A comparison of state compliance with reparation orders by regional and sub-regional human rights tribunals in Africa: case studies of Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe

Frans Viljoen and Victor Ayeni*

Centre for Human Rights, University of Pretoria, Pretoria, South Africa

*CONTACT Victor Ayeni. Email: victorayeni@up.ac.za

Abstract

This article compares second-order state compliance in respect of regional and sub-regional human rights tribunals (HRTs) in Africa. Using as its unit of analysis the compliance orders issued by these HRTs, the article analyses state compliance with 75 such orders contained in 32 decisions of six selected HRTs, decided in the period between 1 January 2000 and 31 December 2015, in five states – Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe. Based on available data supplemented by in-depth interviews conducted between July 2015 to December 2018, the study establishes the compliance status of the 75 reparations orders. The authors advance the notion of 'aggregate compliance', which accords weight to both full and partial compliance, as a suitable yardstick to compare state compliance. Finding that 29 percent aggregate compliance was recorded with respect to reparations orders issued against the selected states by African sub-regional HRTs, compared to 33 percent aggregate compliance with respect to regional HRTs, the study concludes that the hypothesis that the *studied states comply better with decisions of African sub-regional HRTs than regional HRTs* cannot be substantiated. It argues that the defining factors for compliance are state-level characteristics, the nature of the reparation orders and the effectiveness of follow-up.

Keywords: African states; regional; sub-regional; human rights tribunals; reparations orders; compliance; second-order compliance; aggregate compliance

1. Introduction

International law has over the years grown in size and importance.[1] The same is true of international adjudication.[2] Scholars point to the increasing legalisation 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 as one of the most remarkable developments in contemporary international law.[5] However, despite the advances 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.[6]

While IHRL is generally assumed to have a constraining effect on state behaviour,[7] empirical evidence tends to suggest that the effect of treaties on human rights practices at the state level

is negligible.[8] In fact, some quantitative studies found that human rights practices at the domestic level may worsen following ratification of human rights treaties.[9] However, qualitative studies[10] and some more recent quantitative research have given cause for greater optimism, suggesting that human rights treaties do give rise to positive domestic consequences.[11]

This article focuses on second-order compliance in relation to HRTs situated in Africa and introduces a novel concept of *aggregate compliance* to categorise human rights judgment compliance, thus avoiding the rigid distinction between full and partial compliance. 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.

In recent times, there has been growing engagements with 'second-order compliance' at the global, regional and sub-regional level.[12] Second-order treaty compliance refers to compliance with the *decisions of a treaty body* that is authorised to interpret provisions of a treaty or resolve disputes arising from the implementation of a treaty.[13] This contrasts with first-order treaty compliance, which refers to compliance with the substantive provisions of a *treaty*.[14]

While some studies have interrogated the domestic level effects of human rights instruments adopted by the African Union (AU), formerly the Organisation of African Unity (OAU), fewer empirical studies have been conducted into the phenomenon of state compliance with decisions of HRTs in Africa.[15] Africa currently has three main bodies that perform the function of adjudicating human rights complaints at the continental level: the African Commission on Human and Peoples' Rights (African Commission), the 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).[16] 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.[17]

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 than 'recommendatory decisions'.[18] According to Helfer and Slaughter, the perception that the decision of a HRT is legally binding is relevant and has significant consequences for the effectiveness of the tribunal.[19] While the differences in the remedial powers of the various HRTs selected for this study is unarguably pertinent for state compliance, its implication for state compliance is subject of a separate enquiry, with full data analysis and discussion provided by the author.[20] The focus of the present analysis is whether HRTs situated at the sub-regional level in Africa tend to attract greater state compliance than those at the regional or continental level.

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; the non-compliance rate was estimated at 52 percent.[21] With respect to recommendations of the African Commission, Viljoen and Louw in 2004 found that full compliance rate was 14 percent, while non-compliance was 66 percent.[22] This led Louw to conclude that decisions of the HRC enjoyed better compliance among African states than those of the African Commission.[23] Louw nevertheless noted that with respect to countries that had cases at both the HRC and African

Commission, compliance rates did not seem to differ from the global system to the regional system.[24]

Adjolohoun added a new dimension to the dataset on state compliance with decisions of HRTs in Africa.[25] In 2013, he found that member states of the Economic Community of West African States (ECOWAS) complied fully with 66 percent of reparation orders issued by the ECOWAS Community Court of Justice (ECCJ).[26] Quite recently, Possi[27] and Lando[28] conducted studies into aspects of the decisions of the East African Court of Justice (EACJ), and similarly found that East African states have mostly complied with reparation orders of the EACJ.[29] The results of the various studies into state compliance with reparation orders issued by sub-regional judicial bodies in Africa prompt the question: Do states in Africa comply better with reparation orders of sub-regional HRTs than regional HRTs? This analysis is of particular importance in the African context, in view of the growing influence of sub-regional HRTs in the development of human rights jurisprudence in Africa;[30] and considering the relative success of the ECCJ and EACJ in securing compliance with their decisions by African states, some of which have disregarded decisions of regional HRTs.

The notion that state compliance with reparation orders of HRTs in Africa may be better at the sub-regional than the regional level derives from an ideational logic of regional contagion which suggests 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 located further away.[31] The assumption therefore is that obligations arising from institutions of regional economic communities (RECs) formed consensually by geographically proximate states are likely to be observed more often than those from inter-governmental organisations comprising different states with limited commonalities in terms of domestic legal systems, language, history, and political or socio-economic challenges. Against this background, a study was undertaken to determine whether five selected states in Africa complied better with reparation orders issued by sub-regional compared to regional HRTs. The basic hypothesis that underpins the study and which forms the core of this article is: *selected African states comply better with reparation orders of sub-regional HRTs than those of regional HRTs.* This hypothesis is tested by comparing the human rights judgment compliance records of the five selected African states at the regional and sub-regional level.

2. Selection of study cases, states and HRTs

The regional HRTs selected for the analysis in the study are: the African Commission, the African Court and the African Children's Rights Committee. The sub-regional HRTs selected are the EACJ, the ECCJ and the Tribunal of the Southern African Development Community (SADC Tribunal). The sub-regional HRTs were selected to represent East, West and Southern Africa, the continental sub-regions from which the selected countries come. Although they were initially conceived as mechanisms for resolving mainly trade and political integration disputes, these sub-regional tribunals, referred to in this study as 'sub-regional HRTs', have decided significant human rights related cases.[32] Of these three, only the ECCJ has a clear and unlimited jurisdictional mandate to adjudicate human rights cases.[33] The other two – the SADC Tribunal (prior to its suspension) and more recently the EACJ – have repurposed their mandate and crafted a human-rights related mandate for themselves through creative interpretation of their founding treaties.

The five states selected for the investigation are: Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe. These five states have been found in violation in human rights and human-rights

related cases by *at least one selected regional and one sub-regional* HRT.[34] In order to be eligible for selection for the study, a candidate state is required not only to have cases decided against it on the merit at both systems, but also to have relatively higher number of cases than other states. The selected states generally have poor overall human rights records.[35] Between 2011 and 2021, Freedom House rates Tanzania and Nigeria as 'Partly free'.[36] During the same period, Uganda and Zimbabwe were rated mostly as 'Not Free'.[37] The Gambia's case provides a mixed-bag: it was rated 'Not Free' from 2012 to 2017, and 'Partly Free' in 2011 and 2018–2021. The Economic Intelligence Unit (EIU)'s Democracy Index Reports rank the five states as either 'Hybrid Regimes' or 'Authoritarian Regimes.[38] In essence, the human rights records of all five selected states have been less than satisfactory.

Temporally, the study is confined to cases decided against the five study countries during the period from *1 January 2000–31 December 2015*. The choice of starting date (1 January 2000, and not an earlier date) is motivated by the need to exclude cases that are no longer pertinent, or in respect of which it may be very difficult to gather data to establish the implementation status. 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 till December 2018.

The substantive scope of the study relates to only *merit decisions of the selected HRTs*. The study investigates only merit decisions in which the selected HRTs found any of the five selected states in violation of the relevant human rights treaties. The scope of the study does therefore not extend to cases declared inadmissible, cases concluded through amicable settlement between parties, or cases in which no violations were found against the defendant states. The subject of the study further excludes provisional or interim measures. 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 have overstretched the scope of this study; in any event, other scholars have already dealt with some of these issues.[39] Because only merit decisions are included in the analysis, the total number of cases to be analysed in the study is relatively restricted. A total of 32 'cases' (or 'merits decisions') are included, as set out in Table 1.

Table 1. Number of cases decided by HRT per country (2000–2015).

Country	African Commission	African Court	Children's Committee	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**		

Although it began its operations in 1987, the African Commission initially did not publish its findings under the individual communication procedure.[40] The first Activity Report containing the findings of the African Commission was published in 1994.[41] In total, 12 decisions of the African Commission involving three countries – Nigeria, The Gambia and Zimbabwe – are discussed here. As at 31 December 2015, the African Commission had not decided any individual communication against Tanzania and Uganda.[42]

Between 1994 and 2015, the African Commission found Nigeria in violation of the African Charter in 20 individual communications.[43] Most of the Nigerian cases were decided prior to 1999, when the country was under various military administrations. However, during the study period, 2000–2015, the Commission found Nigeria in violation of the African Charter only in six cases.[44] Due to the criteria for case selection in this study, two of the six cases, namely *HURILAWS v Nigeria*[45] and *Access to Justice v Nigeria,*[46] are excluded from the analysis in this article. The decision of the Commission in *Access to Justice v Nigeria* had not been published,[47] while the Commission did not issue any reparation order for the government of Nigeria to implement in *HURILAWS v Nigeria*.[48] This leaves Nigeria with a total of four African Commission cases for the study.[49]

The African Commission has found The Gambia in violation of the African Charter in only two cases.[50] The two cases – *Jawara v The Gambia*,[51] and *Purohit and Moore v The Gambia*[52] – were decided during the study period. From 2000, the number of individual communications filed at the African Commission against Zimbabwe increased significantly due to the deteriorating human rights situation in the country.[53] During the study period (2000–2015), African Commission decided eight individual communications involving Zimbabwe on the merits.[54] Of the eight merit decisions, the Commission found no violation in two, and in the remaining six cases, the Commission found various violations of the African Charter and issued at least one reparation order for the government of Zimbabwe to implement. These are the six African Commission cases discussed in relation to Zimbabwe.[55]

Of the five states selected for the study, only Tanzania has been a subject of an African Court judgment where a finding of violation has been made. As at 31 July 2017, the time of completing the study, the Court has issued four decisions against Tanzania but only two of the decisions, *Mtikila v Tanzania*[56] and *Alex Thomas v Tanzania*,[57] fall within the study period (2000–2015).[58] By the end of 2015, the African Children's Rights Committee had finalised a communication against only one of the five states, Uganda.[59] These figures add up to a total of 15 decisions of regional HRTs considered in the study.

Starting from its inception in 1993 to September 2015, the ECCJ received 271 cases, and delivered 136 judgments.[60] 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.[61] The ECCJ made findings of violations and issued specific remedial order in nine human rights cases.[62] Five of the nine cases covered in Adjolohoun's study relate to Nigeria and The Gambia, two studied countries for this study. However, the ECCJ delivered a significant number of human rights judgments during the study period that had not been not covered in Adjolohoun's study. The additional decisions delivered by the ECCJ, which relate to Nigeria and The Gambia, are as follows: *SERAP v Nigeria* (*Niger Delta environmental pollution* case),[63] *Modupe Dorcas Afolalu v Nigeria,*[64] *Alimu Akeem v Nigeria*,[65] *SERAP v Nigeria (Bundu Waterfront* case*)* and *Deyda Hydara v The Gambia.*[66] This list brings to a total of 10 the number of ECCJ human rights cases involving Nigeria and the Gambia; seven of the cases involving Nigeria and three involving The Gambia.[67] However, due to the criteria set for selection of cases in the study, the case of *Ugokwe v Nigeria*,[68] one of the 9 ECCJ cases involved in the Adjolohoun's study, is not selected for this study.[69] The case concerns only interim measures, and it has been clarified earlier that cases in which only interim measures were issued are not selected for the study. Accordingly, only nine human rights decisions of the ECCJ, involving Nigeria and the Gambia,

are selected for this study. All nine cases were decided within the cut-off dates for the study (2000–2015).

As at 31 December 2015, the EACJ adjudicated on the merits a total of 14 human rights related cases, and some of these cases have been decided further on appeal.[70] The Republic of Uganda is involved in at least seven of these cases.[71] However, due to the criteria for case selection in this study, three of the seven cases are excluded from this study.[72] 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,*[73] *Sitenda Sibalu v S-G of EAC, AG Uganda and Others,*[74] *Democratic Party & Another v S-G of EAC and AG Uganda*,[75] and *Anita v A-G Uganda and Another.*[76] 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.[77]

The SADC Tribunal delivered a total of 19 judgments by the time it was suspended in 2010.[78] Of the 19 judgments delivered by the Tribunal, 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.[79] 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.[80] 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.[81]

The study uses as its unit of analysis not the 'decisions' as such, but rather the specific reparation orders that are contained in 'decisions' (or 'judgments'). States are required to comply not with *cases or judgments,* rather, they are called upon to comply with 'discrete obligations' or *specific reparation orders* contained in judgments.[82] Case-level compliance analysis tends to mask significant measures of compliance in multiple reparation orders cases, which are most often categorised as partial compliance, and thus ignored in the final computation of compliance rates. Framed by the five countries under study, the temporal scope, the HRTs involved, and the substantive scope identified, the analysis in this study concerns itself with *only 75 reparation orders* contained in *32 merits decisions*,[83] as set out in Table 2.

Table 2. Number of reparation orders by HRT per country (2000–2015).

Country	African Commission	African Court	Children's Committee	ECCJ	EACJ	SADC Tribunal
Nigeria	9	–	–	13	–	–
The Gambia	4	–	–	8	–	–
Tanzania	–	7	–	–	1	–
Uganda	–	–	5	–	6	–
Zimbabwe	14	–	–	–	–	8
Total	**27**	**4**	**5**	**21**	**7**	**8**
Group total	**Regional: 39 reparation orders**			**Sub-regional: 36 reparation orders**		

The study acknowledges the difficulties often associated with establishing the status of state compliance with decisions of any HRT. These challenges stem from multiple factors relating to the HRTs themselves, state-level factors and the data gathering process.[84] For instance, the reparation orders of HRTs are sometimes vague and ambiguous; state actors are mostly 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 in many cases are untraceable due to relocation, displacement or death; and academic research by its nature is limited by time, funding and other constraints.

3. Categories of compliance: introducing 'aggregate compliance'

In this study, the focus falls on the more limited concept 'compliance'. Compliance is defined as conformity between an observable behaviour and a legal rule or standard.[85] In relation to decisions of HRTs in the study, compliance is used to mean conformity between a reparation order by an HRT on the one hand and state action or resulting factual situation at the domestic level on the other hand.[86] Mostly, compliance does not happen the same way 'a twist to the hand causes pain'.[87] More often than not, compliance is the result of coincidence, inadvertence or reasons extrinsic to a legal rule or reparation order of a HRT.[88] Some scholars argue that the focus on compliance tends to over-simplify the various ways through which international law can have an effect at the domestic level.[89] It is indeed important to distinguish compliance from implementation. Implementation refers to the process of taking legislative, judicial or administrative measures to give effect to a legal rule or decision of a HRT.[90] Implementation is a *process* that leads to compliance. In other words, compliance is the end point or result of implementation. However, compliance can occur in the absence of implementation, and implementation need not lead to compliance.[91] Compliance should also be distinguished from 'effectiveness' and 'impact', which in this context speak to the extent of actual change induced by the treaty or HRT order.[92]

After nearly a decade of following up states' implementation of its Views, the Human Rights Committee in 1990 stated that 'attempts to categorise follow up replies are necessarily imprecise.'[93] Compliance analysis involves interpretation of data as well as exercise of judgment.[94] Scholars previously conceptualised state compliance with reparation orders of HRTs in binary terms: compliance or non-compliance.[95] The middle ground has rarely been thoroughly conceptualised, until Hawkins and Jacoby emphasised the role of partial compliance, in understanding the phenomenon of compliance.[96] 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'.[97]

In categorising the level of compliance, this study introduces the concept of aggregate compliance, a concept that accords weight to both full and partial compliance. This concept aims to avoid the rigid juxtaposition of full and partial compliance, which suggests that nothing has *really* been accomplished until *everything* has been achieved. The question may be asked: Which of the compliance categories – full, partial and non-compliance – is best suited for comparing compliance across states and HRTs? We argue that for an HRT to be regarded as having a higher compliance rating than other tribunals, the tribunal ordinarily should have both 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 study, the tribunal that has a higher full compliance rate usually also has a higher non-compliance rate, and vice versa. Where none of the tribunals has both a higher full compliance and lower non-compliance rates, we argue that it would be appropriate to compare the aggregate compliance rates of the two or more HRTs. Further, we argue that the 'all or nothing approach', which focuses only on the rate of full compliance, conflates 'pending compliance' with 'non-compliance'. Such characterisation of compliance is not only unfair to the state but also inaccurate as far as the actual rate of non-compliance is concerned. The concept of 'aggregate compliance' we develop in this study circumvents the situation whereby non-compliance is overstated, or partial compliance is under-rated.

In order to determine the aggregate compliance rating of a HRT, the relative weight of partial compliance must be determined. 'Partial compliance' 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. Since partial compliance lies on a continuum, it follows that partial compliance as a compliance category does not always imply that implementation is half-way to completion.[98] 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. In any event, as Murray and Long argue, 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.[99]

Admittedly, all partial compliance is not *half of full compliance*. However, if we assume that full compliance is awarded a score of '1′ and non-compliance is graded '0′, the continuum between the two (from 0.1–0.9) represents various degrees of partial compliance. Identifying the specific value of each case of partial compliance on the continuum would require a great deal of sophistication. While we are aware of the contestation that may arise from assigning the median value of the continuum (0.5) to partial compliance, we argue that this approach is preferable to equating 'partial compliance' entirely with 'non-compliance'. 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. We therefore suggest that 'aggregate compliance' be calculated as follows: Aggregate Compliance (AC) = Full compliance (FC) + ½ Partial Compliance (PC) (AC = FC + ½ PC).[100] The aggregate compliance figure is then expressed as a percentage of the total number of orders.

In our study, state compliance with reparation orders of the selected regional and sub-regional HRTs is divided into three categories, namely full compliance, partial compliance and non-compliance.[101] Full compliance entails conformity between a legal standard and an observable behaviour or state of affairs.[102] A state is considered to have 'fully complied' with a reparation order if it has implemented every element of that order. Human rights decisions usually contain one or more reparation orders for states to implement. Each of these orders also may have multiple layers.

4. Status of compliance

According to our study results, set out in Tables 3-5, the selected states complied fully with only five (13 percent) of the reparation orders of regional HRTs, and eight (22 percent) of the reparation orders of sub-regional HRTs. However, we argue that the rate of full compliance alone is an inadequate metric for measuring state compliance or comparing compliance rates among states and HRTs.

In our study, the second category, 'partial compliance', refers to instances where the state concerned had implemented at least one but not all *elements of the specific remedial order*. It also includes instances where the state has taken some steps, but these steps fall short of fully implementing any of the components of the specific reparation order. For case level categorisation, partial compliance describes a situation where the state concerned has implemented at least one of the multiple reparation orders of the HRT in a particular case, or has taken some steps, but the steps fall short of fully implementing at least one reparation order.[103] The survey reveals partial compliance with 16 orders (41 percent) of *regional HRTs*, and five (14 percent) of the reparation orders of *sub-regional HRTs*.

Table 3. Status of compliance with reparation orders of HRTs per country (2000–2015).

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

Table 4. Status of compliance across all states per HRT (2000–2015).

HRT	Aggregate compliance rate	Full compliance	Partial compliance	Non-compliance	Total of orders
EACJ	79%	n = 4	n = 3	n = 0	n = 7
ACERWC	50%	n = 0	n = 5	n = 0	n = 5
ECCJ	24%	n = 4	n = 2	n = 15	n = 21
African Commission	35%	n = 5	n = 9	n = 13	n = 27
African Court	14%	n = 0	n = 2	n = 5	n = 7
SADC Tribunal	0%	n = 0	n = 0	n = 8	n = 8
Overall	**31%**	**n = 13**	**n = 21**	**n = 41**	**n = 75**

Table 5. Status of compliance across all states per HRT (2000–2015): Regional and sub-regional HRTs compared.

HRT	Aggregate compliance rate	Full compliance	Partial compliance	Non-compliance	Total orders
Regional	33%	n = 5	n = 16	n = 18	n = 39
Sub-regional	29%	n = 8	n = 5	n = 23	n = 5
Overall	**31%**	**n = 13**	**n = 21**	**n = 41**	**n = 75**

The third category, non-compliance, 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, or has not made any explicit commitment to implement the order. This category also includes instances where the steps taken only have a distant connection to the reparation order.[104] According to the survey, the selected states did not comply with 18 (46 percent) of the reparation orders of regional HRTs, and 23 (64 percent) of the reparation orders of sub-regional HRTs.

As Table 5 shows, full compliance was recorded in only 13 out of 75 of the reparation orders; and partial compliance was recorded in 21 of the 75 reparation orders, translating into an aggregate compliance rate of 31 percent.[105]

5. Compliance: the interplay between regional and sub-regional HRTs

Litigants, legal experts and other users of international human rights systems generally hold the view that the choice of forum is an important strategic decision that impacts on the overall success of human rights litigation. The same set of claims that results in landmark victory in

one tribunal, if litigated before another tribunal, could result in a monumental loss. What has not been very well interrogated is whether a decision of a HRT which has not been complied with, would lead to state compliance if the decision had been made by a different tribunal. Is there a theoretical approach that explains why a state would prioritise regional HRT orders over those by sub-regional HRTs? This is the question interrogated in this section of the article.

As Table 4 indicates, compliance by the selected states during the study period was highest in respect of reparation orders issued by the EACJ, and lowest in respect of those issued by the SADC Tribunal. While the above results relate primarily to the studied countries, it challenges the notion that a particular type of tribunal is most likely to induce state compliance. According to our survey captured in , both the best and worst tribunals in terms of state compliance are situated at the sub-regional level. Table 5 shows that, by a relatively small margin (with 33% compared to 29% aggregate compliance rate), state compliance was better in respect of regional than sub-regional HRTs. Even though the overall percentage of full compliance for sub-regional HRTs was higher than the overall percentage of full compliance for regional tribunals, the more representative compliance status for these HRTs is reflected by factoring in partial compliance.

The results in Table 3 show that during the study period, Nigeria complied much better with decisions of the African Commission (a regional HRT) than decisions of the ECCJ (a sub-regional HRT). Using the formula AC = FC + ½ PC, the aggregate compliance rate for the African Commission's decisions which involved Nigeria during the study period is 61 percent, while the AC rate for the ECCJ is 38.5 percent. This implies that overall, the dichotomy between regional and sub-regional HRTs has not been significant in defining Nigeria's response to decisions of HRTs during the study period.[106]

The data in Table 3 further 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 HRT, than those issued by the ECCJ, a sub-regional tribunal. One major limitation of the analysis in relation to The Gambia is lack of sufficient data.[107] While the analysis in relation to Nigeria indicates some compliance with specific reparation orders of the ECCJ, Table 3 shows that The Gambia recorded 100 percent non-compliance with reparation orders of the ECCJ. However, The Gambia complied partially with three out of the four reparation orders issued against it by the African Commission. The Gambia's aggregate rate of compliance with reparation orders issued by the ECCJ is 0 percent, while its aggregate in respect of the African Commission is 37.5 percent. Again, the limited data from The Gambia suggests that state compliance is not necessarily more likely at the sub-regional level.

Based on the data in Table 3, 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 has been complied with. The aggregate compliance rate for Zimbabwe in relation to judgments of the SADC Tribunal is 0 percent, while the aggregate rate of compliance in relation to the decisions of the African Commission against the government of Zimbabwe is 17.5 percent.

Due to the limited number of cases, it is difficult to draw far reaching conclusions from Table 3 in relation to Tanzania and Uganda. Overall, Tanzania's aggregate rates of compliance in relation to the African Court and the EACJ are 14.5 and 50 percent, respectively, while

Uganda's aggregate compliance rate for the African Children's Rights Committee is 50, and 83.5 percent for the EACJ. Clearly, Uganda recorded better compliance with reparation orders issued by the EACJ, a sub-regional tribunal, than those issued by the African Children's Rights Committee. None of the reparation orders issued by the African Children's Rights Committee in relation to Uganda has been fully complied with. This data implies that not only has 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 tribunal, than to reparation orders of the African Children's Rights Committee, a regional tribunal. This finding is a departure from the results from Nigeria, The Gambia and Zimbabwe, where the African Commission, a quasi-judicial tribunal, recorded better compliance than both the ECCJ and the SADC Tribunal.

Table 4 shows no consistent or statistically significant correlation between the aggregate state compliance rates of the six selected HRTs and the regional or sub-regional character of the selected HRTs. It shows that two of the 'top three' most complied with HRTs in Africa are sub-regional tribunals, and two of the 'bottom three' are regional HRTs. Overall, however, as indicated in Table 5, regional HRTs recorded 33 percent aggregate compliance, and sub-regional HRTs recorded a slightly lower aggregate compliance rate of 29 percent. These findings are 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, we conclude that the distinction between regional and sub-regional HRTs, if anything, plays only a modest role in defining how the five selected states responded to decisions of the selected HRTs during the study period. In fact, the studied states responded positively to slightly more decisions of regional HRTs, contrary to postulations that sub-regional HRTs would produce better compliance.[108] The above does not imply that regional HRTs are the better or ideal forum for realising state compliance or that regional HRTs are better at inducing state compliance than sub-regional HRTs. Compliance is not necessarily better at one level than the other. We therefore find no support for the hypothesis that the selected African states as a rule comply better with reparation orders issued by sub-regional HRTs compared to those of regional HRTs.

We argue that human rights judgment compliance in every case is, instead, a function of a multiplicity of factors. As shown in Table 3, Uganda recorded the highest aggregate compliance rate (68%), followed by Nigeria (48%), Tanzania (19%), The Gambia (13%) and Zimbabwe (11%). The variation in aggregate compliance by the selected states is due to many factors including state-level characteristics, the nature and the degree of specificity of the reparation order issued by the HRTs, the extent of follow up by domestic compliance constituencies, the number of cases selected for each tribunal, the maturity of the selected HRTs and differences in the length of years since the decisions were issued. The two states at the bottom of the compliance curve, The Gambia and Zimbabwe, for example at the time of the study both had in place authoritarian governments that generally shunned IHRL. In the three studied countries where the African Commission outperformed the two sub-regional HRTs, the success of the Commission 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 including domestic compliance constituencies and international partners. The same 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.

6. Conclusion

This article compares state compliance in three regional and three sub-regional human rights regimes in Africa using five states, namely Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe as case studies. In order to interrogate the interplay between regional and sub-regional HRTs, in terms of the likelihood of state compliance, the study formulates the following hypothesis: *Selected states comply better with decisions of sub-regional HRTs than regional HRTs*. The findings arising from the study do not support this hypothesis. Human rights judgment ccompliance by the selected states does not correlate with the characterisation of the tribunal as 'regional' or 'sub-regional'. Based on both our study and the existing scholarship and literature, we accept that compliance relates to the existence of a multiplicity of factors, ranging from state-level characteristics, the role of domestic compliance constituencies and the nature of the reparation orders issued to the effectiveness of follow-up by the litigants and other transnational actors.[109]

One of the significant contributions of this article is the concept of 'aggregate compliance'. The traditional approach in many studies has been to describe the compliance rate of a HRT or state in terms of the rate of full compliance only. We argue that this 'all or nothing approach' 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. We therefore developed the concept of 'aggregate compliance' as a framework for comparing 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 sum of the rates of full compliance and half the rate of partial compliance'.

One major problem with the implementation narrative and compliance status analysis in the study is establishing a causal connection between the reparation orders of the selected HRTs and the implementation efforts of governments. The studied states seldom make explicit reference to the decisions of the relevant HRTs while taking measures that conform to reparation orders of the HRTs. This disconnection between state behaviour and human rights decisions highlights how peripheral these decisions are in the way African governments approach human rights issues at the domestic level.

Drawing lessons from other developed countries and HRTs' approaches of other sub-regions and regions, it is suggested that the selected states should create well-resourced domestic implementation structures to implement decisions of African HRTs and empower the institution to follow-up or liaise with other relevant domestic institutions for implementation of human rights decisions. Other suggestions include constitutional amendments to reflect the compliance obligation of the relevant state under international human rights law, adoption of domestic legislation on international human rights judgment compliance, setting up of human rights funds and statutory allocation for judgment compliance, and periodic training of members of the executive, legislature, judiciary and civil society on international human rights judgment compliance. Also, there should be in place at the regional and sub-regional level effective periodic follow-up mechanisms which may include creating the office of a Special Rapporteur dedicated to following up decisions HRTs.

Another weakness of our study is the small number of cases in respect of some HRTs. The selection of the six HRTs and five states resulted in the inclusion of only one case by the

African Children's Committee, two cases by the African Court, and three cases by the SADC Tribunal. While the study results obviously relate primarily to the studied countries, and are based on a limited data set, the conclusion provides a solid basis for challenging the assumption that sub-regional HRTs rather than regional HRTs are best suited for state compliance in Africa. Nevertheless, we acknowledge that further research needs to be undertaken to test the validity of this finding in relation to more reparations orders from the five studied states, and with reference to other states not included in this study.

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Notes on contributors

Frans Viljoen is a research professor and director of the Centre for Human Rights, University of Pretoria, South Africa.

Victor Ayeni is a research fellow, Centre for Human Rights, University of Pretoria, South Africa and senior lecturer, Faculty of Law, Adekunle Ajasin University, Akungba, Ondo State, Nigeria. The article draws on ***Victor Ayeni***'s doctoral thesis, titled 'State compliance with and influence of reparation orders by Regional and Sub-Regional Human Rights Tribunals in five African States' University of Pretoria, South Africa, 2018, completed under the supervision of Prof. Frans Viljoen.

Notes

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8 Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology* 110 (2005): 1373, 1373–411; Oona A. Hathaway, 'Do Human Rights Treaties make a Difference?', *Yale Law Journal* 111 (2002): 1935, 1935–2042; Linda C. Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it make a Difference in Human Rights Behaviour?', *Journal of Peace Research* 36 (1999) 95, 95–118.

9 See note 8 above.

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14 See note 13 above.

15 See Frans Viljoen and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and People's Rights, 1994–2004', *American Journal of International Law* 101

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22 See note 21 above.

23 Louw (note 21 above), 82.

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26 Adjolohoun (note 15 above) vi.

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32 See James T. Gathii, 'Saving the Serengeti: Africa's New International Judicial Environmentalism', *Chicago Journal of International Law* 16 (2016): 386, 391.

33 Gathii (note 32 above).

34 See Obiora C. Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007), 6. See also See Open Society Justice Initiative (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 of the EACJ, seven of which involved the Republic of Uganda

35 See David L. Cingranelli, David L. Richards, and K. Chad Clay, 'The CIRI Human Rights Dataset', 2014. http://www.humanrightsdata.com (accessed 10 June 2021).

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37 Uganda was rated 'Partly Free' only in 2018 and 2011 to 2014 while Zimbabwe was rated 'Partly Free' only in 2016–2017 and 2019–2020.

38 The Economist Intelligence Unit (EIU) Democracy Index Reports 2016 to 2020, available at https://www.eiu.com (accessed 10 June 2021).

39 See for instance, Japheth Biegon, 'The Impact of the Resolutions of the African Commission on Human and Peoples' Rights', unpublished LLD thesis, University of Pretoria, 2016. See also Rachel Murray and Debra Long, *Implementation of the findings of the African Commission on Human and Peoples' Rights* (Cambridge: Cambridge University Press, 2015).

40 Viljoen and Louw (note 15 above), 4–5.

41 Louw (note 21 above), 23.

42 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).

43 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).

44 See note 43 above.

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

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

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48 ee *Huri-Laws v Nigeria* (note 45 above).

49 See below the list of cases selected for the study in note 83 below.

50 African Commission 'Gambia' http://www.achpr.org/states/gambia/ (accessed 24 April 2017).

51 *Sir Dawda Jawara v The Gambia* (*Jawara* case) (2000) AHRLR 107 (ACHPR 2000).

52 *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

53 See Tarisai Mutangi, 'The impact of the African Charter and the Maputo Protocol in Zimbabwe', in *The impact of the African Charter and the Maputo Protocol in selected African states*, ed. Victor O. Ayeni (Pretoria: Pretoria University Law Press, 2016), 291.

54 African Commission, 'Zimbabwe' http://www.achpr.org/states/zimbabwe/ (accessed 19 April 2017).

55 See below the list of cases selected for the study in note 83 below.

56 *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* Application 009&011/2011.

57 *Alex Thomas v Tanzania* Application No 005/2013.

58 The other two decisions decided at the time of writing, 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.

59 See Communication 001/Com/001/2005 *Michelo Hunsungule and others (on behalf of children in northern Uganda) v Uganda*.

60 '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).

61 See Adjolohoun (note 15 above), 11.

62 See Adjolohoun (note 15 above), 38 & 45.

63 ECW/CCJ/JUD/18/12 *SERAP v Nigeria* (*Niger Delta Environmental Pollution* case).

64 ECW/CCJ/JUD/15/14 *Modupe Dorcas Afolalu v Nigeria*.

65 ECW/CCJ/JUD/01/14 *Alimu Akeem v Nigeria*.

66 ECW/CCJ/APP/30/11 *Deyda Hydara v The Gambia*.

67 In total, the ECCJ has delivered 17 judgments against Nigeria, and only seven of these are categorised in this study as related to human rights. See Jerry Ukaigwe, *ECOWAS law* (Cham: Springer International Publishing, 2016), 195.

68 ECW/CCJ/JUD/03/05 *Jerry Ugokwe v Nigeria*.

69 See *Jerry Ugokwe* case (note 68 above).

70 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.

71 See note 70 above.

72 *Mohochi v A-G Uganda*, Reference No 5 of 2011, decided by the First Instance Division of the EACJ on 17 May 2013, *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 & Others* (*Democratic Party* case).

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

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

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

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

77 *African Network for Animal Welfare (ANAW) v Tanzania* (*Serengeti* case), Reference No 9 of 2010.

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79 See Richard F. Oppong, 'Enforcing Judgments of the SADC Tribunal in the Domestic Courts of Member States', *Monitoring regional integration in Southern Africa Yearbook* 1 (2010): 1, 115.

80 Erika de Wet (note 78 above).

81 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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84 See generally Frans Viljoen, 'The African Human Rights System and Domestic Enforcement', in *Social Rights Judgments and the Politics of Compliance: Making it Stick*, eds. Malcolm Langford, Cesar Rodríguez-Garavito, & Julietta Rossi (Cambridge: Cambridge University Press), 351–98. doi:10.1017/9781316673058.012.

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

87 See Okafor (note 34 above), 116–7.

88 Raustiala (note 85 above), 391-392.

89 Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters?' *Global Policy* 1 (2000): 127, 127; James L. Cavallaro and Stephanie E. Brewer, 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court', *American Journal of International Law* 102 (2008): 768–827; Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-criminal Jurisdiction of the Human Rights Courts', *American Journal of International Law* 107 (2013): 1–44. See also Okafor (note 34 above), 43 and 49.

90 See Markus Burgstaller, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff, 2005), 4.

91 See Raustiala (note 85 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.

92 See Laurence R. Helfer, 'The Effectiveness of International Adjudicators', in *Oxford handbook of international* adjudication, eds. Cesare P.R. Romano, Karen Alter and Yuval Shany (Oxford: Oxford University Press, 2014), 464–82.

93 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 (note 21 above), 52.

94 See Murray and Long (note 39 above), 40–1.

95 See Darren and Jacoby (note 82 above), 35–6.

96 Darren and Jacoby (note 82 above), 36.

97 Darren and Jacoby (note 82 above), 36.

98 See Darren and Jacoby (note 82 above), 79–80.

99 Murray and Long (note 39 above), 40.

100 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.

101 See, for instance, Hillebrecht (note 4 above), 3; Jack Donnelly, *International human rights* (Boulder: Westview Press, 2007), 11–13 and 64–5. See also Viljoen and Louw (note 15 above) 4–6; Adjolohoun (note 15 above), 163–4.

102 Raustiala (note 85 above).

103 See Louw (note 21 above), 53; Viljoen and Louw (n 15 above) 4–6; Adjolohoun (note 15 above), 162–3.

104 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.

105 See

: There was non-compliance recorded in respect of 13 reparation orders, and partial compliance in respect of 21, out of a total of 75 orders. Therefore: AC = FC (n = 13) + ½ PC (n = 21); thus 13 + 10.5 = 23.5; expressed as a percentage of the total orders (n = 75), this is 31% (23.5/75).

106 See above in note 83 the list of cases involved in the study.

107 The conclusion was made based on the four reparation orders issued by the African Commission in the two cases of *Dawda Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) and *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) and the eight reparation orders issued by the ECCJ in the following cases: *Chief Ebrima Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008), ECW/CCJ/JUD/08/10 *Musa Saidykhan v The Gambia* (*Musa Saidykhan* case), and ECW/CCJ/APP/30/11 *Deyda Hydara v The Gambia* (*Deyda Hydara* case).

108 See Adjolohoun (note 15 above), vi. See generally Viljoen (note 84 above).

109 See E. Neumayer, 'Do International Human Rights Treaties Improve Respect For Human Rights?', *Journal of Conflict Resolution* 49, no. 6 (2005): 925–53; Jasper Krommendijk, 'The (In) Effectiveness of UN Human Rights Treaty Body Recommendations', *Netherlands Quarterly of Human Rights* 33, no. 2 (2015): 194–223.