights system, ineffectiveness of follow-up, non-domestication of human rights treaties and perceptions about monism and dualism.

6.2. Challenges of regional and sub-regional HRTs in Africa

Sub-regional tribunals such as the ECCJ, EACJ and the SADC Tribunal are not human rights courts in the strict sense. They are regional integration courts protecting human rights. Their 'drift' into human rights adjudication as well as the proliferation of regional human rights bodies on the African continent is not without some concerns. A few eye brows have been raised over the spread of sub-regional trade courts in Africa and the implication of their limited human rights jurisdiction for judicial institutions dedicated to the promotion and protection of human rights at the continental level. This section examines briefly some challenges of regional and sub-regional human rights adjudication in Africa.

6.2.1 Poor coordination

Lack of effective coordination is the principal challenge facing the selected HRTs. There is very limited coordination among the various HRTs at regional and sub-regional levels. This is evident at both regional and sub-regional levels. At the regional level, there is apparent lack of coordination among the three main regional HRTs – the African Commission, the African Court and the African Children's Rights Committee. In terms of an Advisory Opinion given by the African Court, the African Children's Rights Committee may not refer cases to the African Court.[1] This decision left many people wondering why the drafters of the African Court Protocol did not anticipate any relationship between the protective mandates of the African Children's Rights Committee and that of the African Court.

With regard to the promotion and protection of human rights, there is inadequate coordination among the various organs of the AU such as the AU Assembly, the Executive

[1] See Request No 002/2013 - 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. The African Court has also recently held in a request submitted by SERAP that, in relation to NGOs, only Africa-based NGOs duly accredited by the AU are competent to submit requests for advisory opinion to the Court. See Request for advisory opinion by the Socio-Economic Rights and Accountability Project (SERAP), Request No 001/2013 (Advisory Opinion, 26 May 2017). Similar conclusions were reached in relation to NGOs in Request for advisory opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians, Request No 002/2015 (Advisory Opinion, 28 September 2017).

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Council, Pan African Parliament (PAP), Peace and Security Council (PSC), Permanent Representatives Committee (PRC) and the AU Commission. Thankfully, the African Human Rights Strategy now designates the African Governance Architecture (AGA) as the primary AU institution with the primary mandate to coordinate human rights programmes of AU.[2] The downside is that the Human Rights Strategy does not provide concrete arrangements for the coordination of follow up and implementation of decisions of HRTs in Africa.

There is also very limited coordination among the three main regional human rights tribunals in Africa, on the one hand, and the various sub-regional tribunals, on the other hand. An attempt has been made to fill this gap through the proposed African Court of Justice and Human and Peoples' Rights. The African Court, when formally established, will have competence to receive appeals from courts of RECs.[3] However, the treaties setting up tribunals of RECs do not envisage such appellate system. According to their founding treaties, decisions of each of the sub-regional tribunals are final and not appealable to any other regional tribunals.

The three tribunals that exercise full human rights jurisdiction in Africa – the African Court, African Commission and the ECOWAS Court of Justice -- interpret the African Charter, yet there is no formal agreement as to which of the three tribunals has primary responsibility for interpreting the provisions of the African Charter. In principle, it would seem the African Court has overriding competence for the interpretation of the African Charter. As argued by Viljoen, one of the fundamental consequences of the complementarity between the African Court and the African Commission is that the Court can 'overrule' the Commission.[4] What happens if the Commission or a sub-regional court decides to deviate from the interpretation of the African Charter by the African Court? The lack of clarity on hierarchy of competing interpretive competences of regional and sub-regional tribunal is

[2] African Human Rights Strategy, para 31 < http://au.int/en/sites/default/files/HRSA-Final-table%20EN%29%5B3%5D.pdf> (accessed 18 October 2016).

[3] Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the AU Assembly at its twenty-third ordinary session, held in Malabo, Equatorial Guinea, on 27 June 2014 (the Malabo Protocol), art 3(2).

[4] F Viljoen *International human rights law in Africa* (2012) 425.

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one challenge that has implication for the harmonious relationships of the selected HRTs in the future.

The normative dimension of the problem of lack of coordination is the absence of a common standard for the promotion and protection of human rights by the major regional and sub-regional HRTs. With the exception of the Protocol establishing the SADC Tribunal, the legal instruments setting up sub-regional courts in Africa recognised the promotion and protection of human rights on the basis of the African Charter as part of the fundamental principle or objective of the respective RECs.[5] The ECCJ is the only sub-regional court, at the time of writing, which exercises full human rights jurisdiction on the basis of the African Charter. The EACJ is yet to fully assume human rights jurisdiction in terms of the African Charter. Thankfully, the Appellate Division of the EACJ in the *Democratic Party* case has held that the EACJ has jurisdiction to ensure adherence to the African Charter and its supplementary Protocols.[6] The human rights jurisdiction and jurisprudence of the now defunct SADC Tribunal are not linked to the African Charter.[7]

6.2.2 Jurisdictional overlaps

The African Court was established to complement the protective mandate of the African Commission. This implies that the Commission still retains almost exclusive control over promotion of human and peoples' rights in terms of the African Charter. Some writers have suggested that the Commission should surrender its protective mandate to the Court, thus allowing the Commission to focus on promotional activities.[8] As Viljoen has argued, this suggestion is premature.[9] Only 30 out of 54 AU member states have ratified the Protocol setting up the African Court, and only seven states have made the article 34(6) declaration

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[5] Viljoen (n 4 above) 452.

[6] See *Democratic Party v The Secretary General of the EAC and others* Appeal No 1 of 2014 (*The Democratic Party* Appeal case) para 79 http://eacj.org/wp-content/uploads/2014/02/REFERENCE-NO-2-of-2012-Democratic-party-VS-SG-and-4-Others.pdf (accessed 11 October 2016).

[7] See ST Ebobrah 'Tackling threats to the existence of the SADC Tribunal: A critique of perilously ambiguous provisions in the SADC Treaty and the Protocol on the SADC Tribunal' (2010) 4 *Malawi Law Journal* 199, 211.

[8] M Mutua 'The African human rights court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342, 360 - 361; VOO Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 307.

[9] Viljoen (n 4 above) 424.

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which allows individual access to the Court.[10] As a result, the protective mandate of the African Commission is the only complaint mechanisms available under the African Charter for individuals in the 24 states that are yet to ratify the Court's Protocol. Also, individuals in the 47 states that have not made the article 34(6) declaration need to first invoke the Commission's protective mandate before their grievances can be heard by the Court.

The bottom line is that the protective mandate of the African Commission remains at the heart of the African human rights protection system. A communication submitted to the African Commission may be referred to the African Court by the Commission even before the Commission makes a ruling on admissibility.[11] This is one way the 'case referral mechanism' can be used to prevent unnecessary duplication of duties between the Commission and the Court. Another potential duplication of duty is the mandate of the African Commission to interpret the African Charter through advisory opinions.[12] The Court also under article 4 of its Protocol has advisory opinion jurisdiction. While the Commission's jurisdiction with regard to giving advisory opinion is limited to the African Charter, the Court may offer advisory opinion on the Charter and other relevant human rights instruments.[13] The fact that the Court is forbidden from giving an opinion on any matter pending before the African Commission is an internal mechanism that checks unnecessary duplication of functions between the Court and the Commission. However, the Protocol setting up the Court fails to clarify whether the Court may accept a request for advisory opinion the subject matter of which has been determined by the African Commission. Obviously, the admissibility requirement under article 56(7) is inapplicable to resolve the potential duplication of duties that this type of situation may give rise to.

In certain cases, the jurisdiction of regional and sub-regional tribunals overlaps. The recurring question has been at what point does the decision of a sub-regional court create '*res judicata*' effect on the jurisdiction of a regional court, and *vice versa*? This question is

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[10] African Union, 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 28 August 2017).

[11] 2010 Rules of Procedure of the African Commission, rule 118(1) - (4). See also Viljoen (n 4 above) 425.

[12] African Charter, art 45(3).

[13] African Court Protocol, art 4.

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very important because the decisions of these tribunals on the same subject matter are seldom made on the basis of the same treaty. While regional HRTs rely on the African Charter and other AU human rights treaties, sub-regional courts more often than not rely on their founding treaties. Can an unsuccessful party before a sub-regional tribunal subsequently approach a regional tribunal? This may not be possible. The treaties setting up the various regional tribunals in African prohibit them from accepting complaints that have been 'settled' by any judicial mechanism of a supranational nature recognised by the UN or the AU.[14]

Can an unsuccessful party before a regional tribunal subsequently approach any of the sub-regional tribunals over the same dispute? On the basis of the principle of *res judicata,* the answer to this is 'No'.[15] Can a litigant simultaneously litigate the same matter before a regional human rights tribunal and a sub-regional court? The answer to this will depend on a number of factors such as the provisions of the treaties setting up the various HRTs. For instance, the subject matter of the *Yogogombaye* case decided by the African Court was simultaneously ligated before the ECOWAS Court in the *Hissène Habré* case.[16] When conflicting decisions result from these proceedings, it is not clear how litigants and states will respond.

6.2.3 The problem of forum shopping

Forum shopping, which literally means choosing from multiple forums, is the practice whereby litigants submit their legal disputes to courts they believe would produce the most favourable judgment. The practice may lead to dearth of cases in one tribunal and the overload of cases in another. This is one major challenge that regional and sub-regional HRTs selected for this study will have to contend with as they develop their jurisprudence. Viljoen argues that litigants' choice of forum is influenced by a cluster of factors including the type of provision litigants are seeking to enforce, the likelihood of success drawing from the tribunal's previous jurisprudence, and the legal effect of the decision of the tribunal.[17] In addition to the three factors identified by Viljoen, one primary logistical factor

[14] African Charter, art 56(7); African Court Protocol, art 6(2).
[15] See Viljoen (n 4 above) 454.
[16] As above.
[17] Viljoen (n 4 above) 455.

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that influence litigants to choose one international tribunal over another is accessibility. Tribunals that are geographically proximate to litigants generally have higher usage rate. This, to some extent, explains the surge of cases against the Republic of Tanzania at the African Court. In 2015 alone, not less than 26 cases were submitted against Tanzania at the African Court.[18] So far in 2016, 46 cases have been submitted at the Court against Tanzania.[19]

Accessibility of an international human rights tribunal may also be understood in terms of the criteria for submitting complaints to the tribunal. A tribunal with flexible admissibility criteria may have high usage rate than those with very stringent accessibility criteria. This factor perhaps explains why the ECOWAS Court of Justice, which has no requirement for exhaustion of domestic remedies, has been inundated with cases in recent years.[20] Dealing with dearth of cases in one tribunal and overflow in another tribunal is one challenge the selected regional and sub-regional HRTs will have to face sooner rather than later.

6.2.4 Hostile responses from government officials

The African Commission is no stranger to backlashes and hostiles responses from state representatives and government delegations. On a number of occasions, state representatives have mounted high level resistance to the adoption of reports containing decisions of the Commission which the government found to be offensive or embarrassing. In 2004, the African Commission submitted its 17th Activity Report to the AU Assembly for adoption as required in terms of article 59 of the African Charter. The 17th Activity Report contained the final report of an on-site mission to Zimbabwe in which the Commission presented damning allegations of human rights violations against the government.[21] When the Activity Report was tabled for adoption at the 3rd ordinary session of the AU Assembly in 2004, the government of Zimbabwe raised objections that it has not had prior access to the mission report and was not given an opportunity to

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[18] African Court on Human and Peoples' Rights 'Pending cases' http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#pending-cases (accessed 18 October 2016).

[19] As above.

[20] See for instance, 'ECOWAS Court holds 89 sessions, delivers 34 judgements in 2015/2016 legal year' *Premium Times* 28 September 2016.

[21] F Viljoen 'Recent developments in the African regional human rights system' (2004) 4 *African Human Rights Law Journal* 344, 345.

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respond to it. Acting on Zimbabwe's objections, the AU Assembly suspended the publication of the entire 17th Activity Report of the Commission until the comments of the government of Zimbabwe were attached to the mission report.[22]

In 2005, governments of Ethiopia, Eritrea, Zimbabwe, Uganda and the Sudan teamed up to block the adoption of the African Commission's 19th Activity Report They alleged that the Commission publicised those resolutions prior to their adoption by the relevant AU organs. As a result, the Executive Council of the AU in its decision requested the African Commission to expunge the affected resolutions from its Activity Report until the states concerned responded to the resolutions.[23] Drawing from these experiences, the Executive Council has made a rule curtailing the Commission's freedom to publish the report of its mission without first seeking government's inputs and comments.[24]

On another occasion, the government of Zimbabwe during the presentation of the African Commission's 20th Activity Report to the AU Executive Council, objected to the publication of the Commission's decision in *Zimbabwe Human Rights NGO Forum v Zimbabwe.*[25] As a consequence, the AU Executive Council refused to approve the decision for publication until the decision was formally communicated to the government of Zimbabwe and the government was given three months within which to provide its response to it.[26] Also in 2005, the AU Commission requested the African Commission's Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons, Commissioner Nyanduga, to undertake a fact finding mission to Zimbabwe between 30 June and 4 July 2005.[27] The Special Rapporteur travelled to Zimbabwe on 5 June 2005 but on the following day, the

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[22] See AU Assembly, 'Decisions and declaration: Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights - Doc. EX.CL/109 (V)', Assembly/AU/Dec.49(III) Rev.1.

[23] See Resolution of the AU Executive Council entitled 'Decision on the 19th Activity Report of the African Commission on Humana and Peoples' Rights', 8th ordinary session, EX.CL/Dec.257(VIII). See also African Commission on Human and Peoples' Rights, Twentieth Activity Report, EX.CL/279/(IX) 46.

[24] See Viljoen (n 21 above).

[25] (2006) AHRLR 128 (ACHPR 2006).

[26] African Commission on Human and Peoples' Rights, Twenty-First Activity Report, EX.CL/322(X) 13, para 60.

[27] African Commission on Human and Peoples' Rights, Nineteenth Activity Report, EX.CL/236 (VIII) 11, para 38.

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Ministry of Foreign Affairs of Zimbabwe ordered the Special Rapporteur to leave the country.[28]

Following the decision of the African Commission in *Good v Botswana*,[29] the government of Botswana stated unequivocally through a Diplomatic Note that: 'the Government has made its position clear; that it is not bound by the decision of the Commission.'[30] In the case of *International Pen and Others (on behalf of Ken Saro-Wiwa) v Nigeria*,[31] the African Commission issued a provisional measure requesting the government of Nigeria to suspend the execution of the 'Ogoni nine' pending the determination of their complaints before the Commission. The request was ignored, and the government as if asking the Commission to do its worst, proceeded with haste to execute all the nine applicants.[32] These are only a handful of cases where states have challenged the authority of the African Commission, and actually backed up their positions with hostile measures.

The African Court and the African Children's Committee have not faced any significant political backlash from states. The complaint procedures of the two bodies is at its infancy when compared with the more developed procedure and jurisprudence of the African Commission. One instance of a backlash that comes readily to mind in the case of the African Court is the March 2016 decision of the government of Rwanda to withdraw its article 34(6) declaration following series of lawsuits filed against the state by private litigants.[33]

More political backlash has been experienced by sub-regional tribunals in Africa. Attempts by the ECCJ, EACJ and the SADC Tribunal to invest in themselves human rights jurisdiction through creative interpretation of their founding treaties attracted hostile reactions from

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[28] As above.

[29] (2000) AHRLR 25 (ACHPR 1997).

[30] African Commission on Human and Peoples' Rights, Combined 32nd and 33rd Activity Report, EX.CLU/782(XXII)Rev.2, 9, para 24.

[31] (2000) AHRLR 212 (ACHPR 1998).

[32] See VO Ayeni 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case study of Nigeria' unpublished LLM dissertation, University of Pretoria, 2011, 2.

[33] Centre for Human Rights, 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court.html (accessed 20 October 2016).

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states. Alter, Gathii and Helfer chronicled three backlash attempts against sub-regional tribunals in Africa.[34] One of the attempts succeeded, another failed while the third was redirected.[35] As a result of the various rulings of the SADC Tribunal against the government of Zimbabwe, especially the *Campbell* decisions, the government of Zimbabwe mounted a campaign that resulted ultimately in the suspension of the Tribunal, and the abolition of access rights for private litigants.[36]

In East Africa, the government of Kenya sought to abolish the East African Court of Justice following a ruling of the Court in the case of *Anyang Nyong'o v Attorney General of Kenya* challenging the election of a Kenya national into the East African Legislative Assembly.[37] While Kenya's initial proposal failed, it succeeded in securing a revision of the EAC Treaty. The amended Treaty introduced an appellate chamber, added a new ground for removal of judges, restricted the court's material jurisdiction and imposed a limitation period for private litigants intending to submit complaints to the EACJ.[38]

Following unfavourable judgments of the ECOWAS Court of Justice in the cases of *Ebrima Manneh v The Gambia* and *Musa Saidykhan v The Gambia*, the government of the Gambia responded by submitting a proposal to the ECOWAS Commission seeking to amend the 2005 ECOWAS Supplementary Protocol. The text of the proposed amendment included provisions that would scale down the powers and jurisdiction of the Court, create an appellate chamber and introduce additional admissibility criteria.[39] The proposed amendment was rejected unanimously by a Committee of Legal Experts convened to review and discuss the proposal.[40] The Committee's position was subsequently endorsed by the ECOWAS Council of Justice Ministers. The Gambian backlash, instead of resulting in a sweeping erosion of the ECOWAS Court's jurisdiction, led ultimately to the adoption of even more stringent rules for the enforcement of the decisions of the Court in 2012. The

[34] KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293, 293 - 328.
[35] As above.
[36] Alter, Gathii & Helfer (n 34 above) 306 - 315.
[37] Alter, Gathii & Helfer (n 34 above) 300 - 306.
[38] As above.
[39] Alter, Gathii & Helfer (n 34 above) 297 - 298.
[40] As above.

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failure of the Gambian backlash has been attributed to effective civil society mobilization as well as information sharing and indirect coalition building by the ECOWAS Commission.[41]

6.2.5 Inadequate funding

A paucity of funds is another major challenge impeding the work of the selected regional and sub-regional HRTs. The resources at the disposal of these tribunals are seldom enough to implement their mandates. Even if it is a resource constrained world, still judicial institutions need to be well resourced in order to perform optimally. Viljoen identified inadequate support and meagre resource allocation from the AU as one of the seven challenges facing the African Court.[42] As at the time of writing, the African Children's Rights Committee is grossly under-resourced with no functional secretariat of its own.[43] For instance, the Committee's budget for the year 2016 stood at US$739,178.[44] The Committee ranks fourth among the AU institutions with the least budgetary allocation.[45] The African Commission is no exception. The Commission's secretariat has always been under resourced.[46] Despite its numerous promotional activities, the African Commission's budget for the financial year 2016 stood at US$ 5,581,245, a lot less than the allocation to the African Court which was US$ 10,286,401 for the same financial year.[47] The Commission relies largely on funds and support from external donors for many of its activities.

The ECCJ has consistently lamented the paucity of funds available for its operations.[48] The Court also expressed concerns about being short-changed in the disbursement of funds by the ECOWAS Commission. This is in addition to the problem of inadequate office space which successive Presidents of the Court have flagged. The EACJ has recently reported

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41 Alter, Gathii & Helfer (n 34 above) 319.
42 Viljoen (n 4 above) 465 - 466.
43 As above.
44 Budget of the African Union for the 2016 Financial Year, Doc. Assembly/AU/3(XXV), Assembly/AU/Dec. 577(XXV) [2015] http://www.saflii.org/au/AUDECISIONS/2015/19.html (accessed 31 December 2016).
45 As above.
46 Viljoen (n 4 above) 294.
47 Budget of the African Union for the 2016 Financial Year, Doc. Assembly/AU/3(XXV), Assembly/AU/Dec. 577(XXV) [2015] http://www.saflii.org/au/AUDECISIONS/2015/19.html (accessed 31 December 2016).
48 'The ECOWAS Court has expressed concern over non-implementation of its judgment by the members' states' *Vanguard Online News* 28 June 2016 http://www.vanguardngr.com/2016/06/ecowas-court-laments-non-execution-judgment-member-states/ (accessed 19 October 2016).

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that it faces 'crippling challenges' including 'budgetary constraints', 'lean staff' and 'undetermined terms and conditions of service for Judges'.[49] In response to the problem of inadequate funding, the African Commission has called on AU political organs to set up a 'Voluntary Contribution Funds for African Human Rights Institutions'.[50] As at July 2017, this Fund has not been created.

6.3. Hindrances to compliance and influence

The single most important challenge facing the selected regional and sub-regional HRTs in Africa is non-compliance by state parties with their decisions. In order for the HRTs to fulfil their mandate, there is a need for them to identify and address the barriers to state compliance. A study by Viljoen and Louw, which analysed the status of compliance with the recommendations of the African Commission in 44 communications as at 2004, found that only six (representing 14 percent) of the 44 decisions have been fully complied with.[51] Another study carried out in 2013 by Adjolohoun found that 66 percent of the merit decisions of the ECCJ have been fully complied with and implemented by states.[52] However, quite recently, the ECCJ has decried non-compliance with its decisions.[53] As the Court itself noted, 'enforcement is the major challenge because most of the member states have not designated their focal points for the enforcement of the decisions of the court.'[54] As at July 2017, only Nigeria, Guinea and Togo have adopted mechanisms for

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49 East African Court of Justice, 'Strategic Plan 2010 – 2015' (April 2010) v, http://eacj.huriweb.org/wp-content/uploads/2013/09/EACJ_StrategicPlan_2010-2015.pdf (accessed 19 October 2016); Gathii (n 437 above) 250.

50 See Decision on the 21st Activity Report of the African Commission, AU Doc EX.CL/Dec.344(X), para 2(vi), referred to in Viljoen (n 4 above) 294.

51 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and People's Rights, 1994-2004' (2007) 101 *American Journal of International Law* 4 - 5; L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005, 61.

52 HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: compliance and influence' unpublished LLD thesis, University of Pretoria, 2013, vi.

53 See KJ Alter, LR Helfer & JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 746, 739. For earlier suggestions on how to secure compliance with judgments of the ECCJ, see KO Kufuor 'Securing compliance with the judgements of the ECOWAS Court of Justice (1996) 8 *African Journal of International and Comparative Law* 4.

54 Community Court of Justice – ECOWAS 'Court President calls on ministers responsible for regional integration to facilitate the implementation of its decisions' http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=251:court-

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implementing decisions of the ECCJ.[55] The ECCJ has now devised three strategies to promote compliance with its decisions, namely the requirement of strict proof from applicants, issuance of very limited remedies and conducting public outreach on the importance of compliance with its decisions.[56] The extent to which these strategies have improved compliance with decisions of the ECCJ has been discussed in chapter 4. In response to the 11 decisions issued by the SADC Tribunal against Zimbabwe,[57] the government of Zimbabwe publicly rejected the decisions and stated categorically that it will not comply with them.[58] The Zimbabwean government did not stop at 100 percent non-compliance; it went ahead to engineer the suspension of the SADC Tribunal.[59]

In Tanzania, this study found that four of the six reparation orders issued by the African Court in the *Mtikila* case have not been complied with. The Gambia recorded 100 percent non-compliance with reparation orders of the ECCJ. Eleven of the 14 reparation orders of the African Commission issued against Zimbabwe between 2000 and 2015 have not been complied with. Seven of the 13 reparation orders issued by the ECCJ against Nigeria also during the study period have not been complied with. These numbers prompt the question: What factors hinder the selected states from complying with remedial orders of selected human rights bodies? Clearly, the absence of one or more of the five primary factors identified in chapter 4 of the thesis – namely limited commitment to compliance by states; the presence of free, stable and democratic system; issuance of low-cost, specific and limited reparation orders by the relevant HRT; effective follow-up by HRTs and NGOs; and regular political transition or regime change at the state-level – may encumber human rights judgment compliance. The five primary compliance factors are framed

president-calls-on-ministers-responsible-for-regional-integration-to-facilitate-the-implementation-of-its-decisions&catid=14:pressrelease&Itemid=36 (accessed 19 October 2016).

[55] See 'Nigeria among only three countries implementing ECOWAS court judgements – Wright' *The Eagle Online* http://theeagleonline.com.ng/nigeria-among-only-three-countries-implementing-ecowas-court-judgements-wright/ (accessed 1 August 2017).

[56] Alter, Helfer & McAllister (n 53 above) 765 - 766.

[57] See E de Wet 'Reactions to the backlash: Trying to revive the SADC Tribunal through litigation' http://www.ejiltalk.org/reactions-to-the-backlash-trying-to-revive-the-sadc-tribunal-through-litigation/ (accessed 10 October 2016).

[58] A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond' (2009) 9 *African Human Rights Law Journal* 590, 610 - 611.

[59] See E de Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' (2013) 28 *ICSID Review* 1, 1 - 19.

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deliberately in positive, not negative terms for a number of reasons. First, the analysis in chapter 4 is aimed at identifying the factors that influence states to comply. Secondly, it is common knowledge that narratives about African states are mostly portrayed with a focus on the negatives and not the many ways the African stories are similar to the experiences of other regions.[60]

Actually, a lot has been written on the problems of the African human rights system and the cause of the widespread non-compliance by states.[61] Most of what has been written is related to the five primary compliance factors identified in chapter 4. For example, Ayinla and Wachira, in their study of the implementation of the recommendations of the African Commission, provided a number of explanations for the poor rate of compliance by African states which include 'the lack of political will on the part of state parties, a lack of good governance, outdated concepts of sovereignty, a lack of an institutionalized follow-up mechanism for ensuring the implementation of its recommendations, weak powers of investigation and enforcement and the non-binding character of the Commission's recommendations, the last of which is the most cited reason why states have not been inclined to enforce its recommendations.'[62]

The question was put to respondents selected for the study to identify hindrances to state compliance with reparation orders of the selected HRTs, and similar sentiments were expressed by the respondents. Five main barriers to implementation and compliance with HRTs' decisions in the selected states were identified, namely: ineffective supervision mechanisms, weak domestic infrastructures, weak state institutions, poor institutional designs of HRTs and poor system of governance.[63] Attitude barriers, including negative

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60 See 'Elumelu: Pervasive negative narrative is Africa's greatest challenge' *This Day Newspaper* 13 September 2017.

61 See R Gittleman 'The African Charter on Human and Peoples' Rights' (1981 - 1982) 22 *Virginia Journal of International Law* 667, 694; HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (2000) 920; J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 72, 72.

62 See GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 African Human Rights Law Journal 465, 470 - 471.

63 See, for example, email from OC Okafor on 5 May 2016; email from A Possi on 30 March 2017; email from S Ibe on 25 May 2016; interview with S Egbeyinka, legal counsel in some of the ECCJ cases selected for this study & Legal Counsel, Falana & Falana Chambers, Abuja (Abuja, 20 May 2016); interview with A Longe, Programme Manager, Media Rights Agenda (Lagos, 13 May 2016). Okafor, for example identified the

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perceptions about the role and importance of international protection of human rights, were identified as the underlying cause of the various barriers to compliance and influence of HRTs' decisions. The next sub-sections examine these barriers and hindrances to state compliance in greater detail.

6.3.1 Ineffective supervision mechanisms

One of the often cited hindrances to human rights judgment compliance in Africa is the general weakness of the enforcement mechanisms of regional and sub-regional HRTs. It is usually assumed that states will comply in good faith with recommendations and orders of the selected HRTs, especially the African Commission and the African Children's Rights Committee. This explains why there is usually no developed framework regulating enforcement and lack of explicit powers for HRTs to enforce compliance with their decisions. So far, mechanisms for monitoring the implementation of decisions of the selected HRTs have been largely judicial and administrative rather than political. This problem was identified as lack of commitment to compliance by the intergovernmental organisation that sets up the tribunal in the analysis of factors influencing state compliance in chapter 4.

The African Court, for instance, plays a facilitating role in the process of implementation of its judgments.[64] The Court transmits its judgment to the relevant state, clarifies its orders on a request from the state, and notifies the relevant organs of the AU on the status of compliance.[65] The Court has been reporting non-compliance to the relevant AU organs through its annual reports and follow-up letters. The AU Executive Council has the mandate to monitor execution of the Court's judgments on behalf of the AU Assembly.[66] There is no indication the Executive Council takes any further steps to monitor

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following obstacles to state compliance: 'absence of political will, ignorance about specific recommendations, absence of technical or other expertise required to implement the decision, unspecific recommendations, cost of implementation – financial, bureaucratic, political and economic, poor communication and non-existent follow-up mechanism between the state and human rights body and weak state institutions.' See Okafor (n 63 above).

[64] Coalition for an Effective African Court on Human and Peoples' Rights *Booklet on the implementation of decisions of the African Court on Human and Peoples' Rights* (2017) 8.

[65] See African Court Protocol, arts 29 - 31.

[66] See African Court Protocol, art 29(2).

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implementation after receiving the compliance report from the Court.[67] Several highly respected writers and commentators have described the implementation mechanisms of the African Charter in relation to the African Commission as the least developed among the three main regional human rights system, woefully deficient, weak, ineffectual and dysfunctional.[68] None of the selected HRTs has a functional monitoring body similar to the Committee of Ministers of the Council of Europe and the Department for the Execution of Judgments of the European Court of Human Rights. Even though some political bodies exist within the AU with similar mandate, none of these bodies could be regarded as 'functional' in relation to monitoring execution of decisions and judgments of the selected HRTs.

When asked to cite the most important factor to explain the widespread non-compliance with decisions of the selected HRTs, most of the respondents cited the lack of effective supervision mechanisms and failure by the relevant intergovernmental authorities to impose stiff penalties on states for non-compliance.[69] Even though the legal instruments setting up the ECCJ, EACJ and SADC Tribunal provide for the imposition of sanctions on states in the case of non-compliance, sanctions have not been implemented in practice. To address the problem of non-compliance, respondents recommended that authorities of the AU, EAC, ECOWAS and SADC should treat with severe sanctions states that do not comply with decisions of the relevant HRTs.[70] Sanctions should include suspension of bilateral and multilateral relations with a non-complying member state.[71]

6.3.2 Weak domestic infrastructures

A fundamental principle of international human rights law is that states have the primary responsibility to implement decisions of HRTs.[72] Thus, while effective supervision at the supranational level matters for state compliance, what matters even more is the existence

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[67] Coalition for an Effective African Court on Human and Peoples' Rights (n 64 above) 8.
[68] See Gittleman (n 61 above) 694; Steiner & Alston (n 61 above) 920; Okafor (n 61 above) 41.
[69] See, for instance, Egbeyinka (n 63 above). See also telephone communication with T Adewale, Deputy Director, SERAP on 6 April 2017.
[70] See Egbeyinka (n 63 above).
[71] As above.
[72] Open Society Justice Initiative *From rights to remedies: Structures and strategies for implementing international human rights decisions* (2013) 25

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of implementing infrastructures at the domestic level. The problem of weak domestic infrastructure was identified as lack of commitment to compliance at the national level in the analysis of factors influencing state compliance in chapter 4. Domestic infrastructures for human rights judgment implementation are not only institutional in nature but also legal and political. Thus, in addition to creating institutions for human rights judgment compliance, there is a need to enact laws, adopts rules of procedures and guidelines, and create a domestic political climate supportive of international institutions, particularly HRTs. Although every branch and level of government bears the responsibility for state compliance, actual implementation rests on specific institutions within the state.'[73] Some of the institutions typically implicated in the process of implementation include government ministries, departments and agencies, parliament, judiciary and NHRIs; the challenge for states therefore is to institutionalise the involvement of the various institutions and actors.[74]

At the time of writing, decisions of regional and sub-regional HRTs are channelled to the selected states through the Ministry of Foreign Affairs or the Ministry of Justice.[75] In The Gambia, Nigeria and Zimbabwe, the national 'focal point' responsible for carrying out international human rights obligations including liaising with HRTs is the Ministry of Justice.[76] In Uganda, the national 'focal point' is the Ministry of Foreign Affairs[77] while in Tanzania, it is the Ministry for Constitutional and Legal Affairs and the Division of Constitutional Affairs and Human Rights in the Attorney General's Chambers.[78] The national focal points usually liaise with the relevant state institution whose mandate

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[73] Open Society Justice Initiative (n 72 above) 27.

[74] E Lambert-Abdelgawad 'The execution of the judgments of the European Court of Human Rights: Towards a non-coercive and participatory model of accountability' (2009) 69 *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 397, 397 - 432.

[75] See Coalition for an Effective African Court on Human and Peoples' Rights (n 64 above) 7.

[76] See S Nabaneh 'The impact of the African Charter and the Maputo Protocol in The Gambia' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 77; VO Ayeni 'The impact of the African Charter and the Maputo Protocol in Nigeria' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 185; T Mutangi 'The impact of the African Charter and the Maputo Protocol in Zimbabwe' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 282.

[77] See AD Kabagambe 'The impact of the African Charter and the Maputo Protocol in Uganda' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 266.

[78] See GK Kazoba & C Mmbando 'The impact of the African Charter and the Maputo Protocol in Tanzania' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 251.

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touches on the subject matter of the decision. The problem with this approach is that the implementation process is *ad hoc*, fragmented and lacks proper coordination. The national focal also usually lacks a well-defined mandate for judgment implementation and the mechanisms are rarely well-funded.[79] The ECCJ, for example, has requested states to appoint competent national authorities for receiving and enforcing a writ of execution from the Court.[80] As at July 2017, only four countries – Nigeria, Guinea Bissau, Mali and Burkina Faso – had designated the relevant national authority.[81] The Gambia and other 10 countries are at various levels of compliance.

Apart from the limited mechanisms situated within the ministries of justice, foreign affairs and the Attorney General's Office, which are mostly poorly resourced, badly staffed, and politically feeble,[82] there is no dedicated body in parliament, judiciary or even the responsible ministry for supervising implementation of HRTs' decisions in the selected states. There is no procedural requirement to inform parliament of adverse decisions of HRTs in the selected states. There is also a lack of 'formalised channels of communication' not only among the three branches of government but also within government ministries, departments and agencies in matters relating to implementation of human rights decisions. At least, six parliaments in Europe, namely those of Croatia, Finland, Hungary, Romania, Ukraine, and the United Kingdom have established special mechanisms for supervising implementation of judgments of the European Court of Human Rights.[83] Similarly, 12 states in Europe have special procedures for informing parliament about an adverse decision by the European Court.[84] In the Netherlands, it is obligatory for the parliament to be briefed not only about adverse judgements against The Netherlands but also those against other countries.[85]

[79] Open Society Justice Initiative (n 72 above) 28.
[80] 1999 ECOWAS Court Protocol, art 24 as amended by 2005 ECOWAS Supplementary Protocol, art 6.
[81] 'Forty-six cases filed before the ECOWAS Court during the last legal year' http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=336:forty-six-cases-filed-before-the-ecowas-court-during-the-last-legal-year&catid=14:pressrelease&Itemid=36 (accessed 31 July 2017).
[82] Open Society Justice Initiative (n 72 above) 28.
[83] Open Society Justice Initiative *From judgment to justice: Implementing international and regional human rights decisions* (2010) 32.
[84] Open Society Justice Initiative (n 83 above) 55.
[85] As above.

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National human rights institutions (NHRIs) in the selected states currently plays little or no role in the implementation of decisions of the selected HRTs.[86] This is unfortunate as NHRIs could provide a form of nationally institutionalized pressure on executive actions.[87] The involvement of NHRIs and parliament in the process of implementation could increase 'pressure for compliance at the domestic political level'.[88] The absence of dedicated domestic implementation mechanisms in the selected states makes follow-up very difficult because institutional memory is not preserved.[89] With a designated implementing authority in each ministry including parliament and judiciary, any time there is a decision against a state, the judgment will simply be forwarded to the implementing authority, and follow-up also can be done through the mechanism. Respondents interviewed during the study complained that the current practice which is largely *ad hoc* and limited to the ministries of justice or foreign affairs constitutes a barrier to state compliance and influence of HRTs' decisions.[90]

6.3.3 Weak institutions

The problem of weak state institutions was identified as lack of commitment to compliance at the sub-national level in the analysis of factors influencing state compliance in chapter 4. It is easy to put the blame for states' poor compliance records at the feet of the ministry of justice or any other government department that acts as a focal point for implementation. The truth is many government institutions and non-state organisations, from parliament, judiciary, police, intelligence agencies, electoral bodies, anti-corruption agencies, NGOs and some lesser known establishments, are implicated in human rights judgment implementation, depending on the issues involved in the case. The capacity and independence of these institutions is crucial for state compliance.

The selected states mostly have strong individuals and weak institutions.[91] The efficiency and effectiveness of many institutions in the selected states is usually linked to certain

[86] See generally VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 1 - 308.
[87] Open Society Justice Initiative (n 83 above) 56.
[88] Open Society Justice Initiative (n 83 above) 56 - 57.
[89] Egbeyinka (n 63 above).
[90] See, for instance, Egbeyinka (n 63 above).
[91] See Longe (n 63 above).

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individuals, not the existence of protocols, rules or systems. The absence of strong and independent institutions make politics rather than principles the basis of state actions including in the areas of human rights judgment compliance. In the selected states, most state institutions are tied to the apron-string of powerful individuals who decide what ought to be done based on what is favourable to them. Respondents noted that the failure of the selected states consistently to observe the rule of law make institutions weak, thus constituting a barrier to human rights judgment compliance.[92] Respondents observed that when state institutions such as the parliament, the court system, electoral bodies and anti-corruption agencies are weak, accountability is low, and so, political actors are able to defy orders of national and international tribunals with impunity. A recent study of nine member-states of the Council of Europe (CoE) finds a direct correlation between state compliance and government effectiveness, defined as 'the capacity of state institutions to coordinate and formulate policies in a timely manner.'[93]

In the case of The Gambia and Zimbabwe, respondents cited weak state institutions as responsible for low records of compliance.[94] Weak state institutions are responsible in certain cases for the lack of political transition, lack of political will and lack of national and sub-national commitment to comply with HRTs' decisions. The 'big man syndrome' not only in the states selected for the study but across Africa implies that the political, judicial, electoral and other systems operate at the discretion of the President and few powerful individuals. They appoint members of the electoral body, constitute the courts, control law enforcement and sometimes even the media. The surprise political transitions in The Gambia and Zimbabwe in 2017 proves that the people, when they stand united and receive the support of relevant international actors, can break the syndrome of strong individuals and weak institutions. However, real victory over the problem of weak institutions and the 'big man syndrome' in the selected states is not the removal of one or more sit-tight leaders but ensuring that new political demagogues do not emerge.

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[92] As above.

[93] See D Anagnostou & A Mungiu-Pippidi 'Domestic implementation of human rights judgments in Europe: Legal infrastructure and government effectiveness matter' (2014) 25 *European Journal of International Law* 205, 205.

[94] See Egbeyinka (n 63 above); Longe (n 63 above). See also interview with CA Odinkalu, former chairperson of the Governing Council, Nigeria's National Human Rights Commission (Abuja, 23 May 2016).

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6.3.4 Poor institutional designs of some HRTs

Some of the respondents also raised the recommendatory nature of the decisions of the African Commission and the African Children's Rights Committee as a possible cause of non-compliance.[95] The problem of poor institutional design was identified as lack of commitment to compliance at the supranational level in the analysis of factors influencing state compliance in chapter 4. It would be recalled that there were debates initially about the competence of the African Commission to take on individual communications.[96] This debate was due largely to the poor drafting of article 55 of African Charter relating to 'other communications'. This lack of clarity about the competence of the African Commission to handle individual communications provided some states flimsy excuses to justify their non-compliance.[97]

The article 55 debate is also further complicated by the non-binding or recommendatory nature of the Commission's findings. Even the Commission itself has not been consistent regarding its approach on the legal status of its decisions.[98] For instance, the Commission has described its mandate as follows: 'the mandate of the Commission is quasi-judicial and as such, its final recommendations are not in themselves legally binding on the States concerned'.[99] There is no question the non-binding nature of the Commission's findings will continue to affect the perception of states towards its decisions; thus constituting a major obstacle to compliance.[100] In a number of cases earlier discussed, some states have expressed disagreement on this grounds with decisions of the selected HRTs, particularly the African Commission. Following the decision of the African Commission in *Good v*

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[95] See Possi (n 63 above); Okafor (n 63 above); Ibe (n 63 above).

[96] See generally CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law and Contemporary Problems* 358, 369 - 372.

[97] See, for instance, the Botswana government's response with regard to Communication 313/05 *Good v Botswana*, as reported in the combined 32nd and 33rd activity report of the African Commission (2012) EX.CL/782(XXII) Rev 2, para 24.

[98] R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 50-53.

[99] Murray & Long (n 98 above) 53. See for instance, African Commission information sheet on the communication procedure, section on recommendations or decisions http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf (accessed 23 August 2017).

[100] See Open Society Justice Initiative (83 above) 28.

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Botswana,[101] the government of Botswana stated unequivocally through a Diplomatic Note that: 'the Government has made its position clear; that it is not bound by the decision of the Commission.'[102]

According to one respondent, the existence of specific provisions making decisions of HRTs binding 'takes away an important and plausible rationale for non-compliance.'[103] Governments can no longer simply say that they will not comply because they are not bound to do so. This makes it harder to justify their non-compliance.[104] The argument was also made by respondents that because of their design, sub-regional HRTs may not be effective at protecting human rights.[105] This is because, unlike the African Commission, African Court and the African Children's Rights Committee, sub-regional tribunals were not created specifically to deal with human rights, but established for a number of tasks including trade.[106] This dual mandate, from time to time, may make sub-regional courts to be 'caught up in two minds' in choosing their established functions, especially when faced with integration matters. In other words, these courts have no specific human rights mandate which might compromise their effectiveness in dealing with human rights matters. This study has argued in chapter 4 that even though the perceived legal status of the decisions of a HRT is not a strong predictor of whether a state would comply with decisions of HRTs in the in a particular case, it undoubtedly remains relevant to the implementation process at the domestic level.[107]

6.3.5 Poor system of governance

Some of the respondents also observed that poor system of governance in some states constitute obstacles to human rights judgment compliance.[108] The data from The Gambia

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101 (2000) AHRLR 25 (ACHPR 1997).

102 African Commission on Human and Peoples' Rights, Combined 32nd and 33rd Activity Report, EX.CLU/782(XXII)Rev.2, 9, para 24.

103 Okafor (n 63 above).

104 As above.

105 Possi (n 63 above).

106 As above.

107 See Murray & Long (n 98 above) 15. See also M Barelli 'The role of soft law in the international legal system: The case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 957, 972.

108 Okafor (n 63 above); Possi (n 63 above).

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and Zimbabwe in this study points to the poor system of governance in the two countries as a major impediment to compliance. It was demonstrated in chapter 4 that there is a clear and direct correlation between state compliance and the system of governance at the domestic level. The result of the analysis, based on Table 4.9 in chapter 4 shows that out of the five states selected for the study, the top three states, in terms of aggregate compliance, are mostly ranked 'partially free' while the two least complying states have also been rated mostly 'not free' by the Freedom House.

Nearly all the respondents agree that the democracy status of a country is relevant for state compliance, and that states with poor governance systems are very likely to be habitual defaulters of HRTs' decisions. One respondent argued that 'the more open a state is, the more likely that its citizens will demand accountability both for internal as well as external affairs.'[109] Two important points, however, were made by the respondents. First, they noted that what matters most for state compliance is 'the real life democratic depth of the governance arrangement in the country concerned, regardless of whether it is formally styled a democracy or not.'[110] Secondly, it was also noted that even though the perception is correct that open, liberal and democratic states tend to comply more with remedial orders or recommendations of international human rights bodies than closed, illiberal and non-democratic states, the fact that more open and democratic states also need to consult more broadly may mean that compliance may in fact suffer.[111] While democratic consultations could impede state compliance in a few cases, the respondents agree that poor system of governance in many cases constitute an obstacle to state compliance.[112]

6.3.6 Other barriers to state compliance

Other barriers to state compliance identified during the study include the unspecificity of reparation orders of HRTs.[113] According to Possi, clarity and specificity of reparation orders

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[109] As above.
[110] Ibe (n 63 above).
[111] Okafor (n 63 above).
[112] Okafor (n 63 above); Ibe (n 63 above); Possi (n 63 above).
[113] As above.

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enable governments to know exactly what is needed to remedy the situation.[114] Lack of awareness about international human rights system was also identified as a possible hindrance to state compliance and influence of HRTs' decisions.[115] It was pointed out, correctly I believe, that many senior legal practitioners in the selected states do not know of the existence of international human rights remedial mechanisms and those who know about the international protection system tend to have more faith in the domestic legal system.[116] Ignorance about the decisions of HRTs is also worsened by widespread poverty and illiteracy in the selected states. Poverty and illiteracy affects the capacity of members of various communities in whose favour HRTs have ruled to effectively follow-up on the decisions. Ineffectiveness of follow-up by HRTs and NGOs was also mentioned as a possible barrier to state compliance. According to one respondent, the *Mtikila* case has not been given much attention by civil society in making the government to comply.[117] The other reason might be due to the fact that Mr Christopher Mtikila himself has passed-on and as a result, there is no one to push his agenda the way he would have done[118] Non-domestication of human rights treaties by the selected states and perceptions about monism and dualism were also identified as barriers which impact negatively on state compliance and the overall impact of HRTs' decisions.

6.4 Chapter conclusion

This chapter discusses five main challenges of the selected regional and sub-regional HRTs in Africa and identifies five hindrances to state compliance and influence of HRTs' decisions in the selected states. The chapter argues that notwithstanding the proliferation on the African continent of bodies with human rights mandate, the AU is yet to adequately mainstream human rights into its processes and programmes. This results in lack of coordination and collaboration among the various AU organs, avoidable jurisdictional overlaps as well as duplication of functions and also the problem of limited capacity of, and limited access to, the various human rights-protecting institutions. The chapter,

114 Possi (n 63 above).
115 Egbeyinka (n 63 above).
116 As above.
117 Possi (n 63 above).
118 As above.

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however, notes that while the AU Human Rights Strategy has not solved most of these problems, the Strategy remains one of the clearest policy documents from a major AU organ aimed at addressing the problems.

The chapter argues that state compliance and influence of HRTs' decisions in the selected states have been limited as a result of poor supervision mechanisms, weak domestic infrastructures, weak state institutions caused by 'strong men syndrome' and poor observance of the rule of law, poor institutional designs of regional and sub-regional HRTs, lack of awareness and erroneous perceptions about international human rights system, ineffective follow-up, and poor system of governance in some of the selected states, among others. Identification of the barriers to state compliance and impact of HRTs' decisions is crucial in order to identify where gaps exit, and the actions required to fill the gaps. The interviews with respondents showed that attitudinal barriers and erroneous perceptions about international human rights system are central to the various barriers highlighted above. This finding has important implications for politics and policies aimed at improving state compliance. While improvement of state compliance requires taking actual steps and devising policies and strategies, adequate attention should also be given to changing negative attitudes and perceptions about international protection of human rights. In the next chapter, the thesis makes a number of targeted proposals on how to improve human rights judgment compliance and influence of human rights tribunals' decisions in the selected states.

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Chapter 7

Summary, recommendations and conclusions

7.1. Summary

7.2. Recommendations

7.3. Conclusion

7.1. Summary

This study investigates whether five states in Africa complied better with decisions of sub-regional human rights tribunals (HRTs) than those of regional tribunals, and if so, why. This analysis is very important in an African context, in view of the growing influence of sub-regional HRTs in the development of human rights jurisprudence in Africa.[1] The regional HRTs selected for the analysis in the thesis are: the African Commission, the African Court and the African Children's Rights Committee. The sub-regional HRTs selected are the ECCJ, the EACJ and the SADC Tribunal. The five states selected for the investigation are: Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe. Each of these states has a relatively significant number of cases that were decided on the merits and resulted in findings of violations, by the various HRTs selected for the study. All the 32 cases selected for analysis in the thesis were decided during the case selection period adopted for the study (2000 - 2015).

The study is based on certain key assumptions derived from international law compliance scholarship. One such assumption is that greater compliance would lead to more effectiveness of regional and sub-regional HRTs in Africa. Identifying which type of HRT

[1] See generally, ST Ebobrah 'Litigating human rights before sub-regional Courts in Africa: Prospects and challenges' (2009) 17 *African Journal of International and Comparative Law* 79, 80; ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption?' (2007) 7 *African Human Rights Law Journal* 307, 312; ST Ebobrah 'Tackling threats to the existence of the SADC Tribunal: A critique of perilously ambiguous provisions in the SADC Treaty and the Protocol on the SADC Tribunal' (2010) 4 *Malawi Law Journal* 199, 211; A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' unpublished LLD thesis, University of Pretoria, 2014; HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: Compliance and influence' unpublished LLD thesis, University of Pretoria, 2013; KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293, 298; KJ Alter, LR Helfer & JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737, 746.

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produces more state compliance and the factors that facilitate such compliance will enable compliance-minded actors to channel their resources appropriately to produce optimal results.

Overall, the thesis answers five research questions, namely: (i) What constitutes regional and sub-regional HRTs in Africa, and to what extent do states have obligations to comply with reparation orders issued by them? (ii) What is the status of compliance with reparation orders of the selected HRTs in Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe, and how does state compliance compare with respect to the selected regional and sub-regional HRTs? (iii) What factors make state compliance of reparation orders of sub-regional as opposed to regional HRTs more likely, and to what extent do existing theories explain the identified factors? (iv) What legal effects and influence do decisions of regional and sub-regional HRTs have in the selected states, and how significant is such influence relative to compliance? (v) What are the hindrances to compliance with and influence of reparation orders of HRTs in the selected states and how can compliance and overall impact of HRTs' decisions be improved? This concluding chapter takes a question-by-question approach to discussing the various issues that emerge from this study.

7.1.1 States' obligations to comply with the selected HRTs' decisions

The thesis, in chapter 2, provides background information about the mandate, jurisdiction and jurisprudence of regional and sub-regional courts in Africa. The background information on the *modus operandi* of the various HRTs in Africa is useful to the subsequent discussion on the status of compliance with decisions of the HRTs or how and why states comply with their decisions. Due to the proliferation of 'human rights treaty bodies' at the regional and sub-regional level in Africa, I argue in the thesis that the 'African human rights system' suffers from the problem of lack of coordination, resulting in avoidable overlap of mandates and duplication of functions.

Although several sub-regional tribunals exit in the African judicial landscape, the focus of the thesis falls on three of them, namely; the ECOWAS Community Court of Justice (ECCJ), the East African Court of Justice (EACJ) and the Tribunal of the Southern African Development Commission (SADC Tribunal), because they have decided significant human

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rights-related cases. Of the three sub-regional tribunals regarded as HRTs in this thesis, only the ECCJ has clear and unlimited jurisdictional mandate to adjudicate human rights cases. The other two – the EACJ and the SADC Tribunal (prior to its suspension) – repurposed their mandates and crafted a 'limited human rights mandate' for themselves through creative interpretive strategies.

The thesis argues that states have an obligation to comply with the reparation orders of regional and sub-regional HRTs in Africa, regardless of whether the decisions of the tribunals are perceived to be binding or recommendatory. The obligation to comply with decisions of HRTs is based on the principle of *pacta sunt servanda* and is also part of the common overarching obligation to 'give effect' to the provisions of the relevant human rights treaties under which the various HRTs were established. Decisions of quasi-judicial HRTs become fully binding on states as soon as these decisions are adopted by the relevant HRT or soon after the reports embodying the decisions have been adopted by the relevant intergovernmental organisation such as the AU Assembly or the Executive Council.

The thesis also argues that state obligations arising from decisions in individual communications are not 'new obligations' created by the HRTs; they are supplementary obligations assumed by states as a consequence of ratifying human rights treaties. The African Charter, for instance, gives the African Commission the mandate to interpret provisions of the Charter. All that the African Commission does when it decides an individual communication is to interpret and define a state's obligation under the African Charter in relation to a given set of facts presented in the communication. Based on the principles of *res interpretata,* the thesis argues that states' obligation to implement decisions of the selected HRTs may not be separated from the existing obligations of states under international law to implement provisions of ratified treaties.

7.1.2 Status of compliance with HRTs' decisions in the selected African states

First, this thesis acknowledges the difficulties often associated with establishing the status of state compliance with decisions of any HRT. As noted by Viljoen and Louw in their study of the African Commission, 'the attempt to chart compliance empirically and analytically is

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fraught with methodological difficulties.'[2] The challenges stem from multiple factors relating to the HRTs themselves, state-level factors and the nature of human rights judgment compliance research. For instance, the reparation orders of HRTs sometimes are vague and ambiguous; state actors may be unforthcoming, unwilling or unable to provide crucial information due to lack of institutional memory or 'fear of the political consequences'; individual victims of human rights violations may be untraceable due to relocation, displacement or death; and research by its nature is limited by time, finance and other constraints. Despite these challenges, this study establishes, to the best of the researcher's abilities, the status of state compliance with 75 reparation orders contained in 32 decisions of six selected regional and sub-regional HRTs in Africa.

The thesis develops various Tables, particularly Table 3.3 and the various tables contained in Appendices I to III, which provide implementation narratives and compliance status analysis of the 75 reparation orders issued by the selected HRTs. The analyses in the thesis indicate that compliance during the study period is highest in respect of the EACJ, and lowest in respect of the SADC Tribunal. While the results obviously relate primarily to the studied countries, the conclusion challenges the growing assumption that sub-regional HRTs rather than regional HRTs are best suited for human rights judgment compliance in Africa. The findings arising from the study also challenges the assumption that judicial rather than quasi-judicial HRTs are better fora to realise state compliance. As the analysis in the thesis indicates, both the best and worst tribunals in terms of compliance are situated at the sub-regional level and they are both judicial HRTs.

The data in the thesis indicates that state compliance, during the study period and in respect of the studied countries, was better at the regional than the sub-regional level. At least three of the five studied countries, namely; Nigeria, The Gambia and Zimbabwe, performed better in terms of compliance at the regional than at the sub-regional level. *This is an area where further research would be useful to test this finding in relation to other states that have been involved in human rights cases at both the regional and sub-regional level in Africa.* Other highlights of the major issues and important statistics arising from the

[2] F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1993-2004' (2007) 101 *American Journal of International Law* 1, 32.

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analysis in the thesis are discussed below. While The Gambia and Zimbabwe, respectively, recorded 100 percent non-compliance with judgments of the ECCJ and the SADC Tribunal, The Gambia, for instance, partly implemented some of the reparation orders issued against it by the African Commission in the *Jawara* case and the *Gambian Mental Health* case.[3] Zimbabwe complied fully with two and partially with one of the 14 reparation orders issued by the African Commission against it during the study period,.[4] All the reparation orders of the SADC Tribunal against the government of Zimbabwe have not been complied with. Nigeria complied fully with only 31 percent of the orders of the ECCJ in human rights cases, while Uganda recorded 67 percent full compliance with all reparation orders of the EACJ in human rights related cases, as at July 2017.

One major problem with the implementation narrative and compliance status analysis in the study is establishing a causal connection between the reparation orders of HRTs and the implementation efforts of governments. As noted in the thesis, there is hardly ever a reference by states to the decisions of the relevant HRTs when they take measures that conform to implementing a decision. The thesis argues that this disconnection between state behaviours and human rights decisions highlights how peripheral these decisions are in the way African governments approach human rights issues at the domestic level.

In addition to investigating the status of compliance with the reparation orders contained in the 32 selected cases, the thesis also analysed how state compliance compares with respect to regional and sub-regional HRTs in the five studied states. In chapter 3, the thesis compares human rights judgment compliance data in six regional and sub-regional human rights regimes in Africa, and assesses the interplay between regional and sub-regional HRTs, using the five studied states as case studies. The thesis formulated the following hypothesis in chapter 3, based on the prevailing views in human judgment compliance literature: *States comply better with decisions of sub-regional HRTs than regional HRTs.* The study finds this hypothesis not to have been supported by empirical evidence arising from analyses of the 32 selected decisions of regional and sub-regional HRTs in the selected African states.

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[3] See chapters 3 & 4 of the thesis.
[4] As above.

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The study finds that more reparation orders of regional HRTs were complied with in three of the five studied states than reparation orders of sub-regional HRTs. The thesis, however, notes that the finding highlighted above is pure coincidence as the rate of compliance depends, not on whether a tribunal is located regionally or sub-regionally, but on factors which are identified in this study as the primary factors that influence state compliance. The thesis also finds that in three studied countries, namely, Nigeria, The Gambia and Zimbabwe, remedial orders of the African Commission, a quasi-judicial HRT, attracted considerably more compliance than orders of the respective sub-regional judicial tribunals. While this data does not associate non-binding decisions with better compliance, it demonstrates that issuance of legally binding decisions, without more, is no guarantor of state compliance.

The thesis also underscores the futility of compartmentalising cases into CPRs and ESCRs categories for the purpose of explaining variations in human rights judgment compliance amongst states. The thesis argues that reparation orders arising from CPRs cases have no better chance at compliance than reparation orders issued in ESCRs cases. In the first place, states do not comply with cases; they comply with specific reparation orders contained in the cases, and these reparation orders, in principle, do not discriminate between CPRs and ESCRs cases. The analysis of cases involving Nigeria and The Gambia indicates that compliance and non-compliance are equally shared between CPRs and ESCRs cases alike.

7.1.3 Factors indicative of state compliance

During this study, each of the state compliance factors featured in the most relevant existing literature was enumerated and analysed. However, some of the factors could not be verified using the descriptive methodology adopted in this study. As discussed in chapter 1, the methodology adopted involves an in-depth study of the 32 cases selected for the study. This approach was supplemented by extensive review of the most relevant literature to document compliance factors related to each of the 32 cases. Information relevant to factors that influenced states to comply with some of the cases selected were also extracted from previous studies. Further information relating to possible compliance

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factors was obtained through in-depth interviews involving government representatives, NGO representatives and complainants. The information obtained through the various sources was used to develop several tables where the 32 cases were checked against each of the 15 compliance factors selected for the study.

While there is no fool-proof formula, this study identifies five primary factors that drive human rights judgment compliance in the five states. These factors are: (1) some commitment to compliance by states; (2) low-cost, specific and limited remedies; (3) the existence of free, stable and democratic system of governance in the state required to implement the decision; (4) the effectiveness of follow up by the HRTs and NGOs; and (5) political transition or regime change subsequent to the decision. Of these five factors, the study singles out 'commitment to compliance' as the most important factor predictive or indicative of state compliance.

Many factors have been suggested by various scholars as facilitative of state compliance with HRTs' decisions. These include: the perceived legal status of the tribunal's decisions, the quality of legal reasoning in a case, the type of remedy imposed on the state, regime type, regime change and civil society involvement. This study finds that these factors are indeed relevant to domestic-level implementation of human rights decisions, yet they are not 'sufficient' for state compliance. In other words, states compliance can happen in their absence. I argue that whenever any of the relevant factors, highlighted above, appears to have played a 'significant' role in shaping a compliance outcome, they do so because of certain preconditions. The preconditions are the necessary conditions for state compliance. When these preconditions change or are non-existent, the effects of the relevant factors also change. Using the procedure and methodology indicated earlier, the thesis identifies five of the preconditions, and argues that a minimum degree of each of the conditions is required for human rights judgment compliance. These conditions are: (a) some commitment to compliance by states; (b) low-cost, specific and limited remedies; (c) the existence of free, stable and democratic system of governance; (d) effective follow-up of human rights decisions by HRTs themselves and NGOs; and finally, (e) political transition or regime change subsequent to the decisions.

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Commitment to human rights judgment compliance is discussed at three levels: supranational, national and sub-national. The thesis also identifies the indicators of each of these layers of commitment. The second necessary condition for state compliance discussed in the thesis is cost-related. The thesis argues that states generally comply with human rights decisions whenever the cost of compliance is low, or the cost of non-compliance is high. The thesis identifies three types of cost associated with human rights judgment compliance, namely financial, political and normative costs. The contents of each of these cost types is also discussed. Another component of the second necessary condition for state compliance is specificity of reparation orders. The thesis argues that vagueness and ambiguity accounts for a significant number of non-compliance and partial compliance cases. Another necessary condition for state compliance discussed in the thesis is effective follow-up by HRTs and NGOs. Follow-up is crucial because reparation orders of HRTs, most often, require time, resources, coordination and consistent social mobilisation for their implementation.

Following the above, the thesis proceeds to determine whether the various propositions above are consistent with existing theories of compliance with international law. The various rationalist and constructivist approaches are discussed. The chapter concludes that the findings of the study are consistent with three main theories of compliance with international law, namely; management theory, transnational legal process theory and the domestic politics theory. The three selected theories cut across the constructivist and rationalist divide. While the management theory and the transnational legal process theory belong to the ideational constructivist category, the domestic politics theory jungle elements of rationalism and constructivism.

One major question this thesis sets out to answer is whether a regional HRT such as the African Commission whose decisions are perceived as recommendatory has more leverage to push for state compliance than sub-regional tribunals whose decisions are mostly binding on states. An often-overlooked advantage of quasi-judicial tribunals is their capacity to engage states through various channels that may not be available for judicial tribunals. For instance, quasi-judicial rather than judicial tribunals review state parties' periodic reports and carry out more promotional activities. This study concludes that no

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system, regional or sub-regional, is intrinsically better for state compliance; and issuance of binding decisions, without more, is not a guarantor of compliance. State compliance with HRTs' decisions depends on a multiplicity of factors ranging from the nature of reparation order issued, the type of state involved in the case, the degree of commitment of supranational actors to compliance and the extent of social mobilisation around the case. While the institutional design of a human rights system, no doubt, contributes to pulling states towards compliance, it is not deterministic of state compliance.

Both regional and sub-regional HRTs may experience widespread non-compliance if their reparation orders become too vague or costly for states to implement or if the states with respect to which the orders are made are less committed to compliance. As these factors are not unique to any particular HRT, it is difficult to say that state compliance with HRTs' decisions is better naturally at one level than the other. Notwithstanding the variations in human rights judgment compliance, the reasons state compliance is sometimes better at one level than the other is very much the same across states and HRTs: weak commitment to compliance; issuance of costly and unspecific reparation orders; absence of free, stable and democratic system of governance at the domestic level; ineffective follow-up by HRTs and NGOs; and absence of political transition or regime change at the state level or subsequent to the decision.

7.1.4 The impact or influence of HRTs' decisions

A handful of scholars have called to question the focus on compliance as a measure of the effectiveness of international legal regimes.[5] This is because a high level of compliance with the norms of a human rights regime does not always equate to high impact or effectiveness. A high rate of compliance may be due, for instance, to the 'minimalist nature' of the obligations imposed on states. This thesis, therefore, calls for a shift in the

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[5] See generally, W Bradford 'International legal compliance: Surveying the field' (2004 - 2005) 36 *Georgetown Journal of International Law* 495, 498; E Duruigbo 'International relations, economics and compliance with international law: Harnessing common resources to protect the environment and solve global problems' (2001) 31 *California Western International Law Journal* 177, 177; B Kingsbury 'The concept of compliance as a function of competing conceptions of international law' (1998) 19 *Michigan Journal of International Law* 345, 345; VA Leary 'Nonbinding accords in the field of labour' in EB Weiss (ed) *International compliance with nonbinding accords* (1997) 9 - 10; K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, 387.

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analytical lens of human rights implementation scholarship from 'compliance' to impact or influence of HRTs' decisions; compliance is too narrow an approach to assess how the decisions of HRTs contribute to the promotion and protection of human right at the domestic level. While state compliance narrative obviously remains one of the most important ways to measure the effectiveness of HRTs, the thesis argues that compliance has not been shown to be the only measure of the effectiveness of HRTs' decisions.

Despite the general low level of compliance across the six regional and sub-regional HRTs selected for this study, the various cases and themes discussed in the thesis suggest that decisions and individual communication procedures of African regional and sub-regional HRTs have had notable direct and indirect impact in each of the five states selected for the study. Some domestic legislation has been repealed, reparation measures have been implemented, resources have been allocated, and some institutions were created in the studied countries as a direct consequence of decisions and communication procedures of the selected regional and sub-regional HRTs.

The examples of state-level impact of HRTs' decisions include amicable settlement of disputes and proactive remediation of violations; provision of tangible benefits for successful applicants; legislative and policy reforms; the use of HRTs' decisions as tools for social mobilization, advocacy and research; judicial impact of HRTs' decisions which may take the form of 'authoritative norm setting', 'transnational judicial communication' and other 'knock-on effects'; holding multinational oil companies (MNCs) and other similar non-state actors accountable for human rights violations; providing a permanent record of human rights violations; increasing the level of awareness about human rights and activities of HRTs; and creating limited deterrence effects on state actions. It is noteworthy that some of these domestic-level effects and impact of HRTs' decisions do not relate to any specific reparation orders, and so do not count towards compliance.

HRTs' decisions do not have the same effects in all states. Rather, their effects are conditional on a combination of factors, including state level characteristics, the nature of the decision and the level of interaction, persuasion and pressure applied on state actors

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by various domestic and transnational actors.[6] In terms of state characteristics, decisions of HRTs have their most impact in 'transitioning states' such as Nigeria, Uganda and Tanzania.[7] The view that human rights regimes generally tend to have more impact in new democracies and transitioning states than in stable democracies and authoritarian states, have been confirmed by Moravcsik,[8] and Simmons.[9] The evidence in this study is also confirms that human rights norms will have their most significant impact if they have 'added value'.[10] The decisions that made the most impact are those that add value to existing jurisprudence such as the *Mtikila* case, *Ogoniland* case, *Katabazi* case and the *Mike Campbell* cases. Cases that raise significant social justice issues affecting many people or an entire community also tend to have more impact than individual cases involving limited social justice issues. The evidence also shows a relationship between broad remedies and human rights judgment impact. Overly specific remedies such as release of prisoners or payment of specified amount as compensation do not provide incentives for significant human rights judgment impact. Other factors that improved the impact of HRTs' decisions in the selected states include social mobilization, ongoing domestic reforms, judicial activism by national judges, domestication of the relevant treaty that set up the HRT, and pressure from international actors such as international NGOs and donor agencies.

The thesis concludes that, if HRTs' decisions are to have more effects at the domestic level, domestic activist forces and transnational compliance actors must take more seriously the national process of implementation. HRTs' decisions do not normally translate automatically into tangible outcomes without significant social mobilization around the case. Thus, the most important factor predictive of human rights judgment impact is the extent of social mobilization built around a case. The thesis, however, noted that the success of social mobilization depends on other factors such as 'media response, public

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6 VO Ayeni 'Conclusion, summary of findings and recommendations' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 297.

7 Ayeni (n 6 above) 298.

8 A Moravcsik 'The origins of human rights regimes: Democratic delegation in Postwar Europe' (2000) 54 *International Organization* 217, 228.

9 BA Simmons *Mobilising for human rights* (2009) 16 - 17 & 360.

10 See R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 10 - 26; Simmons (n 9 above) 125.

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receptivity and pre-existing understanding of the issues.'[11] The thesis also suggests that human rights decisions would have greater impact if HRTs engage in 'dialogical activism'. This approach entails the use of 'reflexive remedies'. Reflexive remedies encourage state actors sometimes to come up with more efficient and lower-cost ways to achieve the goal of the litigation. It also addresses issues of democratic legitimacy and institutional competence of HRTs to adjudicate especially in ESCRs cases. Overall, the use of reflexive remedies tends to deepen democratic participation, promote social mobilization and improve human rights judgment impact.

7.1.5 Hindrances to state compliance and challenges of the selected HRTs

This thesis discusses five main challenges of the selected HRTs in Africa, namely; lack of coordination, jurisdictional overlaps, the problem of forum shopping, hostile responses from government officials and Poor funding. It argues that state compliance and influence of HRTs' decisions in the selected states have been limited as a result of poor supervision mechanisms, weak domestic infrastructures, weak state institutions, poor institutional designs of regional and sub-regional HRTs, lack of awareness and erroneous perceptions about international human rights system, ineffective follow-up, and poor system of governance in some of the selected states, among others. While improvement of state compliance requires taking actual steps and devising policies and strategies, the thesis argues that adequate attention should also be given to changing negative attitudes and perceptions about international protection of human rights.

7.2. Recommendations

In the light of the various issues raised and discussed in chapters 1 to 6, the study recommends various measures as way forward for enhancing compliance and overall impact of HRTs' decisions in the selected states. In order to improve the impact and compliance with HRTs' decisions in the selected states and Africa in general, the following suggestions are made to members of HRTs, state actors, African intergovernmental

[11] M Langford, C Rodríguez-Garavito & J Rossi 'Introduction: From jurisprudence to compliance' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 30.

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organisations, civil society, litigants and their legal counsels, academics, and human rights law implementation scholars. The measures are: Constitutional amendment to reflect states' compliance obligations; adoption of specific legislation on judgment implementation and compliance; creation of domestic political structures for human rights judgment implementation; enhancing freedom of expression, association and assembly; setting-up Human Rights Funds and statutory allocation for judgment compliance; designation of a focal point in each MDA for judgment implementation; periodic training on human rights judgment implementation; domestication of relevant human rights instruments; the need for HRTs to issue clearer, more specific and limited remedies; the need to focus on 'what needs to be done' and not 'how it should be done'; the need to engage in more social mobilisation; the need for incrementalism; the need for effective follow-up of decisions; conducting implementation hearing and issuing detailed implementation reports; creating a special rapporteur position or working group on implementation; and introduction of grading and accreditation system, among others. These measures are discussed in detail below.

7.2.1 The selected African states

States have the primary responsibility to implement HRTs' decisions. As the analysis in chapter 4 demonstrates, the degree of commitment to compliance by states and the system of governance in place at the domestic level are crucial for human rights judgment compliance. Thus, if a regional human rights system is constituted by states that are generally rated as strong democracies that usually have domestic incentives to comply with HRTs' decisions, there are chances the rate of state compliance overall will be high in such regional system. This study finds no support for the proposition that a tribunal is necessarily effective and would generate high levels of compliance just because it is situated at the sub-regional level rather than the regional level. The obvious solution to the problem of non-compliance is to transform states into full democracies, thereby having domestic incentives to comply with HRTs' decision. However, the process of democratisation often takes decades, and falls well outside the control of HRTs, civil society and international partners. What is clear from this study is that regional and sub-regional human rights systems that enjoy high rates of state compliance generally are

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constituted by states that are committed to implement the tribunals' decisions. The 'magic wand' for significantly improving state compliance therefore is to progressively increase states' commitment to compliance. In other to increase states' commitment to compliance, thus enhancing compliance with decisions of the selected regional and sub-regional HRTs in the selected states, the followings actions are suggested for the selected states.

(a) Constitutional amendment to reflect states' compliance obligations

The constitution is one of the best ways available to a state to express its commitment to international human rights obligations. This is because a country's constitution is not just the highest law in the 'land', it is the foundation of government. The constitution is thus linked to the provision of public goods. Outcomes such as democracy, free and fair elections and human rights protection are in one way or another related to the contents of a country's constitution. Thus, one of the ways to secure the commitment to compliance of the various actors within the state is to ensure that the Constitution of each state speaks specifically to their obligations to implement decisions of international adjudicatory bodies, including HRTs. Accordingly, it is suggested that selected states should amend their Constitutions to reflect their obligations to implement international human rights judgments.

(b) Adoption of legislation on judgment implementation and compliance

Outside Africa, states such as Italy, Poland, Russia and Turkey have adopted specific legislation aimed at providing effective remedies in relation to violations of the European Convention on Human Rights (ECHR) found by the European Court of Human Rights

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(ECtHR).[12] None of the states selected for this study has adopted such legislation.[13] It is also suggested that the selected states should adopt specific laws, policies, administrative guidelines and clear-cut rules of procedures for the enforcement and implementation of decisions of international adjudicatory bodies, including HRTs. The proposed legislation should establish the framework for the reception and execution of decisions of HRTs in the domestic legal system. The legislation should also define the roles of various actors such as the Ministry of Foreign Affairs, Ministry of Justice, Ministry of Finance, the judiciary, Parliament, civil society and other actors in the implementation and monitoring of HRTs' decisions. The legislation should also set specific time-frame for each state actors and department to carry out their responsibilities. The legislation may also impose an obligation on the Attorney General and Ministry of Justice to report annually to Parliament on the status of implementation of decisions of international adjudicatory bodies, including HRTs. With the aid of a specific legislation on international judgment implementation, successful litigants before HRTs will know the procedures for getting relief from the state. The adoption of national legislation on international human rights judgment implementation could also aid and facilitate the follow-up efforts of the HRTs.

(c) Creation of domestic political structures for human rights judgment implementation

This study finds that one of the major impediments to implementation of decisions of HRTs at the domestic level is the lack of domestic infrastructures and absence of strong political structures to carry out the task of judgment implementation. Where *ad hoc* inter-agency structures exist, these mechanisms are rarely well funded and usually lack a well-defined mandate for judgment implementation. This study recommends the establishment of a

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[12] See L Oette 'Bringing the enforcement gap: Compliance of states parties with decisions of human rights treaty body' (2010) 16 *Interights Bulletin* 51, 52. See generally A Jakab & D Kochenov (eds) *The enforcement of EU law and values: Ensuring member states' compliance* (2017) 1 - 425; A Donald & P Leach *Parliaments and the European Court of Human Rights* (2016) 1 - 240. See also Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe 'Implementation of judgments of the European Court of Human Rights: 9th report' (2017) http://website-pace.net/documents/19838/3115031/AS-JUR-2017-15-EN.pdf/18891586-7d6c-4297-b5f7-4077636db28e (accessed 11 December 2017). See also Parliamentary Assembly of the Council of Europe 'The role of parliaments in implementing ECHR standards: Overview of existing structures and mechanisms' (2015) http://website-pace.net/documents/10643/695436/20142110-PPSDNotefondstandardsCEDH-EN.pdf/113ad45b-7ffd-4ee7-b176-7fb79ad32f93 (accessed 11 December 2017).

[13] F Viljoen 'The African human rights systems and domestic enforcement' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 365.

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permanent, independent and well-resourced body with the responsibility of implementing or coordinating implementation of decisions of HRTs. The mechanism may take the form of an independent commission or inter-agency committee, created by law and charged with the task of implementing decisions of international HRTs. The powers of the agency should be well defined, and its membership should include representatives from various ministries, departments and agencies (MDAs) that have responsibility for human rights issues; such as the Ministry of Justice, Ministry of Foreign Affairs, Ministry of Gender, Ministry of Finance and Ministry of Interior. Representatives from each of the listed ministries should be someone from a directorate level, and not a junior officer without clout in the respective MDAs. The national mechanism should also be required to submit periodically to Cabinet, through the Attorney General, reports on the international human rights obligations of the state.

(d) Freedom of expression, association and assembly

It is suggested that states should secure the rights to freedom of expression, association and assembly to the full extent possible. Freedom of expression, association and assembly has been found to be crucial to the formation of social movements which are vital to put the pressure on the state. States must ensure that they guarantee freedom of expression, association and assembly not only in their laws, but also in practice. Imposition of limitations which are arbitrary and unjustifiable in a democratic society does not promote human rights judgment compliance. Citizens should be free to mobilise and form social movements around human rights issues without unnecessary restrictions from state agents. Freedom of expression which essentially includes freedom of information especially on the internet as well as freedom of association and assembly provides a good climate for social mobilisation which has been found in various studies to be a necessary condition for significant social reforms and human rights change.

(e) Setting-up Human Rights Funds and statutory allocation for judgment compliance

This study finds that non-compliance with compensatory orders of HRTs is usually associated with lack clarity about the procedure for payment of compensations to successful litigants who are mostly victims of human rights violations by state agents. In

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many cases, state actors complain about budget issues; that the payment have not been budgeted for or there is insufficient fund to cover the payment. While there are many ways to address this vexed issue, this study recommends the establishment in every state of a Human Rights Fund, managed by the Ministry of Justice or the national human rights institution for the purpose, among others, of defraying the financial costs of HRTs' decisions. States are also encouraged to include in their annual budgets specific allocations for the settlement of outstanding judgment debts, especially those arising because of decisions of HRTs. A more proactive approach is for each MDA to make provisions for a Contingency Fund in their annual budget. Thus, in addition to other uses such as in the case of emergency, human rights debts for which the MDAs are liable may be defrayed from time to time from such funds.

(f) Designation of a focal point in each government ministry for judgment implementation

In addition to setting up a permanent inter-agency committee responsible for human rights judgment implementation, this study finds that the representatives from the cognate ministries are usually engaged in different, and completely unrelated, tasks in their respective ministries. This lack of concentration may affect the efficiency of the inter-agency Committee. Thus, it is recommended that in addition to being members of the inter-agency committee, representatives of the cognate MDAs should also be the focal point for human rights judgment implementation in their respective MDAs. This arrangement allows for not only seamless transmission of information from the bottom-up but also provides effective institutional memory in each MDA. The focal person coordinates human rights judgment implementation effort in each ministry and reports to the Minister. The Minister in person or through the focal person reports to the inter-agency committee, who in turn reports to Cabinet, through the Attorney General. While the specific channel of communication applicable to each state may differ depending on the peculiarity of the state, the designation of a top-level officer responsible for human rights judgment implementation in each MDA will provide more clarity about 'who does what, when and how', thus improving the efficiency of the domestic implementation process.

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(g) Periodic training on human rights judgment implementation

Training in this sense is very crucial not only for members of the executive arm of government but also for members of parliament and judiciary. The training should encompass the obligations of the state to respect provisions of human rights treaties and decisions of HRTs. The training should also focus on the nature of states' obligation to respect HRTs' decisions especially in cases where the treaty that established the tribunal has not been domesticated by the state. Non-domestication is usually used by states as an excuse for non-compliance. Overall, governments should raise awareness about decisions of HRTs among cabinet members, legislators, judges, lawyers, academics, civil society and members of the public especially women, youth and children.

(h) Domestication of relevant human rights instruments

Steps should be taken in each of the selected states incorporate into the national legal system the African Charter, the Maputo Protocol, the African Court Protocol, the African Children's Rights Charter and other relevant human rights instruments. This may be done by following the Kenyan or Nigerian examples. In Kenya, the Constitution provides that all duly ratified treaties are directly applicable and form part of the domestic law. In Nigeria, the entire African Charter was incorporated into domestic law through an Act of parliament. At the very least, it is recommended that the selected states should borrow a leaf from South Africa where the Constitution imposes an obligation on domestic courts to consider principles of international law when interpreting the South African Bill of Rights. Importantly, states that are yet to make the article 34(6) declaration under the African Court Protocol should also urgently do so. It is also suggested that in future, political bodies within the AU should consider the possibility of making domestication of duly ratified treaties obligatory for all state parties to regional human rights instruments in Africa. States that have incorporated the African Charter and the Maputo Protocol in their domestic law should raise awareness about these treaties and encourage citizens to use them interchangeably with domestic laws.

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(i) Other suggestions for the selected states

The parliament should consider establishing a parliamentary committee to monitor the extent of implementation of decisions of international HRTs, and summon the Attorney General or any relevant Cabinet member where widespread non-compliance with decisions of HRTs is reported or observed. The functions of this parliamentary committee could also include studying decisions of relevant HRTs to identify recommendations that require amendment of laws. The committee periodically may report such reparation orders to the plenary or to the law reforms commission for appropriate actions. The judiciary also should set up similar mechanism to monitor decisions of HRTs that are relevant to them. Notably, there are reparation orders that require the judiciary to carry out training for its members on specific human rights issues such as torture and violence against women. The mechanism may report such reparation orders to the chief justice for appropriate actions.

National action plans for the promotion and protection of human rights should be reviewed to reflect the procedure for implementation of HRTs' decisions. In addition to the review of national action plans, another issue that is closely linked to domestic-level implementation of HRTs' decisions in the lack of clarity on the status of international human rights treaties and decisions in the domestic legal system. The recommendation is that both parliament and judiciary should work in harmony to clarify the place of treaties and HRTs' decisions in the national legal order.

7.2.2 Human rights tribunals (HRTs)

The dearth of attention to the role of HRTs in facilitating human rights judgment compliance has led to near exclusive focus by scholars on domestic politics, at the expense of 'managerial' and 'transnational legal process' factors. There is no doubt that HRTs play a key role in the implementation process. While states have the primary responsibility for human rights judgment implementation and eventual compliance, HRTs themselves can affect compliance with their decisions through how they frame their reparation orders and also through the follow-up policy they employ. HRTs are the architects of the decisions the states are required to comply with. The clarity of the reparation orders contained in the

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decisions is crucial for state compliance. HRTs determine the complexity or otherwise of the reparation orders, and this has been shown to be crucial for state compliance. By issuing clearer, more specific and limited remedies, HRTs can significantly improve compliance with their decisions. By engaging states through various channels, post-judgment, HRTs can increase not only the visibility of their decisions but also increase the cost of non-compliance by states. Some of the roles HRTs may play in enhancing compliance and overall impact of their decisions in the selected states are discussed below.

(a) The need to issue clear, more specific and limited remedies

If there is a point agreed upon by nearly every international law compliance scholar, it is that vagueness and lack of specificity impacts negatively on state compliance. Nearly all studies on human rights judgment compliance confirms that vagueness of remedies is associated with non-compliance with decisions of HRTs. In this thesis, it has been argued that vagueness of reparation orders inflicts three evils on the process of human rights judgment implementation: (i) victims are left uncertain what to expect after the decision; (ii) government officials too may be confused about what exactly to do in order to give effect to the decision; and (iii) pro-compliance partnerships may have no yardsticks with which to assess or monitor government compliance.

In order to address the issue of vagueness of reparation orders, a three-prong approach is suggested. First, HRTs' decisions and reparation orders need to be sufficiently clear. The key is to keep it simple and straightforward. There is a certain majesty in clarity and simplicity. The test of clarity and simplicity is whether victims and state actors understand the full ramifications of the reparation orders without seeking expert advice or additional court interpretations. Next to clarity is specificity; HRTs should ensure their reparation orders are adequately specific. Thus, it is not enough to require states to pay 'adequate compensation'. What is adequate compensation and how is the adequacy of the compensation to be determined? It is suggested that HRTs should indicate, if possible, the amount payable as compensation by states. The EACJ, ECCJ and the African Court already adopt this approach. It is thus recommended that the African Commission and the African Children's Rights Committee should develop similar procedures for determining the

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quantum of compensation or damages payable to victims by states. While the quantum of compensation may not be determined in the merit decisions, the African Commission and the African Children's Rights Committee may set up supplementary hearings similar to the Taxation hearing of the EACJ or the Reparation hearing of the African Court to allow parties to submit their claims on reparations.

The final aspect of the three-prong approaches to addressing vagueness in the reparation orders of HRTs is the need to issue clearly limited remedies. One of the factors that accounted for the high rate of compliance with reparation orders of the EACJ and the ECCJ is the issuance of limited remedies. Reparation orders of HRTs are not supposed to be framed like 'recommendations' in a report. As far as possible, the reparation orders should be clear, specific and very limited. Thus, reparation orders requiring a state to bring all their laws in conformity with the African Charter or any other human rights treaty or directing a state to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found, should be avoided. If these vague expressions would be used at all, it should be after the specific remedies affecting the complainants or victims have been set out.

(b) The need to focus on 'what needs to be done' and not 'how it should be done'

In the preceding sections, specificity of reparation orders has been linked to increased state compliance with reparation orders of HRTs. However, too much specificity can sometimes be detrimental to the national process of implementation. There are hardly any limits to what HRTs may prescribe in terms of 'what needs to be done' by the state in order to remedy a human rights violation. However, HRTs do not enjoy the same wide discretion when it comes to prescribing the means by which states may remedy the violations. While a HRT may recommend the amendment of a country's laws, it is not up to the tribunal to prescribe the procedure for the amendment. When a case raises issues of accountability, that is investigation and prosecution of perpetrators of human rights violations, it may not be appropriate for the tribunal to decide which state institution should carry out the investigation or prosecution.

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Thus, HRTs' decisions ought to be limited to 'what ought to be done', not 'how it should be done'. Sometimes, there is only a thin line between what needs to be done and how it should be done. While clarity, specificity and prescriptiveness are the touchstones of a good reparation order, HRTs can issue reparation orders which are too prescriptive, thereby encroaching on the legitimate authority of states. This idea is rooted in the principles of subsidiarity which in other words implies that states have the primary responsibility to secure human rights; international HRTs have only supervisory roles.[14] Clarity, specificity and prescriptiveness relate to 'what a state must do to redress a violation'. This has very little to do with 'how the state should redress the violation'. Although HRTs are not precluded legally from prescribing how states should redress a violation, they need to be extremely cautious, as they are not fully aware of the various constitutional regimes of states. Thus, while reparation orders that target specific state institutions or domestic actors may have their merits, HRTs need to be alert to the fact that they have limited legitimacy to determine the responsibilities of the various organs of government at the domestic level. Targeted reparation orders should thus be used sparingly and in situation where the tribunal is sure of how the domestic legal system operates.

(c) The need to engage in more social mobilisation

Several scholars including Simmons,[15] Rosenberg[16] and Viljoen[17] have confirmed that social mobilisation is necessary for significant human rights change at the domestic level. In chapter 4 of this thesis, the study underscores the futility of judicial isolationism. HRTs cannot effect significant change at the domestic level without connecting with relevant domestic actors. Helfer, for instance, observes that 'compliance with international law increases when international institutions, including tribunals, can penetrate the surface of

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[14] See, for instance, S Besson 'Subsidiarity in international human rights law - What is subsidiary about human rights?' (2016) 61 *American Journal of Jurisprudence* 69, 69 - 107; PG Carozza 'Subsidiarity as a structural principle of international human rights law' (2003) 97 *American Journal of International Law* 38, 38 - 79.

[15] Simons (n 9 above).

[16] GN Rosenberg *The hollow hope: Can courts bring about social change?* (1991) 1-425; GN Rosenberg *The hollow hope: Can courts bring about social change?* (2008) 1 - 534.

[17] Viljoen (n 13 above).

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the state to interact with government decision-makers.'[18] Mobilisation, coordination and network have been shown to be more effective in 'bringing home' the benefits of international human rights adjudication than pure activism.

Social mobilisation, in the context of HRTs, is a process whereby HRTs engage and motivate a wide range of actors and partners at various levels for the purpose of ensuring implementation of their decisions. Abdelgawad has advocated the need for 'dialogue' HRTs, specifically the European Court of Human Rights and national actors.[19] The clearest demonstration of the limits of judicial activism without significant social mobilisation is the suspension of the SADC Tribunal. Ultimately, the success of a HRT does not depend on how ground-breaking its decisions are but the extent to which domestic actors identify with its decisions and are committed to ensure implementation of the decisions. While 'ground-breaking decisions' may sometimes become the rallying point of social mobilisation, HRTs themselves can connect with the critical mass of domestic actors by: aggressively engaging national and international media in their activities; in appropriate cases, moving their proceedings and hearings to the state or territory where the human rights violations occurred; conducting on-sight missions to the areas where the violations occurred; and coordinating with key national actors. There are usually some courageous judges, legislators and cabinet members in every country, and these are the national actors every HRT should identify and work with as entry points for their activities.

In the light of the above, HRTs should not be driven only by 'judicial activism'. Judicial activism that is disconnected from the social reality can sometimes be counter-productive, as the case of the SADC Tribunal demonstrates. While 'judicial creativity' and activism is necessary, the success of the ECCJ has indicated that sometimes international tribunals need to state the law as it is; thereby using the inadequacy of the law a basis for social mobilisation. It should always be noted that in nearly every case, the success of social mobilisation depends on public receptivity and pre-existing understanding of the issues.

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[18] LR Helfer 'Redesigning the European Court of Human Rights: Embedded-ness as a deep structural principle of the European human rights regime' (2008) 19 *European Journal of International law* 125, 132.

[19] See E Lambert-Abdelgawad 'Dialogue and the Implementation of the European Court of Human Rights' Judgments' (2016) 34 *Netherlands Quarterly of Human Rights* 340, 340 - 363.

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(d) The need for incrementalism

Henkin who initiated the first major research into the phenomenon of compliance with international law suggested that the most effective method of enhancing compliance with international law is to foster a domestic culture of compliance.[20] How is such culture to be developed? One of the ways to foster a domestic culture of compliance is for HRTs to adopt an incremental approach in formulating their remedies: from easy to difficult; simple to complex; and limited to wide-ranging remedies. According to Helfer and Slaughter 'Bold demonstrations of judicial autonomy by judgments against state interests and appeals to constituencies of individuals must be tempered by incrementalism and awareness of political boundaries.'[21] There is no doubt that states love a 'restrained court.' Incremental style of adjudication enables a HRT to respond to strong political signals that it has gone too far.[22] Young HRTs in Africa may at first confine their reparation orders to administrative and compensatory remedies. The incrementalist style of decision-making, in part, accounts for the success of the EACJ and the ECCJ. As the system matures and a culture of compliance is fostered among states, more difficult reparation orders may be issued for states to implement. The 'too far too fast' approach may in the end be counter-productive, especially for young HRTs.

(e) Improving state compliance through cross-system dialogue

There is a need to increase cross-system dialogue on the African continent. The use of cross-system communication and collaboration is already happening, although to a limited degree. For instance, the African Commission and the African Court holds Joint Annual Meeting. The first meeting between the two human rights bodies, co-chaired by heads of the two human rights institutions, was held in 2012.[23] The fifth joint meeting was held in Arusha in September 2016.[24] Through this process, the two bodies have strengthened their

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20 See L Henkin *How nations behave* (1967) 5 - 8.

21 LR Helfer & A-M Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273, 314.

22 Helfer & Slaughter (n 21 above) 315.

23 'Press release on the First Joint Annual Meeting between the African Commission and the African Court www.achpr.org/press/2012/07/d118/ (accessed 6 March 2018).

24 'African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights meet in Arusha 19 - 22 September 2016' www.african-court.org (accessed 6 March 2018).

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complementary relationship, thus promoting the practice of constructive dialogue. There is nothing stopping all major HRTs at regional or sub-regional level in Africa to hold biennial, triennial or quadrennial meetings with the aim of improving dialogue and coordination. In 2017, the African Commission and the African Children's Rights Committee adopted a Joint General Comment on ending Child Marriage.[25] This is the first ever joint general comment adopted by the two human rights bodies and it is an important milestone for human rights protection on the African continent. The African human rights system will benefit from cross-regional dialogue with regional systems in Europe and the Americas to exchange experience, discuss challenges and share best practices.[26] There are so many areas where the African human rights systems would benefit from sharing experiences and exchange of best practices with other regional human rights systems. Some of the pertinent areas could include the use of supervisory and enforcement mechanisms, the role of special rapporteurs in following-up decisions, victims' involvement in the process of implementation and the style of formulating remedies.

(f) The need for effective follow-up

HRTs in Africa need to adopt well-developed procedures for following up their decisions. The analysis in this thesis has demonstrated that effective follow-up is crucial for human rights judgment compliance. This is because follow-up increases the visibility of HRTs' decisions, thus increasing the cost of non-compliance. In 2004, Viljoen and Louw found that in four of the six cases in which full compliance was recorded with decisions of the African Commission, the Commission took some steps to follow up the decisions.[27] The authors also observed that in majority of the cases where non-compliance was recorded, no similar follow up activities by the Commission was recorded.[28] This thesis, thus, concluded that a minimum degree of follow-up is necessary for human rights judgment compliance, and the more effective the actions taken towards follow-up, the greater the

[25] See Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending Child Marriage www.achpr.org (accessed 6 March 2018).

[26] Open Society Justice Initiative From judgment to justice: Implementing international and regional human rights decisions (2010) 30.

[27] F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1993-2004' (2007) 101 *American Journal of International Law* 1, 17.

[28] As above.

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chances of compliance. In order to improve their procedures for follow-up, it is suggested that HRTs in Africa should adopt the following indicators of effective follow-up, namely; regular monitoring of the status of implementation of their decisions; consistent engagement with parties to the case; periodic issuance of compliance reports; and the development of up-to-date database on the status of implementation of their decisions. At least four ways HRTs can improve their follow-up process are discussed below.

(i) Conducting implementation hearing and issuing detailed implementation reports

HRTs in African should set up the procedure and guidelines for conducting implementation hearings. Whereas the European human rights system adopts a political model for the enforcement of the judgments of the ECtHR, the Inter-American system adopt a judicial approach. The Committee of Ministers of the Council of Europe, the Department for the Execution of Judgments of the European Court of Human Rights as well as the Parliamentary Assembly of the Council of Europe monitor implementation of the ECtHR's decisions.[29] The Committee of Minister could even commence infringement proceedings against non-complying states.[30] Unlike the ECtHR, the Inter-American Court of Human Rights (IACtHR) monitors its owns decisions.[31] The IACtHR directs states to report on their compliance efforts within set dates, summons parties to a compliance hearing, and issues its own compliance reports.[32] The IACtHR conducts individual implementation hearing and joint hearing of several cases involving the same state.[33] In 2015, the IACtHR established a unit, the Unit for Monitoring Compliance with Judgments, dedicated exclusively to monitoring implementation and compliance.[34] It is suggested that HRTs in Africa should

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[29] C Hillebrecht 'Implementing international human rights law at home: Domestic politics and the European Court of Human Rights' (2012) 13 *Human Rights Review* 279, 283. See also D Anagnostou & A Mungiu-Pippidi 'Domestic implementation of human rights judgments in Europe: Legal infrastructure and government effectiveness matter' (2014) 25 *European Journal of International Law* 205, 205 - 277.

[30] As above.

[31] See A Huneeus 'Court resisting court: Lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 493, 501.

[32] As above. See also JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, 768. The paper is also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404608 (accessed 23 February 2017).

[33] See Annual report of the Inter-American Court of Human Rights (2016) 70-74 http://www.corteidh.or.cr/tablas/informe2016/ingles.pdf (accessed 31 July 2017).

[34] As above.

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establish such dedicated unit within their secretariats. While HRTs in Africa have held implementation hearings in a few cases,[35] none of the tribunals in Africa has developed specific procedure for conducting implementation hearing with respect to all their cases. It is suggested that HRTs in Africa should develop practical guidelines for conducting implementation hearings on cases that are pending implementation. In addition to holding hearings, HRTs in Africa ought also to be issuing detailed implementation reports on a periodic basis. These reports should be made available on the website of each tribunal. This will enable government officials and victims of human rights violations as well as all those interested in the jurisprudence of the HRTs in Africa to have the true picture of the status of compliance with decisions of HRTs in Africa. Clear-cut

(ii) Development of a grading system for follow-up activities

HRTs in Africa may need to develop a grading system for its limited follow-up activities, similar to the grading system of the Human Rights Committee (HRC). While the ECtHR and the IACtHR each has a system of grading or categorising implementation status, the approach of the HRC is recommended in this study because it is more comprehensive than the grading systems of the ECtHR and the IACtHR. Currently, no HRT in Africa has a systematic grading system for its follow-up activities. The follow-up criteria of the HRC, indicated below, could be adopted by HRTs in Africa with some modifications.

Table 7.1: Follow-up criteria of the Human Rights Committee

Assessment criteria	
Reply/action satisfactory	
A	Reply largely satisfactory
Reply/action partially satisfactory	
B1	Substantial action taken, but additional information required.

[35] For example, the African Commission during its 53rd ordinary session held from 9 to 23 April 2013, in Banjul, The Gambia, conducted oral hearing with respect to the *Endorois* case whereby the parties updated the Commission on the implementation of its decision in the case. The oral hearing followed a 'workshop on the status of implementation of the Endorois decision of the African Commission on Human and Peoples' Rights' organised by the African Commission's Working Group on Indigenous Populations/Communities in collaboration with the Endorois Welfare Council held in Nairobi, Kenya on 23 September 2013. On 4 May 2017, the African Children's Rights Committee received reports from state parties on the implementation of the Committee's decisions in the *Talibe* and *Children of Nubian Descent* cases. The Committee's session held at Maseru, Lesotho was attended by the author.

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B2	Initial action taken, but additional information required.
Reply/action not satisfactory	
C1	Reply received but action taken does not implement the recommendation.
C2	Reply received but not relevant to the recommendation.
No cooperation with the Committee	
D1	No reply received within the deadline, or no reply to any specific question in the report.
D2	No reply received after reminders.
The measure taken are contrary to the recommendations of the Committee	
E	The reply indicates that the measures taken go against the recommendations.

(iii) Introduction of grading and accreditation system for national implementation institutions

Motivation is a key factor that improves performance. This is true of humans as it is true of states. This implies that HRTs should provide incentives for compliant states to remain compliant; and a desire by non-complying states to join the compliance league. One of the ways to provide incentives to states to comply with HRTs' decisions is through a grading or accreditation system. Lack of political will has been mentioned, on many occasions, as the main cause of non-compliance by states with their international obligation. One of the main contributions of this thesis is the shift of focus from 'political will' to 'commitment to compliance'. The difference between the two is that it is possible to enumerate the indicators of commitment to compliance or a lack of it. This study identifies four dimensions of national commitment to compliance, namely; constitutional, legal, institutional and political. HRTs in Africa may need to set up an accreditation system to grade the respective national implementation mechanisms of states in line with these four criteria. Based on these criteria, states may be ranked in terms of the effectiveness of their national implementation mechanisms. Like the national human rights institutions accreditation system, states that have effective national implementation mechanisms in place may be awarded 'Grade A' status, and vice versa. The desire to achieve a 'Grade A'

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status may motivate some states to improve their national implementation mechanisms, thus improving their overall compliance with HRTs' decisions.

(iv) Creating a special rapporteur position or working group on implementation

The African Commission currently has 15 special mechanisms, comprising five special rapporteurs, seven working groups and three committees.[36] There is a specific working group on communications, established in 2011. The mandate of the Working Group on Communications covers several issues from seizure of communications, admissibility, merits, provisional measures, referral of communications to the African Court, and also includes advising the Commission on the need to grant oral hearings, and to inform the Commission on the status of implementation of its decisions.[37] Because of the extensive nature of the mandate, the Working Group on Communications may not adequately focus on issues of state compliance and implementation. It is recommended that the African Commission and the African Children's Rights Committee or if possible all HRTs in Africa should designate a special rapporteur or working group with the specific mandate to follow-up on implementation of reparation orders issued by the tribunals. The Human Rights Committee (HRC), for instance, formally established a follow-up procedure in July 1990. The HRC currently has a Special Rapporteur on Follow-up on Views, which submits reports to the Committee annually on the status of implementation of the Committee's Views.

7.2.3 African intergovernmental organisations

African intergovernmental organisations such as the AU, EAC, ECOWAS and SADC have key roles to play in the enforcement of HRTs' decisions. This study finds that commitment to compliance is the foremost factor that drives human rights judgment compliance, and one of the actors whose commitment is crucial for state compliance is the intergovernmental organisation that created the tribunal. With a few notable exceptions, the commitment of

[36] African Commission 'Special mechanisms' http://www.achpr.org/mechanisms/ (accessed 31 July 2017).

[37] See Resolution on the mandate of the Working Group on Communications of the African Commission on Human and Peoples' Rights http://www.achpr.org/sessions/11th-eo/resolutions/212/ (accessed 31 July 2017).

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African intergovernmental organisations to human rights judgment compliance is generally weak. It is thus critically important for intergovernmental organisations in Africa to take more seriously their primary functions of holding states accountable and providing the political wherewithal to prevent states from derailing from mutually accepted human rights standards.

The AU, for instance, can demonstrate its commitment to compliance by urging states to implement decisions of the African Commission, the African Court and the African Children's Rights Committee; adopting a resolution that provides expressly that decisions of these HRTs are legally binding on states; setting up a dedicated body to monitor the execution and implementation of decisions of the tribunals and incorporating in treaty a specific provision for sanctions to be imposed on states in the case of non-compliance, especially with decisions of the African Commission and the African Children's Rights Committee. Threat of sanctions or actual imposition of sanctions on non-complying states would also act as a booster to the work of HRTs in Africa. Beyond the regional system, the EAC, ECOWAS and SADC should also ensure that decisions and judgments of their respective tribunals are respected by states and given effect to.

Heads of the various HRTs should ensure they submit compliance reports to their respective intergovernmental bodies on a regular basis. The relevant political organs should also ensure they act promptly once they have received the report of HRTs. Funding is key to success. HRTs need to be better funded to enable them to perform the task of following-up their decisions effectively. The AU Commission and other secretariats of intergovernmental organisations in African need to advocate for better funding for their respective HRTs. It is also suggested that the AU should adopt a resolution or an interpretive declaration to clarify the binding nature of the decisions of the African Commission and the African Children's Rights Committee.

7.2.4 NGOs and civil society

This study and other similar research have underscored the crucial role of civil society and specifically human rights NGOs in facilitating human rights change at the domestic level. Despite their significance to domestic-level implementation of human rights decisions, the

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field research carried out during this study indicates that human rights NGOs seldom commit reasonable resources to follow-up the outcome of successful litigations. The activities of NGOs up to the delivery of judgment by HRTs are most times published in lavish details on the websites of NGOs and in the media, but it is not easy to find out what happens after the judgment.

Civil society organisations with observer status with the African Commission should comply with their reporting obligations by virtue of their observer status; as this avenue could be used to report on non-compliance by states with decisions of the African Commission and other HRTs in Africa. It is also recommended that NGOs involved in the complaint procedures of African regional or sub-regional HRTs should ensure they monitor the process of state reporting to the relevant treaty monitoring bodies; and submit shadow reports where appropriate. This could also provide an avenue for civil society organisation to highlight issues of non-compliance by states.

Human rights NGOs have generally taken the lead in creating awareness about the communication procedures and decisions of African regional and sub-regional HRTs. However, they sometimes fail to involve the media in their promotional activities. Greater use of the media in the reportage of the proceedings and decisions of HRTs in Africa would increase the 'naming and shaming' effects of the decisions, thus pulling more states towards compliance. In this wise, human rights NGOs and civil society generally should intensify their efforts at creating awareness about the jurisprudence of HRTs in Africa. Civil society organisation should also seek funding from relevant international partners to organise training for members of the public, especially women, youth and children, on the jurisprudence of regional and sub-regional HRTs in Africa.

While submitting individual communications, civil society organisations representing or assisting complainants should ensure that communications submitted to HRTs include very clear and specific reliefs. This will assist the tribunals in formulating specific reparation orders at the conclusion of the case. African civil society organisations should also explore options outside the regional human rights system. As the analysis in this study

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demonstrates, sub-regional platforms such as the EACJ and ECCJ have become viable alternatives for enforcement of human rights in Africa.

7.2.5 Legal experts and future research

This study has confirmed that state compliance is a shallow paradigm to assess the effect of human rights decisions. Human rights judgment compliance analysis offers an inadequate metric for measuring the real-world effects of human rights decisions. Celebrating a reparation order where the state has paid N5million as full compliance, and disparaging another reparation order where the state has committed nearly US$1 billion as 'partial compliance' is misleading. The effectiveness of human rights regimes cannot be measured properly using only the compliance metric. More compliance is not the same as more impact; and less compliance is not synonymous with less impact. The type of research that informs members of the public about the goal of human rights treaty regimes is one that assesses the quantum of change, not one that discusses the degree of conformity. On the one hand, compliance analysis may result in the celebration of deferential tribunals that issue minimalist reparation orders that are easy for states to implement. Impact assessment, on the other hand, celebrates bold, courageous and creative tribunals that issue deep structural remedies. While structural remedies have been identified in this study as a major cause of partial compliance, they are found to be the foundation of any significant human rights change.

It is good for victims of human rights violations to be released from detention and for victims to receive reasonable amounts as compensation for the harm they suffered. However, it is much better to ensure that no one else is ever detained unjustly. While reparation orders that usually lead to a high rate of compliance help limited number of individuals, structural remedies that may produce partial compliance help significant number of people, not only immediately but also in the future. In human rights judgment compliance studies, it is good to criticize HRTs for issuing high cost, non-specific and expansive reparation orders. In a research world that focuses on human rights judgment impact, issuance of issuing high cost, non-specific, broad and comprehensive remedies is an advantage. It is thus recommended that future research should focus progressively on

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the real-world effects of HRTs' decisions at the domestic level, and not merely the degree of conformity by states with reparation orders of HRTs.

In chapter 3 of this thesis, the concept of aggregate compliance has been developed as a framework for comparing human rights judgment compliance across tribunals and states. The argument is that the 'all or nothing approach' which defines a HRT's rate of compliance only in terms of the rate of 'full compliance' is misleading and conflates 'ongoing compliance' with 'non-compliance'. However, the concept has not been fully formulated in this thesis, and further research may be required to assess its full relevance to cross-regional comparison of human rights judgment compliance. Again, the study hypothesis that sub-regional HRTs are much likely to induce state compliance better than regional HRTs, was not supported by the evidence. However, additional research may be needed to further test the hypothesis or confirm the findings in this study. A good starting point is a larger sample of cases as well as more cross-national comparisons.

7.3. Conclusion

There are several descriptive accounts stating that, with respect to implementation of decisions of African regional human rights adjudicatory bodies, non-compliance is the norm and compliance is the exception among African states. This study is an attempt to test these claims empirically in at least five carefully selected states. The thesis investigates whether five states in Africa complied more with decisions of sub-regional HRTs than regional tribunals, and if so, why. As stated earlier, this analysis becomes important in view of the growing influence of sub-regional HRTs in the development of human rights jurisprudence in Africa.

The thesis finds that state compliance with reparation orders of regional and sub-regional HRTs in the selected states is generally low. For instance, The Gambia and Zimbabwe recorded 100 percent non-compliance with reparation orders of the ECCJ and the SADC Tribunal, respectively. Zimbabwe also failed to comply with 11 out of the 14 recommendations of the African Commission in individual communications decided between 2000 and 2015. Nigeria has not complied with 7 of the 13 reparation orders issued by the ECCJ in human rights cases. More than four years after the *Mtikila* decision of the

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African Court, Tanzania is yet to comply with four of the six reparation orders contained in the case; the government complied only partially with two of the orders.

One crucial finding arising from the various analyses in the thesis, and which touch directly on the central research theme of the study, is that the selected African states do not differentiate between decisions of regional and sub-regional human rights tribunals. Decisions of HRTs are complied with by the selected states not because the tribunal is situated at the regional or sub-regional level. The distinctions between regional and sub-regional or binding and non-binding make little or no difference to state compliance with reparation orders of HRTs in the selected states. Instead, commitment to human rights judgment compliance at various levels, the nature of the reparation orders issued by the HRTs, the degree of openness, stability and democracy at the state level, the frequency of political transition or regime change as well as the effectiveness of follow-up are the primary factors that determine whether a decision is complied with.

What came clear from the various interviews conducted during this study is that regardless of the binding, non-binding or recommendatory nature of a human rights decision, a deliberative and dialogical process was required for states to comply with human rights decisions. The perception that a binding decision of a HRT is the magic wand for state compliance was found to be misleading. While the perceived legal status of the decisions of a HRT remains relevant to the implementation process at the domestic level, it was found not tp be a useful predictor of state compliance. State practice in relation to the *Mtikila* and *Alex Thomas* cases, discussed in chapter 3, clearly demonstrates that the government of Tanzania did not feel a peculiar urgency to implement decisions of the African Court. The findings from The Gambia and Zimbabwe indicate that decisions of the African Commission which are perceived to be merely recommendatory received more compliance than binding decisions of the ECCJ and the SADC Tribunal, respectively. The point, then, is that the dichotomy between binding and non-binding decisions was not shown to be crucial for or deterministic of state compliance.

The thesis concludes that the most important factor predictive or indicative of state compliance is the degree of commitment to compliance by the selected states. This is

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followed closely by the nature of the reparation order, that is, the financial, political and normative costs of compliance or non-compliance with the decisions. Three other factors found to be necessary for state compliance are the effective follow-up by HRTs and NGOs; the presence of open, stable and democratic system in the state; and finally, the frequency of political transition or regime change. These five factors are regarded in this thesis as the primary factors predictive of compliance in the selected states.

Despite the general low level of compliance by the selected African states, the thesis concludes that decisions of the selected regional and sub-regional HRTs have had directly or indirectly significant consequences for politics, policies and perceptions in each of the selected states. In some of the selected cases, the indirect effect or impact is more significant than the direct effects. Some of the indirect effects of HRTs' decisions in the selected states include: amicable settlement of disputes and proactive remediation of violations; provision of positive material and non-material benefits for successful applicants; legislative and policy reforms; the use of HRTs' decisions as tools for social mobilization, advocacy and research; holding multinational oil companies (MNCs) and other similar non-state actors accountable for human rights violations; providing a permanent record of human rights violations; increasing the level of awareness about human rights and activities of HRTs; and creating limited deterrence effects on state actions. Some of these domestic-level effects and impact of HRTs' decisions do not relate to any specific reparation orders, and so do not count towards compliance.

On the whole, the thesis concludes that human rights judgment compliance is crucial to domestic-level human rights change; and as argued by Heyns and Viljoen, the time is due for a shift in focus from norms creation and elaboration to implementation, compliance and impact.[38] The selected states are yet to develop a culture of compliance with decisions of international HRTs, and the limited internalisation contributes to non-compliance or partial compliance with decisions of the selected HRTs. The thesis thus concludes that the future of African regional and sub-regional human rights systems is domestic. In other

[38] See CH Heyns & FJ Viljoen (eds) *The impact of the United Nations human rights treaties on the domestic level* (2002) 1. See also G Beco *Non-judicial mechanisms for the implementation of human rights in European states* (2010) 3 - 13. See also United Nations Secretary General Report *In larger freedom*, where it stated that 'we must move from an era of legalisation to an era of implementation'.

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words, the efficacy and effectiveness of regional and sub-regional HRTs depends on the difference they make at the domestic level. While significant attention should be given to the role of domestic politics in human rights judgment implementation and compliance, it is equally important to keep in mind that the intergovernmental organisations that set up HRTs and the tribunals themselves have key roles to play in bending domestic politics towards compliance. Regional and sub-regional HRTs in Africa, civil society organisations, African inter-governmental organisations and most importantly the selected states ought, therefore, to carry out the above recommended reforms in order to enhance compliance and domestic-level impact of HRTs' decisions in the selected states.

The conclusions of this study may thus inform future research. A good starting point is the selection of larger sample of cases as well as more cross-national comparison, using inferential statistics and regression analysis. Even though limited descriptive analysis was carried out to arrive at the various conclusions in the thesis, the arguments and conclusions are more or less intuitive; inferential statistics and more sophisticated statistical tools would no doubt be useful for future analysis. As argued earlier in the thesis, the factors that induce state compliance vary from state to state and region to region. Thus, the conclusions drawn from this study are based on data obtained from the five selected states. As such, this affects the generalisability of the research findings to other states and other human rights regimes.

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Annexures

Annexure I List of cases selected for the study

S/N	Case No	Case Title	Country	Year of decision
African Commission				
1	Communication 205/97	*Kazeem Aminu v Nigeria*	Nigeria	2000
2	Communication 224/98	*Media Rights Agenda v Nigeria*	Nigeria	2000
3	Communication 218/98	*CLO, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*	Nigeria	2001
4	Communication 155/96	*The Social and Economic Rights Action Centre (SERAC) v Nigeria*	Nigeria	2001
5	Communication 147/95 and 149/96	*Jawara v The Gambia*	The Gambia	2000
6	Communication 241/2001	*Purohit v The Gambia*	The Gambia	2003
7	Communication 245/2002	*Zimbabwe Human Rights NGO Forum v Zimbabwe*	Zimbabwe	2006
8	Communication 284/2003	*Zimbabwe Lawyers for Human Rights v Republic of Zimbabwe*	Zimbabwe	2009
9	Communication 294/2004	*Zimbabwe Lawyers for human Rights and the IHRD v Republic of Zimbabwe*	Zimbabwe	2009
10	Communication 297/2005	*Scanlen & Holderness v Zimbabwe*	Zimbabwe	2009
11	Communication 288/2004	*Shumba v Zimbabwe*	Zimbabwe	2012
12	Communication 295/04	*Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi v Zimbabwe*	Zimbabwe	2012
African Court				
13	Application 009&011/2011	*Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania*	Tanzania	2013
14	Application No 005/2013	*Alex Thomas v Tanzania*	Tanzania	2015
African Children's Rights Committee				
15	Communication 2/2009	*Hansungule and Others (on behalf of children in Northern Uganda) v Uganda*	Uganda	2013

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ECCJ				
16	ECW/CCJ/JUD/01/09	*Djot Bayi v Nigeria*	Nigeria	2009
17	ECW/CCJ/JUD/07/10	*SERAP v Nigeria (Education)*	Nigeria	2010
18	ECW/CCJ/JUD/18/12	*SERAP v Nigeria (Environment)*	Nigeria	2012
19	ECW/CCJ/JUD/01/14	*Alimu Akeem v Nigeria*	Nigeria	2014
20	ECW/CCJ/JUD/15/14	*Modupe Dorcas Afolalu v Nigeria*	Nigeria	2014
21	ECW/CCJ/APP/10/10	*SERAP v Nigeria (Bundu Waterfront case)*	Nigeria	2014
22	ECW/CCJ/JUD/03/08	*Manneh v The Gambia*	The Gambia	2008
23	ECW/CCJ/JUD/08/10	*Saidykhan v The Gambia*	The Gambia	2010
24	ECW/CCJ/PP/30/11	*Deyda Hydara v The Gambia*	The Gambia	2014
EACJ				
25	Reference 1 of 2007	*Katabazi v Secretary General, EAC & Attorney General, Uganda*	Uganda	2007
26	Reference No 1 of 2010	*Honorable Sitenda Sibalu v Secretary General of the EAC, Attorney General, Uganda*	Uganda	2011
27	Reference No 5 of 2011	*Mohochi v Uganda Attorney General*	Uganda	2013
28	Reference No 2 of 2012	*Among Anita v A-G Uganda and others*	Uganda	2013
29	Reference No 9 of 2010	*African Network for Animal Welfare v AG Tanzania*	Tanzania	2014
SADC Tribunal				
30	SADCT: 07/2008	*Tembani v Zimbabwe*	*Zimbabwe*	2009
31	SADCT: 02/2007	*Campbell v Zimbabwe*	*Zimbabwe*	2008
32	SADCT: 05/2008	*Gongo v Zimbabwe*	*Zimbabwe*	2010

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Annexure II Participant Information Leaflets and Informed Consent Form

Dear Participant

Title of project: State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five African states.

Introduction

You are invited to volunteer for a research study. This information leaflet is to help you decide if you would like to participate. Before you agree to take part in this study you should fully understand what is involved. If you have any questions, which are not fully explained in this leaflet, do not hesitate to ask the researcher. You should not agree to take part unless you are completely happy about all the procedures involved.

What is the purpose of the study?

This research seeks to ascertain whether states in Africa have been complying with decisions issued against them by international human rights monitoring bodies. The unique contribution of the study is that it will assess, using five case study countries - Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe – whether compliance with decisions of international human rights tribunals is better at the sub-regional level than the regional level, and if so, why? Overall, the study is aimed at improving compliance with decisions of human rights monitoring bodies in Africa.

How will the study be conducted?

If you agree to participate in my research, I will conduct a semi-structured interview with you at a time and location of your choice. The interview session will last approximately 30minutes, during which I will ask you questions about your experience with regard to implementation of one or more decisions of a regional or sub-regional human rights body in Africa. With your permission, I will audiotape and take notes during the interview. The recording is to accurately record the information you provide, and will be used for transcription purposes only. If you choose not to be audiotaped, I will take notes instead. If you agree to be audiotaped but feel uncomfortable at any time during the interview, I can turn off the recorder at your request, or if you don't wish to continue, you can stop the interview at any time.

What is the duration of the study?

The study began in 2015. Interviews will take place between May 2016 and July 2017.

Has the study received ethical approval?

This research protocol was submitted to the Faculty of Law Research Ethics Committee, University of Pretoria, and written approval has been granted by the Committee. The study

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has been structured in accordance with ethical considerations such as the protection of the identity of all participants.

What are my rights as a research participant in this study?

Your participation in this research is entirely voluntary and you can refuse to participate or stop at any time without stating any reason. The investigator retains the right to withdraw you from the study if considered to be in your best interest.

May any of the research procedures result in any discomfort?

No aspect of the research procedures will result in any discomfort for the participants.

What are the benefits involved in the study?

The study will be of immense benefits to victims of specific violations, users of international human rights tribunals in Africa, governments of the five countries as well as other stakeholders involved in promotion, protection and implementation of international human rights norms at the domestic level.

The outcome of the study will provide useful guide to users of international human rights bodies in Africa during submission of their cases, especially on factors to consider while drafting their communications or complaints. It will also assist international human rights tribunals in Africa on how to frame remedial orders in ways that could make compliance almost inevitable. Government officials in the five countries will also benefit from the recommendations to be made at the end of the study, especially those recommendations on how to enhance voluntary compliance with decisions of international human rights tribunals in Africa.

The aim of the researcher is to disseminate the results of the research through the publication of a doctoral thesis, reports and journal articles.

Are there any restrictions concerning my participation in this study?

There are no restrictions to your participation in this study.

Source of additional information

The study will be conducted by way of interviews by Victor Ayeni. Should you have any questions, please do not hesitate to contact him. The telephone number is (+27) 715241486/604942613 or (234) 7066711568, through which you can reach him or another authorised person. You may also contact the researcher through his email: victorayeni7@gmail.com.

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Confidentiality

All information obtained during the course of this research will be handled as confidentially as possible. Data that may be reported in law or scientific journals will not include any information which identifies you as a participant in this study. Data / information will be published anonymously. No information will be disclosed to any third party without your written permission.

Informed Consent Form

I hereby confirm that I have been informed by the researcher Victor Ayeni about the nature, conduct, benefits and risks of the proposed research. I have also received, read and understood the above written information (informed consent) regarding the study. I am aware that the results of the study, including personal details regarding sex, age, marital status etc (state) of myself will be anonymously processed into the research report. (See in particular the definition of 'personal information' in the Promotion of Access to Information Act 2 of 2000.)

I may, at any stage, without prejudice, withdraw my consent and participation in the study. I have had sufficient opportunity to ask questions and (of my own free will) declare myself prepared to participate in the study.

Participant's name: ______________________________

Participant's signature: ______________________________

I, ________________________ herewith confirm that the above participant has been informed fully about the nature and scope of the above study.

Investigator's name: ______________________________

Investigator's signature: ______________________________

Witness's name: ______________________________

Witness's signature: ______________________________

Date: ______________________________

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Annexure III Interview guide for litigants and NGO representatives

Dear litigant,

1. The list of cases being investigated/assessed by this study is attached to the Research Questionnaire. Which of these cases were you involved in litigating?

2. Are you satisfied with the recommendations of the international human right body in that case? How would you rate your satisfaction with the recommendation(s): highly satisfactory, satisfactory, neutral, unsatisfactory or highly unsatisfactory? What is the reason for your opinion?

3. What steps did you take or are you taking to give publicity to this decision? Did you put in place a special awareness programme to sensitize members of the public about this decision?

4. Have you taken any action, for instance through correspondence or by way of an advocacy visit, to the relevant government department towards ensuring implementation of this decision? What is the outcome of such effort, if any?

5. To what extent would you say the remedial orders or recommendations of the human rights bodies have been complied with by the government? How would you rate the level of compliance so far: highly satisfactory, satisfactory, neutral, unsatisfactory or highly unsatisfactory?

6. Have you written any follow-up letters to the secretariat of the international human rights body that issued the decision with a view to updating it about the status of implementation and also seeking their help towards ensuring implementation? What was the outcome or effect of such correspondence?

7. How would you rate the response of the relevant human rights body to your correspondence: highly satisfactory, satisfactory, neutral, unsatisfactory or highly unsatisfactory? What could the relevant human right body have done to make you more satisfied?

8. What particular challenges do you face in following up the implementation of this decision?

9. What factors, in your view, have prevented government from fully implementing the remedial orders or recommendations of the human rights body?

10. What do you suggest should be done and by whom to make government comply with the remedial orders or recommendations international human rights bodies?

11. Is there anything more you would like to add?

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Annexure IV Interview guide for government representatives

Dear government representative(s),

1. The list of cases being investigated/assessed by this study is attached to the Research Questionnaire. Which of these cases are you familiar with?

2. Do you agree with the reasoning and recommendations of the international human right body in those cases? How would you rate your satisfaction with the reasoning and recommendation(s) in those cases: highly satisfactory, satisfactory, neutral, unsatisfactory or highly unsatisfactory? What is the reason for your opinion?

3. Is your department/commission/ministry always clear about what international human rights bodies expect them to do in order to implement a particular decision? How would you rate in general the level of clarity of the recommendations of international human rights bodies: very clear, clear, neutral, not clear or extremely unclear?

3. Does your department/commission/ministry follow up on implementation of decisions of international human rights bodies? Any insight on what happens to these decisions after they have been transmitted to your department/commission/ministry?

4. People say governments rarely comply with decisions of international human rights bodies. Is this perception correct from your experience?

5. What steps, in your view, have government taken, whether through your department/commission/ministry or through any other government agency known to you, to ensure the implementation of these decisions?

6. Would you say the remedial orders or recommendations in these decisions have been fully or partially implemented? What are your reasons for this assertion?

7. If you think these decisions have not been sufficiently implemented, what, in your view, is the reason for that? How can this be avoided? What do you think the relevant international human rights bodies should do so as to enhance domestic implementation of their decisions?

8. Are there any particular challenges your department/commission/ministry is facing in ensuring implementation of these decisions?

8. Do you think your department/commission/ministry is properly placed to oversee implementation of decisions of international human rights bodies? What institution of government do you think is well suited to oversee implementation of these decisions?

9. What do you suggest should be done and by whom to enhance implementation of the decisions of international human rights bodies in your country?

10. Is there anything more you would like to add?

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Annexure V Interview guide for HRTs' officials

Dear HRT official,

1. The list of cases being investigated/assessed by this study is attached to the Research Questionnaire. Which of these cases are you familiar with?

2. What steps did you take or are you taking to give publicity to this decision? Did you put in place a special awareness programme to sensitize members of the public about these decisions?

3. Have you taken any action, for instance through correspondence or by way of advocacy visit, to the relevant state or the litigants towards ensuring implementation of this decision? What is the outcome of such effort?

4. To what extent would you say the remedial orders or recommendations of your court/commission/committee/tribunal in any of these cases that you are familiar with have been fully implemented by states?

5. If you think these decisions have not been sufficiently implemented, what, in your view, is the reason for that? How can this be avoided? What do you think your court/commission/tribunal should do so as to enhance domestic implementation of its decisions?

6. Would you say compliance with decisions of international human rights bodies is better at the regional than the sub-regional level? What are your reasons for this assertion?

7. What factors, in your view, accounts for non-implementation or partial implementation of decisions of your court/commission/committee/tribunal at the domestic level?

8. What are the various ways through which decisions of international human rights bodies contribute to the promotion, protection and realisation of human rights at the domestic level despite the high rate of non-compliance by states?

9. What do you suggest should be done and by whom to make governments comply with decisions of international human rights bodies?

10. Is there anything more you would like to add?

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Annexure VI Interview guide for academics and human rights experts

Dear expert,

1. The list of cases being investigated/assessed by this study is attached to the research questionnaire. Which of these cases are you familiar with?

2. Do you agree with the reasoning and recommendations of the international human right body in those cases? What aspects of the reasoning or recommendations are you satisfied or dissatisfied with?

3. To what extent would you say the remedial orders or recommendations of the international human rights bodies in any of these cases that you are familiar with have been fully implemented by government?

4. Would you say compliance with decisions of international human rights bodies is better at the regional than the sub-regional level?

7. What factors, in your view, accounts for non-implementation or partial implementation of decisions of international human rights bodies at the domestic level?

8. Some people are of the view that binding decisions are more likely to be complied with than non-binding or recommendatory decisions. Do you agree?

9. How important, in your view, is clarity and specificity of remedial order to the process of human rights judgment compliance?

10. Some people are of the view that as a general rule, open, liberal and democratic states tend to comply more with remedial orders or recommendations of international human rights bodies than closed, illiberal and non-democratic states. Is this perception correct from your experience? Do you think the distinction between liberal and illiberal states is important in predicting whether or not a state will comply with decision of a human right body?

11. A growing body of scholarship tend to attribute compliance with decisions of international human rights bodies to the costs (financial or political) of implementing such decision. Do you consider costs an important factor preventing states from implementing human rights decisions, and from your experience, which type of costs is usually more decisive of compliance, financial or political cost?

12. What are the various ways through which decisions of international human rights bodies contribute to the promotion, protection and realisation of human rights at the domestic level despite the high rate of non-compliance by states?

13. What do you suggest should be done and by who to make governments comply with decisions of international human rights bodies?

14. Is there anything more you would like to add?

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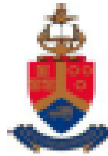
Annexure VII Ethics clearance certificate



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Faculty of Law

RESEARCH ETHICS COMMITTEE

Tel: + 27 (0)12 420 5778
Fax: +27 (0)12 420 2991
E-mail: annelize.nienaber@up.ac.za

MR VICTOR AYENI
CENTRE FOR HUMAN RIGHTS,
FACULTY OF LAW UNIVERSITY
OF PRETORIA PRETORIA 0002

1 June 2016

Dear Mr Ayeni

ETHICS CLEARANCE CERTIFICATE

The Research Ethics Committee of the Faculty of Law at the University of Pretoria has reviewed your application for ethics clearance entitled "Compliance with remedial orders of international human rights tribunals in Africa: An assessment of the interplay between the regional and sub-regional systems" and granted you CONDITIONAL ethics approval for your project.

The approval is conditional upon you obtaining permission from the relevant authorities, in instances where it is at all possible, in the different countries that you intend to do your research. Proof of such permissions, if obtained, must be submitted to us.

Please note further that you need to keep to the protocol you were granted approval on – should your draft respondent questionnaire be amended in due course, you will need to submit the amended version to us.

We wish you every success in your research project.

Yours faithfully

(PROF) A G NIENABER

CHAIR: RESEARCH ETHICS COMMITTEE (FACULTY OF LAW)

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Annexure VIII List of interview participants

Advocate Bellinda Chinowawa, Senior Projects Lawyer, Zimbabwe Lawyers for Human Rights (Email, 4 April 2017).

Advocate Evelyn Chijarira, Programme Officer – Human and Peoples' Rights in Africa, Pan African Lawyers Union (Skype, 5 May 2017).

Advocate FrankMchomvu, Advocate of the High Court of Tanzania (Email, on 24 April 2017).

Advocate Frank Pelser, Legal Counsel in *Mike Cambell & Others v Zimbabwe*; Counsel, Huguenot Chambers, Cape Town (Email, 21 March 2017).

Advocate Kazeem Aminu, the complainant in *Kazeem Aminu v Nigeria* (Lagos, 11 May 2016).

Advocate Sola Egbeyinka, Legal counsel in some of the ECCJ cases selected for this study; Legal Counsel, Falana & Falana Chambers, Abuja (Abuja, 20 May 2016).

Dr Ally Possi, Advocate of the High Court of Tanzania (Email, 30 March 2017).

Dr David Padilla, Legal Counsel to the complainant in *Shumba v Zimbabwe* (Pretoria, 21 March 2017).

Dr Emma Lubale, Senior Lecturer, University of Venda (Email, 27 April 2017).

Dr Gabriel Shumba, complainant in *Shumba v Zimbabwe* (Pretoria, 21 March 2017).

Dr Ousmane Diallo, Director, Research, Communication and Documentation of the ECOWAS Community Court of Justice, Abuja, Nigeria (Email, 23 May 2016).

Dr Prudence Acirokop, Uganda-based human rights consultant (Email, 8 May 2017).

Dr Tarisai Murungi, Managing Partner, Donsa-Nkomo and Mutangi Attorneys & Lecturer at Midlands State University (Telephone communication, 25 April 2017).

Mr Ayode Longe, Programme Manager, Media Rights Agenda (Lagos, 13 May 2016).

Mr Ayodele Ameen, the victim in *Kazeem Aminu v Nigeria* (Lagos, 11 May 2016).

Mr Dawda Samba, Country Facilitator, Mental Health Leadership and Advocacy Program Gambia (Skype, 20 March 2017).

Mr Oliver Windridge, Founder, The ACtHPR Monitor (Email, 4 May 2017).

Mr Simon Tweny, Court Clerk, EACJ Sub-registry, Kampala, Uganda (Email, 29 May 2017).

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Mr Stanley Ibe, Associate Legal Officer, Open Society Justice Initiative (Email, 25 May 2016).

Mr Timothy Adewale, Deputy Director, SERAP (Telephone communication, 6 April 2017).

Ms Anietie Ewang, Social and Economic Rights Action Centre, SERAC (Email, 4 April 2017).

Ms Blessing Gorejena, Programmes Coordinator, Zimbabwe Human Rights NGO Forum (Email, 30 March 2017).

Ms Brenda Ntihinyurwa, Legal Expert, East African Community (Email, 2 June 2017).

Ms Dora Mawutor, Programme Manager, Media Foundation for West Africa (Email, 3 April 2017).

Professor Chidi Odinkalu, former chairman of the Governing Council, Nigeria's National Human Rights Commission (Abuja, 23 May 2016).

Professor Michelo Hansungule, Centre for Human Rights and complainant in *Michelo Hunsungule and others (on behalf of children in northern Uganda) v Uganda* Communication 001/Com/001/2005 (Pretoria, 6 April 2017).

Professor Muhammed Tawfiq Ladan, Department of Public Law of the Faculty of Law, Ahmadu Bello University, Zaria, and member, United Nations Technical Advisory Committee on Environmental Crimes (Telephone, 10 May 2016).

Professor Nsongurua Udombana, Professor of international law, Babcock University, Ogun State, Nigeria (Telephone, 10 May 2016).

Professor Obiora Chinedu Okafor, York Research Chair in International and Transnational Legal Studies and Member, UN Human Rights Council Advisory Committee (Email, 5 May 2016).

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Appendices

Appendix I: Implementation narrative and compliance status analysis of reparation orders of regional HRTs selected for the study

<table>
<tr><td colspan="3">African Commission</td></tr>
<tr><td rowspan="3">1.</td><td colspan="2">Jawara v The Gambia[1]
Case summary: The communication alleges suspension of the Bill of Rights, banning of political parties, the restriction of freedom of movement and expression as well as detention and arrest of people without charges.
Date of decision: 11 May 2000</td></tr>
<tr><td>Reparation order</td><td>Implementation narrative and compliance status</td></tr>
<tr><td>The Commission requests the government of the Gambia to ‘bring its laws in conformity with the provisions of the African Charter.’[2]</td><td>Following intense international criticism and pressure, the government of the Gambia has taken limited measures to roll back some of the legislation and policies that led to the violations complained of in this case. Sir Dawda Jawara has returned to the Gambia from exile.[3] On 23 July 2001, the ban on political parties was formally lifted.[4] Sir Jawara’s party, the Peoples’ Progressive Party, has since then participated in political activities.[5] In principle, the Bill of Rights was restored with the adoption of the Constitution of the Republic of the Gambia in 1997.[6] The 1997 Constitution of the Gambia contains what has been described as a ‘comprehensive</td></tr>
</table>

[1] *Sir Dawda Jawara v The Gambia* (*Jawara* case) (2000) AHRLR 107 (ACHPR 2000).

[2] Determining the compliance status of cases where HRTs requested states to ‘bring their laws in conformity with the African Charter’ is problematic. A reparation order requesting conformity between national law and human rights obligations could possibly have both broad and narrow meaning. In the broad and generic sense, the order requires the state to take general measures to comply with its obligations under the Charter. In a specific sense, the reparation order requires the state to take measures to comply with its obligations under the Charter as it relates to the case at hand. For this thesis, the specific or narrow connotation is adopted.

[3] L Louw ‘An analysis of state compliance with the recommendations of the African Commission on Human and Peoples’ Rights’ unpublished LLD thesis, University of Pretoria, 2005, 38.

[4] BBC News ‘The Gambia profile – Timeline’ 27 January 2017 http://www.bbc.com/news/world-africa-13380407 (accessed 5 March 2017).

[5] Gainako ‘Gambian opposition parties set to select a single candidate for December polls at a convention’ 30 October 2016 http://gainako.com/gambian-opposition-parties-set-select-single-candidate-december-polls-convention/ (accessed 5 March 2017).

[6] See Constitution of the Republic of The Gambia of 1997, chapter IV, articles 17 - 39.

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		catalogue of rights and freedoms'.[7] The government of The Gambia adopted the Women's Act in 2010.[8] The Women's (Amendment) Act 2015 expressly prohibits female circumcision, otherwise referred to as female genital mutilation (FGM), and imposes an imprisonment term of 3 years or a fine of 50,000 *Dalasis* or both on anyone convicted of having engaged in the act. The Gambia in 2013 adopted the Domestic Violence Act and the Sexual Offences Act. Although these laws, one way or another, fall short of international best practices and standards, they nonetheless partly fulfil the obligation to bring domestic laws in line with the African Charter.[9] *Status: Partial compliance*
2.	***Kazeem Aminu v Nigeria***[10] *Case summary:* The communication alleges arbitrary arrests, detention and torture by Nigerian security personnel; denial of access to medical treatment and inhuman and degrading treatment because of which the accused went into hiding. *Date of decision:* 11 May 2000	
	Reparation order	*Implementation narrative and compliance status*
	The Commission requests the government to 'take necessary measures to comply with its obligations under the Charter'.[11]	Both the victim and the complainant stated on 11 May 2016 that events since the transfer of power to civilian administration in 1999 have resolved the allegations complained of in this case.[12] The victim in the case, Mr Ayodele Ameen, regained his freedom since the return of

7 See S Nabaneh 'The impact of the African Charter and the Maputo Protocol in The Gambia' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 75.
8 See Women's Act of The Gambia, adopted July 2010.
9 Other laws include the Domestic Violence Act of 2013 and the Sexual Offences Act of 2013.
10 Kazeem *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000).
11 See *Kazeem Aminu v Nigeria*, para 26.
12 Interview with A Ameen (the victim in this case) on 11 May 2016. Interview with K Aminu (the complainant in this case) on 11 May 2016. According to the victim: 'circumstances and events have overtaken the case. By the time the decision was delivered by the African Commission, a new government was already in power.' The victim's life was therefore no longer at risk.

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<table>
<tr><td></td><td></td><td>power to civilian leadership in 1999.[13] Decree No 2 of 1984, which ousted the jurisdiction of domestic courts to entertain the complainant's case, has been repealed.[14]

Status: Full compliance</td></tr>
<tr><td>3.</td><td colspan="2">***Media Rights Agenda v Nigeria***[15]
Case summary: Arbitrary arrest and detention of a newspaper editor, Niran Malaolu, alongside three journalists who were later released. During his detention, Malaolu was denied access to his lawyer, doctor and family. Following a secret trial, he was convicted to life imprisonment. The communication also alleges denial of right of appeal by a military decree - the Treason and Other Offences (Special Military Tribunals) Decree of 1986.
Date of decision: 6 November 2000</td></tr>
<tr><td></td><td>*Reparation order*</td><td>*Implementation narrative and compliance status*</td></tr>
<tr><td></td><td>The Commission requests Nigeria to 'bring its laws in conformity with the provisions of the Charter.'[16]</td><td>The victim, Niran Malaolu, was initially sentenced to life imprisonment, which was later commuted to 15 years.[17] Malaolu, along with 95 others, were granted clemency on 4 March 1999 and the law under which he was tried, the Treason and Other Offences (Special Military Tribunals) Decree of 1986, was repealed, upon return to civil rule in 1999.[18]

Status: Full compliance</td></tr>
<tr><td>4.</td><td colspan="2">***Civil Liberties Organisation & 2 Others v Nigeria***[19]
Case summary: The communication alleges unfair trial and conviction for treason of Lt Gen Oladipo Diya, four other soldiers and a civilian by a special military tribunal set up under the</td></tr>
</table>

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13 As above.

14 See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999, adopted on 29 May 1999, the date the military handed over power to democratically elected civilian administration.

15 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

16 *Media Rights Agenda* case (n 15 above) para 75.

17 See interview with A Longe (Media Rights Agenda) on 13 May 2016.

18 See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999, Laws of the Federation of Nigeria. See also Louw (n 2 above) 43.

19 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (2001) AHRLR 75 (ACHPR 2001).

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<table>
<tr><td rowspan="4"></td><td colspan="2">Treason and Other Offences (Special Military Tribunal) Decree No 1 of 1986. The victims were sentenced to death.
Date of decision: 7 May 2001[20]</td></tr>
<tr><td>Reparation orders</td><td>Implementation narrative and compliance status</td></tr>
<tr><td>The Commission:
(i) urges the government of Nigeria to bring its laws in conformity with the Charter by repealing the offending Decree.</td><td>The offending Decree in this case is the Treason and Other Offences (Special Military Tribunal) Decree No 1 of 1986 (as amended by the Treason and Treasonable Offences Decree No 29 of 1993).[21] This Decree was repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999, enacted on 29 May 1999, the day the military junta transferred power to a democratically elected civilian administration.[22]

Status: Full compliance[23]</td></tr>
<tr><td>(ii) requests the Government of the Federal Republic of Nigeria to compensate the victims as appropriate.</td><td>A total of 95 political detainees, including the six victims involved in this case, were granted clemency and released from prison on 4 March 1999, as part of preparations towards military to civilian hand over of power on 29 May 1999.[24] It has been pointed out, however, that the clemency granted did not amount to a pardon.[25]</td></tr>
</table>

[20] Where the duration of the session at which the decision was taken is indicated in the HRT's 'judgment' or 'decision', the closing date of the session is taken in this study as the date of the decision.
[21] There is no reference to the so-called 'offending Decree' throughout the 45-paragraph decision of the African Commission in this case. However, Communication 224/98 (n 15 above), whose facts also relate to the Special Military Tribunal that tried the complainant in this case, in paragraphs 12, 14 and 30 clearly indicates the Tribunal was set up and trial was conducted under the Treason and Other Offences (Special Military Tribunal) Decree No1 of 1986 as amended by the Treason and Treasonable Offences Decree No 29 of 1993, Cap 444 of the Laws of the Federation of Nigeria, 1990.
[22] See the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999.
[23] Implementation status of this reparation order is categorised as 'full compliance' because the Commission specifically requires the repeal of 'the offending decree'.
[24] See C McGreal "Nigeria frees last of the 'plotters' against Abacha" *The Guardian* Friday 5 March 1999 https://www.theguardian.com/world/1999/mar/05/chrismcgreal (accessed 13 March 2017).
[25] See Louw (n 3 above) 47.

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		The government on 12 March 2013 formally granted full presidential pardon to three of the six victims.[26] The Executive Order directed that the victims' military ranks be restored, and various sums were allocated to them as arrears of salaries, gratuities and pensions.[27] Two issues, however, remain unresolved. First, it has not been established that the victims received the various sums approved.[28] Secondly, three of the six victims are yet to receive a presidential pardon, and no compensation, salary arrears or gratuities have been approved for them by government.[29] *Status: Partial compliance*
5.	***SERAC v Nigeria***[30] *Case summary:* The communication alleges that the Nigerian government has been involved in oil production in Ogoniland, through the state-owned oil company which owns the majority share in a consortium with the Shell Petroleum Development Company (SPDC). These oil production operations, the communication alleges, cause environment degradation, affects the means of livelihood of Ogoni people and cause severe health	

[26] A Novak *Comparative executive clemency: The constitutional pardon power and the prerogative of mercy in global perspective* (2016) 97 & 102; B Adefaka '1997 'Phantom coup', corruption: Diya, Adisa, Alamieyeseigha pardon gazetted; Olanrewaju, Akiyode left in the cold!' *TheVanguard* 14 June 2015 http://www.vanguardngr.com/2015/06/1997-phantom-coup-corruption-diya-adisa-alamieyeseigha-pardon-gazetted-olanrewaju-akiyode-left-in-the-cold/ (10 April 2017). The three victims pardoned are Oladipo Diya, Adisa and Bello Fadipe. Those not pardoned are Major General Tajudeen Olanrewaju, Colonel Edwin Jando and the late Lieutenant Colonel Olu Akiyode.

[27] A Novak 'Transparency and comparative executive clemency: Global lessons for pardon reform in the United States' (2016) 49 *University of Michigan Journal of Law Reform* 848; B Oladeji 'State pardon - Yar'Adua, Diya, others get N1.01 Billion as benefits' *The Leadership* 18 March 2013 http://allafrica.com/stories/201303180345.html (accessed 10 April 2017).

[28] B Adefaka '1997 coup pardon: Diya, Adisa's family disagree over entitlements' *Vanguard News* 20 April 2014 http://www.vanguardngr.com/2014/04/1997-coup-pardon-diya-adisas-family-disagree-entitlements/ (accessed 14 March 2017); B Adefaka 'General Adisa's wife opens up: Life without husband's benefits' http://www.vanguardngr.com/2013/11/general-adisas-wife-opens-life-without-husbands-benefits/ (accessed 10 April 2017).

[29] A Adedipe "Diya's coup: Plea to President Buhari to pardon General Olanrewaju & co." *The Sun* 18 May 2016 http://sunnewsonline.com/diyas-coup-plea-to-president-buhari-to-pardon-general-olanrewaju-co/ (accessed April 2017).

[30] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*Ogoniland* case) (2001) AHRLR 60 (ACHPR 2001).

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<table>
<tr><td rowspan="3"></td><td colspan="2">problems. The communication also alleges that government has condoned these violations and have carried out ‘ruthless military operations’ against Ogoni leaders and communities.
Date of decision: 27 October 2001</td></tr>
<tr><td>Reparation orders</td><td>Implementation narrative and compliance status</td></tr>
<tr><td>The Commission urges Nigeria to:
(i) Stop all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permit citizens and independent investigators free access to the territory.</td><td>(a) Stopping all attacks
Over the years, attacks on Ogoni communities have reduced and the communities have become relatively accessible due to efforts by the government through the Niger Delta Development Commission (established in 2000) and the Ministry of the Niger Delta Affairs (established in 2008) to ensure peace in the region.[31] Although the RSISTF has withdrawn from Ogoniland and no attacks on Ogoni communities by the RSISTF has been reported during the study period, a good number of military joint task force, similar to the RSISTF, are still on the streets and waterways of oil producing states in Nigeria.[32]

(b) Ensuring access
In 2006, the government of Nigeria invited the United Nations Environment Programme (UNEP) to undertake an independent scientific assessment of Ogoniland. The investigation, which was carried out over a period of 14 months, saw UNEP technical teams visiting more than 200 locations in Ogoniland and surveyed 122 kilometres of</td></tr>
</table>

[31] Email from A Ewang (Social and Economic Rights Action Centre, SERAC) on 4 April 2017.

[32] See JO Alabi ‘The dynamics of oil and fiscal federalism: Challenges to governance and development in Nigeria’ unpublished PhD thesis, University of Leeds, 2010, 229. As recently as 2016, military invasions of four communities in Ogoniland and attacks on Ogoni women by security operatives were widely reported. See S Aborisade ‘Senate probes military invasion of Ogoniland’ *The Punch* 10 March 2016 http://punchng.com/senate-probes-military-invasion-of-ogoniland/ (accessed 20 March 2017). The series of attacks and invasion reportedly claimed the lives of 12 Ogoni men, women and children on 23 February 2016. See H Umoru, E Obuakporie, J Agbakwuru & J Erunke ‘Ogoni killings: Why we struck – Army’ *The Vanguard News* 11 March 2016 http://www.vanguardngr.com/2016/03/ogoni-killings-why-we-struck-army/ (accessed 20 March 2017).

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		pipeline rights of way.[33] During the assessment, the UNEP team 'analysed 4,000 soil and water samples, reviewed more than 5,000 medical records and engaged over 23,000 people at local community meetings.'[34] In a nutshell, government has allowed citizens and independent investigators access to Ogoniland but military attacks and invasion of Ogoniland has not stopped completely. *Status: Partial compliance*
	(ii) Investigate the human rights violations described above and prosecute officials of the security forces, NNPC and relevant agencies involved in human rights violations.	*(a) Investigation* There has been no official inquiry into the human rights violations that took place in Ogoniland.[35] However, in January 2001, the Human Rights Violations Investigation Commission (HRVIC), headed by Justice Chuckwudifu Oputa, held hearings in Rivers State during which issues relating to human rights abuses in Ogoniland were discussed.[36] The Commission, also called 'Oputa Panel', was inaugurated to 'investigate mysterious deaths, assassinations and other human rights abuses committed by the successive military regimes between January 1966 and June 1998'.[37] During the hearing, more than 10,000 cases from Ogoniland were submitted to the Commission.[38] The Movement for the Survival of the Ogoni People (MOSOP) participated in the hearing. At the hearing, MOSOP called on

33 United Nations News Centre 'Oil clean-up in Nigeria's Ogoniland urgent but national collaboration crucial – UN envoy' 5 February 2013 http://www.un.org/apps/news/story.asp?NewsID=44072#.WM-xtfjwGM8 (accessed 20 March 2017).
34 As above.
35 Amnesty International *The Niger Delta: No democratic dividend* (2002) 20 https://www.hrw.org/reports/2002/nigeria3/nigerdelta.pdf (accessed 18 April 2017).
36 See Report of the Human Rights Violations Investigation Commission (Oputa Panel), Volume IV http://www.nigerianmuse.com/nigeriawatch/oputa/OputaVolumeFour.pdf (accessed 17 April 2017).
37 Amnesty International (n 35 above) 20; Oputa Panel Report (n 35 above).
38 As above.

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		the Nigerian armed forces to accept responsibility for the human rights violations perpetrated by its officers in Ogoniland between 1994 and 1998. Senior military officers that appeared before the Panel, including the former Commander of the infamous RSISTF, Colonel Paul Okuntimo, refused to accept responsibility for the violations.[39] Shell Petroleum Development Company (SPDC), the main oil company indicted in the Ogoniland human rights abuses, also appeared before the Commission.[40] The Commission also arranged separate meetings with representatives of MOSOP, SPDC and the Rivers State government.[41] *(b) Prosecution* No member of the now defunct Rivers State Internal Security Task Force (RSISTF) or any other security agency that formed the RSISTF are known to have been prosecuted for atrocities committed against the Ogoni people.[42] The men who superintended the various human rights violations, Lt Colonel Dauda Musa Komo and Colonel Paul Okuntimo, were never prosecuted. Majority of the military officers involved in the human rights abuses of Ogoniland became influential politicians on return to civil rule in 1999.[43] *Status: Partial compliance*
	(iii) Ensuring adequate compensation to victims of	*(a) Payment of compensation*

[39] See S Peggs 'Human rights in Nigeria's Niger Delta' (2001-2002) 4 *Indiana International Human Rights Law Bulletin* 5 - 6; Unrepresented Nations and Peoples Organization 'Ogoni' 25 March 2008 http://unpo.org/members/7901 (accessed 20 March 2017).

[40] As above.

[41] Amnesty International (n 35 above) 21.

[42] Ewang (n 11 above).

[43] It would be recalled that Lt Colonel Dauda Musa Komo formed the RSISTF while he appointed Colonel Paul Okuntimo to lead the Task Force. Komo was only relieved of his position on 22 August 1996. He even attempted to contest the governorship position of his state, Kebbi, in 2003.

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	the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations.	On 8 June 2009, Shell Petroleum Development Company (SDPC) agreed to pay the sum of US$15.5 million to settle legal actions instituted by dependants of the Ogoni nine, alleging SPDC of complicity in the various human rights abuses in Ogoniland and the execution of Ken Saro-Wiwa and eight others.[44] Part of the payment was used to create a trust, called *Kiisi*,[45] to support education, agriculture, and other social initiatives in Ogoniland.[46] In January 2015, the parent company of SPDC, the Royal Dutch Shell, without admitting responsibility, agreed to pay the sum of US$84 million (£55 million) as a 'humanitarian gesture' to 15,600 farmers, fishermen and women in Bodo community of Ogoniland.[47] Of the amount, the sum of £35 million would be paid directly to the individuals, with each person getting £2,100, while the Bodo community gets £20m.[48] No record exists of payment of compensation directly by government to Ogoni communities. The government has, however, provided other social benefits to Ogoni communities and the Niger Delta area, in general, through the Niger Delta Development Commission, the

44 M Ssenyonjo *Economic, social and cultural rights in international law* (2016) 214. See also P Apps 'A dirty business: Shell's crimes in the Niger Delta' 18 June 2010 https://www.wessexscene.co.uk/politics/2010/06/18/a-dirty-business-shells-crimes-in-the-niger-delta/ (accessed 18 March 2017).

45 In Ogoni Gokana language, *Kiisimeans* 'progress'.

46 E Pilkington 'Shell pays out $15.5m over Saro-Wiwa killing' *The Guardian News* 9 June 2009 https://www.theguardian.com/world/2009/jun/08/nigeria-usa (accessed 18 March 2017).

47 BBC News 'Shell agrees $84m deal over Niger Delta oil spill' 7 January 2015 http://www.bbc.com/news/world-30699787 (accessed 18 March 2017).

48 J Vidal 'Shell announces £55m pay-out for Nigeria oil spills' *The Guardian News* 7 January 2015 https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills (accessed 18 March 2017).

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		Ministry of the Niger Delta Affairs and the Niger Delta Amnesty Programme.[49] *(b) Clean-up of Ogoniland:* There is patchy evidence that Nigeria has begun the clean-up of Ogoniland following the decision of the African Commission and the recommendations contained in the 2011 UNEP report on *Environmental Assessment of Ogoniland*.[50] In 2012, the government set up the Hydrocarbon Pollution Restoration Project (HYPREP) to lead and co-ordinate the clean-up of Ogoniland.[51] The UNEP report in 2011 had recommended that both government and Shell should provide an initial sum of US$1 billion for the remediation of the environment in Ogoniland.[52] On 2 June 2016, the government formally launched a US$1 billion operation for the clean-up of Ogoniland.[53] The government also inaugurated a 10-member Board of Trustees and a 13-member Governing Council to supervise the clean-up.[54] According to the plan, which was designed by 'UN engineers, oil companies and government', an estimated

49 The benefits provided for oil communities include special bursaries and scholarships, skill acquisition and vocational training for youth and women, and provision of special housing scheme. See 'Niger Delta Development Commission' http://nddc.gov.ng/ (accessed 10 April 2017).
50 UNEP *Environmental Assessment of Ogoniland* (UNEP Report) (2011). See M Langford, C Rodriguez-Garavito & J Rossi 'Introduction: From jurisprudence to compliance' in M Langford, C Rodriguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 4.
51 US Chamber of Commerce Foundation 'Hydrocarbon Pollution Restoration Project by Shell Oil Company' https://www.uschamberfoundation.org/hydrocarbon-pollution-restoration-project (accessed 20 March 2017).
52 UNEP report (n 50 above).
53 'Oil clean-up pledge divides Nigerians' *BBC News* 28 June 2016 http://www.bbc.com/news/world-africa-36641153 (accessed 18 March 2017).
54 O Nnodim 'Buhari approves governing council, board for Ogoni clean up' The *Punch News* 31 July 2016 http://punchng.com/buhari-approves-governing-council-board-ogoni-clean/ (accessed 18 March 2017). See also 'Buhari approves governing council, board for Ogoniland cleanup' *Vanguard News* 30 July 2016 http://www.vanguardngr.com/2016/07/buhari-approves-governing-council-board-ogoniland-cleanup/ (accessed 18 March 2017).

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		$200m will be spent annually for five years.[55] This money, government sources claimed, will be paid for mainly by the polluters – the multinational oil companies.[56] At least one evidence of commitment to the Ogoniland clean-up on the part of government is that in the 2017 federal budget, government allocated N164,875,374 (about US$ 500,000) for the Ogoniland clean-up programme support.[57] *Status: Partial compliance*
	(iv) Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and	At the request of the government of Nigeria in 2006, the United Nations Environment Programme (UNEP) carried out an environmental impact assessment of oil exploration activities in Ogoniland.[58] The UNEP report was published in August 2011. However, no oil production or exploration has taken place in Ogoniland since 1993.[59] As a result, government is yet to be presented with a situation where its commitment to compliance with this reparation order will be tested.[60] However, some measures have been taken to ensure safe operation of oil development in other oil producing areas.[61] In 2002, the Environmental Guidelines and Standards for the

55 J Vidal 'Niger delta oil spill clean-up launched – but could take quarter of a century' *The Guardian News* 2 June 2016 https://www.theguardian.com/global-development/2016/jun/02/niger-delta-oil-spill-clean-up-launched-ogoniland-communities-1bn (accessed 18 March 2017).

56 Each member of the Shell Petroleum Development Company (SPDC) joint venture is 'expected to pay a pro-rata share of the $1bn. See Vidal (n 55 above).

57 Federal Government of Nigeria 'Federal Ministry of Environment: 2017 FGN budget proposal' http://www.budgetoffice.gov.ng/pdfs/2017pro/FEDERAL%20MINISTRY%20OF%20ENVIRONMENT%20-.pdf (accessed 18 March 2017).

58 UNEP Report (n 50 above).

59 BR Konne 'Inadequate monitoring and enforcement in the Nigerian oil industry: The case of Shell and Ogoniland' (2014) 47 *Cornell International Law Journal* 181, 181; UNEP Report (n 50 above) 25.

60 The UNEP Report contains 10 guidelines to be followed by government for future oil exploration in Ogoniland. See UNEP Report (n 50 above) 228.

61 This reparation order, it would seem, is not confined to oil development in Ogoniland but the entire Niger Delta area where oil production takes place.

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		Petroleum Industry in Nigeria (EGASPIN) was adopted.[62] In 2006, the National Oil Spill Detection and Response Agency (NOSDRA) was created to co-ordinate the implementation of the National Oil Spill Contingency Plan (NOSCP).[63] The National Environmental Standards and Regulations Enforcement Agency (NESREA) was established in 2007 to replace the Federal Environmental Protection Agency (FEPA) which has been in existence since 1992.[64] *Status: Partial compliance*
	(v) Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.[65]	This reparation order has not been complied with.[66] The study was unable to find any national policy of government aimed at communicating risks and educating Ogoni communities about the health and environmental risks of oil exploration.[67] Some of the environmental and health problems in Ogoniland manifest in air quality, food quality and supply, waste and disposal of hazardous chemicals, water quality and ecosystem alterations.[68] Government has also not adopted any specific policy on the procedure for

[62] EGASPIN was adopted by the Department of Petroleum Resources (DPR) to ensure that petroleum industry operators do not degrade the environment during their operations. See DPR 'Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)' https://dpr.gov.ng/index/egaspin/ (accessed 11 April 2017).

[63] National Oil Spill Detection and Response Agency (Establishment) Act of 2006.

[64] See the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act of 2006.

[65] In addition to the five clear reparation orders, the Commission also urged the government of Nigeria to keep it informed of the outcome of the work of the Federal Ministry of Environment, the Niger Delta Development Commission (NDDC) and the Judicial Commission of Inquiry inaugurated to investigate issues of human rights violations.

[66] Ewang (n 31 above).

[67] The essential components of effective risk communication are 'information quality, transparency, simplicity and coherence of the message, receptivity to public concerns and timing'. See World Health organisation (WHO), Regional Office for Europe 'Health and environment: Communicating the risks' http://www.euro.who.int/__data/assets/pdf_file/0011/233759/e96930.pdf (accessed 11 April 2017).

[68] OH Yakubu 'Addressing environmental health problems in Ogoniland through implementation of United Nations Environment Program recommendations: Environmental management strategies' (2017) 4 *Environments*, 28 28.

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		consultation with oil producing communities prior to commencement of oil operations. *Status: Non-compliance*
6.	***Purohit & Moore v The Gambia***[69] *Case summary:* The communication deals with several aspects of the Lunatic Detention Act of The Gambia and alleges overcrowding at the Psychiatric Unit of the Royal Victoria Hospital. *Date of decision:* 29 May 2003	
	Reparation orders	*Implementation narrative and compliance status*
	The Commission strongly urges the government of The Gambia to (i) 'Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in the Gambia compatible with the African Charter' and other international norms and standards for the protection of mentally ill or disabled.	The Lunatics Detention Act of 1917 has not been repealed. It is still part of the laws of The Gambia, as at July 2017.[70] However, the application of the law is very much limited, due to increased awareness. Since August of 2016, the Ministry of Health, the Mental Health Leadership and Advocacy Programme (MHLAP) and other civil society organisations, supported by the World Health Organisation (WHO), began a series of workshops to enact new mental health legislation.[71] A zero draft of the new mental health legislation has been produced, but the draft Bill is yet to be presented to either cabinet or parliament.[72] Since 2004, the government of The Gambia has been involved with the WHO on the formulation of the first mental health policy for The Gambia.[73] The government, in November 2004, requested WHO for technical assistance to develop a mental

69 *Gambian Mental Health* case.

70 Skype communication with D Samba (MHLAP) on 20 March 2017. See also F Viljoen *International human rights law in Africa* (2012) 378.

71 Samba (n 70 above).

72 As above.

73 World Health Organisation 'The Gambia: Effective and humane mental health treatment and care for all' http://www.who.int/mental_health/policy/country/GambiaSummary_7May2007NOPics.pdf (accessed 11 April 2017).

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		health policy and plan for The Gambia. The first draft was prepared between January and September 2005. Two workshops on mental health policy were held in Banjul: one from 28 November to 2 December 2005, and the other in October 2006 to discuss the various drafts of the mental health policy. The policy was finalised in January 2007, and has been awaiting official adoption since then.[74] Since the state department of health is involved in the process of discussing and elaborating the draft mental health legislation, it will be unfair to disregard this cooperative involvement in the assessment of compliance with this reparation order. *Status: Partial compliance*[75]
	'(ii) Pending (i), create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release.'	No expert body has yet been created as at 31 July 2017. However, the draft mental health legislation contains provisions on a Mental Health Authority, whose functions when formally established could include reviewing cases of persons detained under the Lunatic Detention Act. With the political transition in January 2017, the chances of getting this legislation enacted has improved.[76] *Status: Non-compliance*
	(iii) Provide adequate medical and material care for persons suffering from mental health problems in	A new psychiatric facility, the Tanka Tanka Psychiatric Hospital, has been built since 2009. The facility at the new hospital is much better than the Psychiatric Unit of the Royal Victoria Hospital, which was the only facility available when

74 World Health Organisation (as above). See also Viljoen (n 70 above) 379; D Samba 'Mental health in The Gambia' *The Point* 25 September 2012 http://thepoint.gm/africa/gambia/article/mental-health-in-the-gambia (accessed 11 April 2017).

75 Samba suggested the implementation status of this reparation order should be categorised as 'low level of partial compliance'. See Samba (n 130 above).

76 Samba (n 70 above).

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	the territory of The Gambia.	this case was decided.[77] Although the Commission did not require that an hospital be built, it is arguable that the new hospital constitutes a form of state compliance by substitution.[78] The facilities at the new hospital, however, could be improved through constant and consistent medical supply and provision of non-clinical support services such as psychological programmes, recreational services and community mental health programmes. As at the time of this assessment in July 2017, the human resource of the new hospital is limited.[79] *Status: Partial compliance*
7.	***Zimbabwe Human Rights NGO Forumv Zimbabwe***[80] *Case summary:* This communication relates to the series of political violence, intimidation, harassment of members of opposition parties and various human rights violations that followed the Constitutional referendum and parliamentary elections of year 2000. *Date of decision*: 15 May 2006	
	Reparation orders	*Implementation narrative and compliance status*
	The Commission: (i) Calls on Zimbabwe to 'establish a Commission of Inquiry to investigate the causes of the violence which took place from February – June 2000, and bring	On 26 October 2000, a general amnesty was announced by the President for politically motivated crimes committed during the January – July 2000 campaign.[81] Although the names of those pardoned were never published, many people believe the

[77] Samba (n 70 above); F Viljoen 'The African human rights system and domestic enforcement' in M Langford, C Rodriguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 378 - 379.
[78] See D Hawkins & W Jacoby 'Partial compliance: Comparison of the European and Inter-American courts of human rights' (2010-2011) 6 *Journal of International Law and International Relations* 35, 78 - 79.
[79] Samba (n 70 above).
[80] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).
[81] Telephone communication with T Murungi on 25 April 2017. See also Clemency Order No 1 of 2000; Amnesty International *Perpetual fear: Impunity and cycles of violence in Zimbabwe* (March 2011) 25 https://www.hrw.org/sites/default/files/reports/zimbabwe0311NoPage8Full.pdf (accessed 26 April 2017).

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	those responsible for the violence to justice.'	beneficiaries are mostly supporters of the ruling party.[82] The Zimbabwe Human Rights NGO Forum stated on 30 March 2017 that the perpetrators involved in the case are known members of the communities; the victims' families made reports at the police station and the police have the records of the incidences. The government, instead of bringing the perpetrators to account, have promoted and granted them influential positions in government.[83] *Status: Non-compliance*
	(ii) Identify victims of the violence to 'provide them with just and adequate compensation.'	Since no investigation was carried out, victims have not been identified or paid compensation.[84] *Status: Non-compliance*
8.	***Zimbabwe Lawyers for Human Rights & ANZ v Zimbabwe***[85] *Case summary:* This communication involves Associated Newspapers of Zimbabwe (ANZ) whose freedom of expression was suppressed through a law that required media organisations in Zimbabwe to register with the Media and Information Commission (MIC) before they can carry on their business. For failing to comply with the law and challenging it constitutional validity, ANZ's office was forcibly closed, its assets were seized and several of its staff arrested. *Date of decision:* 3 April 2009	
	Reparation order	*Implementation narrative and compliance status*

82 See E Mandikwaza 'The place for amnesty in Zimbabwe's transitional justice process'http://www.accord.org.za/conflict-trends/place-amnesty-zimbabwes-transitional-justice-process/ (accessed 26 April 2017).

83 E-mail from B Gorejena (Zimbabwe Human Rights NGO Forum) on 30 March 2017.

84 Telephone communication with Murungi (n 81 above).

85 Communication 284/2003 *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*.

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	(i) The Commission recommends that Zimbabwe should 'provide adequate compensation to the Complainants' for the loss they incurred because of this violation.	This reparation order has not been implemented; compensation is yet to be paid to the complainants.[86] Associated Newspapers of Zimbabwe (ANZ), however, resumed operations in 2010. It took the intervention of domestic courts in Zimbabwe for ANZ to recommence operations.[87] However, police have refused to return the confiscated property.[88] *Status: Non-compliance*
9.	***Zimbabwe Lawyers for Human Rights & IHRDA v Zimbabwe***[89] *Case summary:* This communication was submitted on behalf of Mr Andrew Meldrum, an American citizen and journalist who was residing legally in Zimbabwe and had a Permanent Residence Permit since 1980 until he was deported in 2003. Meldrum published an online article in the *Mail and Guardian* which government officials considered to be false. He was charged with 'publishing falsehood' but later acquitted. Despite his acquittal, the government of Zimbabwe deported him. In this communication, Mr Meldrum challenged his deportation. *Date of decision:* 3 April 2009	
	Reparation orders	*Implementation narrative and compliance status*
	The Commission urged Zimbabwe to take urgent steps to ensure that court decisions are respected and implemented.	Non-compliance with court decisions by government officials is still commonplace in Zimbabwe.[90] Decisions of the SADC Tribunal against Zimbabwe are yet to be complied with.[91] It would be recalled that the complaint that gave rise to this reparation order was submitted to the African Commission after the

[86] Email from B Chinowawa (Zimbabwe Lawyers for Human Rights) on 4 April 2017.
[87] See W Mandinde 'Media laws In Zimbabwe' http://archive.kubatana.net/docs/media/misaz_media_laws_ 051130.pdf (accessed 25 April 2017).
[88] As above.
[89] Communication 292/04 Zimbabwe *Lawyers for Human Rights & Institute for Human Rights and Development in Africa (IHRDA) v Zimbabwe.*
[90] See, for instance, T Kamhungira 'Police defy Mazowe court order' *The Daily News* 29 March 2017 https://www.dailynews.co.zw/articles/2017/03/29/police-defy-mazowe-court-order (accessed 25 April 2017).
[91] JW Chikuhwa *Zimbabwe: The end of the First Republic* (2013) 101; Viljoen (n 130 above) 497 - 499.

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		government Zimbabwe had failed to honour the judgment of its own court which ordered that the complainant be allowed to stay in Zimbabwe.[92] As at the time of writing, the court decision has not been complied with.[93] *Status: Non-compliance*
	(ii) Rescind the deportation orders against Mr Andrew Meldrum, so that he can return to Zimbabwe, if he so wishes, being a person who had permanent residence status prior to his deportation.	Implementation of this order is outstanding; the deportation order has not been rescinded. Mr Andrew Meldrum has yet to return to Zimbabwe.[94] *Status: Non-compliance*
	(iii) Ensure that the Supreme Court finalizes the determination of the application by Mr Meldrum, on the denial of accreditation; (OR) grant accreditation to Mr Meldrum, so that he can resume his right to practice journalism.	Implementation of this order is outstanding. The complainant in this case, Mr Andrew Meldrum, has yet to return to Zimbabwe.[95] Meldrum currently resides in Johannesburg, South Africa, and works as the Assistant Africa Editor at Associated Press.[96] *Status: Non-compliance*
10.	***Scanlen & Holderness v Zimbabwe***[97] *Case summary:* The communication dealt with various aspects of the Information and Protection of Privacy Act (AIPPA) Chapter 10:27. Sections 79 & 80 of the AIPPA require journalists to be accredited by the Media and Information Commission (MIC), now	

92 See *ZLHR & IHRDA v Zimbabwe*, paras 37, 42, & 53 - 54.
93 Chinowawa (n 86 above).
94 As above.
95 Chinowawa (n 86 above).
96 Lindedin public profile 'Andrew Meldrum' https://www.linkedin.com/in/andrewmeldrum/?ppe=1 (accessed 5 May 2017).
97 Communication 297/2005 *Scanlen & Holderness v Zimbabwe*.

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	Zimbabwe Media Commission (ZMC), prior to practicing journalism. The complainants allege that compulsory accreditation of journalists interferes with freedom of expression. *Date of decision:* 3 April 2009	
	Reparation orders	*Implementation narrative and compliance status*
	The Commission recommends that Zimbabwe should: (i) 'Repeal sections 79 and 80 of the AIPPA.'	Sections 79 and 80 of the AIPPA Chapter 10:27 have been repealed.[98] The sections were repealed by the Access to Information and Protection of Privacy (Amendment) Act of 2007. *Status: Full compliance*
	(ii) 'Decriminalize offences relating to accreditation and the practice of journalism.'[99]	Section 83 of the AIPPA, which criminalises activities relating to accreditation and the practice of journalism, has been repealed.[100] The section was repealed outright, without any replacement.[101] *Status: Full compliance*
	(iii) Adopt legislation providing a framework for self-regulation by journalists.	Implementation of this reparation order is outstanding. Civil society organisations, through the Voluntary Media Council of Zimbabwe (VMCZ), are pushing for the adoption of a Media Practitioners Bill, which would result in self-regulation[102] At the time of this assessment in July 2017, VMCZ has been holding consultative meetings in various locations in Zimbabwe to gather the views of journalists on the

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[98] Chinowawa (n 86 above). See also Access to Information and Protection of Privacy (Amendment) Act of 2007. The amendment was adopted while this communication was pending before the Commission. The Amendment Act was gazetted and became effective on 11 January 2008.

[99] According to the *Ejusdem generis* rule of interpretation of statutes, the phrase 'practice of journalism' ought to be interpreted in relation to 'accreditation'.

[100] Chinowawa (86 above).

[101] See Access to Information and Protection of Privacy (Amendment) Act of 2007, sec 18.

[102] Chinowawa (n 86 above).

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<table>
<tr><td></td><td></td><td>Bill.[103] The Bill is yet to be presented to either parliament or cabinet.

Status: Non-compliance</td></tr>
<tr><td></td><td>(iv) Bring AIPPA in line with article 9 of the African Charter and other and international human rights instruments.</td><td>Despite the repeal of some provisions of the AIPPA, full Implementation of this reparation order is outstanding.[104] The 2007 AIPPA (Amendment) Act is still considered as inconsistent with the African Charter.[105] However, since the 2007 Amendment Act repeals sections 79, 80 and other provisions of the AIPPA, it will be unfair to disregard this modest yet significant implementation activity.

Status: Partial compliance</td></tr>
<tr><td rowspan="3">11.</td><td colspan="2">Gabriel Shumba v Zimbabwe[106]
Case summary: Arbitrary arrest and detention, torture, and denial of access to legal counsel, food and water by government security personnel. The complainant was stripped naked, bound hands and feet, and electrocuted intermittently for 8 hours. The complainant vomited blood, lost control of his bodily functions and was forced to drink his vomit.
Date of decision: 2 May 2012</td></tr>
<tr><td>Reparation orders</td><td>Implementation narrative and compliance status</td></tr>
<tr><td>The Commission recommends that Zimbabwe should (i) ‘Pay adequate compensation to the victim for the torture and trauma caused.’</td><td>The complainant, Gabriel Shumba, is yet to receive any compensation from the government of Zimbabwe.[107] In fact, the government has not invited the</td></tr>
</table>

[103] See B Matendere ‘VMCZ drafts bill on media self-regulation’ *The Zimbabwean* 21 July 2016 http://thezimbabwean.co/2016/07/vmcz-drafts-bill-on-media-self-regulation/ (accessed 25 April 2017).

[104] Chinowawa (n 86 above).

[105] Southern Africa Litigation Centre (SALC) ‘Amend AIPPA - African Commission’ http://www.southernafricalitigationcentre.org/2009/08/28/zimbabwe-misa-ruling-says-aippa-should-be-amended/ (accessed 25 April 2017).

[106] Communication 430/2012 *Gabriel Shumba v Zimbabwe*.

[107] Interview with G Shumba on 21 March 2017; Interview with D Padilla (legal counsel to Shumba) on 21 March 2017.

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		complainant or his legal representatives for any discussion on the implementation of the decision.[108] On 12 November 2013, REDRESS, one of the NGOs involved in the case, wrote to the African Commission, seeking to know the status of implementation of the decision.[109] In another letter dated 18 July 2014 jointly signed by the complainant, his legal counsel and REDRESS, the complainant puts the value of compensation payable to him at US$ 578,155.15.[110] This sum, according to the complainant covers future medical and psychological treatment, lost earnings and moral damages.[111] On 29 March 2016 and 15 April 2017 respectively, the Centre for Human Rights (CHR) of the University of Pretoria, acting on behalf of the complainant, wrote letters to the African Commission also seeking to know the status of implementation of the decision, and requesting the Commission to hold an implementation hearing with regards to the case.[112] The Commission responded to the CHR's letters on 18 April 2016 and 21 June 2016, stating that it would follow up with the Respondent state on the measures taken to implement the Commission's decision.[113]

[108] As above.

[109] See REDRESS Letter to Dr May Maboreke, Executive Secretary of the African Commission on 12 November 2013 (copy on file with the author).

[110] See REDRESS letter to Dr Mary Maboreke, Executive Secretary of the African Commission on 18 July 2014 (copy on file with the author).

[111] The estimate was supported by medical and psychological reports prepared by the complainant's doctors.

[112] See CHR letters to the Chairperson of the African Commission on 29 March 2016 and15 April 2017 (copy on file with the author).

[113] See African Commission letter to the Director, Centre for Human Rights, referenced ACHPR/COMM/669/16 and dated 18 April 2016, and African Commission letter to the Director, Centre for

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		Status: Non-compliance
	(ii) 'That an inquiry and investigation be carried out to bring those who perpetrated the violations to justice.'	No enquiry has been carried out to bring to justice those who perpetrated torture against Mr Shumba.[114] *Status: Non-compliance*
12.	***Noah Kazingachire & Others v Zimbabwe***[115] *Case summary:* The communication alleges wrongful and extrajudicial killings of four persons in Zimbabwe. It alleges that the use of excessive force by government security operatives was responsible for the death of the four victims. *Date of decision:* 2 May 2012	
	Reparation orders	*Implementation narrative and compliance status*
	The Commission recommends that Zimbabwe should: (i) 'Undertake law reform to bring domestic laws on compensation in case of wrongful killings into conformity with the African Charter.'	At the time of writing, there is no tort law in Zimbabwe that enables victims of wrongful deaths to recover bereavement damages.[116] The only cause of action available is for loss of support or actual damages in relation to medical, hospital or funeral costs.[117] *Status: Non-compliance*
	(ii) 'Pay compensatory damages to the legal heirs and next of kin of the four deceased.'	Compensation has not been paid to the heirs and next of kin of the four deceased persons.[118] *Status: Non-compliance*

Human Rights, referenced ACHPR/COMM/288/04/ZW/1156/16 and dated 21 June 2016 (copy on file with the author).

[114] Shumba (n 107 above).

[115] Communication 295/04 *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*.

[116] OSJI 'Case digests: Decisions of the African Commission on Human and Peoples' Rights, 2010-2014' September 2015 18 - 19 https://www.opensocietyfoundations.org/sites/default/files/case-digests-achpr-20151014.pdf (accessed 26 April 2017).

[117] As above.

[118] Gorejena (n 83 above).

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African Court		
13.	***Mtikila & Others v Tanzania***[119] *Case summary:* The applicants in this case challenged the Tanzanian constitutional provisions and election laws which prohibit independent candidates from running for public office.[120] The applicants claim the Tanzanian laws are in breach of the African Charter and other human rights treaties. *Date of decision (merits):* 14 June 2013 *Date of reparation ruling*: 13 June 2014	
	Reparation orders	*Implementation narrative and compliance status*
	The Court directs the government of Tanzania to 'take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations' found by the Court and to inform the Court of the measures taken.	By a letter dated 25 July 2013, the applicants submitted to the African Court their requests on compensation and reparations.[121] This was served on the government of Tanzania on 29 July 2013.[122] In its response to the applicants' submissions on reparation, filed with the African Court on 29 August 2013, the government of Tanzania maintained that the judgment of the Court in the *Mtikila* case was wrong.[123] The African Court, in its reparation ruling dated 13 June 2014, noted that as at that date, the government of Tanzania was yet to report to the Court on measures it had adopted to bring the laws on candidature of

[119] Application 009&011/2011 *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (*Mtikila* case).

[120] The Tanzanian constitutional provisions and election laws which violate the African Charter include: The Constitution of the United Republic of Tanzania, arts 21, 47 (4)(c), 39(1)(c) & 67(1) (b)); Local Authorities (Elections) Act as amended by the Local Authorities (Elections) Act No 7 of 2002, sec 39(2)(f); Local Government (Urban Authorities) Act, 1982, sec 31(1)(e); Local Government (District Authorities) Act, 1982, sec 38(f); National Election Act, 2010, sec 34; Election Expenses Act, 2010. See generally Coalition for an Effective African Court on Human and Peoples' Rights *Booklet on the implementation of decisions of the African Court on Human and Peoples' Rights* (2017) 27 - 28.

[121] Application 11 of 2011 *Mtikila v Tanzania* (Ruling on Reparations), decided on 13 June 2014, para 7.

[122] Reparations ruling, paras 8 & 9.

[123] Reparations ruling, para 43.

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		elections in Tanzania in conformity with the African Charter.[124] Thus, the Court ordered Tanzania to report within six months. This report has been due since 13 January 2015. So far, the government of Tanzania has demonstrated little interest in complying with the decision.[125] As at November 2013, Adjolohoun reported that this reparation order had not been complied with.[126] As argued by Windridge, compliance may only occur when state officials accept the legal validity of a decision.[127] The Minister of Justice and Constitutional Affairs of Tanzania, Dr Harrison Mwakyembe, stated on 21 November 2016, during the 10th anniversary symposium of the African Court, that the government was aware of the *Mtikila* decision and the obligations it imposes on the state.[128] The Minister stated further that the independent presidential candidate issue has not been 'ditched' and had been included in the Proposed Constitution, which awaits a referendum for its adoption. Section 216 of the Final Draft of the Proposed Constitution as approved by Parliament in October 2014 provides for the right of independent candidates to contest any election in Tanzania.[129] The

[124] As above.
[125] O Windridge 'A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples' Rights' (2015) 15 *African Human Rights Law Journal* 299, 327.
[126] HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: Compliance and influence' unpublished LLD thesis, University of Pretoria, 2013, 103.
[127] Windridge (n 125 above) 325.
[128] AllAfrica 'Independent candidacy not ditched – govt' http://allafrica.com/stories/201611230534.html (accessed 20 April 2017).
[129] Proposed Constitution of the United Republic of Tanzania, approved by Parliament in October 2014 http://www.humanrights.or.tz/downloads/proposed%20constitution%20-%20english%20version.docx (accessed 21 April 2017).

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		Proposed Constitution gives parliament power to make further provisions to implement this guarantee.[130] The referendum, which was earlier scheduled for 30 April 2015 was not held due to protests from opposition political parties.[131] The constitutional reform and referendum was the idea of President Jakaya Kikwete. Since the change in leadership on 5 November 2015, the referendum has not been one of the priorities of the new President, Dr John Magufuli.[132] The new government is decidedly non-committal to implementing this decision.[133] While it may take some time, Tanzania will eventually allow independent candidates as some cabinet members in the new administration, especially the Minister of Constitutional Affairs and Justice, are reportedly sympathetic to constitutional reforms.[134] *Status: Non-compliance*[135]
	(ii) An order requiring the government of Tanzania within six	The government of Tanzania is yet to publish the English summary of the judgment as required by the Court.[136] The government has reservations to the

[130] In a version of the Proposed Constitution translated by International Institute for Democracy and Electoral Assistance (International IDEA) in September 2014, the provision for independent candidate appears in section 210 of the Proposed Constitution. See International Institute for Democracy and Electoral Assistance (International IDEA) 'The Proposed Draft Constitution of Tanzania (September 2014)' http://www.constitutionnet.org/files/the_proposed_constitution_of_tanzania_sept_2014.pdf (accessed 21 April 2017).

[131] Reuters Africa 'Tanzania to hold referendum on new constitution in April 2015' http://af.reuters.com/article/topNews/idAFKCN0IB15F20141022 (accessed 21 April 2017).

[132] Email from O Windridge on 4 May 2017; email from F Mchomvu on 24 April 2017; N Branson 'Forty years of Tanzania's constitution: Is the 1977 *katiba* still fit for purpose?' *African Research Institute* 25 April 2017 https://www.africaresearchinstitute.org/newsite/blog/forty-years-tanzanias-constitution-1977-katiba-still-fit-purpose/ (accessed 5 May 2017).

[133] Windridge (n 125 above).

[134] Branson (n 132 above).

[135] See Coalition for an Effective African Court on Human and Peoples' Rights (n 120 above).

[136] As above.

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	months to publish the official English Summary of the judgment developed by the Registry of the Court.	English summary, because the English summary as prepared by the Court does not contain an overview of the main application, especially the arguments and main issues raised by both parties in the application.[137] *Status: Non-compliance*[138]
	(iii) An order requiring the government of Tanzania within six months to translate the English summary of the judgment into Kiswahili at its own cost.	This reparation order has not been implemented.[139] There is no evidence that the official English summary of the judgment was translated by government into Kiswahili.[140] A state official at the Attorney General's Chambers indicated that the translation of the Summary of the Judgment into Kiswahili will be done once the African Court issues a more reflective summary of the Application as requested by the government of Tanzania.[141] *Status: Non-compliance*
	(iv) An order requiring the Government of Tanzania to ensure that the summary of the judgment developed by the court is published in both English and Kiswahili, once in the official	This reparation order has also not been implemented because its implementation depends on the Court issuing a more reflective English Summary of the Judgment as requested by the government of Tanzania in its implementation report to the Court.[142]

137 See Report on the Measures taken by the Government of Tanzania to implement the Court Orders delivered in the Ruling on 14 June 2013 (Implementation report of the government of Tanzania) submitted to the African Court, referred to in Coalition for an Effective African Court on Human and Peoples' Rights (n 180 above) 27 - 29.
138 See Coalition for an Effective African Court on Human and Peoples' Rights (n 120 above) 27 - 29.
139 As above. See also Windridge (n 132 above); Mchomvu (n 192 above).
140 As above. See Coalition for an Effective African Court on Human and Peoples' Rights (n 120 above) 27-29. An online search of the case using both Google Translate and https://www.google.co.ke, the Swahili version of Google search engine, did not produce any results indicating the official summary of the judgment translated and published by government in the official gazette or a national newspaper.
141 See Coalition for an Effective African Court on Human and Peoples' Rights (n 120 above) 29.
142 As above.

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	Gazette and once in a Newspaper with widespread circulation.	*Status*: *Non-compliance*
	(v) An order requiring the government of Tanzania to make available on an official website the judgment of the Court of 14 June 2013 in its entirety in English a period of one year.	The judgment on the merits has been published on the official website of the government of Tanzania on 18 January 2016 (19 months after the reparation ruling), and has remained on the website since then.[143] At the time of the assessment on 22 July 2017, 5927 internet users have downloaded the judgment directly from the government official website. The African Court required this action to be taken within 6 months. Since the time-frame set by the Court has not been respected by the state, the government cannot be said to have complied fully with the reparation order. *Status: Partial compliance*
	(vi) An order requiring the government to submit to the Court within six months starting from the date of the reparation ruling a report a report on the measures it has taken in compliance with the judgment of 14 June 2013.	The report ordered by the Court has been due since 13 January 2015. An overdue report was submitted to the Court by the government of Tanzania on 17 April 2015.[144] In this report, the government stated that the issue of participation in public affairs and independent candidacy is being considered under a constitutional review process which is under way. Articles 33(1), 75 and 117 of the Proposed Constitution endorse independent candidacy.[145] Since the report was submitted out of time and does not contain

[143] 'Rev. Mtikila TLS & LHRC vs URT (Application No: 009& 011/2011' 18 January 2016 http://sheria.go.tz/index.php?option=com_docman&task=cat_view&gid=44&Itemid=68 (accessed 22 July 2017). See also Report of the activities of the African Court on Human and People's Rights (January - June 2016) 8, submitted to the Executive Council, thirtieth ordinary session, 22 - 27 January 2017 in Addis Ababa, Ethiopia.

[144] Report of the activities of the African Court on Human and People's Rights (January - June 2015), submitted to the Executive Council, Twenty-Seventh ordinary session, 7 - 12 June 2015 in Johannesburg, South Africa (EX.CL/922(XXVII) 10 - 11.

[145] As above.

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		information on measures taken to give effect to the judgment of the Court with respect to other laws, the implementation report at best is an incomplete implementation of the state's duty to report. *Status: Partial compliance*
14.	***Alex Thomas v Tanzania***[146] *Case summary:* The applicant was tried *in absentia* by the High Court of Tanzania, while he was hospitalized for a chronic ailment. The conviction was confirmed by the Tanzania Court of Appeal. The applicant's efforts to seek judicial review at the Supreme Court proved abortive; hence this complaint. *Date of decision:* 20 November 2015	
	Reparation order	*Implementation narrative and compliance status*
	The Court directed Tanzania to 'take all necessary measures within a reasonable time to remedy the violations found, especially precluding the reopening of the defence case and retrial of the applicant.'	The Court, in its judgment of 20 November 2015, directed the applicant to file submissions on reparations within 30 days of the decision. The application for reparation was filed in March 2016.[147] At the time of this assessment, the state is yet to respond to the applicant's request for reparations.[148] The Applicant's legal counsel stated on 5 May 2017 that government is yet to implement the reparation order in this case.[149] The state did not report within six months as ordered by the Court; it reported only about a month after the deadline. Thereafter, the state submitted a fresh application to the Court seeking interpretation of the judgment.[150] One issue

146 Application No 005/2013 *Alex Thomas v Tanzania*.

147 African Court 'App. No. 005/2013 – Alex Thomas v. United Republic of Tanzania' http://en.african-court.org/index.php/55-finalised-cases-details/858-app-no-005-2013-alex-thomas-v-united-republic-of-tanzania-details (accessed 21 April 2017).

148 See Skype communication with E Chijarira (PALU) on 5 May 2017.

149 Chijarira (n 148 above).

150 As above.

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		highlighted by the Applicant's legal counsel is the lack of clarity on the interpretation of the reparation order. The phrase 'take all necessary measures within a reasonable time to remedy the violations found, especially *precluding* the reopening of the defence case and retrial of the applicant' has been interpreted by the state to mean 'including retrial and reopening of the case'. Then, the Applicant understand the phrase to mean 'excluding retrial and reopening of the case'.[151] The applicant's counsel argued that the Court's intention in using the phrase above is to enable the government to use its initiative to order the release of the applicant.[152] The Court is yet to issue a ruling on the application for interpretation of the judgment and the application for reparations. At the time of this assessment, the applicant is still locked up in prison after nearly 20 years;[153] and with the fresh application for interpretation, the applicant may stay even much longer in prison. *Status*: *Non-compliance*
African Children's Rights Committee		
15.	***Hansungule & Others (on behalf of children in Northern Uganda) v Uganda***[154] *Case summary:* This communication relates to the situation of insurrection and instability that prevailed in Northern Uganda between 1986 and 2006. During this period, the government of Uganda had to deal with the activities of the Lord's Resistance Army (LRA).	

151 Chijarira (n 148 above).
152 As above.
153 Chijarira (n 148 above).
154 Communication 2/2009 *Michelo Hansungule and Others (on behalf of children in Northern Uganda) v Uganda*.

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<table>
<tr><td rowspan="3"></td><td colspan="2">The communication alleges that several rights of children in Northern Uganda, protected under the African Children's Charter, were violated because of the actions or omission of government.
Date of decision: 10 April 2013</td></tr>
<tr><td>Reparation orders</td><td>Implementation narrative and compliance status</td></tr>
<tr><td>The African Children's Rights Committee recommends that:
(i) Uganda should include in its Penal Code a section which provides for the criminal responsibility of anyone who recruits or use persons below the age of 18 in situations of hostilities, tension or strife.</td><td>The Penal Code Act of Uganda was last amended in 2007.[155] The 2007 Penal Code (Amendment) Act contains no provision criminalising recruitment or use of children in situations of hostilities. The Children (Amendment) Act, which was recently signed into law by the President on 20 May 2016, also contains no provision criminalising the use of children in situations of hostilities.

However, the International Criminal Court Act No 11 of 2010 (which domesticates the Rome Statute of the International Criminal Court) provides in section 9 that 'war crime' under the Uganda ICC Act has the same meaning as article 8 of the Rome Statute. Sub-article 2(b)(xxvi) and 2(e)(vii) of article 8 of the Rome Statute define war crime to include 'Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'. Since the Committee required the prohibition to extend to all persons below the age of 18 years, the Uganda ICC Act is at best a partial compliance of this reparation order. A specific legislative measure is still required extending the prohibition to all persons below 18 years.</td></tr>
</table>

155 See Penal Code (Amendment) Act No 8 of 2007, adopted on 17 August 2007.

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		Status: *Partial compliance*
	(ii) Recommends that Uganda should implement fully the standard operating procedures (SOPs) for the reception and handover of children separated from armed groups, as well as undertake comprehensive DDR programmes, in collaboration with the African Union, United Nations.	The government of Uganda adopted the Peace, Recovery, and Development Plan (PRDP) and the Amnesty Act to address issues of reintegration of ex-combatants.[156] The DDR process in Northern Uganda has been criticised as being more focused on reintegration; with inadequate focus on disarmament and demobilisation.[157] Research also finds that overall coordination of the DDR process has been extremely poor.[158] The Executive Director of Facilitation for Peace and Development stated that most DDR actions undertaken by the government of Uganda were 'fragmented, uncoordinated, experimental and incomplete'.[159] Children were at first supported at NGOs-operated reception centres before being before assisted to identify, and return to, their family.[160] As the main implementing actors of the DDR process, NGOs perform family tracing and provide counselling as well as follow-up visits.[161] These services also were haphazard, according to GUSCO.[162] Most returning

[156] N Compton 'A disjointed effort: An analysis of government and non-governmental actors' coordination of reintegration programs in Northern Uganda' (2014) 1920 *Independent Study Project Collection Paper* http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2946&context=isp_collection (accessed 3 June 2017).
[157] C Blattman & J Annan 'Child combatants in northern Uganda: Reintegration myths and realities' in R Muggah (ed) *Security and post-conflict reconstruction: Dealing with fighters in the aftermath of war* (2008) 103 - 126.
[158] Compton (n 156 above).
[159] United Nations Security Council (UNSC) 'Security Council, Adopting Resolution 2225 (2015)' SC/11932 18 June 2015 http://www.un.org/press/en/2015/sc11932.doc.htm (accessed 26 April 2015).
[160] L Finnegan & C Flew 'Disarmament, demobilisation and reintegration in Uganda: Mini case study' (2008) http://www.saferworld.org.uk/DDR%20Mini%20Case%20Study%20Uganda.pdf (accessed 3 June 2017).
[161] Compton (n 156 above).
[162] As above.

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		children are escapees; only few were captured by government forces or released by the LRA.[163] In other words, there has been no large-scale demobilisations.[164] Some of the returning children went home straight without reporting to any authority.[165] The complainant in this case indicated on 6 April 2017 that the freeing of children was done haphazardly.[166] There was no formal collaboration with the African Union and United Nations agencies. *Status: Partial compliance*
	(iii) Recommends that Uganda takes all necessary legislative, administrative, and other measures to ensure that children are registered immediately after birth. Measures should be put in place to improve the birth registration. The Committee further recommends that Uganda should prepare and effectively implement a national action plan for the registration of those children who have thus far not been registered, and to issue full birth certificates to those who have registered but have not been able to access a birth certificate.	There have been some developments in this regard. On 26 March 2015, the Registration of Person Act of 2015 received the assent of the President. The legislation, which applies to all persons in Uganda, established a central registration body for the registration of all persons in Uganda, creates a national identification register and provides for free and compulsory registration of all births in Uganda. Prior to the Registration of Persons Act 2015, the Mobile Vital Records System (VRS) Project was established in 2011. This was by way of a public-private partnership between National Identification and Registration Authority (NIRA), Uganda Telecom and UNICEF.[167] The VRS encompasses electronic birth and death registration and makes use of web-based applications and mobile networks, hence the name

[163] Blattman & Annan (n 157 above).
[164] As above.
[165] Blattman & Annan (n 157 above).
[166] Interview with M Hansungule on 6 April 2017.
[167] NIRA 'Uganda mobile VRS' http://www.mobilevrs.co.ug/home.php (accessed 7 May 2017).

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		Mobile VRS. Mobile VRS enables birth notifications to be sent by mobile phones to NIRA's server and enables health and government officials who have access to the internet and a printer to register and print birth certificates in real time.[168] The system has been designed to work in both healthcare and non-healthcare environments. For example, in a healthcare setting where a child is born in a hospital, local administrators simply enter and upload birth details to a web-based registration portal – with connectivity delivered through Uganda Telecom's existing 3G network. Challenges, however, remain because not all health facilities have this system. Financial constraints are a major barrier. In addition, not all births take place in designated facilities where registration can be effected. Some health professionals also remain ignorant of the system and therefore, do not invoke it. NIRA still has only 2 offices in Kampala and in Gulu. It is therefore still out of reach for the majority of Ugandans.[169] *Status*: *Partial compliance*
	(iv) Recommends that Uganda should establish administrative procedures in relation to all armed forces, which ensure that, in instances where there is no credible or conclusive proof of age, a person alleged or alleging to	Section 52(2)(c) of the Uganda Peoples' Defence Forces Act of 2005 provides: 'No person shall be enrolled into the Defence Forces unless he or she is a citizen of Uganda; is of good character; is at least 18 years of age.' On 6 May 2000, the government of Uganda deposited a binding declaration with the United Nations Secretary-General at the time of

[168] The data was formerly hosted on the Uganda Registration Statistics Bureau (URSB)'s server but was transferred to NIRA effective 1 January 2016.

[169] Email from P Acirokop on 8 May 2017.

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	be a child shall not be recruited or used in any situations of hostilities until conclusive proof of age is provided to confirm that the person is aged over 18 years.	Uganda's accession to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The declaration states unequivocally that: 'the minimum age for the recruitment of persons into the armed forces is by law set at eighteen (18) years.'[170] It is clear from the legal point of view that the minimum age of recruitment into the army in Uganda is 18 years. It is also clear based on the provisions of the Children (Amendment) Act of 2016 that anyone below the age of 18 years is a child. Section 88(5) of the Children (Amendment) Act provides that: 'Any person shall be presumed to be child if he or she claims or appears to be younger than 18 years old pending a conclusive determination of the age by court.' The provision above has partially addressed the Committee's concern. However, there are yet no specific administrative procedures related to the army that ensure that, in instances where there is no credible or conclusive proof of age, a person alleged or alleging to be a child shall not be recruited or used in any situations of hostilities until conclusive proof of age is provided.[171] *Status: Partial compliance*
	(v) Recommends that Uganda should rely on forms of accountability other than	The Children (Amendment) Act, which was recently signed into law by the President on 20 May 2016 already makes provisions related to this reparation

[170] Binding declaration deposited with the United Nations Secretary-General at the time of Uganda's accession to the Optional Protocol, 6 May 2000.
[171] Email from E Lubale on 27 April 2017.

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	detention and criminal prosecution, that take the best interest of the child as the primary consideration and promote the reintegration of the child into his or her family, community and society, including the use of restorative measures and truth-telling.	order. Under the Children's Act, detention of children is a measure of last resort. In Northern Uganda, specifically, there are traditional justice mechanisms that have been vouched for as advancing the notion of restorative justice and hence very useful for addressing crimes by children.[172] These mechanisms have been invoked, to some extent, in Northern Uganda but at an informal level. *Status*: *Partial compliance*

172 Hansungule (n 166 above); Lubale (n 171 above).

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Appendix II: Implementation narrative and compliance status analysis of reparation orders of sub-regional HRTs selected for the study

ECOWAS Community Court of Justice (ECCJ)		
1.	***Chief Ebrimah Manneh v The Gambia***[1] *Case summary:* Arbitrary arrest and detention of Chief Ebrimah Manneh, a journalist with the *Daily Observer* newspaper based in Banjul, by officials of The Gambia's National Intelligence Agency on 11 July 2006. Manneh was denied access to family, friends, legal counsels, and medical care. The complaint alleges that Manneh has been held *incommunicado* without charges. *Date of decision:* 5 June 2008	
	Reparation orders	*Implementation narrative and compliance status*
	(i) The ECCJ orders Gambia to release Chief Ebrimah Manneh, plaintiff herein from unlawful detention without any further delay upon being served with a copy of the judgment.	A copy of the judgment containing this reparation order, together with a writ of execution, was transmitted to the Attorney General of the Gambia on 14 August 2009.[2] The Gambia's Attorney General, on 15 October 2009, acknowledged receipt of the writ of execution and stated that the government of The Gambia could not comply with the order because the whereabouts of the complainant were unknown.[3] The Media Foundation for West Africa (MFWA), in June 2010, filed a new application before the ECCJ requesting the Court to hold that the disappearance of the complainant amounted to a violation of the rights to life, and directing the state to pay the sum of US$10 million as compensation

[1] *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008).

[2] See ECOWAS Community Court Registry, Letter Reference ECW/CR/01/01/F1, 14 August 2009. See also HS Adjolohoun 'Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African states: Compliance and influence' unpublished LLD thesis, University of Pretoria, 2013, 165.

[3] See Ministry of Justice of The Gambia, Letter Reference LD440/491/PART1(13), 15 October 2009. See also Adjolohoun (n 2 above) 165 - 166.

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		to the family of the complainant.[4] The government of the Gambia, however, denied that it has ever held or is holding the complainant.[5] In response to the claim of disappearance, the state argued that the case was premature as under the laws of The Gambia, a person may be presumed dead only after seven years of disappearance. The ECCJ, on 6 February 2012, agreed with the Gambia's argument, and ruled that the MFWA's application was premature.[6] MFWA in March 2017 discussed the non-implementation of this case with the new Gambian President, Adama Barrow.[7] Ebrima Manneh's whereabouts remain unknown as at 31 July 2017.[8] *Status: Non-compliance*[9]
	(ii) That the human rights of the plaintiff be restored, especially his freedom of movement	The Gambia has not complied with this order.[10] The whereabouts of the complainant is unknown, as at 31 July 2017.[11] *Status: Non-compliance*
	(iii) The Gambia to pay the plaintiff the sum of one hundred thousand United	The government has not complied with this order. No compensation has been paid to Manneh or any member of his family.[12]

4 See *Media Foundation for West Africa (on behalf of Manneh's family) v The Gambia*, Application ECW/CCJ/APP/15/10, 23 December 2010. See also Adjolohoun (n 2 above) 166.

5 F Viljoen *International human rights law in Africa* (2012) 498.

6 See *Media Foundation for West Africa (on behalf of Manneh's family) v The Gambia*, Application ECW/CCJ/APP/15/10, judgment of 6 February 2012.

7 'MFWA holds discussions with Gambian President Adama Barrow' http://www.mfwa.org/mfwa-holds-discussions-with-gambian-president-adama-barrow/ (accessed 24 March 2017).

8 As above.

9 Email from D Mawutor (Media Foundation for West Africa) on 3 April 2017; Interview with S Egbeyinka on 20 May 2016. See also Adjolohoun (n 126 above) 165-166.

10 Mawutor (n 9 above); Egbeyinka (n 9 above); Adjolohoun (n 2 above).

11 See Ifex 'Eight years on, still no justice for Gambian journalist Ebrima Manneh and family' https://www.ifex.org/the_gambia/2016/06/06/denied_justice/ (accessed 24 March 2017). See also Mawutor (n 181 above).

12 Mawutor (n 9 above); Adjulohoun (n 2 above) 166. See MFWA (n 7 above).

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	States Dollars (US$100 000) as damages.	*Status: Non-compliance*
	(iv) The Government is also to pay the costs of the case to the complainant.	The government has not complied with this order.[13] *Status: Non-compliance*
2.	***Djotbayi Talbia and Others v Nigeria*** [14] *Case summary:* 10 Applicants, who were aboard a foreign vessel rendering assistance to another vessel in distress at 16 nautical miles off the cost of Nigeria, were arrested and detained by officials of the Nigerian Navy on the allegation that the applicants were taking crude oil on board. They were paraded before national press as crude oil thieves. On 27 July 2004, a Federal High Court in Nigeria ordered their release as subsequent investigation revealed the cargo being loaded on their vessel was fuel oil, not crude oil. This court order was not complied with; thus, this complaint.[15] *Date of decision:* 28 January 2009	
	Reparation orders	*Implementation narrative and compliance status*
	The ECCJ ordered as follows: (i) The 10 Applicants are entitled to fair and just reparation adjudged by the Court in the lump sum of US$ 42, 750, against the Defendants jointly and severally.	This judgment, delivered on 28 January 2009, was transmitted to Nigeria's Ministry of Foreign Affairs for enforcement.[16] Upon receipt, the government, on 30 July 2009, applied to the ECCJ for a review of the case.[17] In a ruling, delivered on 3 June 2010, the Court dismissed the application for review because it did not contain any new facts and was not made within the time prescribed by the Rules of the Court.[18] Human rights activists and NGOs have since written to the President and the Minister of Justice to implement this decision.[19] As at 31 July 2017, the government of Nigeria is yet to comply with the order.

13 Mawutor (n 9 above); Egbeyinka (n 9 above); Adjulohoun (n 2 above) 166.
14 ECW/CCJ/APP/10/06 *Djotbayi Talbia & 14 Others v Nigeria & 4 Others*.
15 The applicants were later released by the government of Nigeria after this complaint had been filed.
16 Adjolohoun (n 2 above) 170.
17 ECW/CCJ/APP/10/06 *Nigeria & 3 Others v Djotbayi Talbia & 14 Others* (Application for review).
18 *Djotbayi Talbia* case (Application for review), para 14.
19 Adjolohoun (n 2 above) 170.

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		Status: Non-compliance
	(ii) The Court awards the sum of US$10,000 costs against the defendant.	The order has not been complied with.[20] The costs awarded by the Court in favour of the applicants have not been paid. *Status: Non-compliance*
3.	***Musa Saidykhan v The Gambia***[21] *Case summary:* The applicant, a journalist at *The Independent* newspaper based in Banjul, published the list of alleged coup plotters on 21 March 2006. He was arrested 6 days later by soldiers and policemen, detained and held *incommunicado* for 22 days. He was tortured and denied access to medical care during his detention.[22] *Date of decision:* 16 December 2010	
	Reparation orders	*Implementation narrative and compliance status*
	(i) The Court awards the plaintiff damages in the sum US$200,000.00	The government of the Gambia expressed its 'dissatisfaction with the entire judgment' in this case.[23] On 3 March 2011, it filed an application for review.[24] To support the application, the government argued that the ECCJ failed to consider some facts that were placed before it by the government, and failed to provide the evidentiary basis upon which the award of US$200,000.00 was calculated. The government also queried the amount as excessive, and requested to know why the judgment sum was expressed in United States Dollars since the official currency of the Gambia is the Dalasi.[25] On 6 February 2012, the application for review was dismissed by the ECCJ because there was no new evidence to support the application.[26]

20 Adjolohoun (n 2 above) 170.
21 ECW/CCJ/JUD/08/10 *Musa Saidykhan v The Gambia*.
22 By the time this case was submitted to the ECCJ, the applicant had been released on bail by the government.
23 Adjolohoun (n 2 above) 180.
24 ECW/CCJ/APP/11/07 Musa *Saidykhan v Republic of The Gambia* (Application for Revision).
25 Adjolohoun (n 2 above) 180 - 181.
26 As above.

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		As at November 2013, Adjolohoun reported the decision has not been complied with.[27] Media Foundation for Africa (MFWA) indicated on 3 April 2017 that the decision has not been complied with.[28] This position was also confirmed by Saidykhan's lawyer.[29] With the change of government in January 2017, it is expected that the new government will comply with the decision.[30] *Status: Non-compliance*
	(ii) The plaintiff is entitled to costs in this action which shall be borne by the defendant.	The government of The Gambia has not complied with this order.[31] *Status: Non-compliance*
4.	***SERAP v Nigeria (Nigerian Right to Education* case)**[32] *Case summary:* The Independent Corrupt Practices Commission (ICPC) in Nigeria reported in October 2007 that more than 488 million Naira was looted from the state and national headquarters of the Universal Basic Education Commission (UBEC), the government agency responsible for implementing basic education programme in Nigeria. An additional sum of 3.1 billion Naira was also reportedly looted by officials of UBEC. Based on this report, SERAP, an NGO based in Lagos, approached the ECCJ arguing that the corrupt practices in UBEC, of which government is complicit, violates the right to free and compulsory basic education under the African Charter. The Court in effect dismissed the objections of the government of Nigeria that education is a mere directive policy and not	

27 Adjolohoun (n 2 above) 181.
28 Mawutor (n 9 above).
29 Egbeyinka (n 9 above). Other sources have also confirmed non-implementation of this decision. See, for instance, Adjolohoun (n 2 above) 180 - 181; J Ukaigwe *ECOWAS law* (2016) 188; Amnesty International 'Dangerous to dissent: Human rights under threat in Gambia' (2016) 42 https://www.justice.gov/eoir/file/876131/download (accessed 14 April 2017).
30 Mawutor (n 9 above).
31 Mawutor (n 9 above); Egbeyinka (n 9 above); Adjolohoun (n 2 above) 180 - 181; Ukaigwe (n 29 above) 188.
32 *SERAP v Nigeria* (*Right to Education case*), Suit No ECW/CCJ/APP/12/07; Judgment No ECW/CCJ/JUD/07/10.

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	a legal entitlement of citizens. The ECCJ accordingly held that it will enforce the right to education. *Date of decision:* 30 November 2010	
	Reparation orders	*Implementation narrative and compliance status*
	The ECCJ ordered: (i) Nigeria to take necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme.	On 4 March 2011, SERAP wrote to the ECCJ requesting the Court to issue a writ of execution for the implementation of this case.[33] The judgment, together with a writ of execution, was served on the government of Nigeria by the ECCJ's Registry.[34] Mr Falana also sent an open letter to President Goodluck Jonathan on 23 April 2011, urging him to ensure full implementation of the decision.[35] At the 10th anniversary ceremony of the ECCJ in Abuja on 4 July 2011, the Presidents of the ECOWAS Commission and the ECCJ urged the government of Nigeria to ensure speedy implementation of this and other decisions of the ECCJ.[36] As noted by Adjolohoun, an accurate compliance categorization of the reparation order in this case requires some understanding of how the Universal Basic Education (UBE) programme operates in Nigeria.[37] Nigeria is a federation of 36 constituent states. The Federal Government in 2004 established the Universal Basic Education Commission (UBEC) to oversee the universal basic education programme.[38] Under this programme, the

33 S Mugaga 'ECOWAS Court urged to issue writ of execution against FG' *The Nigerian Voice* 7 March 2011 https://www.thenigerianvoice.com/news/47438/ecowas-court-urged-to-issue-writ-of-execution-against-fg.html (accessed 13 March 2017).

34 According to the ECCJ, the judgment in this case together with all previous requests relating to decisions of the Court, which had become final were transmitted to Nigeria's Ministry of Foreign Affairs.

35 A Mumuni 'The ECOWAS right to education judgement' *Daily Independent (Lagos)* 26 April 2011 http://allafrica.com/stories/201104280477.html (accessed 13 April 2017).

36 AllAfrica 'ECOWAS Court President urges speedy compliance with court decisions' *Foroyaa Newspaper* 11 July 2011 http://allafrica.com/stories/201107140899.html (accessed 14 April 2017).

37 Adjolohoun (n 2 above) 178.

38 The Compulsory, Free Universal Basic Education Act 2004, sec 7 - 10.

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		Federal Government contributes not less than two percent of the total Consolidated Revenue Fund of the Federation as matching grant to the 36 states, which may be accessed only after the states have provided their own counterpart funds.[39] Where a state is unable to access its grant in a particular year, the backlog could be accessed subsequently. The grants are made available to states on the basis of a workplan submitted by states to UBEC. This case is significant for many reasons.[40] However, the only reparation order contained in the case is that Nigeria should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme. The UBE programme has continued uninterrupted.[41] The programme has not stopped in any state in Nigeria. Previously unassessed grants were released once the states concerned provide their counterpart contribution. Because of the limited nature of the reparation order in this case, this study concludes, as earlier suggested by other commentators and scholars, that the specific reparation order in this case has been fully complied with.[42] *Status: Full compliance*

[39] See Compulsory, Free Universal Basic Education Act 2004, sec 11. See also Compulsory, Free Universal Basic Education Act 2004, sec 11(2).

[40] See ES Nwauche 'Enforcing ECOWAS law in West African national courts' (2011) 55 *Journal of African Law* 197.

[41] See Adjolohoun (n 2 above) 177 - 179.

[42] As above. See also Ukaigbe (n 29 above) 196; Telephone communication with T Adewale (SERAP) on 6 April 2017.

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5.	***SERAP v Nigeria* (*Niger Delta Environmental Pollution* case)**[43] *Case summary:* The case alleges various violations by the government of Nigeria of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the government to enforce laws and regulations to protect the environment and prevent pollution in the Niger Delta area. *Date of decision:* 14 December 2012	
	Reparation orders	*Implementation narrative and compliance status*
	The ECCJ ordered Nigeria as follows: (i) Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta.	The International Commission of Jurists (IJC), in a letter dated 19 February 2013, urged the President of Nigeria to 'take all necessary steps and issue instructions to relevant officials to comply with this ruling without delay'.[44] The ICJ noted that despite the previous decision of the African Commission in *SERAC v Nigeria*, 'the conditions of living and the respect of the rights of the Niger Delta people have not substantially improved.'[45] SERAP, on 12 June 2016, also called on the government of Nigeria to implement *the Niger Delta environmental pollution* case without further delay.[46] As stated in relation to the *Ogoniland case*, the government has been taking steps to ensure the clean-up of Ogoniland and restoration of the Niger Delta environment.[47] In 2012, the Hydrocarbon Pollution Restoration Project (HYPREP) was set up to co-ordinate the government's efforts to

43 *Niger Delta Environmental Pollution* case

44 'ICJ urges Jonathan to implement ECOWAS ruling on oil pollution' *Channels Television* 19 February 2013 https://www.channelstv.com/2013/02/19/icj-urges-jonathan-to-implement-ecowas-ruling-on-oil-pollution-2/ (accessed 13 April 2017).

45 As above.

46 'SERAP to FG: Implement ECOWAS Court ruling to end Niger Delta crisis' *The News* 12 June 2016 http://thenewsnigeria.com.ng/2016/06/serap-to-fg-implement-ecowas-court-ruling-to-end-niger-delta-crisis/ (accessed 15 April 2017).

47 M Langford, C Rodriguez-Garavito & J Rossi 'Introduction: From jurisprudence to compliance' in M Langford, C Rodriguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 4.

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		implement the recommendations contained in the UNEP report. At least, two studies have confirmed that three of the specific recommendations in the UNEP report have been partially implemented.[48] Government has also launched a US$1 billion operation for the remediation of Ogoniland over a period of five years.[49] Since Ogoniland is part of the Niger Delta, it is only natural to see the clean-up of Ogoniland as part of a broader process to restore the environment of the Niger Delta. *Status: Partial compliance*
	(ii) Take all measures that are necessary to prevent the occurrence of damage to the environment.	The complainant, SERAP, indicated that this order has not been complied with.[50] Nearly all laws and institutions dedicated to environmental protection in Nigeria were put in place prior to this decision.[51] Except for efforts aimed the clean-up of Ogoniland, there have been no major government policy or law to prevent the occurrence of damage to the environment since 2012 when this judgment was delivered.[52] *Status: Non-compliance*
	(iii) Take all measures to hold the perpetrators of	There are been only limited prosecution of companies involved in the oil and gas sector in Nigeria. In April 2013, for instance, a US drilling firm was fined US$11.76 million for

[48] See A Fentiman & N Zabbey 'Environmental degradation and cultural erosion in Ogoniland: A case study of the oil spills in Bodo' (2015) 2 *Extractive Industries and Society-an International Journal* 615, 615 - 624.
[49] 'Oil clean-up pledge divides Nigerians' *BBC News* 28 June 2016 http://www.bbc.com/news/world-africa-36641153 (accessed 18 March 2017).
[50] Telephone communication with Adewale (n 42 above).
[51] See, for instance, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) adopted in 2002; the National Oil Spill Detection and Response Agency (NOSDRA) established in 2006; the National Environmental Standards and Regulations Enforcement Agency (NESREA) established in 2007.
[52] Telephone communication with Adewale (n 42 above). See Environmental Law Research Institute (ELRI) 'A synopsis of laws and regulations on the environment in Nigeria' http://www.elri-ng.org/newsandrelease2.html (accessed 16 April 2017).

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	the environmental damage accountable.	bribing customs officials.[53] Prosecution have also been widely reported in relation to several fuel subsidy scam cases.[54] These prosecutions relate mostly to corruption in the oil and gas sector. No major perpetrator of environmental damage in the Niger Delta has been prosecuted.[55] Some national mechanisms have been put in place however to address oil pollution resulting from pipeline vandalisation and oil bunkering. The government of Nigeria, in 2003, set up a dedicated agency – the Nigeria Security and Civil Defence Corps (NSCDC) – to prosecute individuals responsible for oil spillage and pipeline vandalisation.[56] Thus, it will be unfair to state that these limited categories of offences have not been prosecuted in Nigeria.[57] Both the National Oil Spill Detection and Response Agency (NOSDRA) Act of 2006 and the National Environmental Standards and Regulations Enforcement Agency (NESREA Establishment) Act of 2007 create sundry offences and fines for environmental pollution and damage.[58] However, the *Niger Delta Environmental Pollution* case is specific to oil pollution caused by activities of transnational

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53 Oxford Business Group *The report: Nigeria* (2013) 123.

54 See 'N1.9bn Oil Subsidy Fraud: Court Convicts Wagbatsoma, Others' https://efccnigeria.org/efcc/news/2268-n1-9bn-oil-subsidy-fraud-court-convicts-wagbatsoma-others (accessed 15 April 2017); Sahara Reporters 'Fuel subsidy scam: Court adjourns trial of oil marketer' 20 January 2017 http://saharareporters.com/2017/01/20/fuel-subsidy-scam-court-adjourns-trial-oil-marketer (accessed 15 April 2017).

55 S Marchisio 'Environmental crimes and violations of human rights' http://www.unicri.it/topics/environmental/conference/Thematic_Debate_-_Sergio_Marchisio.pdf (15 April 2017).

56 Nigeria Civil Security and Civil Defence Corps (Amendment) Act No 6 of 2007, section 3 (1) (f) (vi).

57 See, for instance, O Hakeem 'Over 30 pipeline vandals, oil bunkerers under prosecution' https://www.naij.com/885659-good-news-read-happening-pipeline-vandals-oil-bunkerers-presently.html (accessed 15 April 2017).

58 2006 NOSDRA Act, sec 6(2); 2007 NASREA Act, sec 20 - 27.

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		corporations (TNCs). No TNCs are known to have been prosecuted or held accountable for environmental damage in the Niger Delta.[59] At the 6th All Nigeria Editors Conference in Port Harcourt, the President of MOSOP, Ledum Mitee stated: 'there does not appear to have been a single prosecution of corporations for environmental pollution despite the huge oil pollutions with devastating consequences that have been recorded in Nigeria, yet under our laws, to pollute the water or land is a criminal offence.'[60] The complainant in this case, SERAP, also indicated that government has not complied with this order.[61] *Status: Non-compliance*
	(iv) The Federal Republic of Nigeria shall bear the costs.	The government did not pay any costs to the complainant.[62] *Status: Non-compliance*
6.	***Alimu Akeem v Nigeria***[63] *Case summary:* The case alleges arbitrary arrest and detention of the applicant since 13 November 2006. He was detained from the date of the arrest to 15 May 2009 when he was formally arraigned before a Court Martial. *Date of decision:* 28 January 2014	
	Reparation orders	*Implementation narrative and compliance status*
	The ECCJ: (i) Ordered the immediate release of Alimi Akeem.	The complainant was released soon after the decision was issued.[64] *Status: Full compliance*

59 Telephone communication with Adewale (n 42 above).
60 L Mitee 'Oil exploitation, the environment and crimes against nature' Vanguard Newspaper 26 March 2012 http://www.vanguardngr.com/2012/03/oil-exploitation-the-environment-and-crimes-against-nature/ (accessed 15 April 2017).
61 Telephone communication with Adewale (n 42 above).
62 As above.
63 See *Alimu Akeem v Nigeria*.
64 Interview with Egbeyinka (n 9 above).

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	(ii) Ordered Nigeria to pay to Alimu Akeem an all-inclusive reparation of 5 million Naira for the harms done.	The sum of 5 million Naira was paid to Alimi Akeem by the Nigerian government.[65] *Status: Full compliance*
	(iii) Ordered Nigeria to bear the legal costs of the case.	The government did not pay any costs to the complainant.[66] *Status: Non-compliance*
7.	***Modupe Dorcas Afolalu v Nigeria***[67] *Case summary:* The applicant contends that the post-election violence that took place at Zaria in Kaduna on 18 April 2011 caused her husband's death who was at the time a lecturer at the Nuhu Mamali Polytechnic in Nigeria. The applicant alleged discrimination in the process of payment of compensation of victims of the post-election violence as her family and other families who were victims of the violence were singled out. *Date of decision:* 10 June 2014	
	Reparation orders	*Implementation narrative and compliance status*
	(i) The Court orders the government of Nigeria to pay the Applicant 10 million Naira for all the harm caused.	The sum of 10 million Naira was paid to Mrs Modupe Dorcas Afolalu by the government of Nigeria.[68] *Status: Full compliance*
	(ii) The Court requests Nigeria to 'bear the costs'.	The government did not pay any costs to the complainant.[69] *Status: Non-compliance*

65 As above.
66 Egbeyinka (n 9 above).
67 *Modupe Dorcas Afolalu* case.
68 Egbeyinka (n 9 above).
69 As above.

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<table>
<tr><td rowspan="3">8.</td><td colspan="2">SERAP v Nigeria (Bundu Waterfront case)[70]
Case summary: On 12 October 2009, armed security forces opened fire on unarmed peaceful protesters in Bundu Ama, an informal settlement in Port Harcourt, leaving 1 person dead and 12 others severely injured. The government, without adequate consultation with the affected communities, also planned large-scale demolitions of the Port Harcourt city’s waterfront settlements, home to at least 200,000 people. These facts made SERAP and 10 residents of Bundu Ama to approach the ECCJ on 29 October 2010. Amnesty International supported the suit through an amicus brief filed on its behalf by Dr Kalawole Olaniyan.
Date of decision: 10 June 2014</td></tr>
<tr><td>Reparation orders</td><td>Implementation narrative and compliance status</td></tr>
<tr><td>(i) The court awarded a total of 11 million Naira (nearly US$70,000 as at the time of the decision) in damages.</td><td>The government of Nigeria paid to the victims in this case the sum of 6.5 million Naira (over US$30,000).[71] SERAP has since called on the government to complete the payment.[72]

Status: Partial compliance</td></tr>
<tr><td rowspan="2">9.</td><td colspan="2">Deyda Hydara v The Gambia[73]
Case Summary: This case concerns the failure of the government of The Gambia to conduct effective investigation into the killing of Mr Deyda Hydara, co-founder, publisher and editor of The Point newspaper in Banjul. My Hydara was murdered on the night of 16 December 2004. The applicants in this case are children of the deceased journalist, supported by the International Federation of Journalists (Africa).
Date of decision: 10 June 2014</td></tr>
<tr><td>Reparation orders</td><td>Implementation narrative and compliance status</td></tr>
</table>

[70] *SERAP v Nigeria* (*Bundu Waterfront* case), decided by the ECCJ on 10 June 2014. See Amnesty International “Nigeria: Slum-dwellers' victory over government in international court a triumph against impunity” 10 June 2014 https://www.amnesty.org/en/press-releases/2014/06/nigeria-slum-dwellers-victory-over-government-international-court-triumph/ (accessed 27 April 2017).

[71] Egbeyinka (n 9 above); See also ‘Bundu waterfront shooting: SERAP faults FG’s N6.5m compensation’ *Vanguard News* 1 July 2015 http://www.vanguardngr.com/2015/07/bundu-waterfront-shooting-serap-faults-fg-n6-5m-compensation/ (accessed 25 March 2017).

[72] As above.

[73] *Deyda Hydara* case.

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	(i) The plaintiffs are awarded compensation in the sum of US$50,000 for the prejudice suffered.	The government of the Gambia has not complied with this order. The plaintiffs are yet to receive any compensation from the government.[74] *Status: Non-compliance*
	(ii) Costs of US$10,000 is awarded in favour of the plaintiffs against the government of The Gambia	The government of the Gambia has not complied with this order.[75] *Status: Non-compliance*
East African Court of Justice		
10.	***James Katabazi and 21 others v The S-G of EAC and AG Uganda***[76] *Case summary:* In 2004, the applicants were charged with treason, and so were remanded in custody. However, on 16 November 2006, a High Court in Uganda granted them bail. Immediately after the bail was granted, the courtroom was surrounded by heavily armed security operatives who interfered with preparation of bail documents, and rearrested the applicants, and put them back in jail. It is based on this interference that the applicants approached the EACJ. The Court held that the interference by the armed security agents amounted to a violation of the principle of the rule of law. *Date of decision:* 1 November 2007	
	Reparation orders	*Implementation narrative and compliance status*
	The EACJ ordered the government of Uganda to pay costs to the claimants.	Following the Court's decision in the *Katabazi* case, the 22 applicants were released without facing further charges.[77] With regard to costs, the legal counsel to the government of Uganda proposed the award of US$ 59,411 as fair amount for the applicants. This sum was accepted by the legal counsel

[74] Email from Mawutor (n 9 above).

[75] See MFWA 'Two years on: Gambia yet to comply with ECOWAS Court ruling on murder of Deyda Hydara' http://www.mfwa.org/two-years-on-gambia-yet-to-comply-with-ecowas-court-ruling-on-murder-of-deyda-hydara/ (accessed 18 April 2017).

[76] *Katabazi and Others v S-G of EAC and A-G Uganda* (2007) AHRLR 119 (EAC 2007).

[77] A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' unpublished LLD thesis, University of Pretoria, 2014, 181.

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		for the 22 applicants.[78] On 8 May 2008, the Taxation Registrar of the EACJ assessed the costs payable to the applicants at US$70,185 only.[79] In a study conducted in 2015, Possi concluded that the Katabazi decision has been fully complied with by government.[80] The EACJ Sub-Registry in Uganda also confirmed on 29 May 2017 that the cost order has been complied with by government.[81] *Status: Full compliance*
11.	***Sitenda Sibalu v S-G of EAC, AG Uganda and Others***[82] *Case summary:* The Applicant participated in a parliamentary election in Uganda, and lost. Being dissatisfied with the outcome of the election, he challenged the results in the High Court, Court of Appeal and subsequently the Supreme Court of Uganda but was unsuccessful in all those courts. His attempt to appeal to the EACJ failed, thus this Reference. The applicant argued that the delay to vest the EACJ with appellate jurisdiction contravenes the rule of law as enshrined in the EAC Treaty. The Court held that the delay to operationalize the extended jurisdiction of the EACJ violated articles 29, 7(2), 8(1)(c) and 6(d) of the EAC Treaty. *Date of decision:* 22 November 2013	
	Reparation orders	*Implementation narrative and compliance status*
	(i) The Court awarded the Applicant the costs of the Reference against the Secretary General and the	On the 20 January 2012, Taxation Registrar of the EACJ taxed the bill and awarded a total of US$ 105,068.20, as costs to the Applicant, to be shared equally between the EAC Secretary-General and the government of Uganda in the sum of USD 52,534.10 each.[84] According to the EACJ and

[78] See *Katabazi and Others v S-G of EAC and A-G Uganda*, Taxation Number 5 of 2008, issued on 8 May 2008 (Katabazi Taxation Ruling).
[79] As above.
[80] Possi (n 77 above).
[81] Email from S Tweny (EACJ Sub-Registry in Uganda) on 29 May 2017.
[82] *Sitenda Sibalu v S-G of EAC, A-G Uganda and others*, Judgment of 30 June 2011 (*Sitendu Sibalu* case).
[84] Sitenda Sibalu v *S-G of EAC, A-G Uganda and others*, Taxation Clause Number 1 of 2011 page 10, Taxation ruling of 20 January 2012 (*Sibalu* Taxation Ruling).

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	Attorney General of the Republic of Uganda.[83]	applicant's submission to the Court, the government of Uganda has paid its share of the taxed costs to the Applicant.[85] The compliance status of this order was also confirmed by the EACJ Sub-Registry in Uganda on 29 May 2017.[86] *Status: Full compliance*
12.	***Democratic Party and Mukasa Mbidde v S-G of EAC and A-G Uganda***[87] *Case summary:* This Reference concerns full participation and effective representation in the East African Legislative Assembly (EALA). According to article 50 of the EAC Treaty, members of the EALA are to be elected by national assemblies of each state, provided all political parties, shades of opinions, gender and other special interests are well represented. The Uganda Parliament in 2006 adopted Rules of Procedure pursuant to article 50 of the EAC Treaty. In 2008, the Uganda's Constitutional Court declared the 2006 Rules of Procedure null and void. The crux of the case is that the government of Uganda is unwilling to amend the 2006 Rules of Procedure to bring it in conformity with article 50 of the EAC Treaty. The Court restrained the Parliament of Uganda from conducting any elections of members into the EALA until the 2006 Rules of Procedure are amended. *Date of decision:* 10 May 2012	
	Reparation orders	*Implementation narrative and compliance status*
	(i) The Parliament of Uganda and the Attorney General are restrained from conducting any elections of members to the EALA; and the EALA is	In a study on the EACJ in 2015, Possi found that the government of Uganda complied with this reparation order.[88] The study stated that 'the government of Uganda complied with the judgment by not conducting any election and also amended the rules that were used to elect EALA members for the Third Assembly.' [89]

83 *Sitendu Sibalu* case 49.
85 *Sitenda Sibalu v S-G of EAC, A-G Uganda and others,* Reference No 8 of 2012 (Sibalu non-compliance case) para 13 http://eacj.org/wp-content/uploads/2014/02/REFERENCE-NO-8-OF-2012.pdf (accessed 3 June 2017).
86 Email from Tweny (n 81 above).
87 *Democratic Party and Mukasa Mbidde* case.
88 Possi (n 77 above) 180.
89 As above.

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	prohibited from recognizing any nominees nominated or elected to the EALA from Uganda until Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedure of the Parliament of Uganda, 2006 are amended by Uganda to conform to the provisions of article 50 of the EAC Treaty.	Certainly, some form was compliance was recorded by the government of Uganda, but it is difficult to categorise what was done as full compliance, for this thesis. The reason for the above argument is stated below. Following the EACJ's decision in the *Democratic Party and Mbidde* case, and in preparation towards the election of members into the Third Assembly of the EALA that opened in June 2012, the Parliament of Uganda took steps to amend the Rules of Procedure of the Parliament of Uganda.[90] However, the Parliament failed to reach a consensus on the correct interpretation of article 50 of the EAC Treaty that requires that representation to the EALA should cover different interest groups. The Parliament thus resolved to refer the matter to the EACJ for interpretation. Without referring the matter to the Court for interpretation, the Ugandan Parliament on 18 May 2012 proceeded to enact the Rules of Procedure for the Election of Members of the East African Legislative Assembly (EALA), 2012. The EACJ again in the case of *Among A Anita v A-G Uganda and Another*, decided on 29 November 2013, found that Rule 13 (1) and (2) of Appendix B of the 2012 Rules of Procedure contravene article 50 of the EAC Treaty. *Status: Partial compliance*
	(ii) The Attorney General of Uganda to pay the costs of this Reference to the Applicants.	On 3 May 2013, the Taxing Officer of the EACJ put the costs payable to the applicants at US$ 51,556.[91] The EAC

[90] See *Among Anita* case.

[91] See *Democratic Party and Mukasa Mbidde v S-G of EAC and A-G Uganda*, Taxation Cause Number 1 of 2012 (*Democratic Party and Mukasa Mbidde Taxation* Ruling) 8.

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		Secretariat and EACJ registry confirmed that the sum of US$ 51,556 has been paid by government to the claimants.[92] *Status: Full compliance*
13.	***Among Anita v A-G Uganda and others***[93] *Case summary:* This Reference also concerns inclusive representation at the East African Legislative Assembly (EALA). The applicant is a member of the Forum for Democratic Change (FDC), one of the registered Political Parties in Uganda, and a nominee of her party for election into the EALA. This case is a sequel to the *Democratic Party and Mbidde* case. Following the EACJ decision in the *Democratic Party and Mbidde* case and the eventual amendment of the Rules of Procedure of the Uganda Parliament in May 2012, the applicant challenges the legality of the 2012 Rules of Procedure, and that the nomination and subsequent election of members of the EALA under the said Rules of Procedure is unlawful and a contravention of the EAC Treaty. *Date of decision:* 29 November 2013	
	(i) The Court orders the Uganda to amend Rule 13 (1) and (2) of Appendix B of the 2012 Rules of Procedure to bring it into conformity with article 50(1) prior to the next EALA elections.	On 9 August 2016, the Parliament of Uganda formally constituted a Standing Committee to review the Rules of Procedure of the Uganda Parliament. One of the four objectives of the Committee is to 'align the Rules to the observations and decisions of the EACJ with respect to the election petition of Uganda's representatives to the EALA'.[94] In its Report submitted to Parliament in January 2017, the Committee recommended that Rule 13 of Appendix of the 2012 Rules of Procedure be amended as follows: 'The Speaker shall ensure that the members elected under rule 12 in as much as it is feasible, represent the various political parties represented in the House, shades of

92 Email from Tweny (n 81 above). See also email from B Ntihinyurwa (EAC Secretariat) on 2 June 2017.
93 *Among Anita* case.
94 See Report of the Standing Committee on Rules, Privileges and Discipline on the Amendment of the Rules of Procedure of the Parliament of Uganda (January 2017) 3 https://www.scribd.com/document/337292458/Report-on-the-Amendment-of-the-Rules-of-Procedure-of-the-Parliament-of-Uganda#download&from_embed (accessed 6 May 2017).

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		opinion, gender and other special interest groups in Uganda.'[95] The report states unequivocally that the basis of the amendment is to bring the provisions in line article 50 of the EAC Treaty and the decision of the EACJ in *Among A Anita* v *A-G Uganda and others*.[96] If approved by Parliament, the above amendment will constitute full compliance with the reparation orders of the EACJ in this case and full compliance with the reparation orders of the EACJ in the *Democratic Party and Mbidde* case. At the time of this assessment, the Proposed Amendment to the Rules of Procedure is yet to be approved Parliament in plenary. For that reason, implementation of this reparation order is considered ongoing. *Status: Partial compliance*
	(ii) The Applicant is awarded a quarter of the taxed costs to be borne by the government of Uganda.	On 20 March 2015, a Taxing Officer of the EACJ awarded the sum of US$ 14,787 as a quarter of the cost of the Reference.[97] The EAC Secretariat and EACJ registry confirmed that the sum of US$ 14,787 has been paid by government to the claimant.[98] *Status: Full compliance*
14.	***African Network for Animal Welfare v AG Tanzania***[99] *Case summary:* This Reference essentially is a challenge to the proposal by the government of Tanzania to upgrade, construct or commission a superhighway across the Serengeti	

95 See Report of the Standing Committee (n 366 above) 26.
96 Report on the Amendment of the Rules of Procedure of the Parliament of Uganda (2017) 26 https://www.scribd.com/document/337292458/Report-on-the-Amendment-of-the-Rules-of-Procedure-of-the-Parliament-of-Uganda#download&from_embed (accessed 6 May 2017).
97 See *Among Anita v A-G Uganda*, Taxation Ruling of 20 March 2015.
98 Tweny (n 81 above); Ntihinyurwa (n 92 above).
99 *Serengeti* case.

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	National Park. The applicant, an NGO based in Nairobi, Kenya contends that the action of the Tanzanian government was unlawful and contravenes the EAC Treaty. *Date of decision (First Instance Division):* 20 June 2014 *Date of decision (Appellate Division):* 29 July 2015	
	Reparation orders	*Implementation narrative and compliance status*
	(i) A permanent injunction is issued restraining the government of Tanzania from operationalizing its initial proposal to constructor maintain a road of bitumen standard across the Serengeti National Park.	Since the decision of the First Instance Division in June 2014, President Kikwete was silent on the Serengeti road until the end of his tenure in December 2015.[100] The new President, Dr John Magufuli, initially impressed 'conservatists' with his actions against poaching syndicates, until news broke in January 2017 that he planned to revive the plan for a highway across the Serengeti.[101] On 17 January 2017, the Tanzania National Roads Agency under the Ministry of Works, Transport and Communication reportedly issued a notice requesting for bids 'to build a paved highway that would cross the Serengeti National Park, renewing a catastrophic threat to the ecosystem.'[102] The Notice states that the deadline for submission of Tenders closed on 27 February 2017.[103] This allegation has been refuted by the Tanzanian government.[104] Some official sources state that government has no intention to violate the order of the EACJ.[105] As at the time of this assessment, no road of bitumen standard has been constructed across

[100] See 'Whom to believe about road plans through the Serengeti' 16 November 2016 https://wolfganghthome.wordpress.com/2016/11/16/whom-to-believe-about-road-plans-through-the-serengeti/ (accessed 6 May 2017).

[101] As above.

[102] Save the Serengeti 'Bad news! – Serengeti highway threat is back' *Social media post* 28 October 2016 https://www.facebook.com/Save-the-Serengeti-125601617471610/ (accessed 6 May 2017).

[103] See 'Tender No. AE/001/2016-17/HQ/W/03 for upgrading of Natta – Mugumu - Loliondo Road to bitumen standard, package I: Natta to Mugumu Section (38 KM)' 19 January 2017 http://tenders.ppra.go.tz/portalcp/modules/main/attachments/tender/TanroadsHQ.pdf (accessed 6 May 2017).

[104] 'Tanzania government denies highway plans through Serengeti' *eTurboNews* 15 November 2016 http://etn.travel/tanzania-government-denies-highway-plans-serengeti-4390/ (accessed 6 May 2017).

[105] As above.

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		the Serengeti National Park.[106] However, until the lingering doubts are fully and completely dispelled by government, implementation of this order remains ongoing. *Status: Partial compliance*
SADC Tribunal		
15.	***Mike Campbell & Others v Zimbabwe***[107] *Case summary:* In 1974, Mike Campbell a commercial farmer purchased Mount Carmel. On 14 September 2005, Amendment 17 was added to the Constitution of Zimbabwe. This constitutional amendment clause vests ownership of certain lands in the government and outs the jurisdiction of courts to challenge land acquisitions. Mike Campbell challenged the validity of Amendment 17 but while his case was pending, government adopted a law which required that all white farmers whose lands have been acquired compulsorily must leave within 45 to 90 days of the notice. Thus, Campbell approached the SADC Tribunal on 11 October 2007 challenging the acquisition of their lands by the government of Zimbabwe. Subsequently, 77 other farmers were joined in the proceedings. *Date of decision:* 28 November 2008	
	Reparation orders	*Implementation narrative and compliance status*
	(i) Zimbabwe is directed to take all necessary measures to protect the possession, occupation and ownership of the lands of the Applicants, except	On 29 June 2008, Campbell, his wife and son-in-law were abducted, and brutally assaulted by militias and 'war veterans'.[108] Mike Campbell applied to register the Tribunal's judgment of 28 November 2008 in the High Court of Zimbabwe on 23 December 2008, but the application was

[106] According to Serengeti Watch, Researchers at the University of Glasgow have published a study that shows an alternative to Serengeti Highway. The study shows that 'a road around the Serengeti, rather than through it, would bring substantially larger social, economic and health benefits to the Tanzanian people'. See JGC Hopcraft, G Bigurube, JD Lembeli & M Borner 'Balancing conservation with national development: A socio-economic case study of the alternatives to the Serengeti Road' (2015) 10 *Plos One* 1 – 16 http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0130577&type=printable (accessed 6 May 2017).

[107] *Mike Campbell & Others v Zimbabwe*, Case No 2/2008, SADC (T), 28 November 2008; (2008) AHRLR 199 (SADC 2008).

[108] Mike Campbell Foundation 'Campbell case: Decisions by SADC Tribunal' http://www.mikecampbellfoundation.com/page/campbell-case-decisions-by-sadc-tribunal (accessed 3 April 2017).

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	for Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd that have already been evicted from their lands, and to take all appropriate measures to ensure that no action is taken, to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants.	not accepted with no reasons given.[109] On 5 June 2009, the SADC Tribunal found the government of Zimbabwe in contempt having failed to comply with the 28 November 2008 judgment. By August 2009, Campbell and his family were forced out of their home in Mount Carmel, and their homesteads were destroyed in fires.[110] The government of Zimbabwe consistently denies the Tribunal's legitimacy to issue the decision. The President of Zimbabwe, at least one cabinet member, and some senior members of the Zimbabwean judiciary have publicly repudiated the *Mike Campbell* decision.[111] On 1 December 2008, the Zimbabwe's Minister of State for National Security, Lands, Land Reforms and Resettlement was reported to have said the SADC Tribunal was 'day-dreaming' because the Zimbabwean land reform programme would not be reversed.[112] On 7 August 2009, the Zimbabwe's Minister of Justice wrote to the SADC Tribunal arguing that the tribunal lacked jurisdiction over Zimbabwe, and stated unequivocally that Zimbabwe would no longer abide by the Tribunal's decisions.[113] Twice, between 2008 and 2009, the SADC Tribunal held the government of Zimbabwe in contempt for failing to comply with its decisions in the *Campbell* case. On 26 January 2010,

109 Mike Campbell Foundation (n 108 above).
110 As above.
111 See Mugabe and the White African 'Mike Campbell v. Zimbabwe' http://www.pbs.org/pov/mugabe/case-timeline/ (accessed 3 April 2017).
112 As above.
113 Mike Campbell Foundation (n 108 above).

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		a Zimbabwean High Court refused to register the SADC Tribunal's decision in *Campbell* case.[114] A South African High Court sitting in Pretoria in February 2010 ordered that the decision of SADC Tribunal in *Campbell* case be registered, recognised and enforced in South Africa.[115] The Pretoria High Court's decision was affirmed by the South African Supreme Court of Appeal on 20 September 2012.[116] The Constitutional Court of South Africa in 2013 finally held that the government of South Africa has an obligation, by being a member state of SADC, to enforce the decision of the SADC Tribunal against Zimbabwe in South African domestic courts.[117] The Court also held that the cost order issued against Zimbabwe in the *Fick* case could be enforced as a 'foreign judgment' in South Africa. On 21 September 2015, a property belonging to the government of Zimbabwe was auctioned off for ZAR 3.76million to cover the costs order in the *Fick* case (CC).[118] As at the time of writing, the reparation order in *Campbell* case has not been implemented.[119] The reason for the non-

114 See *Gramara (Private) Limited and Another v The Government of the Republic of Zimbabwe* (HC33/09); Mike Campbell Foundation (n 108 above).

115 *Government of the Republic of Zimbabwe v Fick and Others* [2011] ZAGPPHC 76 ('Fick High Court').

116 *Government of the Republic of Zimbabwe v Fick and Others* [2012] ZASCA 122 ('Fick SCA'); Mike Campbell Foundation (n 108 above).

117 *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22, 2013 (5) SA 325 (CC). See also H Woolaver 'Domestic enforcement of international judicial decisions against foreign states in South Africa: *Government of the Republic of Zimbabwe v Fick*' (2015) 6 *Constitutional Court Review* 219.

118 J Evans 'Zim govt propertry in Cape Town sold for R3.7m' *News24* 21 September 2015 http://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921 (accessed 1 May 2017).

119 Viljoen (n 5 above) 498; Woolaver (n 117 above). G Erasmus 'The new Protocol to the SADC Tribunal: Jurisdictional changes and implications for SADC community law' 2015 1 https://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf (accessed 3 April 2017).

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		compliance is the government's explicit rejection of the decision.[120] *Status: Non-compliance*
	(ii) Zimbabwe is directed to pay fair compensation, on or before 30 June 2009, to the following 3 Applicants: Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd.	The government of Zimbabwe is yet to comply with this reparation order.[121] *Status: Non-compliance*
16.	***Tembani v Zimbabwe***[122] *Case summary:* This case concerns a black farmer who in 1983 borrowed money from the Agricultural Bank of Zimbabwe (ABZ). Due to the harsh economic situation in Zimbabwe, he was unable to pay back the loan as agreed. ABZ, purportedly acting under Zimbabwean law and without affording Tembani any opportunity to contest the amount of his outstanding debt or the value of the farm, sold Tembani's farm. Tembani contend that the denial of a fair hearing by an independent court or tribunal to contest the issues constitute a violation of Zimbabwe's obligations under the SADC Treaty. *Date of decision:* 5 June 2009	
	Reparation orders	*Implementation narrative and compliance status*
	The SADC Tribunal ordered as follows:	In October 2009, Tembani and his family were evicted and prevented from taking any of their farm implement.[123] In a communication submitted to the African Commission in 2012

[120] Email from F Pelser on 21 March 2017.
[121] As above. See also Viljoen (n 5 above) 498; Woolaver (n 117 above); Erasmus (n 319 above).
[122] *Tembani v Zimbabwe* Case No 7/2008 SADC (T), 5 June 2009.
[123] L Tembani 'Letter to the editor of *The Patriot*' 6 June 2014 http://www.cfuzim.org/index.php/newspaper-articles-2/land-issues/4526-letter-to-the-editor-of-the-patriot-from-luke-tembani (accessed 28 April 2017); Mike Campbell Foundation 'Luke Tembani' http://www.mikecampbellfoundation.com/page/luke-tembani-968 (accessed 28 April 2017); 'Black farmer falls on hard times' *RadioVop Zimbabwe* 22 May 2011 http://www.radiovop.com/index.php/feed/national-news/6384-black-farmer-falls-on-hard-times.txt (accessed 28 April 2017).

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	(i) Zimbabwe is directed to take all necessary measures, through its agents, from evicting the Applicant or his family from the property.	on behalf of the applicant in 2012, the applicant stated that the reparation order had not been complied with.[124] According to a report by the Mike Campbell Foundation, Tembani and his family are 'now virtually destitute; they live in very basic accommodation and are without income.'[125] *Status: Non-compliance*
	(ii) Zimbabwe is directed to take all necessary measures, through its agents, from interfering with the Applicant's use and occupation of the property.	This reparation order has not been complied with. Responding to questions from Benjamin John Freeth, Mr Tembani stated as follows: 'As I speak to you, at the age of 75, I'm sitting on an old stool with nothing, despite all the years of hard work. We live hand-to-mouth selling little bags of sugar and other basics in a difficult and competitive environment, instead of contributing to food security. My wife and I want our farm back but right now it's too political.'[126] Mr Tembani's daughter has been unable to attend school because her parents could not afford either the fees or the cost of uniforms. She recently returned to school following generous donations to Mr Tembani's family through the Mike Campbell Foundation.[127] *Status: Non-compliance*
	(iii) Zimbabwe is directed to take all necessary measures not to subject the property to any further sale, disposal, transfer, encumbrance or similar	The Agricultural Bank of Zimbabwe has not reversed the unilateral auction of Mr Tembani's farm. There has not been a proper determination of the applicant's debts by an independent and impartial court, as ordered by the SADC Tribunal. Mr Tembani's property was in November 2000 auctioned to Takawira Zembe, 'a businessman who only

[124] Communication 409/12 *Luke Tembani and Benjamin John Freeth v Angola and 13 Others*, decided by the African Commission on 5 November 2013, paras 4-5.

[125] Mike Campbell Foundation 'Luke Tembani' (n 123 above).

[126] As above.

[127] Mike Campbell Foundation 'Luke Tembani' (n 123 above).

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	limitation of proprietary rights pending the proper determination of the Applicant's debt by an independent and impartial court or tribunal.	paid 10% at the auction and who is believed to have as many as 18 farming enterprises in the country, gained in this way.'[128] The new owner of the property, Zembe, is not operating the property he acquired through the ABZ as a commercial farming enterprise 'but has cut it into plots for peasant farmers who are paying him for the use of the land.'[129] *Status: Non-compliance*
	(iv) Costs is ordered against the government of Zimbabwe.	The government of Zimbabwe has not complied with this reparation order.[130] *Status: Non-compliance*
17.	***Gondo and Others v Zimbabwe***[131] *Case summary:* This case was instituted by 9 victims who suffered various injuries in the hands of the Zimbabwean Police and the Army between 2004 and 2009. They had all previously instituted proceedings against the government of Zimbabwe and were awarded various sums as damages by domestic courts, but the government failed to comply with the decisions of its own courts. The applicants approached the SADC Tribunal arguing that the non-compliance by government violates various fundamental rights including the right to an effective remedy. The applicants also argued that the Zimbabwean State Liability Act which does not allow state property to be attached to satisfy a judgment debt is a contravention of various fundamental rights including the right to effective remedy. *Date of decision:* 9 December 2010	
	Reparation orders	*Implementation narrative and compliance status*
	The SADC Tribunal: (i) Orders Zimbabwe to meet with the agents of	The African Commission on 5 November 2013 noted that the reparation orders contained in this case has not been

[128] Mike Campbell Foundation 'Luke Tembani' (n 123 above).
[129] As above.
[130] See Mike Campbell Foundation 'Luke Tembani' (n 123 above).
[131] *Gondo and Others v Zimbabwe*, Case No 5/2008, SADC (T) 9 December 2010.

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	the Applicants, under the supervision of the Registrar, to agree to a mutually satisfactory adjustment to the damages awarded in favour of the applicants by Zimbabwean courts.	complied with by the government of Zimbabwe.[132] The government has openly condemned and rejected the decision. On 17 March 2017, a Zimbabwean High Court judge, Justice Judith Mushore, declared as unconstitutional, null and void section 5(2) of the State Liability Act which does not allow state property to be attached to satisfy a judgment debt.[133] This ruling, which has been referred to the Constitutional Court for 'a confirmation of the order', was commended by the Speaker of the National Assembly.[134] Despite this landmark decision, the applicants in the *Gondo and Others* case are yet to benefit from the judgment of the SADC Tribunal.[135] *Status: Non-compliance*
	(ii) Awards costs to the Applicants. The costs are to be taxed by the Registrar.	The government has not complied with the costs order.[136] *Status: Non-compliance*

[132] African Commission 'Luke Tembani case' (n 124 above) paras 4-5.
[133] C Laiton 'State Liabilities Act invalid: High court' *News Day* 17 March 2017 https://www.newsday.co.zw/2017/03/17/state-liabilities-act-invalid-high-court/ (accessed 2 May 2017).
[134] G Phiri 'Mudenda hails State Liabilities Act repeal' *Daily News* 21 March 2017 https://www.dailynews.co.zw/articles/2017/03/21/mudenda-hails-state-liabilities-act-repeal (accessed 2 May 2017).
[135] MR Phooko 'The SADC Tribunal: Its jurisdiction, enforcement of its judgments and the sovereignty of its member states' unpublished PhD thesis, University of South Africa, 2016.
[136] As above.

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Appendix III: Analysis and categorisation of the 75 reparation orders selected for the study in terms of factors indicative of compliance

	List of cases and reparation orders	Degree of specificity	Scale of violation	Nature of reparation orders	State directly involved in the proceedings	NGO directly involved in the proceedings
African Commission						
1.	***Jawara v The Gambia***					
	The Commission requests the government of The Gambia to 'bring its laws in conformity with the provisions of the African Charter.' *Status: Partial compliance*	Vague	Massive	Legislative	Yes	No
2.	***Kazeem Aminu v Nigeria***					
	The Commission requests the government to 'take necessary measures to comply with its obligations under the Charter'. *Status: Full compliance*	Vague	Individual	Others	No	No
3.	***Media Rights Agenda v Nigeria***					
	The Commission requests Nigeria to 'bring its laws in conformity with the provisions of the Charter.' *Status: Full compliance*	Vague	Individual	Legislative	No	Yes
4.	***Civil Liberties Organisation & 2 Others v Nigeria***					
	The Commission: (i) urges the government of Nigeria to bring its laws in conformity with the Charter by repealing the offending Decree. *Status: Full compliance*	Specific	Multiple	Legislative	Yes	Yes

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	(ii) requests the Government of the Federal Republic of Nigeria to compensate the victims as appropriate. *Status: Partial compliance*	Vague	Multiple	Compensation	Yes	Yes
5.	***SERAC v Nigeria***					
	The Commission urges Nigeria to: (i) Stop all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permit citizens and independent investigators free access to the territory. *Status: Partial compliance*	Specific	Massive	Administrative	Yes	Yes
	(ii) Investigate the human rights violations described above and prosecute officials of the security forces, NNPC and relevant agencies involved in human rights violations. *Status: Partial compliance*	Specific	Massive	Accountability	Yes	Yes
	(iii) Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations. *Status: Partial compliance*	Vague	Massive	Compensation	Yes	Yes
	(iv) Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and	Vague	Massive	Other general measures	Yes	Yes

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	Status: Partial compliance					
	(v) Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations. *Status: Non-compliance*	Vague	Massive	Other general measures	Yes	Yes
6.	***Purohit & Moore v The Gambia***					
	The Commission strongly urges the government of The Gambia to (i) 'Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in the Gambia compatible with the African Charter' and other International norms and standards for the protection of mentally ill or disabled. *Status: Partial compliance*	Specific	Massive	Legislative	Yes	No
	'(ii) Pending (i), create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release.' *Status: Non-compliance*	Specific	Massive	Administrative	Yes	No
	(iii) Provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia. *Status: Partial compliance*	Vague	Massive	Other general measures	Yes	No
7.	***Zimbabwe Human Rights NGO Forumv Zimbabwe***					

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	The Commission: (i) Calls on Zimbabwe to 'establish a Commission of Inquiry to investigate the causes of the violence which took place from February – June 2000, and bring those responsible for the violence to justice.' *Status: Non-compliance*	Specific	Massive	Accountability	No	Yes
	(ii) Identify victims of the violence to 'provide them with just and adequate compensation.' *Status: Non-compliance*	Vague	Massive	Compensation	No	Yes
8.	***Zimbabwe Lawyers for Human Rights & ANZ v Zimbabwe***					
	(i) The Commission recommends that Zimbabwe should 'provide adequate compensation to the Complainants' for the loss they incurred because of this violation. *Status: Non-compliance*	Vague	Multiple	Compensation	Yes	Yes
9.	***Zimbabwe Lawyers for Human Rights & IHRDA v Zimbabwe***					
	(i) The Commission urged Zimbabwe to take urgent steps to ensure that court decisions are respected and implemented. *Status: Non-compliance*	Vague	Individual	Other general measures	Yes	Yes
	(ii) Rescind the deportation orders against Mr Andrew Meldrum, so that he can return to Zimbabwe, if he so wishes, being a person who had permanent residence status prior to his deportation. *Status: Non-compliance*	Specific	Individual	Administrative	Yes	Yes
	(iii) Ensure that the Supreme Court finalizes the determination of the application by Mr Meldrum, on the	Specific	Individual	Administrative	Yes	Yes

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	denial of accreditation; (OR) grant accreditation to Mr Meldrum, so that he can resume his right to practice journalism. *Status: Non-compliance*					
10.	***Scanlen & Holderness v Zimbabwe***					
	The Commission recommends that Zimbabwe should: (i) 'Repeal sections 79 and 80 of the AIPPA.' *Status: Full compliance*	Specific	Massive	Legislative	Yes	Yes
	(ii) 'Decriminalize offences relating to accreditation and the practice of journalism.' *Status: Full compliance*	Specific	Massive	Legislative	Yes	Yes
	(iii) Adopt legislation providing a framework for self-regulation by journalists. *Status: Non-compliance*	Specific	Massive	Legislative	Yes	Yes
	(iv) Bring AIPPA in line with article 9 of the African Charter and other and international human rights instruments. *Status: Partial compliance*	Vague	Massive	Legislative	Yes	Yes
11.	***Gabriel Shumba v Zimbabwe***					
	The Commission recommends that Zimbabwe should (i) 'Pay adequate compensation to the victim for the torture and trauma caused.' *Status: Non-compliance*	Vague	Individual	Compensation	Yes	Yes
	(ii) 'That an inquiry and investigation be carried out to bring those who perpetrated the violations to justice.'	Specific	Individual	Accountability	Yes	Yes

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	Status: Non-compliance					
12.	***Noah Kazingachire & Others v Zimbabwe***					
	The Commission recommends that Zimbabwe should: (i) 'Undertake law reform to bring domestic laws on compensation in case of wrongful killings into conformity with the African Charter.' *Status: Non-compliance*	Vague	Multiple	Legislative	Yes	No
	(ii) 'Pay compensatory damages to the legal heirs and next of kin of the four deceased.' *Status: Non-compliance*	Specific	Multiple	Compensation	Yes	No
African Court						
13.	***Mtikila & Others v Tanzania***					
	The Court directs the government of Tanzania to 'take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations' found by the Court and to inform the Court of the measures taken. *Status: Non-compliance*	Vague	Multiple	(Other) general measures	Yes	Yes
	(ii) An order requiring the government of Tanzania within six months to publish the official English Summary of the judgment developed by the Registry of the Court. *Status: Non-compliance*	Specific	Multiple	Administrative	Yes	Yes
	(iii) An order requiring the government of Tanzania within six	Specific	Multiple	Administrative	Yes	Yes

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	months to translate the English summary of the judgment into Kiswahili at its own cost. *Status: Non-compliance*					
	(iv) An order requiring the Government of Tanzania to ensure that the summary of the judgment developed by the court is published in both English and Kiswahili, once in the official Gazette and once in a Newspaper with widespread circulation. *Status: Non-compliance*	Specific	Multiple	Administrative	Yes	Yes
	(v) An order requiring the government of Tanzania to make available on an official website the judgment of the Court of 14 June 2013 in its entirety in English a period of one year. *Status: Partial compliance*	Specific	Multiple	Administrative	Yes	Yes
	(vi) An order requiring the government to submit to the Court within six months starting from the date of the reparation ruling a report a report on the measures it has taken in compliance with the judgment of 14 June 2013. *Status: Partial compliance*	Specific	Multiple	Administrative	Yes	Yes
14.	***Alex Thomas v Tanzania***					
	The Court directed Tanzania to 'take all necessary measures within a reasonable time to remedy the violations found, especially precluding the reopening of the defence case and retrial of the applicant.' *Status: Non-compliance*	Vague	Individual	Other general measures	Yes	Yes

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African Children's Rights Committee						
15.	***Hansugule & Others (on behalf of children in Northern Uganda) v Uganda***					
	The African Children's Rights Committee recommends that: (i) Uganda should include in its Penal Code a section which provides for the criminal responsibility of anyone who recruits or use persons below the age of 18 in situations of hostilities, tension or strife. *Status: Partial compliance*	Specific	Massive	Legislative	Yes	Yes
	(ii) Recommends that Uganda should implement fully the standard operating procedures (SOPs) for the reception and handover of children separated from armed groups, as well as undertake comprehensive DDR programmes, in collaboration with the African Union, United Nations. *Status: Partial compliance*	Vague	Massive	Other general measures	Yes	Yes
	(iii) Recommends that Uganda takes all necessary legislative, administrative, and other measures to ensure that children are registered immediately after birth. Measures should be put in place to improve the birth registration. The Committee further recommends that Uganda should prepare and effectively implement a national action plan for the registration of those children who have thus far not been registered, and to issue full birth certificates to those who have registered but have not been able to access a birth certificate.	Vague	Massive	Other general measures	Yes	Yes

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	Status: Partial compliance					
	(iv) Recommends that Uganda should establish administrative procedures in relation to all armed forces, which ensure that, in instances where there is no credible or conclusive proof of age, a person alleged or alleging to be a child shall not be recruited or used in any situations of hostilities until conclusive proof of age is provided to confirm that the person is aged over 18 years. *Status: Partial compliance*	Specific	Massive	Administrative	Yes	Yes
	(v) Recommends that Uganda should rely on forms of accountability other than detention and criminal prosecution, that take the best interest of the child as the primary consideration and promote the reintegration of the child into his or her family, community and society, including the use of restorative measures and truth-telling. *Status: Partial compliance*	Vague	Massive	Accountability	Yes	Yes
ECOWAS Community Court of Justice (ECCJ)						
1.	***Chief Ebrimah Manneh v The Gambia***					
	The ECCJ orders Gambia to release Chief Ebrimah Manneh, plaintiff herein from unlawful detention without any further delay upon being served with a copy of the judgment. *Status: Non-compliance*	Specific	Individual	Administrative	No	Yes

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	(ii) That the human rights of the plaintiff be restored, especially his freedom of movement *Status: Non-compliance*	Specific	Individual	Administrative	No	Yes
	(iii) The Gambia to pay the plaintiff the sum of one hundred thousand United States Dollars (US$100 000) as damages. *Status: Non-compliance*	Specific	Individual	Compensation	No	Yes
	(iv) The Government is also to pay the costs of the case to the complainant. *Status: Non-compliance*	Vague	Individual	Compensation	No	Yes
2.	***Djotbayi Talbia and Others v Nigeria***					
	The ECCJ ordered as follows: (i) The 10 Applicants are entitled to fair and just reparation adjudged by the Court in the lump sum of US$ 42, 750, against the Defendants jointly and severally. *Status: Non-compliance*	Specific	Multiple	Compensation	Yes	No
	(ii) The Court awards the sum of US$10,000 costs against the defendant.	Specific	Multiple	Compensation	Yes	No

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	Status: Non-compliance					
3.	***Musa Saidykhan v The Gambia***					
	(i) The Court awards the plaintiff damages in the sum US$200,000.00 *Status: Non-compliance*	Specific	Individual	Compensation	Yes	Yes
	(ii) The plaintiff is entitled to costs in this action which shall be borne by the defendant. *Status: Non-compliance*	Vague	Individual	Compensation	Yes	Yes
4.	***SERAP v Nigeria (Nigerian Right to Education case)***					
	The ECCJ ordered: (i) Nigeria to take necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme. *Status: Full compliance*	Vague	Massive	Compensation	Yes	Yes
5.	***SERAP v Nigeria* (*Niger Delta Environmental Pollution* case)**					
	The ECCJ ordered Nigeria as follows:	Vague	Massive	Other general measures	Yes	Yes

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	(i) Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta. *Status: Partial compliance*					
	(ii) Take all measures that are necessary to prevent the occurrence of damage to the environment. *Status: Non-compliance*	Vague	Massive	Other general measures	Yes	Yes
	(iii) Take all measures to hold the perpetrators of the environmental damage accountable. *Status: Non-compliance*	Vague	Massive	Accountability	Yes	Yes
	(iv) The Federal Republic of Nigeria shall bear the costs. *Status: Non-compliance*	Vague	Massive	Compensation	Yes	Yes
6.	***Alimu Akeem v Nigeria***					
	The ECCJ: (i) Ordered the immediate release of Alimi Akeem. *Status: Full compliance*	Specific	Individual	Administrative	Yes	No
	(ii) Ordered Nigeria to pay to Alimu Akeem an al-inclusive reparation of 5 million Naira for the harms done.	Specific	Individual	Compensation	Yes	No

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	Status: Full compliance					
	(iii) Ordered Nigeria to bear the legal costs of the case. *Status: Non-compliance*	Vague	Individual	Compensation	Yes	No
7.	***Modupe Dorcas Afolalu v Nigeria***					
	(i) The Court orders the government of Nigeria to pay the Applicant 10 million Naira for all the harm caused. *Status: Full compliance*	Specific	Individual	Compensation	Yes	No
	(ii) The Court requests Nigeria to 'bear the costs'. *Status: Non-compliance*	Vague	Individual	Compensation	Yes	No
8.	***SERAP v Nigeria* (Bundu Waterfront case)**					
	(i) The court awarded a total of 11 million Naira (nearly US$70,000 as at the time of the decision) in damages. *Status: Partial compliance*	Specific	Multiple	Compensation	Yes	Yes
9.	***Deyda Hydara v The Gambia***					
	(i) The plaintiffs are awarded compensation in the sum of US$50,000 for the prejudice suffered.	Specific	Individual	Compensation	Yes	Yes

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	Status: Non-compliance					
	(ii) Costs of US$10, 000 is awarded in favour of the plaintiffs against the government of The Gambia *Status: Non-compliance*	Specific	Individual	Compensation	Yes	Yes
East African Court of Justice						
10.	***James Katabazi and 21 others v The S-G of EAC and AG Uganda***					
	The EACJ ordered the government of Uganda to pay costs to the claimants (Costs assessed by the Court). *Status: Full compliance*	Specific	Multiple	Compensation	Yes	No
11.	***Sitenda Sibalu v S-G of EAC, AG Uganda and Others***					
	(i) The Court awarded the Applicant the costs of the Reference against the Secretary General and the Attorney General of the Republic of Uganda (Costs assessed by the Court). *Status: Full compliance*	Specific	Individual	Compensation	Yes	No
12.	***Democratic Party and Mukasa Mbidde v S-G of EAC and A-G Uganda***					

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	(i) The Parliament of Uganda and the Attorney General are restrained from conducting any elections of members to the EALA; and the EALA is prohibited from recognizing any nominees nominated or elected to the EALA from Uganda until Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedure of the Parliament of Uganda, 2006 are amended by Uganda to conform to the provisions of article 50 of the EAC Treaty. *Status: Partial compliance*	Specific	Multiple	Legislative	Yes	Yes
	(ii) The Attorney General of Uganda to pay the costs of this Reference to the Applicants (Costs assessed by the Court). *Status: Full compliance*	Specific	Multiple	Compensation	Yes	Yes
13.	***Among Anita v A-G Uganda and others***					
	(i) The Court orders the Uganda to amend Rule 13 (1) and (2) of Appendix B of the 2012 Rules of Procedure to bring it into conformity with article 50(1) prior to the next EALA elections. *Status: Partial compliance*	Specific	Individual	Legislative	Yes	No

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	(ii) The Applicant is awarded a quarter of the taxed costs to be borne by the government of Uganda (Costs assessed by the Court). *Status: Full compliance*	Specific	Individual	Compensation	Yes	No
14.	***African Network for Animal Welfare v AG Tanzania***					
	(i) A permanent injunction is issued restraining the government of Tanzania from operationalizing its initial proposal to constructor maintain a road of bitumen standard across the Serengeti National Park. *Status: Partial compliance*	Specific	Massive	Administrative	Yes	Yes
SADC Tribunal						
15.	***Mike Campbell & Others v Zimbabwe***					
	(i) Zimbabwe is directed to take all necessary measures to protect the possession, occupation and ownership of the lands of the Applicants, except for Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd that have already been evicted from their lands, and to take all appropriate measures to ensure that no action is taken,	Vague	Multiple	Other general measures	Yes	No

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	to evict from, or interfere with, the peaceful residence on, and of those farms by, the Applicants. *Status: Non-compliance*					
	(ii) Zimbabwe is directed to pay fair compensation, on or before 30 June 2009, to the following 3 Applicants: Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd. *Status: Non-compliance*	Vague	Multiple	Compensation	Yes	No
16.	***Tembani v Zimbabwe***					
	(i) Zimbabwe is directed to take all necessary measures, through its agents, from evicting the Applicant or his family from the property. *Status: Non-compliance*	Vague	Individual	Other general measures	Yes	No
	(ii) Zimbabwe is directed to take all necessary measures, through its agents, from interfering with the Applicant's use and occupation of the property. *Status: Non-compliance*	Vague	Individual	Other general measures	Yes	No

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	(iii) Zimbabwe is directed to take all necessary measures not to subject the property to any further sale, disposal, transfer, encumbrance or similar limitation of proprietary rights pending the proper determination of the Applicant's debt by an independent and impartial court or tribunal. *Status: Non-compliance*	Vague	Individual	Other general measures	Yes	No
	(iv) Costs is ordered against the government of Zimbabwe (To be assessed by the Court). *Status: Non-compliance*	Specific	Individual	Compensation	Yes	No
17.	***Gondo and Others v Zimbabwe***					
	The SADC Tribunal: (i) Orders Zimbabwe to meet with the agents of the Applicants, under the supervision of the Registrar, to agree to a mutually satisfactory adjustment to the damages awarded in favour of the applicants by Zimbabwean courts. *Status: Non-compliance*	Vague	Multiple	Compensation	No	No
	(ii) Awards costs to the Applicants. The costs are to be taxed by the Registrar. *Status: Non-compliance*	Specific	Multiple	Compensation	No	No

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