

**THE ROLE OF CIVIL SOCIETY IN IMPROVING COMPLIANCE WITH THE
DECISIONS OF THE AFRICAN HUMAN RIGHTS SUPERVISORY MECHANISMS**

by

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Declaration of originality

I, the undersigned, hereby declare that this thesis - **The role of civil society in improving compliance with the decisions of the African human rights supervisory mechanisms** which I submit for the degree of Doctor Legum (LLD) in the Faculty of law (Centre for human rights) at the University of Pretoria, is my own work, and has not been previously submitted for a degree at this or in any other university/higher institutions. All sources have been properly cited and acknowledged.

Signed.....

Anthony Ebrupihor Etuvoata

Date.....

DEDICATION

To the glory of my creator whom I often called 'Ochukome' - my helper;

To my dear wife, Beke-Ebibo Etuvoata – since we became one, life has been from glory to glory and

To my children: Zoe, Dunamis and Saint Ona - as far as I am concerned, you represent all that means joy and fulfilment.

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ACRONYMS AND ABBREVIATIONS

| | |
|-----------|--|
| ACDHRS | African Centre for Democracy and Human Rights Studies |
| ACHR | American Convention on Human Rights |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| AHRS | African Human Rights System |
| AI | Amnesty International |
| APC | All Progressive Congress |
| APRM | African Peer Review Mechanism |
| AU | African Union |
| CAL | Coalition of African Lesbians |
| CAR | Central African Republic |
| CAT | Convention against Torture |
| CBN | Central Bank of Nigeria |
| CEDAW | Convention on the Elimination of all forms of Discrimination against Women |
| Charter | African Charter on Human and Peoples' Rights |
| CoE | Council of Europe |
| CoM | Council of Minister |
| Committee | African Committee of Expert on the Rights and Welfare of the Child |
| Court | African Court on Human and Peoples' Rights |
| CPR | Civil and Political Rights |
| CPTA | Committee on Prevention of Torture in Africa |
| CRP | Constitutional Rights Project |
| CS | Civil Society |
| CSOs | Civil Society Organisations |

| | |
|--------|--|
| DFID | Department for International Development |
| DRC | Democratic Republic of Congo |
| EACJ | East African Court of Justice |
| ECCJ | ECOWAS Community Court of Justice |
| ECHR | European Convention on Human Rights |
| ECOWAS | Economic Community of West African States |
| ECtHR | European Court of Human Rights |
| EHRM | European Human Rights System |
| EOS | Extra-Ordinary Session |
| EP | European Parliament |
| ESCR | Economic Socio-Cultural Rights |
| EU | European Union |
| FBOs | Faith-Based Organisations |
| FDU | Forces Democratiques Unifies |
| FNCCHR | French National Consultative Commission for Human Rights |
| GNCHR | Greece National Commission for Human Rights |
| HRO | Human Rights Organisation |
| HRT | Human Rights Tribunal |
| HRW | Human Rights Watch |
| IACmHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court on Human Rights |
| IAHRS | Inter-American Human Rights System |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |

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| ICJ | International Commission of Jurists |
| ICRC | International Committee of the Red Cross |
| IHRDA | Institute for Human Right and Development in Africa |
| IHRT | International Human Rights Tribunal |
| IJRC | International Justice Resource Centre |
| INEC | Independent Electoral Commission |
| INGOs | International Non-Governmental Organizations |
| IR | International Relations |
| JCHR | Judicial Committee on Human Rights |
| LLD | Doctor Legum |
| LoA | Logic of Appropriateness |
| LoC | Logic of Consequences |
| LRTAP | Long Range Transboundary Air Pollution Convention |
| MOSOP | Movement for the survival of the Ogoni Peoples |
| NEPAD | New Partnership for Africa's Development |
| NGOs | Non-Governmental Organizations |
| NHIRs | National Human Rights Institutions |
| NJS | National Judicial System |
| OAS | Organization of American States |
| OAU | Organization of African Unity |
| OS | Ordinary Session |
| P/M | Plurality/Majoritarian |
| PAP | Pan-African Parliament |
| PD | Prisoner's Dilemma |
| PDP | Peoples' Democratic Party |

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|-------|--|
| PR | Proportional representation |
| PSC | Peace and Security Council |
| PVCs | Permanent Voters Cards |
| ROP | Rules of Procedure |
| SAA | Stabilization and Association Agreement |
| SADC | Southern African Development Community Tribunal |
| SC | Supreme Court |
| SERAC | Socio and Economic Rights Action Center |
| SERAP | Socio-Economic Rights and Accountability Project |
| SPDC | Shell Petroleum Development Company |
| UBEC | Universal Basic Education |
| UDHR | Universal Declaration of Human Rights |
| UK | United Kingdom |
| UN | United Nations |
| UNCRC | United Nations Convention on the Rights of the Child |
| UNHRC | United Nations Human Rights Commission |
| UNSC | United Nations Security Council |
| US | United States |
| USAID | United States Agency for International Development |
| WB | World Bank |
| WHO | World Health Organisation |

ABSTRACT

The African human rights system (AHRS) has existed for over three decades. To ensure effective protection of human rights of the African people, three supervisory mechanisms have been established with the mandate to receive complaints from victims of rights violations and issue decisions requesting violating states to address violations and to avoid further re-occurrence. These mechanisms are: the African Commission on Human and Peoples' Rights (Commission), the African Court on Human and Peoples' Rights (Court) and the African Committee of Experts on the Rights and Welfare of the Child (Committee).

Since their inception, these mechanisms have issued a series of recommendations and decisions that aim to offer redress to victims of human rights violations and to prevent future violations in Africa. However, the attitude of member states towards compliance or implementation with the decisions of the supervisory bodies has been relatively poor. In order to improve compliance or implementation and, by extension, the effectiveness of the system, it became necessary to understand factors that trigger compliance with a view to amplifying those factors. However, in the African context, it is much more important to know where the balance of pressure for compliance with decisions of the AHRS currently lie as between international and national (domestic) factors. The ultimate aim is to find out which mechanisms have a better link with compliance – the domestic or external.

In view of the above, the study finds that apart from the political will or commitment of member states, NGOs/CSOs interventions have arguably become one of the mediums by which compliance is being driven in the African system. The thesis further finds that in pressuring member state for compliance, NGOs often resort to 'naming' and 'shaming' the violating member state. The probable effect of this strategy often attracts the concerns of regional and western stakeholders who may then raise international costs of non-compliance against the target state. These costs could be in the form of sanctions, embargoes, aid reductions and so on. This therefore implies that in the African system, instances of compliance have often resulted from NGOs/CSOs exploring or mobilizing external opinion and forces as sources of pressure for compliance. It must be noted that while the above compliance measures have hitherto been somewhat successful in influencing the political will of African states for compliance, thereby resulting in some level of compliance, geopolitical and other related factors have arguably whittle down the weight of their influence. Thus, the AHRS which depends almost exclusively on these factors (external mechanisms) for

compliance has remained a cause for concern owing to the growing challenges of non-compliance with human rights decisions and by extension, the ineffectiveness of the system. This lingering (or even growing) concern of non-compliance has inspired this thesis to investigate the need for other (alternative) sources of potential pressure for compliance in order to complement the current mechanisms and the follow-up pattern by which compliance is being driven. This is necessary owing to the fact that if international pressure for compliance is waning, identifying domestic sources of pressure and increasing the domestic or internal legitimacy of sources of pressure for compliance might be one such alternative. This aligns with the major claim in this thesis which is framed as a hypothesis that state compliance with regional human rights decisions is likely to improve if domestic constituencies in state parties under the AHRS are properly engaged to raise the domestic cost of non-compliance.

Drawing from the above, the thesis examines the possibility of how CS engagement can be explored to raise domestic cost of non-compliance against a non-compliant or violating state. In view of this, the study identifies and discusses two models of engagement: direct engagement through protest, and indirect engagement through elections or electioneering processes. In addition, the study further identifies (but not discussed) other forms of direct civic engagement that could equally be explored as potential domestic tools to stimulate states' incentive towards compliance. These includes strike, boycott, lobby, impeachment, recalling and referendum. As part of the findings in this study, the chances of improving compliance is likely when the wider domestic communities in African states are integrated and engaged to be part of the affairs of the AHRS especially in raising electoral and other domestic costs of non-compliance. With respect to the effect of indirect CS engagement – through elections, the study finds that the voting public (CS) can raise electoral costs against elected politicians in government. This then implies that member state compliance can be improved when the voting public is able to raise electoral cost that threatens incumbent politicians seeking re-election. In other words, voters can exercise electoral leverages to stimulate compliance from state actors on a wide range of issues which includes the question of respect for the rule of law and by extension, compliance with human rights decisions. Therefore, to avoid the electoral cost of losing elections and political power, elected politicians seeking re-election will likely succumb to such political pressure to avoid any potential attendant electoral costs. However, as may be applicable in the African context, the possibility that raising electoral and other domestic costs will attract better compliance is contingent on some

variables: (a) the extent of voters' awareness and the value placed on the particular decision for which voters are expected to raise electoral cost for compliance (b) if significant numbers of citizens'with voting capacity are concerned about human rights and compliance in relative proportion (or even more) with other societal needs or matters of general concerns (c) when human rights and issues of non-compliance are factored as part of key electoral issues that voters consider in deciding the choices of candidates to be voted for, or (d) when human rights and compliance are considered as one of the reasons or grounds for citizens' direct civil actions.

In all, the motivation for this thesis was based on the claim that the rate of states parties' compliance with decisions from the regional human rights bodies has been consistently low and when there has been compliance, NGOs/CSOs and other stakeholders have often times prioritise their lobbying, advocacy and follow-up strategies in leveraging on external constituencies for intervention instead of engaging internal forces to pressure for compliance. Thus, the study suggests for a shift of focus from mobilisation of external forces to domestic engagement of internal constituencies.

Therefore, by setting out several arguments to justify the hypothesis that compliance could be improved when certain domestic measures within the internal spheres of state parties are engaged, the thesis presents a unique roadmap for a domestically-based approach (direct and indirect citizens' actions) in cajoling member states' compliance under the AHRS. This is the novelty that this study has contributed to body of scholarship particularly with respect to compliance with decisions of the African regional human rights supervisory bodies.

Key words: Africa, Europe and Inter-American human rights systems, African human rights supervisory mechanisms, compliance, effectiveness, human rights decisions, human rights NGOs and CSOs, civil society (CS), international and domestic costs, internal and external legitimacy electorates, protest.

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CHAPTER ONE: INTRODUCTION

1.1 Background

The African human rights system (AHRS) which has existed for over three decades under the aegis of the former Organization of African Unity (OAU),¹ now the African Union (AU), is based on the normative framework provided by the African Charter on Human and Peoples' Rights (Charter).² The Charter in article 30 established the African Commission on Human and Peoples' Rights (Commission) with the responsibility to promote and protect human rights in Africa.³

Owing to claims that the effectiveness of the AHRS was restricted by the absence of a judicial organ, the AU member states adopted a Protocol to the African Charter establishing an African Court on Human and Peoples' Rights (Court).⁴ The Court is established to 'complement' the protective mandate of the African Commission.⁵ Currently, the AU has three major dedicated supervisory/enforcement mechanisms for the protection and promotion of human rights on the continent: The African Commission, the African Court and the African Committee of Experts on the Rights and Welfare of the Child (Committee).⁶

¹ The Organization of African Unity was established on 25 May 1963 in Addis Ababa with 32 signatory governments. Some of the objectives of the OAU includes: To co-ordinate and intensify the co-operation of member states in order to achieve a better life for the people of Africa; to defend the sovereignty, territorial integrity and independence of African states. The OAU was also dedicated to the eradication of all forms of colonialism and white minority rule and to ensure that all Africans enjoyed human rights protections within the African continent. See art 2 of the OAU Charter. Note that the OAU has since 2001 been replaced by African Union (AU) following a decision declaring the establishment of the African Union based on the unanimous will of member states adopted by the 5th Extraordinary OAU/AEC summit held in Sirte, Libya from 1 - 2 March 2001.

² The African Charter is an international human rights instrument which was adopted by the Assembly of Heads of State and government of the Organization of African Unity (OAU) (now AU) on 27 June 1981 and entered into force on 21 October 1986. The Charter has been ratified by 54 member state. The African Charter sets out rights and duties of African people as it affects the rights of other persons and their respective countries.

³ The Commission is charged with the mandate of monitoring state compliance with the African Charter on Human and Peoples' Rights (African Charter) see art 45 of the African Charter on the general functions of the Commission.

⁴ The protocol that established the Court was approved in 1998 in Addis Ababa, Ethiopia but came into force in 2004; the protective mandate of the African Commission on Human and Peoples' Rights is complemented by the establishment of the African Court. For details, see policy briefing on human rights protection mechanisms in Africa: Strong potential and weak capacity, for this, see Office of Directorate General for external policies, 2013.

⁵ See art 2 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights 1998/2004.

⁶ See art 30 of the African Charter for the establishment of the African Commission; art 2 of the Protocol to the African Charter on the establishment of the Court and art 32 of the Children Charter on the Rights and Welfare of the Child. For comprehensive details on the mechanisms, see CH Heyns & M Killander *Compendium of key human rights documents of the African Union* (2013), see also A Rudman 'The Commission as a party before the Court-Reflections

Since their inception, these mechanisms have issued series of recommendations and decisions⁷ that aim at offering redress and preventing future violations in Africa.⁸ As it is almost generally understood, the effectiveness of these mechanisms to ensure the promotion and protection of human rights on the African continent is largely determined by the extent of member states' expression of political will towards implementation or compliance with the decisions of the mechanisms and of course, when such decisions are able to influence change in the target states.⁹ So far, the compliance level by member state towards decisions of these mechanisms remains low.¹⁰

While African states continue to adopt and ratify new human rights treaties, thereby expanding the AHRS, it remains unclear whether the same momentum is translated into actual commitment or compliance with decisions issued by the system's mechanisms created and accepted by the same states. States often rely on several factors as reasons for non-compliance. Some of the reasons may include: state sovereignty, non-binding nature of decisions issued by the supervisory mechanisms, budgetary constraints, decisions not in conformity with traditional, social, moral and religious values, lack of clarity in decisions and illegitimacy of rights institutions.¹¹ This situation does not

on the complementarity arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 2; F Viljoen *International human rights law in Africa* (2012) 289-410.

⁷ This is in reference to decisions on cases from the Court and recommendations in relation to the Commission and Committee; for further details, see section 1.4 below on use and clarification of terms.

⁸ For details on the recommendations and decisions published, see M Killander 'Human rights developments in the African Union during 2014' (2015) 15 *African Human Rights Law Journal* 537-558; Viljoen (n 6 above) 289-410.

⁹ This must not be understood to mean that implementation or compliance is being used as a sole proxy to determine the effectiveness of these monitoring bodies. The work of these bodies – including the Court can be effective in changing state behavior and influence national decisions without compliance. For the literature on compliance and effectiveness, see Y Shanny *Assessing the effectiveness of international courts: A goal based approach* (2014) 1-21; D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American Courts of human rights' (2010) 6 *Journal of International Law and International Relations* 39-40; K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2002) 32 *Case Western Reserve Journal of International Law* 399; L Helfer & AM Slaughter 'Towards a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273-290.

¹⁰ B Baek 'RHRIs, NHRIs and human rights NGOs' (2012) 24 *Florida Journal of International Law* 247; F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *The American Journal of International Law* 8-12; D Abebe 'Does international human rights law in African courts make a difference?' (2016) 56 *Virginia Journal of International Law* 564; for the literature on poor implementation of decisions, see R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 350.

¹¹ Viljoen (n 6 above) 288. Note, that under art of the 26 Vienna Convention on the Law of Treaties as well as the international principle of *pacta sunt servanda*, member states are bound to implement in good faith decisions from treaty bodies to which they have consented but this is hardly the case with member states in Africa; see also J Meyerfield 'Democratic legitimacy of international human rights adjudication' (2009) 19 *Indian International and Comparative Law Review* 49-88; for different instances where the decisions of the African Court have been resisted

just leave the victims of human rights violations helpless but also erodes and undermines the legitimacy of the institutions from where the decision emanated. Therefore, effectiveness has become a major concern just as compliance has become one of the significant parameters for measuring the effectiveness of the system. Thus, identifying factors that have the potential to enhance compliance with decisions (and by extension, effectiveness) has become even more important.

An important question that attracts attention is: how has the AHRS managed to secure compliance till date? Apart from the goodwill of states, non-governmental organization (NGOs) and civil society organisation (CSOs) have been among the main drivers of compliance in Africa. NGOs and CSOs have undoubtedly contributed in significant ways to the growth of the AHRS. For instance, they are visible at all sessions of the Commission¹² and they have been involved in the process of formulating, drafting, lobbying for adoption of the Commission's resolutions and submission of cases to the regional mechanisms.¹³ In some cases, they exert pressure on states to comply with decisions of regional bodies through a combination of strategies: exposing violating governments to international pressure through media, mobilization of public shaming (mostly international), soliciting support and cooperation of international communities-thereby raising and invoking international cost of non-compliance.¹⁴ Hence, state compliance with the decisions of the

by member states, see TG Daly & M Wiebush 'The African Court on Human and Peoples' Rights: Mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* 294-313.

¹² As evidence of NGOs overwhelming presence at the Commission's session, see the following statistics of delegates' attendance of the Commission's session from May 2017 to 2018: (a) 60th ordinary session of the Commission in May 2017 in the Republic of Niger - 539 total delegates were in attendance. Out of these numbers, 325 NGOs were present which constitute about 60% of total numbers (b) 61st ordinary session of the Commission in the Gambia in November 2017- total attendance: 619 delegates, number of NGOs delegates: 271 (about 43.8%) (c) 62nd ordinary session of the Commission in May 2018 at Mauritania - total attendance: 676 delegates, number of NGOs delegates: 363 (about 53.7%); for these details, see Commission's website available at <http://www.achpr.org/sessions/>; http://www.achpr.org/files/sessions/61st/info/communique61/61st_os_final_communique_eng.pdf; http://www.achpr.org/files/sessions/60th/info/communique60/final_communique_60os_eng.pdf; http://www.achpr.org/files/sessions/62nd_os/info/communique62/en_final_communique_62os.pdf (accessed 12 October 2018).

¹³ See discussions in section 3.5.2 of chapter three below; see also JK Biegon 'The impact of the resolution of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, (2016) 27-78.

¹⁴ In contrast to exclusive reliance on international pressure, Okafor finds the use of national pressure to be quite productive in ensuring compliance from the Nigerian governments during the military era. For this, see OC Okafor 'The African human rights system: Activist forces and international institutions' (2009) 42 *Law and Politics in Africa, Asia and Latin America* 289-292; For details on the Role of NGOs, see K Appiagyei-Atua 'Human rights NGOs and their role in the promotion and protection of rights in Africa' (2002) 9 *International Journal on Minority and Group Rights* 265-289; Viljoen & Louw (n 10 above) 29-31.

African Commission in *Modise v Botswana*,¹⁵ *Amnesty International v Zambia*,¹⁶ *Forum of Conscience v Sierra Leone*,¹⁷ *Lekwot*,¹⁸ *Media Rights Agenda v Nigeria*,¹⁹ *Civil Liberty Organization & 2 ors v Nigeria*²⁰ and *Scanlen & Holderness v Zimbabwe*²¹ cases can be attributed to the intense pressure and series of efforts made by NGOs.²² In *lekwot* case, due to internal and international pressure from NGOs, the Nigerian government partially complied by reducing the death sentence by hanging to life imprisonment. NGOs also play major roles in the funding of the Commission and in litigating of cases at the Commission, Court and Committee.²³ Further details on the role of NGOs and CSOs is discussed in chapter three below.

Also essential for compliance with decisions of the African regional bodies are the role of the international community and western agencies who may (due to NGOs mobilization of naming and shaming) punish non-compliant states through various means: restraint on ‘trade and diplomatic relations’ and other forms of ‘sanction’ which may include aid reductions and global blacklisting.²⁴ These are some of the tools employed to raise cost against the Nigerian government in 1995 during the reign of late General Sani Abacha and President Mugabe of Zimbabwe in

¹⁵ See Comm. No. 97/93 AHRLR 30 (ACHPR 2000); 2000 AHRLR 25 (ACHPR 1994) 2000 AHRLR 25.

¹⁶ See Comm. No. 212/98, 2000 AHRLR 325 (ACHPR 1999).

¹⁷ See Comm. No. 223/98, 2000 AHRLR 293 (ACHPR 2000).

¹⁸ *Constitutional Rights Projects (in respect of Lekwot & six others) v Nigeria* Communication 87/93.

¹⁹ *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

²⁰ Comm. No. 129/94.

²¹ Comm. No. 297/2005.

²² Viljoen and Louw observe that the overwhelming roles played by NGOs (particularly Interights and Constitutional Rights Projects) accounted for the level of compliance recorded from these cases. For details, see Viljoen & Louw (n 10 above) 29; V Ayeni ‘State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five selected African states’ unpublished LLD thesis, University of Pretoria, 2018, 200-201 & 460-461.

²³ Viljoen (n 6 above) 383; see also A Motala ‘Non-governmental organisations in the African system’ in M Evans, & R Murray (eds) *The African Charter on Human and Peoples’ Rights, The System in Practice*, (1986-2000) 246-279.

²⁴ See for instance, the United Nations Human Rights Council (UNHRC) which is tasked with the responsibility to address violations of human rights and make recommendations which could lead to global sanctions. In this regards, UNHRC has convened special sessions to discuss the human rights situations in several African countries: Central African Republic (CAR), Côte d’Ivoire, Democratic Republic of Congo (DRC), Burundi, Libya, Nigeria and Sudan. In similar vein, it has also established Commissions of inquiry to investigate human rights violations in Eritrea, Côte d’Ivoire, Libya, Sudan, and South Sudan. There are other International institutions that have been involved in expressing concerns on human rights violations in African countries, these include: the Committee of Ministers of the Council of Europe and the European Parliament (EP). For details on the works of EP, see European Parliament ‘The impact of the resolutions and other activities of the European Parliament in the field of human rights outside the EU’ (2012) 6. See also European Inter-University Centre for human rights and democratisation beyond activism. For comprehensive details on the impact of United Nations organs and agencies in realising human rights in Africa, see Viljoen (n 6 above) 45-86.

2008.²⁵ A question may be asked: Has reliance on international cost of non-compliance improved state compliance since inception of the AHRS? In 1995, despite pressure from the US, Europe, series of resolutions issued by the United Nations (UN), widespread advocacy campaigns by amnesty international, human rights watch, western news media, local media and mobilisation by international and local human rights actors, Nigeria's General Sani Abacha still ordered the execution of Ken Saro-Wiwa and eight other Ogoni activists.²⁶

Drawing from the above discussions, it can be argued that global shaming may attract contradictory reactions from government as some may comply while others may act erratically.²⁷

A good example of this is the scenario that played out in 2008 when President Mugabe (former president of Zimbabwe) in response to international pressure conducted multi-party elections in Zimbabwe. However, the entire electoral process was reported to have been marred with series of human rights violations directed mostly against opposition political parties and their supporters. Morgan Tsvangirai, the leader of opposition political party - movement for democratic change (MDC) and his supporters were assaulted and 'subjected to grievous inhuman treatments and illegal persecution until he was frustrated out of the political race'.²⁸ In view of these backlashes, it can be argued that the significance or effect of raising and relying on international cost to elicit compliance will depend on how much the recipient state values international cooperation and reputation on the one hand and the extent of active domestic mobilization in support of international pressure for compliance on the other hand.²⁹

Despite many years of existence of the AHRS and the active involvement of NGOs, CSOs and pressure from international community, the AHRS has not been very effective especially in relation to the poor attitude of member states towards implementation and compliance with

²⁵ E Hafner-Burton 'Sticks and stones: Naming and shaming the human rights enforcement problem' (2008) 62 *International Organisation* 692, 710.

²⁶ Hafner-Burton (n 25 above) 710-711.

²⁷ See generally the findings of Hafner-Burton (n 25 above) 689 -716.

²⁸ Hafner-Burton (n 25 above) 692.

²⁹ Viljoen & Louw (n 10 above) 30; see also S Cardenas 'Norm collision: Explaining the effects of international human rights pressure on state behaviour' (2004) 6 *International Studies Review* 215; R Cole 'The African Court on Human and Peoples' Rights: Will political stereotypes form an obstacle to enforcement of its decisions?' (2010) 43 *The Comparative and International Law Journal of Southern Africa*, 42; A Murdie & D Davies 'Shaming and blaming: Assessing the impact of human rights organisation' (2017) available at <https://www.opendemocracy.net/openglobalrights/amanda-murdie-david-r-davis/shaming-and-blaming-assessing-impact-of-human-rights-or> (accessed 25 May 2017).

decisions of the African human rights supervisory mechanisms.³⁰ Some other reasons may account for this. As posited by Viljoen, ‘the African instruments have resulted from a top-down approach that lacks the legitimation that national and pan-African institutional involvement and debate could have provided’.³¹ While this could probably be considered as one of the potential reasons, earlier research has shown that apart from human rights NGOs and CSOs, wider domestic communities³² have not been involved in the activities of the AHRS let alone in the functioning of its mechanisms and the various rights instruments. For instance, Odinkalu states that the African regional human rights practice ‘excludes the participation’ of African people from its activities and most human rights bodies (NGOs) are not concerned about the welfare of local constituents but rather the interest of their western sponsors.³³ This reason appears more compelling. In all, it seems the continued challenge of non-compliance has affected the legitimacy of the mechanisms in the eyes of the people to whom they apply.³⁴ Again, Odinkalu’s position could have also accounted for the reason why the high rate of NGOs and CSOs participation in AHRS does not appear to have had a laudable effect in the follow-up of cases leading to increased rate of compliance. This could then imply that without deep domestic support from wider domestic communities, it seems NGOs and CSOs may not have the influence necessary to trigger compliance as much as expected under the AHRS.³⁵

³⁰ See for instance, F Viljoen ‘From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission’s 25 year mark’ (2013) 17 *Law Democracy and Development* 307; It must be noted that the issue of non-compliance with rights decisions by state actors has become a subject of concern given that several decisions have been issued by the African human rights supervisory mechanisms to address cases of violations but adherence or compliance has been quite challenging. As a result, some scholars have attributed this challenge to lack of follow-up mechanisms and political will of member state to comply with decisions of treaty bodies. For a general discussion on this, see Killander (n 8 above) 358-361; Murray & Mottershaw (n 10 above) 358-361.

³¹ Viljoen (n 6 above) 282.

³² See section 1.4.1 below.

³³ C Odinkalu ‘Why more Africans don’t use human rights language’ (2000) 2 *Human Rights Dialogue* 4 (arguing that the level of knowledge about the existence and operations of the human rights mechanisms is low. This is evident especially among the low profile citizens at the grassroot level within the African continent. He further states that the African human rights system is unable to afford protection of rights of the people it is meant for and of course, this has led to questions about the legitimacy of the human rights institutions. In addition and unfortunately, NGOs representation has not been inclusive of the people it claim to represent as no evidence of adequate representation and involvement of the wider communities exist); see also BK Murungi ‘To whom, for what, and about what? The legitimacy of human rights NGOs in Kenya’ in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 37- 48.

³⁴ As above.

³⁵ See for instance M Mutua ‘Human rights NGOs in East Africa: Defining the challenges’ in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tension* (2009); Hafner-Burton (n 25 above) 691-692.

Due to the challenge of non-compliance facing the AHRS perhaps arising from: over-reliance on international pressure as against domestic pressure for compliance, insufficient awareness by larger society in Africa regarding the existence and functioning of the AHRS, lack of ownership of the system and NGOs/CSOs limitations in compelling state to comply with decisions of mechanisms, the growing perception is that the system has not been very effective when measured in terms of compliance.³⁶ Again, all of these issues raise the question whether strengthening the capacity of civil society (CS) to be more involved in the operations of the AHRS could enhance a sense of ownership and improve compliance and effectiveness of the system.³⁷

1.2 Problem statement

Despite the relatively long years of existence of the AHRS and the array of mechanisms that have been established to promote and protect human rights, it seems there is still a growing dissatisfaction and frustration that the regional system is not very effective partly as a result of low level of compliance with the decisions of its supervisory mechanisms.³⁸ This is due to the fact that even when decisions protective of rights have been issued by the supervisory mechanisms, state compliance or implementation appears to be inadequate.³⁹ In order to improve compliance and by extension, the effectiveness of the system, it is necessary to understand factors that could trigger compliance and improve effectiveness of rights decisions with a view to amplifying those factors. Such factors could be within the domestic, regional or global spheres. Up till now, the focus has generally been on external factors (which includes the role of local and foreign NGOs) that escalate the international cost of non-compliance.⁴⁰ Thus, this thesis

³⁶ For a discussion on the arguments about the AHRS being described as ‘weak and ineffectual’ see OC Okafor *The African human rights system, activist forces, and international institutions* (2007) 67-74.

³⁷ This will be addressed in chapter three and five of the thesis.

³⁸ Viljoen & Louw (n 10 above) 8-12; Abebe (n 10 above) 564.

³⁹ O Olukayode ‘Enforcement and implementation mechanisms of the African human rights Charter: A critical analysis’ (2015) 40 *Journal of Law, Policy and Globalization*, 47, 50-53; See also Murray & Mottershaw (n 10 above) 350-353; The decisions issued by the African Committee of Experts on the Rights and Welfare of the Child (Committee) have been treated with levity by some member states, for this, see A Assefa ‘Advancing children’s rights in Africa: The role of the African Charter and its monitory body’ (2014) 2 *Mekelle University Law Journal* 82-83, 87-88; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples’ Rights* (2015) 4.

⁴⁰ The term ‘external factors’ is used in the context of this study to explain the frequent reliance (by the AHRS) on external bodies or agencies (these include NGOs/CSOs and their donors) in funding and litigating of cases, follow-up on decisions, exploring lobbying and advocacy tools in exerting international pressures on non-compliant states in order to stimulate states’ incentive towards compliance. On the contrary, the term ‘internal or domestic factors’ is used in this study to refer to a domestic approach, that is, reliance on domestic forces in raising domestic costs by exerting electoral or other forms of domestic pressures. See further discussion on this in chapter three below. To explain in few

investigates the possibility of whether domestic costs of non-compliance can be raised to a level that matter to state actors.⁴¹

Evidently, state compliance with decisions of human rights supervisory mechanisms depends partly on the political will of a member state (which is determined by the executive members acting on behalf of the state) which could be triggered by certain factors (mostly external).⁴² These factors may include: (1) state desire to have a respectful standing among other states in the region; (2) avoiding the risk of bad reputation among states – which could arise from potential or actual blacklisting or backlash from powerful states, especially donor states (all these signify actual or potential foreign pressure from international actors against violating state); (3) a proper consideration of the political cost-benefit analysis of compliance – this will help states to determine whether it will be politically beneficial to comply (or not); (4) the role of human rights NGOs and CSOs in triggering national or international cost of non-compliance through public ‘naming and

instances of how the African system depends on external factors, Abebe argues as follows: ‘with the exception of the ECOWAS Court, the African court system is dependent on bilateral, multilateral, and private financing from international, European, and American donors....’ His research findings also show that as at 2016, there were a total numbers of 337 cases on international human rights claims before the ‘African court system’ (comprising of regional and sub-regional courts). The author notes further that out of these numbers, 165 (48%) of these cases were initiated by individuals’ claimants while ‘international human rights organizations brought most of the remaining cases’. For further details, see Abebe (n 10 above) 532, 546-554, 558-564; for a discussion on the extent of how NGOs explored international pressure to elicit state compliance with cases before the Commission, see Viljoen & Louw (n 10 above) 28-30; for other related discussions, see Viljoen (n 6 above) 451-456; R Brett ‘The role and limits of human rights NGOs at the United Nations’ (1995) XLIII *Political Studies* 96-110; on the role of the African group calling on UN (as one example of external factors) to intervene in the fight against apartheid forces in South Africa, see discussion in AM Ibrahim ‘Evaluating a decade of the African Union’s protection of human rights and democracy: A post-tahrir assessment’ (2012) 1 *African Human Rights Law Journal* 35-37.

⁴¹ For instance, see the role of the South African national court in raising domestic cost which threatens the executive government to rescind their action. See also South African government’s response to the domestic court’s decisions over the executive intention to withdraw from the ICC as an indication that domestic pressure can also attract compliance from state government on a wide range of issues (which by extension, may include governments’ responsiveness to human rights obligations as enshrined in the Charter and other related instruments operational in the AHRS). For details on both decisions see the following: F Boehme ‘South Africa and the great escape: Regional politics and compliance with the Rome Statute’ A paper presentation at the ISA- human rights conference, New York, 15 June 2016. See also *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) available at <http://www.southernafricalitigationcentre.org/> accessed 2 April 2017).

⁴² The term ‘political will’ appears in most compliance literature to denote member state’s desire or willingness to comply with rights decisions or treaty obligations. However, it must be noted that non-compliance is not always a function of lack of state political will to comply as other internal configuration of governance – say for instance, budgetary constraints, may also lead to member state non-compliance with rights decision despite a state’s intention to express her political will to comply; for a detail understanding of the concept of ‘political will’, see N Haidari ‘What is political will and how it does affect the implementation and monitoring of schemes’ (2014) available at https://www.researchgate.net/post/What_is_political_will_and_how_does_it_affect_the_implementation_and_monitoring_of_schemes (accessed 20 March 2018); see also appendix 3 understanding ‘political will’ available at <https://assets.publishing.service.gov.uk/media/57a08cbfed915d622c001551/R8236Appendix3.pdf> (accessed 20 March 2018).

shaming’, advocacy or lobbying for economic sanctions, shining spotlights on extent of human rights violations, mobilisation of public opinion and raising global publicity that can attract international attention and intervention.⁴³ As observed by some scholars, the AHRS and even NGOs (foreign and local) depend more on these factors (which are more likely components of international pressure) to attract states’ responses or compliance with rights decisions.⁴⁴

Against these backdrops, it can be argued that while all or some of the above factors (international pressure) have hitherto been somewhat successful in triggering the political will of African states in terms of compliance with rights decisions from regional human rights institutions, thereby resulting in some level of compliance, geopolitical and other domestic factors have arguably whittle down the weight of their influence.⁴⁵ Drawing from the above, the assumption is that the AHRS depends almost exclusively on these factors (international pressure) for compliance. Thus, the seeming enduring lack of effectiveness and compliance has remained a cause for concern.⁴⁶ This lingering (or even growing) concern is an indication that it is time to explore other (complementary) sources of potential pressure for compliance to complement the current practice

⁴³ Viljoen & Louw (n 10 above) 13-14, 26, 30; see also R Murray ‘International human rights: Neglect of perspectives from African institutions’ (2006) 55 *The International and Comparative Law Quarterly* 193-204; Cole (n 26 above) 24, 42, 44. For detail discussion on the role of NGOs and CSOs, see, N Mbele ‘The role of non-governmental organizations and national human rights institutions at the African Commission’ in Evans & Murray (n 23 above) 289; Okafor (n 14 above) 289-292.

⁴⁴ Viljoen & Louw (n 10 above) 26, 29, 30-31; See also similar observation by C Paulson, ‘Compliance with final judgments of the International Court of Justice since 1987’ (2004) 98 *American Journal of International Law* 457.

⁴⁵ For a comprehensive discussion on the effects and downsides of international pressure on compliance, see Hafner-Burton (n 25 above) 689-699; see also the findings of Viljoen & Louw (n 10 above) 29, 30 (arguing as follows: ‘Most state parties attach importance to their reputation in the international community. Those that have ceased to care about their reputation are not likely to be influenced by any of the factors’...and one of such factors is reliance on international pressure (by NGOs) as part of the tools in inducing compliance. From the literature, it seems that undermining the weight of international cost is not only peculiar to African states. Posner reports similar findings on how China and other countries have undermined the weight of international pressure and influence with regards to human rights violation. He reports as follows: ‘The rise of China has also undermined the power of human rights. In recent years, China has worked assiduously behind the scenes to weaken international human rights institutions and publicly rejected international criticism of the political repression of its citizens. It has offered diplomatic and economic support to human rights violators, such as Sudan, that western countries have tried to isolate’. The author further states that ‘the right of “self-determination” can be invoked to convert foreign pressure against a human-rights violating country into a violation of that country’s right to determine its destiny’. For this, see E Posner ‘The Guardian, the case against human rights’ (2014) available via <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> (accessed 27 May 2017).

⁴⁶ Killander (n 8 above) 558; The research work on compliance by Viljoen & Louw also reveal how NGOs rely on international pressure as a mechanism in driving compliance against non-compliant member state and how these mechanism have been applied to trigger compliance in quite a number of recommendations issued by the Commission. With respect to cases of non-compliance, they state: ‘it may be cautiously stated that an absence of international pressures seems to characterize the overwhelming majority of cases of non-compliance’. All these put together partly reveal the extent of the AHRS dependence on international pressure by NGOs for compliance. For details, see Viljoen & Louw (n 10 above) 29-31.

of reliance on international pressure for compliance. If international pressure for compliance is reducing or is no longer very effective, raising domestic cost of non-compliance and increasing domestic pressure for compliance might be one of such complementary mechanisms. This study in the following chapters investigates whether state actors could better comply with or implement decisions of the AHRS mechanisms in response to domestic stimuli as much or even more than in response to international stimuli. In this regard, the underlying claim for this thesis is framed as a hypothesis that state compliance with regional human rights decisions is likely to improve if domestic civil society in state parties are properly engaged to raise the domestic cost of non-compliance. Therefore, the substantive chapters below are dedicated to proving or disproving the hypothesis and finding the conditions on which the hypothesis can apply successfully in the African context (see particularly chapter 5 below).

Drawing from the above discussions, this research seeks to: (1) establish and distinguish more clearly the concept of international cost of non-compliance as against domestic cost of non-compliance and determine whether there is need to increase domestic influence in the AHRS; (2) investigate possible ways of increasing the domestic cost of non-compliance and domestic pressure for compliance; (3) explore how CS in member states can claim ownership of the AHRS and take responsibility for increasing the domestic cost of non-compliance. In this regard, the study investigates to know if domestic mechanisms such as direct and indirect engagement of CS - through national electoral processes and wider domestic mobilization by a way of protest, can be utilized in raising and increasing domestic cost of non-compliance. The study further establishes the link between raising domestic cost of non-compliance and how engagement of CS in the affairs of the AHRS can enhance and strengthen effectiveness and improve compliance to human rights decisions as issued by the supervisory mechanisms under the AHRS.

1.3 Research questions

The major question this study seeks to answer is to find out: whether state compliance levels in the African human rights systems can be raised by improving the domestic legitimacy of the sources of pressure for compliance. In answering this major question, several other questions will be addressed.

1. Where does the balance of pressure for compliance with AHRS decisions currently lie as between the international and the national (domestic)?

2. How much does domestic pressure currently contribute to improving compliance with AHRS decisions on individual communications?
3. What place does CS currently have in the AHRS (that is, can CS claim ownership of the system) and to what extent is CS willing to defend the integrity of the system?
4. In what ways can domestic cost of non-compliance be raised? Can domestic political arena emerge as a potential locus for raising domestic cost of non-compliance?

1.4 Terminology

In the context of this study, the following terms frequently used will be explained in the context of their usage in this thesis. These terms include: Civil society, CSOs/NGOs, supervisory mechanisms, recommendations, decisions, implementation and compliance. In this thesis, these terms may have been used differently from their ordinary usage. Therefore, it is necessary that their specific usage in this study is explained for purposes of clarity.

1.4.1 Civil society (CS)

As evidenced in the literature, varying definitions of CS have been proffered. As a result, it is now difficult to understand what CS is, who makes up CS, and the difference between CS and CSOs on the one hand and CS and NGOs on the other hand. As shown below, CS has a far broader meaning than what CSO/NGOs stand for:

Civil society, consists just of what is not part of the state but also of all who may have become powerless or disenfranchised: not just villagers, fishermen, nomads, members of different age groups, village councillors or slum dwellers, but also professionals, politicians, priests, mullahs, intellectuals, and all others who are, or feel they are, without access to the state.⁴⁷

Owing to the fact that the focus of this thesis revolves around the use of these terms, a further explanation of their usages and applicability is critical. In this regard, it is important to point out that one of the most common definitions of CS is given by CIVICUS ‘as the arena independent of the family, state and market which is created by network of individuals with collective actions, organizations and institutions to advance shared interest’.⁴⁸ In a more nuanced manner, CS has

⁴⁷ H Zafarullah ‘Human rights, civil society and non-governmental organisations: The nexus in Bangladesh’ (2002) 24 *Human Rights Quarterly* 1015.

⁴⁸ VF Heinrich *Assessing and strengthening civil society worldwide, a project description of the CIVICUS civil society index: A participatory needs assessment and action planning tool for civil society* (2004) 1-34; CK Van Dyck ‘Concept and definition of civil society sustainability’ (2017) 1-5 available at https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170630_VanDyck_CivilSocietySustainability_Web.pdf?QfxMIeHr9U8aeV1kOjFo.FBTsLG76HPX (accessed 10 October 2018).

been defined as ‘an ecosystem of organized and organic social and cultural relations existing in the space between the state, business, and family, which builds on indigenous and external knowledge, values, traditions, and principles to foster collaboration and the achievement of specific goals by and among citizens and other stakeholders’.⁴⁹ While in some instances, CS is seen as the different organised groups which operate to represent and express the will of the people independent of the government, in the South African context, a scholar has argued that in his opinion ‘[A]ll of us are civil society. There is a view that business people and politicians are not civil society, but they are. None of us are defined by our work and so within our personal capacity, we are [the makeup of] the society of South Africa’.⁵⁰

While the above definitions give insight into the general understanding of CS, it is also critical in the context of this thesis to define CS to represent its modern evolutions and diversity. In this respect, Klaus Schwab writing on the future role of CS states as follows: ‘The definitions are changing as civil society is recognized as encompassing far more than a mere ‘sector’ dominated by the NGO community: civil society today includes an ever wider and more vibrant range of organized and unorganized groups, as new civil-society actors blur the boundaries between sectors and experiment with new organizational forms, both online and off’.⁵¹

However, for purposes of this study, any reference to CS means every other components or strands of the society except the government, its agencies and organized bodies in the forms of human rights CSOs/NGOs both at international or local levels. In other words, the thesis focuses on the role of wider domestic community particularly the voting publics (that have the electoral powers to punish or raise cost against elected policy makers for any untoward behaviour which undermines the interest of the domestic constituents) and individuals or group of individuals who may be engaged in mobilisation of direct forms of civil actions (protest).

⁴⁹ See Van Dyck (n 48 above) 1-5.

⁵⁰ K Moeti ‘Understanding the differences between civil society and civil society organisations’ (2012) available at <http://www.ngopulse.org/blogs/understanding-differences-between-civil-society-and-civil-society-organisations> (accessed on 10 October 2018).

⁵¹ A Jezard ‘Who and what is civil society?’ (2018) available at <https://www.weforum.org/agenda/2018/04/what-is-civil-society/> (accessed 19 October 2018).

1.4.2 Civil Society Organisations (CSOs) and Non-governmental organisations (NGOs)

CSOs are defined as organised civil society groups that can operate in many forms, some informal and some as formal entities. Examples of these are the non-governmental organisations (NGOs), faith-based organisations (FBOs), labour leaders, environmental organisations, charities, professional associations as well as grassroots organisations.⁵² They are often described as voluntary organisations involving groups of individuals who freely associate without a commercial or pecuniary motive to further their own interest.⁵³ This also entails a situation where a group of individuals under a formal or institutionalised platform come together for a common purpose or mandate driven by need. CSOs can further be described as an ‘intermediary realm between the private sphere and the state’ which does not include parochial society (the individual and family life and activities such as religion worship, recreation, entertainment). It may entail a situation where members of CS consciously and voluntarily engage in civil group activities⁵⁴ or where a group of people come together for purposes of achieving a common goal under a particular registered civil society organisation or organised bodies. More specifically, in the context of this thesis, human rights NGOs and CSOs constitute human rights organized bodies whose ultimate aims are *inter alia*: to identify and expose member states upon violation of rights of individuals, call on international bodies to pressure violating states to improve on promotion and protection of rights and to seek measures to avoid re-occurrence of violations.⁵⁵ In doing this, they engage in advocacy, lobbying and mobilisation strategies in attracting the attention of the public and relevant institutions who could possibly choose to raise national and international costs when the target state refuses to stop violations and improve on the human rights standards.⁵⁶ For purposes of this thesis, NGOs and CSOs are used interchangeably in reference to all human rights non-governmental organisations working under the AHRS, human rights movement, human rights network, human rights non-governmental agencies and human rights civil society organisations that have been participating in the activities of the AHRS. However, the above classification may not include organized CS at the domestic level who constitute part of the wider

⁵² Commission of European communities (2001): European Governance: white paper, COM, 428 Brussels 14.

⁵³ T Hayes *Management, control and accountability in non-profit/voluntary organizations* (1996) 12.

⁵⁴ K Hirata ‘*Civil society in Japan: The growing role of NGOs in Tokyo’s aid and development policy*’ (2002).

⁵⁵ See Wikipedia definition of human rights group available at https://en.wikipedia.org/wiki/Human_rights_group (accessed 25 November 2018); see also AK Lindblom *Non-governmental organisations in international law* (2005) 52; R Brett ‘The role and limits of human rights NGOs at the United Nations’ in D Betham (ed) *Politics and human rights* (1995) 97.

⁵⁶ See generally, Lindblom (n 55 above).

domestic community yet not engaged with the AHRS – for example, student unions, labour groups, traditional and religious institutions, market and traders’ unions, academic and non-academic unions (that is, teaching and non – teaching staff unions), among others.

1.4.3 Decision, recommendation and order

The term ‘decision’, is often used to refer to the entirety of a court’s or quasi-judicial tribunal’s findings after a critical review and analyses of the total submissions, views, written observations and arguments from both parties in respect of a case or communication brought under its jurisdiction. In the context of this thesis decisions would be referred to as written findings or order(s) from the African Court directing a member state to, for instance, redress human rights violation, transform national legal system to conform to international rights standard as contained in the African Charter and avoid re-occurrence of violation. It must be noted that while decisions could be considered as written binding orders against an alleged violating state, recommendations are arguably not binding as they only qualify as written findings from a quasi-judicial body (for instance, the Commission and the Committee) after an evaluation of a complaint or communication submitted before it. However, according to Viljoen, recommendation becomes ‘binding once they are reflected in the Commission’s report and are approved by the relevant AU organs’.⁵⁷ In this study, the term recommendation will refer to written conclusions and remedies, provisional measures issued by the African Commission and the African Children’s Committee in addressing human rights violations in member states, while ‘order’ will be used in reference to the African Court’s judgments and provisional measures. In all, the term ‘decision’ is used in this thesis as a generic term for both recommendation, judgment and order.

1.4.4 Compliance

Most scholars from the field of international relations (IR) and international laws (IL) have paid considerable attention to the concept of compliance.⁵⁸ As Raustiala and Slaughter assert,

⁵⁷ Viljoen (n 6 above) 339.

⁵⁸ For instance, see generally the works of B Kingsbury 'The concept of compliance as a function of competing conceptions of international law' (1998) 19 *Michigan Journal of International Law* 345-72; K Raustiala & A Slaughter 'International law, international relations and compliance' in W Carlsnaes *et al* (eds) *Handbook of international relations* (2002) 538, 539; Raustiala (n 9 above); HH Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2598-2659; SV Scott 'International law as ideology: Theorizing the relation between international law and international politics' (1994) 5 *European Journal of International Law* 313-25; BA Simmons 'Compliance with international agreements' in NW Polsby (ed) (1998) 1 *Annual Review of Political Science, Palo Alto: Annual Reviews* 75-94

compliance literature is a ‘microcosm of developments in both fields, and particularly of the rapprochement between them’.⁵⁹ The term compliance could mean when a member state is in conformity with international legal rules or the relationship between state behavior and a specified standard rule.⁶⁰ In other words, compliance may seem to have occurred when a member state acts in conformity with its international obligations both at international, regional and domestic level and in accordance to specified rule. For Hawkins and Jacoby, compliance could either be the outcome of a member state effort geared towards enforcement of legal rules or a ‘sheer coincidence’.⁶¹ By sheer coincidence, they imply that there are instances where an actor may comply with a legal rule yet the rule does not change state behavior while in other instances, change of behavior may occur in consequence of rule compliance. This perhaps justifies Okafor’s assertion that compliance does not occur in the same way as ‘a twist to the hand causes pain’,⁶² this is because, often times, compliance could be a function of coincidence in state response to change of behavior, the latter may have occurred for reasons extrinsic to compliance.

In a similar approach, Risse and Ropp argue that compliance is based on ‘sustained behaviour and domestic practices that conform to the international human rights norms [or] rule consistent behaviour’.⁶³ These features implicit in the above scholars’ conceptualisation of compliance distinguish member state compliance with rights decisions from implementation. While it can be admitted that both concepts share certain similar features, the thin line of difference between both is the government committed efforts (beyond mere process) resulting to final conformity to rights decisions or international rule standard.⁶⁴

However, for purposes of this thesis, compliance is used to refer to member state deliberate behavior in response to the decisions or recommendations of the African human rights supervisory mechanisms in conformity with expected international legal standard.

⁵⁹ Raustiala & Slaughter (2002) (n 58 above) 538-539; Raustiala (n 9 above) 399.

⁶⁰ Raustiala & Slaughter (2002) (n 58 above) 538-539; Raustiala (n 9 above) 399.

⁶¹ Hawkins & Jacoby (n 9 above) 39-40.

⁶² Okafor (n 36 above) 116 -117.

⁶³ 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) 10.

⁶⁴ For similar exposition, see JF Spriggs ‘Explaining federal bureaucratic compliance with supreme courts opinions’ (1997) 50 *Political Research Quarterly* 576; D Kapiszewski & MM Taylor ‘Compliance: Conceptualising, measuring and explaining adherence to judicial rulings’ (2013) 38 *Law and Social Inquiry* 806.

1.4.5 Implementation

Implementation could mean the process where a state actor takes some steps or measures geared towards giving effect to a legal rule in response to decision from rights institutions. For Murray and Long, member state implementation entails a ‘process by which states take measures at the national level to address issues of concern raised by human rights treaty bodies’.⁶⁵ These measures could be by taking legislative, judicial or administrative steps to facilitate state’s response to adverse rights decisions.⁶⁶ While it could be argued that implementation is a process leading to member state compliance, the latter often times becomes the end result. However, compliance could also occur in the absence of implementation, same way implementation can occur without necessarily leading to compliance with adverse decisions.⁶⁷

For purposes of this study, the term ‘implementation’ will be used interchangeably with ‘compliance’ (as defined above) in referring to member state conformity with human rights decisions issued by any of the African human rights supervisory mechanisms especially when such decision requires a state to transform its human rights records or practices to meet international standard as provided by the African Charter and other legal human rights instruments.

1.4.6 Supervisory mechanisms

The AHRS has three major supervisory mechanisms established to promote and protect human rights in Africa. They are: the African Commission on Human and Peoples’ Rights (the Commission), the African Court on Human and Peoples’ Rights (the Court) and the African Committee of Expert on the Rights and Welfare of the Child (Committee). These mechanisms are collectively referred to in this study as ‘human rights supervisory mechanisms’, ‘monitoring bodies’, ‘human rights tribunals’, ‘regional human rights mechanisms ’ or ‘human rights institutions under the AHRS’

1.5 Literature review

Drawing from the research questions highlighted in section 1.3 above, the literature on subjects related to the research questions will be discussed in this section. First, do state actors respect and obey international human rights obligations? If so, what factors motivate states to respect their international obligations in the rights treaties they have ratified?

⁶⁵ Murray & Long (n 39 above) 27.

⁶⁶ See M Burgstaller *Theories of compliance with international law* (2004) 4.

⁶⁷ Raustiala & Slaughter (n 58 above) 538, 539; Raustiala (n 9 above) 387-394.

A response to the question of whether states do (or not) obey international law underscores the relationship between treaty ratification, post - state ratification behavior and a consideration of other related components or sources of international law which are not treaty based (for instance, customary international law, general principles of law and judicial precedents).⁶⁸ Treaty provisions bind ratifying member states and subject them to change any behavior that is not in congruent with the terms of the treaty. The act of ratification sends a signal to both domestic constituents and global community (all things being equal) that the state is committed and willing to comply with all the rules or obligations contained in the treaty. In the context of the above question: what motivate states to obey international rights treaties, scholars have argued differently. For instance, Henkin observes that ‘almost all nations observe almost all principles of international law and almost all of the time’.⁶⁹ On the contrary, Hathaway argues that worse human rights practices are often seen in countries that have ratified rights treaties, thereby giving cause to rethink state’s actual value and reasons for ratification in the first place.⁷⁰ In further findings, she states:

Although the ratings of human rights practices of countries that have ratified international human rights treaties are generally better than those of countries that have not, noncompliance with treaty obligations appears to be common. More paradoxically, when I take into account the influence of a range of other factors that affects countries practices, I find that that treaty ratification is not infrequently associated with worse human rights ratings than otherwise expected.⁷¹

A similar position was espoused by Emilie Hafner-Burton and Kiyoteru Tsutsui with regards to state membership to the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR). They argue that membership under these treaties was not in any way ‘more likely to produce better results and change of behavior than non-ratified states that chose to operate outside the treaties’ and there were no consequences for non-compliance.⁷²

⁶⁸ For studies on sources of international law, see D Kennedy ‘The sources of international law’ (1987) 2 *American University International Law* 1-96; L Mälksoo ‘Sources of international law in 19th century’ (2017) available at https://www.researchgate.net/publication/316558653_Sources_of_International_Law_in_the_19th_Century (accessed on 20 March 2018).

⁶⁹ L Henkin *How nations behave* (1979) 47.

⁷⁰ O Hathaway ‘Do human rights treaties make a difference’ (2002) 111 *Yale Law Journal* 1935 -1940.

⁷¹ As above.

⁷² E Hafner-Burton & K Tsutsui ‘Human rights in a globalizing world: The paradox of empty promises’ (2005) 110 *American Journal of Sociology* 1373,1374.

After a critical study of the relationship between Kenya and the International Criminal Court (ICC), Dutton unequivocally states that ‘international human rights treaties are not necessarily effective at constraining states that commit human rights abuses such that they are induced to comply with treaty terms’.⁷³

While it could be deduced from the above views that treaty ratification does not necessarily improve states behavior, a conclusion cannot be hastily drawn to the effect that treaty ratification does not matter at all. This is because, first, similar to the communitarianism philosophy, states could improve in their human rights conducts out of sense of community relationship and commitment with treaty partners.⁷⁴ In the context of this narration, treaty ratification may be responsible in changing state behavior merely because the state is a member of a human rights monitoring system guided by treaty provisions. Second, it is unlikely how CS can raise domestic cost in pressuring states for compliance in absence of treaty obligation which the state is committed to. It is on this note that Neumayer states that what determines member state change of behavior after treaty ratification is the presence of active CS in collaboration with ‘transnational actors’ who may then pressure state for change of behavior towards treaty obligations.⁷⁵ In summary, treaty ratification as argued by Hathaway has both positive and negative effects which on the aggregate has ‘little or no net effect on state practices’.⁷⁶ In addition to the role of CS and other transnational actors in pressuring state for change of behavior, it has further been argued that states’ compliance with treaty obligation will depend on ‘the compliance enforcement mechanisms at work’.⁷⁷ Dutton further maintained that the nature of the enforcement mechanism inherent in a treaty will determine the calculation of whether a state will commit and

⁷³ Y Dutton ‘Enforcing the Rome Statute: Evidence of (non) compliance from Kenya’ (2016) 26 *Indiana International Comparative Law Review* 29.

⁷⁴ Communitarianism is a philosophy which emphasizes on the relationship that exists between the individual and the community in which the former is committed to as member. Communitarianism predicts that individual behavior and conduct is largely influenced by the fact of being a member of that community. In this context, states could change human rights conducts out of sense of moral obligation as a result of being a member of a particular human rights treaty body. For general understanding, see D Bell (2001) ‘Communitarianism’ available at <https://plato.stanford.edu/entries/communitarianism/> (accessed on 18 March 2018); D Bell *Communitarianism and its critics* (1993); A Etzioni *New communitarian thinking* (1995).

⁷⁵ E Neumayer ‘Do international human rights treaties improve respect for human rights?’ (2005) 49 *Journal of Conflict Resolution* 925-953.

⁷⁶ As above.

⁷⁷ YM Dutton ‘Explaining state commitment to the International Criminal Court: Strong enforcement mechanisms as a credible threat’ (2011) 10 *Washington University Global Studies Law Review* 477.

eventually comply with treaty obligations or terms. To explicate further, Dutton argues that one of the baseline for determining the impact of treaty is where:

[W]here an international human rights treaty contains legally binding enforcement mechanisms backed by resources to punish noncompliant behavior, states are motivated by rationalist concerns and calculate the costs of treaty commitment by looking retrospectively at the evidence which might influence their ability to comply with treaty terms. Where treaties contain weak enforcement mechanisms, even a rational state may commit without intending to or being able to comply if it can envision other benefits—such as increased trade—that may flow from commitment. But, with weak enforcement mechanisms, the costs of noncompliance may be easily outweighed by such potential benefits. Where treaty mechanisms are stronger, the calculation is different. The quantitative evidence suggests that on the whole, states making commitment calculations in such circumstances are concerned with the consequences of failing to comply with treaty terms.⁷⁸

Similarly, other human rights scholars have also noted that weak enforcement mechanisms give leverage to state to violate human rights decisions without facing any negative consequences.⁷⁹ As a result, it could be assumed that non-compliance and incessant cases of rights violation under the AHRS may be attributed to lack of strong enforcement mechanisms in the rights instruments that bind member states under the AHRS. This perhaps could also explain the reason why despite the seeming high rate of states' ratification to human rights treaties in Africa, the number of states in violation of human rights have continue to grow in a geometric sequence; therefore states ratification could in a way, mean nothing but 'window dressing'.⁸⁰ In essence, the view of these scholars may seem to indicate that the mere existence of human rights treaties and state ratification is not an assurance of member state's compliance and change of behavior. This animates the question of what mechanism determines change of state behavior in terms of compliance with rights treaties and by extension, rights decisions.

In view of this, it may then be asked: Owing to the fact that the rights treaties which establish the African supervisory mechanisms do not provide general strong enforcement mechanisms (with exception of the Court), what other factors could influence states' obedience to treaty obligations? With the existence (or not) of strong enforcement mechanisms, would not international pressure

⁷⁸ As above.

⁷⁹ E Hafner-Burton & K Tsutsui (n 72 above) 1373-1374.

⁸⁰ As above; see also Dutton (n 77 above) 480 (arguing that states can join them almost indiscriminately and without any intention of complying).

be resorted to in order to strengthen the enforcement mechanism generally? If so, can member state change human rights behavior due to international pressure from international forces in avoidance of international cost? There have been varying arguments from scholars in this respect. While some argue that state do obey international treaty on a cost-benefit calculation and for avoidance of international cost that can affect anticipated benefits of compliance, others maintain a line of argument that international cost does not matter in state behavior towards commitment to treaty obligations.

For Harold Koh, international human rights may appear to have been ‘under-enforced’ but in actual sense, they are being enforced through ‘translational legal process’ which includes integration between international institutions, interpretation and internalization of norms into collective consciousness of international actors and domestic system. Koh’s position can be deduced to mean that nations may obey international human rights laws for a number of reasons and part of these reasons may include, among other things, the fear and avoidance of sanction and coercion (international cost of non-compliance).⁸¹

For Chayes and Chayes, international institutions stand to regulate states’ behavior because the states are also in pursuit of a mechanism that can guarantee their commitment to change, so for fear of public shaming and restraint on economic and diplomatic relations, they may be constrained to comply with international human rights decisions.⁸² In 2010, Hill’s study revealed that states that are committed to the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) improved on the promotion and protection of women political rights, apparently to avoid international consequences.⁸³

In the views of Huneeus, states obedience to international human rights may be to show to the world and the electorates that the government is committed to protection and promotion of human rights.⁸⁴ This position is further elaborated by Hillebrecht who posits that states might implement

⁸¹H Koh ‘How is international human rights enforced? (1998) 74 *Indiana Law Journal* 1397-1417.

⁸² See generally A Chayes & AH Chayes *On compliance* (1993) 47 *International Organization* 175.

⁸³ D Hill ‘Estimating the effects of human rights treaties on state behavior’ (2010) 72 *Journal of Politics* 1161, 1170-1171.

⁸⁴ A Huneeus ‘Courts resisting Courts: Lessons from Inter-American Court’s struggle to enforce human rights’ (2012) 44 *Cornell International Law Journal* 101-155; see also JE Haglund ‘Domestic implementation of supranational court decisions: The role of domestic politics in respect for human rights’ unpublished PhD thesis, Florida State University, (2014) 13,17 19.

regional court decisions as an indication of its intent to demonstrate good faith in human rights issue before international agencies. For instance, states that are beneficiaries of financial assistance and other incentives from international agencies and foreign donors like World Bank (WB), United States agency for international development (USAID) and European Union (EU) need to show their future intention to respect human rights.⁸⁵ Similarly, Beth Simmons observed that commitment to international (human rights) institutions could imply that national governments want to show to their domestic constituents or international audiences or community about their intention to demonstrate better human rights culture in the future.⁸⁶ For example, ‘states in democratic transition with poor human rights records may nevertheless wish to identify with human rights institutions in order to facilitate future improvement’.⁸⁷ This goes to show the fact that there are instances where member states (mostly common with undeveloped or developing countries) obey international law to avoid attendant cost or in anticipation of goodwill by international community. Again, going by the above arguments that member states could comply and improve in rights behavior to avoid international cost, will not it be appropriate to ask if the continued exclusive reliance on international cost not manifestly counterintuitive when the influence of powerful states for example, the US and Europe seems to be declining?⁸⁸ And in some cases, as some human rights analysts have also argued, most of the world powerful countries (especially the US) now focus their priority on governance issues concerning American citizens (America first) as against interest of other nationals in other regions.⁸⁹ While it is admitted that states may in some cases respond to treaty obligations out of intense international pressure from

⁸⁵ 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; Haglund (n 74 above) 14.

⁸⁶ B Simmons ‘International law and state behavior: Commitment and compliance in international monetary affairs’ (2000) 94 *The American Political Science Review* 819-835.

⁸⁷ B Simmons & A Danner ‘Credible commitments and the International Criminal Court’ (2010) 64 *International Organization* 225; see also A Moravcsik ‘The origins of human rights regimes: Democratic delegation in postwar Europe’ (2000) *International Organization* 225.

⁸⁸ For the literature expressing dissatisfaction on continued reliance on the influence and support from international actors, see generally, E Posner ‘The case against human rights’ (2017) available at <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> (accessed 13 October 2018).

⁸⁹ For evidence that supports these arguments, see the following reports at <https://www.hrw.org/world-report/2018/country-chapters/united-states> (accessed 13 October 2018); M Spetalnick & PC Thul ‘With ‘American First, ‘Trump mutes U.S voice on human rights in Asia’ (2017) available at <https://www.reuters.com/article/us-trump-effect-asia-rights/with-america-first-trump-mutes-u-s-voice-on-human-rights-in-asia-idUSKBN1D22LJ> (accessed 13 October 2018); for reports showing the current American government’s noninterest in supporting nationals who are not US citizens, see details via <https://issafrica.org/pscreport/on-the-agenda/how-trumps-budget-cuts-impact-security-in-africa> (accessed 13 October 2018).

international community through the mobilisation of NGOs naming and shaming campaign, it will be misnomer to feign ignorance of the recent growing observations that the US (particularly since assumption of office of president Donald Trump) has shown apathy in interfering with countries' poor human right records. This apathy has been demonstrated in different facets.⁹⁰ As Posner similarly notes:

We live in an age in which most of the major human rights treaties – there are nine “core” treaties – [that] have been ratified by the vast majority of countries. Yet it seems that the human rights agenda has fallen on hard times... Political authoritarianism has gained ground in Russia, Turkey, Hungary and Venezuela. Backlashes against LGBT rights have taken place in countries as diverse as Russia and Nigeria. The traditional champions of human rights – Europe and the United States – have floundered. Europe has turned inward as it has struggled with a sovereign debt crisis, xenophobia towards its Muslim communities and disillusionment with Brussels. The United States, which used torture in the years after 9/11 and continues to kill civilians with drone strikes, has lost much of its moral authority. Even age-old scourges such as slavery continue to exist. A recent report estimates that nearly 30 million people are forced against their will to work. It wasn't supposed to be like this.⁹¹

In addition to the above, there are bodies of scholarship that have expressed lack of confidence in the potency of international pressure and its ancillary components (sanctions and aid withdrawals) from Western powers. In this context, Easterly warns that the ‘ideology of the planners who believe that the West can impose a political ideology and economic blueprint that will advance the wellbeing of other countries’ has done so much ill and little good for donor recipient countries.⁹² In other words, aid disbursements with conditionality, aid withdrawal (as one of the consequences of international pressure) and the general intention of the West (particularly towards African recipient states) does not seem to picture a roadmap that is geared towards improving human rights behavior of recipient states, therefore any expectation that states will always be threatened by donor agencies' aid withdrawal may be an endless illusion.

⁹⁰ Posner (n 88 above).

⁹¹ As above.

⁹² W Easterly *The white man's burden: why the west's effort to aid the rest have done so much ill and so little good* (2006); for related literature, see D Moyo *Dead aid: Why aid is not working and how there is a better way for Africa* (2009).

In another perspective, other research further reveals that reliance on international pressure for compliance and member state change of behavior can paradoxically result in increasing government political repression in some instances. For example, as Biegon notes ‘the target state may, for example, intensify torture of detainees, close media outlets, or increase clandestine executions’.⁹³ From a different viewpoint, Neumayer states that:

Powerful countries rarely employ sanctions- political, economic and military or otherwise-to coerce other countries into improving their human rights record. Indeed, for the most parts, countries take relatively little interest in the extent of human rights violations in other countries, unless one of their own citizens is affected....[therefore] human rights violating countries often avoid subjecting foreign citizens, particularly from powerful western countries.⁹⁴

As Hafner-Burton states:

Global publicity from NGOs, the news media, or the UN could have the accidental side effect of providing incentives for groups to orchestrate acts of violence large enough to attract the spotlight. Governments react to these security challenges by repressing human rights even further, setting spirals of violence in motion.⁹⁵

Arising from the inconsistent results from the application of international pressure as one of the mechanisms for enforcing treaty terms, it may seem that international pressure no longer has sufficient influence in improving states’ behaviour towards human rights practices. As a result of this, it has been argued that ‘change of behavior towards human rights practices and improved compliance could also be assumed to be a function of a state voluntary efforts or other domestic factors (and not necessarily a result of international coercion)’.⁹⁶ Jana von Stein posits that international human rights law may place a spotlight on non-compliant member but cannot change their behavior to treaty terms. In that context, Stein’s argument gives the impression that states discretionally respond to human rights decisions, therefore, the influence of international pressure does not always determine states’ responses to treaty’s obligations.⁹⁷ All these analyses simply suggest that international pressure is increasingly becoming weak as far as its capacity to change state behavior is concerned, perhaps, compliance and change of state behavior could be improved

⁹³ Biegon (n 13 above) 162.

⁹⁴ Neumayer (n 75 above) 3.

⁹⁵ Hafner-Burton (n 25 above) 689-693.

⁹⁶ J Goldsmith & E Posner, *The limits of international law* (2005) 121-124.

⁹⁷ J von Stein ‘Do treaties constrain or screen? Selection bias and treaty compliance’ (2005) 99 *American Political Science Review* 611-622.

with combined effects of domestic and international pressures. A broader part of chapter three of this thesis discussed the effect or otherwise of international pressure as a mechanism for driving compliance and improving human rights standards.

Second, going by the ambivalent arguments by these scholars on the effect of international pressure in raising international cost of non-compliance, it may therefore, be necessary to ask the following questions: (1) Drawing from the arguments above, is the effect of international cost of non-compliance not gradually becoming wane especially in the seeming declining influence of western powers (the US and Europe) in Africa? (2) Should internal (domestic) pressure not be considered as a potent complementary mechanism that can support and strengthen the effect of international pressure?

In order to respond to the latter question, the two national courts decisions against the South African government's refusal to arrest the former Sudanese president (Omar Hassan al-Bashir) and blocking withdrawal move from the International Criminal Court (ICC) may be relevant examples in explaining how domestic costs (raised by domestic institutions) can be explored to compel government's compliance (see chapter 4 and 5 below for detailed analyses on the relevance of engagement of CS in raising domestic cost).⁹⁸ In addition, the role of the Nigerian human rights activist forces (national activist judges, civil society actors, media and activist lawyers) in raising domestic cost against the Nigerian military government may help to further justify the assumption (stated in section 1.2 above) that reliance on the effect of domestic forces to raise domestic cost as potential complementary mechanism can be as effective (if not more) as reliance on international cost in improving states' compliance. As Okafor puts it:

This feat could not have been achieved at all, however, but for the kind of trans-judicial communications between the African Commission and the institutions of the Nigerian state (especially the judiciary) that was facilitated, and indeed made possible, by the efforts of the activist forces which operated at the local level within Nigeria.⁹⁹

Third, in view of the above developments, one important question that attracts attention is: whether resort to domestic cost will improve compliance and effectiveness? In response to this question,

⁹⁸ For details on both decisions see the following: F Boehme 'South Africa and the great escape: Regional politics and compliance with the Rome Statute' A paper presentation at the ISA-Human Rights conference (2016); see also *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (n 41 above).

⁹⁹ Okafor (n 36 above) 143.

the views from the following scholars will give some insights in this context. For instance, as some authors have advocated, the presence and engagement of active CS should be considered as a potential mechanism that can trigger compliance and improve states' behaviour towards protection of human rights.¹⁰⁰ The position of these authors suggest the need to increase domestic cost of non-compliance through mobilisation efforts of active engagement of domestic forces (CS) within the African states. While this approach may sound promising, it appears certain factors must be taken into account. For instance, as Ayeni notes, the kind of domestic costs that may trigger treaty effect could either be 'political, financial or ideological'.¹⁰¹ He further notes that 'rights which require huge financial outlay for their realization, or those that threaten the political survival of state actors, are often least likely to be complied with or implemented by states'.¹⁰² Drawing from this, it then means that the nature of decision to be complied with should also determine the kind of domestic costs that CS may be expected to raise against member state.

Furthermore, Hillebrecht gives reasons to justify the effect of domestic cost in improving human rights protection. She argues that state executive also respond to domestic pressure from domestic constituents as much as they respond to international audience; therefore, executive incentives for implementation of regional court's decision will for instance, show a positive signal to the domestic constituents that the 'national government is a duty-bearer of human rights'.¹⁰³ From the foregoing analyses, it appears that the public perception and knowledge about national government's behaviour towards protection of rights might be critical in generating incentive for government to act in good faith in matters of implementation of human rights decisions. No wonder Viljoen notes, that 'ultimately, public opinion is the means through which pressure should be exerted on states to ensure compliance'.¹⁰⁴ The question that may then be asked in line with the main research question is: under what conditions would CS in Africa increase domestic cost of non-compliance? Writing on the link between voters' electoral leverages and politicians' quest for political office survival, Bueno de Mesquita and others posit that citizens, particularly the

¹⁰⁰ See B Simmons (n 58 above) 819-835; Neumeyer (n 75 above) 925,941.

¹⁰¹ V Ayeni 'Introduction and preliminary overview of findings' in V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African States* (2016) 1-13.

¹⁰² As above.

¹⁰³ Hillebrecht (n 85 above) 959.

¹⁰⁴ Viljoen (n 6 above) 464.

electorates can hold government accountable when the voting public are able to raise electoral cost to a level which threatens executive office survival. The authors further state that to retain and sustain political office, national leaders must provide considerable public goodwill (private of public goods), otherwise public support especially, from members of winning coalition may be lost more especially when ‘executive evasion of regional court decisions becomes costlier as the size of winning coalition and electorate increases’.¹⁰⁵

In addition to the role and engagement of the electorates as Bueno de Mesquita et al suggest, Vanberg notes that implementation of human rights decisions requires the support of other actors: domestic court judges whose domestic reputation and legitimacy will be at stake, legislators who may be held responsible by electorates for failure to implement regional court’s decisions and CS who may exercise their electoral leverages to pressure state for compliance.¹⁰⁶ The question would be whether Vanberg’s position can be replicated in states where separation of powers amongst government organs is limited – say for example, most African states? Whether or not this may be possible in the African context, the lessons to be drawn from the above analyses is that exploring domestic costs to stimulate state actors’ incentives towards compliance may be useful in improving compliance under the AHRS.

To further give credence to the potential influence of domestic forces in raising cost, Adjolahoun, commented on the role of domestic courts and judges, civil society, legal practitioners in the success recorded by the ECOWAS Community Court of Justice (ECCJ) in the *Koraou’s* case against Niger. He states that ‘subject to cultural and, to some extent, religious bias, domestic courts have certainly proved to be the most productive channels for influence’.¹⁰⁷ Arguably, the above scholarship have demonstrated the potentials in engagement of domestic courts acting as a disaggregated unit independent of the state. Furthermore, as Murray and Mottershaw suggest, that in addition to other factors, effectiveness can be improved when local constituents and other non-state actors at the grass root level are engaged to perform an independent supervisory role of pressuring government and agencies for compliance at ‘every

¹⁰⁵ BB Bueno de Mesquita *et al* ‘Thinking inside the box: A closer look at democracy and human rights’ (2005) 49 *International Studies Quarterly* 439-457; Haglund (n 84 above) 14, 30.

¹⁰⁶ G Vanberg *The politics of constitutional review in Germany* (2005); Haglund (n 84 above) 28, 35.

¹⁰⁷ H Adjolahoun ‘The ECOWAS court as a human rights promoter? Assessing five years’ impact of the Koraou slavery judgement’ (2013) 31 *Netherlands Quarterly of Human Rights* 368.

stage before and after human rights decisions [would] have been published'.¹⁰⁸ They further argue that for the African Commission to improve its legitimacy and enhance its 'public perception', the following options might be considered: establish a functional follow-up mechanism and build synergy and regular interaction with domestic actors and regular consultation with other AU organs.¹⁰⁹

Despite the arguments in the above literature on the relevance of engagement of domestic actors as potential domestic sources of pressure, there is need to inquire whether and to what extent will compliance be improved in the AHRS by engaging CS to increase domestic cost of non-compliance. This gap is addressed in this study particularly in chapter five below. In response to the fourth research question, this thesis examines whether an enhanced engagement of CS can increase the legitimacy sources of domestic pressure and thus, improve effectiveness and compliance. While it is assumed that engagement of CS may increase the chances of improving compliance, there is need to first of all inquire whether the wider domestic communities in African (CS) are presently concerned or even get to know about the extent of member states' (non) or compliance with rights decisions from the regional mechanisms. This inquiry is necessary owing to the growing perception that knowledge about the workings of the AHRS and of course, the supervisory mechanisms is limited especially within the local communities. Writing on this point and as have been discussed earlier, Odinkalu states that the African people have been 'excluded from participation in the human rights movement' especially at the grass root level.¹¹⁰ In other words, awareness level of the African people about the practices at the regional human rights system is poor.

Similarly, the findings by James and others (in a different survey not concerning Africa) also reveal that the ordinary people are not familiar with human rights practices; they further state that 'familiarity with human rights terms and representatives increases with socio-economic status'.¹¹¹ Relating their finding to Odinkalu's position, it could seem, that similar situation applies in the African context, so that the argument would be that the elites, human rights NGOs and CSOs (with

¹⁰⁸ Murray & Mottershaw (n 10 above) 351-372.

¹⁰⁹ As above.

¹¹⁰ Odinkalu (n 33 above) 3-4.

¹¹¹ R James *et al* 'Human rights familiarity and socio-economic status: A four-country study' (2014) 20 *International Journal for Human Rights* 1-6.

exception of the wider domestic society) are more visibly involved in human rights activities under the AHRS. Writing on the impact of the African Charter and the Maputo Protocol, Ayeni notes that the common man and ordinary citizens in Africa, the judges, policy makers in different strata, legislators and legal practitioners lack knowledge of key human rights instruments in Africa.¹¹² Similarly, Azzam suggests that for human rights groups to have legitimacy of the people, they must ‘expand their reach and engage more seriously, widely and genuinely with ordinary people’.¹¹³ Some other key pieces of research also point to the fact that wider CS has not been engaged in the human rights system. These include the works of Gonzalez,¹¹⁴ Ansolabehere,¹¹⁵ Gallagher,¹¹⁶ Banya.¹¹⁷ Most importantly, Mutua notes in the African context that:

There is no future for the human rights movement in Africa unless it can secure domestic ideological, financial and moral support from interest constituencies. It is crucial that the movement be part of the people; its leadership and aspirations must reflect the needs and perspectives of ordinary citizens ... The movement should not be complacent, as it is today, with external support.¹¹⁸

Drawing from the above pieces of scholarship, Ayeni proposes the need to increase awareness of the AHRS especially as it relates to the African Charter and the Maputo Protocol to policy makers, legislators, judges, civil society and members of the public and to also ensure that the ‘provisions of the human rights instruments be directed towards solving human rights problems in ‘specific domestic context’.¹¹⁹

¹¹² Ayeni (n 101 above) 13, 15.

¹¹³ F Azzam ‘In defense of professional human rights organisations’ (2014) available at <https://www.opendemocracy.net/openglobalrights/fateh-azzam/in-defense-of-professional-human-rights-organizations> (accessed 14 January 2017).

¹¹⁴ E Gonzalez ‘Speaking with an elite accent: Human rights and the masses’ (2013) available via <http://www.opendemocracy.net/opendemocracy.net/openglobalrights/ezequel-gonzalez-ocantos/speaking-with-elite-accent-human-rights-and-masses> (accessed 14 January 2017).

¹¹⁵ K Ansolabehere ‘Reforming and transforming: a multi-directional investigation of human rights’ (2013) available at <http://www.opendemocracy.net/openglobalrights/karina-ansolabehere/reforming-and-transforming-multi-directional-investigation-of-h> (accessed 14 January 2017).

¹¹⁶ J Gallagher ‘Neither elites nor masses: Protecting human rights in the world’ (2013) available at <http://www.opendemocracy.net/openglobalrights/janice-gallagher/neither-elite-nor-masses-protecting-human-rights-in-real-world> (accessed 14 January 2017).

¹¹⁷ M Banya ‘Human rights for who? A closer look at elitism and women’s rights in Africa’ (2013) available at <https://www.opendemocracy.net/openglobalrights/moiyattu-banya/human-rights-for-whom-closer-look-at-elitism-and-women’s-rights-in-a> (accessed 14 January 2017).

¹¹⁸ M Mutua ‘The African human rights system in a comparative perspective’ (1993) 3 *Review of the African Commission on Human and Peoples’ Rights* 31-35.

¹¹⁹ Ayeni (n 101 above) 15.

Fourth, flowing from the above discussions, it will be pertinent to ask: if engagement of CS has contributed in improving compliance in other regions? By way of comparative analysis, this study (in chapter 4 below) conducted an investigation to know whether CS has been actively involved in raising domestic cost in improving compliance under the European and Inter-American human rights systems. To have an insight on the potential role of CS in these regions, some scholars confirm the existence of an entrenched engagement and participation of CS in the process of implementation and compliance with judgment of the European Court of Human Rights (ECtHR) and its Inter-American counterpart. For instance, as demonstrated by Moravcsik, compliance under the European human rights regime is ‘achieved through various established institutions of liberal democracy which allows causal mechanisms’ to operate within a local or national space. He also identifies the medium through which CS can exert pressure for compliance thus:

Individual petition and supranational judicial review function not by external sanctions or reciprocity but by shaming and coopting domestic law-makers, judges and citizens, who then pressure governments for compliance. The decisive causal links lie in civil society: international pressure works when it can work through free and influential public opinion and independent judiciary.¹²⁰

In similar vein, Miara and Priase maintain that effective enforcement process of the judgment of the European Court has been linked to the involvement and consistent pressure from CS. In this regard, CS activism could be considered as a potential factor in building up a ‘culture of human rights dialogue in democratic societies’ and a consistent dialogue of this sort could potentially improve compliance without any external influence.¹²¹ As observed from the literature, most of the arguments seem to support the assumption that there is an entrenched engagement of CS under the European human rights system (EHRS) which may have contributed to increase in not just the rate of individual litigations but also in member state attitude towards implementation or compliance.¹²²

¹²⁰ A Moravcsik ‘Explaining international human rights regimes: Liberal theory and Western Europe’ (1995) 1 *European Journal of International Relations* 158.

¹²¹ L Miara & V Prais ‘The role of civil society in the execution of judgments of the European Court of Human Rights’ (2012) 5 *European Human Rights Law Review* 528 – 533.

¹²² For a brief example of the role of individuals in human rights litigation, see *Elci and Others v Turkey* Appl nos 23145/93, 25091/94 (2003).

Drawing on the above, it may seem that the implementation of human rights decisions from the ECtHR has been considered a great deal within the EHRS because it influences domestic and policy change which is critical in human rights advancement in the region. The conditions for achieving this is through repeated litigation and mobilisation by CS, domestic institutions and other non-state actors capable of exerting pressure and ‘linking court rulings to policy issues’.¹²³ In view of this fact, CS’ vigorous efforts have been commended over the transformation of human rights in Europe under the EHRS.

As explained by Simmons, the implementation of international human rights law can be influenced by concerned domestic actors who may act ‘as agents with the strongest incentives [that] consistently make demands for compliance with treaty obligationsthey also make decisions about what is culturally appropriate in their society and how best to deploy limited resources in order to realise the greatest benefits from the promises of the human rights treatise their governments have signed’¹²⁴ Xinyuan Dai recognizes CS as ‘domestic constituencies’ with ultimate power, as agent of compliance using ‘informational endowment and electoral leverage’ to exert high degree of pressure on government.¹²⁵ While CS can be considered an important domestic actor in fostering compliance, similar to Vanberg’s earlier position, the role of domestic institutions is also critical in the drive for compliance. In the opinion of Hillebrecht,¹²⁶ domestic enforcement of international human rights decisions is a political process that requires the efforts of national human rights institutions and other actors which includes executive, legislative, judiciary and CS. In the Inter-American context, Huneeus¹²⁷ argues that the national judicial system (NJS) is indispensably involved in the process of enforcement of decisions from the Inter-American Court of Human Rights (IACtHR).

This process is not peculiar to the Inter-American human rights system (IAHRS). Under the AHRS, as earlier discussed, Okafor argues that the relentless efforts of ‘local popular forces’ (NGOs and other strands of CS), significantly influenced executive change of behavior in Nigeria.

¹²³ D Anagnostou ‘Does European human rights law matter? Implementation & domestic impact of Strasbourg court judgments on minority-related policies’ (2010) 14 *The International Journal of Human Rights* 721-743; see further discussions in chapter 4 below.

¹²⁴ B Simmons *Mobilizing of human rights: International law in domestic politics* (2009) 372-373; Haglund (n 84 above) 36–37.

¹²⁵ X Dia *International institutions and national policies* (2007) 40-121.

¹²⁶ Hillebrecht (n 85 above); Haglund (n 84 above) 14.

¹²⁷ Huneeus (n 84 above) 101-155.

He further attributed the success of these NGOs mobilization in the Nigerian military era to the synergy and alliance with other strands of CS which includes the national judicial system, mass media, and the Nigerian public. However, he notes that one of the problems with the mobilization efforts by these NGOs was their inability to ‘mass mobilize and connect deeply with the yearnings of the masses of ordinary Nigerians’.¹²⁸

As it relates to the EHRS, Anagnostou and Mungiu-Pippidi states that ‘implementation of the ECtHR’s rulings is the responsibility of states and it is a task that involves the courts, legislatures and CS.’¹²⁹ In their view, Page *et al*, take into cognizance the fact that domestic pressure can be exerted through engagement of different domestic institutions particularly the media.¹³⁰ In addition to the arguments above, especially in the context of the IAHRs, Cavallaro and Brewer note the impact of CS through active involvement of the media.¹³¹ For instance, in the case of *Loayza Tamayo v Peru*, widespread support from domestic actors and media attention led to the release of Loayza.¹³² On the important role of the media in the African context, Asemah and others acknowledge the role and effort of the public and mass media in the promotion of human rights in Nigeria especially during the military era through ‘editorials work, featuring news, endless broadcast, commentaries, discussion programs, debates and global publicity’.¹³³

Without disputing the role of other factors in the process of implementing and enforcing the decisions of the ECtHR, it is pertinent to mention that CS in most cases exert pressure by exploring different incentives as stimuli for raising domestic cost against non-compliant states. For instance, CS can explore electoral cost in lobbying legislature to amend or repeal or make a new law in compliance with an order or decision given by a regional human rights tribunal. On this point, Plumper, Neumayer and Bueno de Mesquita *et al* opine that ‘legislators rely on public

¹²⁸ O Okafor ‘Modest harvests: On the significant (but limited) impact of human rights NGOs on legislative and executive behavior in Nigeria’ (2004) 48 *Journal of African Law* 23-49.

¹²⁹ 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* 205-227.

¹³⁰ B Page *et al* ‘What moves public opinion’ (1987) 81 *American Political Science Review* 23-44.

¹³¹ 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* 768-827; Haglund (n 51 above) 35.

¹³² The above case involved Professor Loayza Tamayo who was arrested and kept in incommunicado detention and was later sentenced to prison for terrorism. Arising from this, the American Court on Human Rights (IACtHR) found Peru in violation of the America Convention and ordered the release of Loayza. The joint efforts of CS and the media facilitated the process of complying with the court’s order. For details, see *Loayza v Peru*, Merits Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, 46(a) (Sep. 17 1997).

¹³³ A Ezekiel *et al* ‘Employing the mass media for the promotion of human rights in Nigeria’ (2013) 7 *African Research Review* 1.

support to retain office’, therefore, for fear of losing citizens’ votes during national elections, they ensure policy accountability in matters of societal importance which may include: human rights and questions of compliance with rights decisions.¹³⁴ In summary, voters could hold legislators accountable for refusing to implement regional court decisions. In another breath, Simmons is of the view that domestic or national judicial institutions and legislature can either aid or forestall the chances of speedy enforcement of regional court decisions depending on the level of separation of power between the executive, the judiciary and legislature. This is due to the assumption that strong and independent domestic judiciaries can make it difficult for ‘domestic judges to ignore regional court orders or to carry out tasks such as reopening and investigating cases or to pay damages even when the interest of the executive is at stake’.¹³⁵

In the above regard, citizens in a way to install judicial independence will pressure both the state and state judiciary to do the needful because the ability of citizens to observe evasion of court decisions increases the cost of shaming against domestic judges which can in turn affect the legitimacy of the domestic court and the judicial institutions.

Samantha Besson in analysing the situation of compliance with decisions of the ECtHR, explains that there are different structures or agencies established for purposes of overseeing implementation of rights decisions. For instance, the UK main actor for domestic implementation is the ministry of justice in conjunction with the judicial committee on human rights (JCHR). Therefore, the JCHR acts as the link between the executive, legislature and judiciary with a view to advising government on measures that will facilitate compliance with human rights decision – which includes international decisions.¹³⁶

In Austria, the structure for compliance is similar to what operates in the UK, Tretter *et al* commented that the ‘robust structure in existence defines a roadmap for public debate and active CS resulting to an effective and plausible implementation’.¹³⁷

¹³⁴ Plumper *et al* ‘Famine mortality, rational political inactivity and international food aid’ (2009) 37 *World Development* 50-61; see also BB Bueno de Mesquita *et al* *The logic of political survival* (2003); Haglund (n 84 above) 30.

¹³⁵ BA Simmons ‘International law and state behavior: Commitment and compliance in international monetary Affairs’ (2000) 94 *The American Political Science Review* 819-835.

¹³⁶ S Besson ‘The reception process in the UK and Ireland’ in H Keller and A Stone Sweet (eds) *A Europe of rights: The impact of the ECHR on National legal systems* (2008) 74.

¹³⁷ H Tretter *et al* ‘Supranational rights, litigation, implementation and the domestic impact of Strasbourg Court Jurisdiction: A case study of Austria’ JURISTRAS Project (2008) 16, available at www.echr.coe.int/libraryDocs/JURISTRAS_2007-EN- Austria.pdf (accessed 24 October 2016).

Conversely, the views canvassed by the above authors may be different from the human rights practices operational in Kenya. For instance, in 2015, Kabata reports that despite Kenya's active participation and long-standing membership under the AHRs, engagement of domestic mechanisms for implementation of rights decisions and recommendations have been lacking and as a result, human rights findings and decisions have limited impact and influence on domestic human rights practices in Kenya.¹³⁸ For details on the potential effect of engaging CS in enhancing effectiveness and improving compliance, see discussions in chapter five below

While the above discussions on the salient role of CS in raising domestic cost for compliance in both the European and Inter-American regions look inspiring when compared to the current Africa situation, one important question is to know whether the European system is equally effective in states (for example, Russia and other parts of Eastern Europe) where engagement of CS is highly restricted? From the literature, civic activism in most of the Eastern European states is limited when compared to the level of CS engagement and participation in Western Europe. As observes by Howard, there is a significant pattern of weak and a growing declining rate of CS participation and activism in the post-communist Europe.¹³⁹ This is further characterized by low levels of membership participation of ordinary citizens in the human rights practices in most of the Eastern states. Distinguishing the pattern of activism in old European member state from the new members (most of whom are from the former Soviet Union bloc), Lane notes that in western liberal democracy, the conceptions of CS are premised on ideas of individual rights as opposed to the widely assumed ideology of socialist collective ideas of rights predominant in many Eastern European states (which includes: Russia, Ukraine, Romania, Bulgaria and others).¹⁴⁰ The perceived weakness of CS in these countries has been largely attributed to a wide range of challenges from the social, political and legal configuration in which the states are embedded. Commenting on Turkey government's restraint on CS space in relation to women groups, Doyle states:

While CSOs do challenge the state in some regards, the state is by far the more powerful actor and very effective at moderating and de-radicalizing civil society... the state does this by controlling

¹³⁸ F Kabata 'Impact of International human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, (2015) 379-381.

¹³⁹ MM Howard *The weakness of civil society in post-communist Europe* (2003) 1-2.

¹⁴⁰ D Lane 'Civil society in the old and new member states' (2010) 12 *Journal of European Societies* 293-315.

the areas in which civil society organization can operate and be effective and through the use of repressive measures...these measures have the effect of tampering the demands of civil society organisations and reducing their capacity to challenge and counterbalance state power¹⁴¹

While there seems to be some pockets of concerns about the weakness of CS in some parts of European states, the situation in Russia appears to be of great concern. As the 2016 report on the state of civil society in Europe and Russia reveals, there is evidence of stability in terms of CS activism in the old European member states. While the Southern and Eastern members are still ‘lagging’, the case in Russia is ‘more worrying, showing a clear regression in terms of the legal environment for CSOs’ and other forms of civic activism.¹⁴²

In another perspective, Henderson reveals that state constraints are not basically the reason for weakness of CS movement and activism in Russia. Domestic citizens’ exclusion in the work and activities of CSOs has largely contributed to the weakness of CS in Russia. In more explicit terms, the author states:

Thus, the largest problem facing NGOs today [in the Russia context] is not potential capture and cooptation by an all-powerful state, but the inability to captivate the average Russian citizen, who still remains suspicious and leery of organizational activity. Part of this is due to the fact that after nearly two decades with independent organizations in existence, Russians still know relatively little about the sector. When asked in October 2007 if they had heard anything or knew anything about the activities of NGOs or social organizations in their region, about 55 percent of the population knew nothing – a figure about seven percent higher than when asked in 2001.... but ignorance about the sector is only part of the problem; a larger issue is that citizens don’t like what they do know about the sector.... this was in marked contrast to Western Europe, where NGOs came in as the most trusted institutions in all countries surveyed except Sweden and the Netherlands¹⁴³

In view of the above, it is doubtful if the same level of CS engagement in the Western European states can be transposed to the counterpart post-communist states with relatively weak CS.

The above literature demonstrated two instances: the first instance reveal the relevance of CS over implementation process under the European and Inter-American human rights systems and the

¹⁴¹ JL Doyle ‘State control of CSO: The case of Turkey’ (2017) 24 *Journal of Democratization* 244-264.

¹⁴² See the ‘2016 report on the state of civil society in the European union and Russia’ available at https://eu-russia-csf.org/fileadmin/State_of_Civil_Society_Report/18_05_2017_RU-EU_Report_spaudai_Hyperlink_Spread.pdf (accessed 14 October 2018).

¹⁴³ S Henderson ‘Civil society in Russia: State society relations in the Post-Yeltsin era’ (2011) 37-38 available via https://www.ucis.pitt.edu/nceer/2011_824-17_Henderson.pdf (accessed 14 October 2018).

second instance exposes factors where CS engagement might be less effective in states where the space for CS activism and engagement is limited. It must be pointed out that while the discussions in the literature concerning possible restrictions on CS activism seem to reflect more on the role of NGOs and CSOs (which is not within the context of my definition of CS for purposes of this thesis), there is also the possibility that engagement of the wider domestic society (CS) may yield little or no result in states where the space for domestic activism is constrained.

Following Hillebrecht, Helfer and Slaughter suggestion, factors and measures responsible for effective adjudication in the ECtHR and IACtHR could be examined and explored in other human rights region when necessary,¹⁴⁴ this research therefore investigates to know whether and to what extent has CS engagement contributed in influencing member states' behaviour towards compliance with human rights decisions in the European and Inter-American systems with a view to drawing lessons to the AHRS. Although, the potential challenge with a comparative analysis of this sort is the fact that there could be variations or different dynamics that exist in these regions that can render whatever insights or lessons from the European and Inter-American systems unsuitable and unrealistic to the AHRS. In this regard, this study will only consider and recommend potential attributes and lessons that can enhance the internal legitimacy of sources of pressure for compliance under AHRS with a view to improving compliance with rights decisions.

1.6 Theoretical framework

Compliance scholars have proposed several theories to explain factors responsible for state compliance with international human rights. Chapter two of this study is dedicated to a comprehensive discussion on theories on compliance and the role of CS in changing government policy. Closely related to the focus of this study is Koh's transnational theory.¹⁴⁵ Transnational legal theory recognises three vital stages of interaction, interpretation and internalization which involves synergy with other stakeholders (transnational actors) which results to internalization of international law into domestic legal system. However, this approach may not be suitable for this study because transnational actors in the perspective of Koh's argument include state actors and other domestic actors (human rights NGOs and CSOs) which strictly speaking are not within the focus of this study.

¹⁴⁴ Helfer & Slaughter (n 9 above) 276; Hillebrecht (n 85 above) 3.

¹⁴⁵ Koh (n 81 above) 1398.

In the above regard, this study will adopt the liberal theory¹⁴⁶ which rests on the premise that state behavior reflects the relationship between the domestic and transnational CS in which it is embedded. The liberal theory further explains that government ‘policy is influenced by the individuals (within and outside state apparatus) who constantly pressure the central decision maker to pursue policies consistent with their interest’.¹⁴⁷

One notable proponent of this theory is Andrew Moravcsik who posits that a state has different components embedded in it and these components includes the executive, legislature, courts, central banks, regulatory bureaucracies and civil society.¹⁴⁸ Accordingly, he argues that ‘state policies are constrained by the underlying interest of these components that constantly pressure the central decision maker to pursue policies that are consistent with their interest’.¹⁴⁹

Moravcsik recognizes the fact that international human right institutions ‘coopt’ a wide range of domestic actors who constantly pressure their government from within to comply with international rights treaties. Going by this theory, the state ceased to operate as the nerve centre (unitary actor), so that the components within the state then dictate the policy direction the state follows. Liberal theory further asserts that ‘political action is determined by domestic and robust civil society understood as an aggregation of rational individuals with differentiated taste, social commitment and resource endowment’.¹⁵⁰ This model of liberal theory is relevant to this study because one of its core focus is that compliance or implementation of human rights decisions especially in relation to international law is undeniably influenced by interested non-state actors.

In the above regard, this study will employ the liberal theory as the theoretical framework to argue that CS being a key actor within the state domestic structure (going by Moravcsik’s proposition) can exert pressure on the national governments for compliance with decisions of human rights mechanisms.¹⁵¹ This theoretical framework as comprehensively discussed in chapter two below will therefore serve as a guide for the entire discussions in this study.

¹⁴⁶ A Moravcsik ‘Taking preferences seriously: A liberal theory of international politics’ (1997) 51 *International Politics Organisation* 513-53.

¹⁴⁷ As above.

¹⁴⁸ Moravcsik (n 146 above) 513 – 553.

¹⁴⁹ As above.

¹⁵⁰ As above 520; for details, see discussions in chapter two below.

¹⁵¹ Simmons (n 124 above) 372-373.

1.7 Methodology and purpose of research

This research methodology section generally describes and introduces the broad philosophical underpinning of the different methods or approaches that is followed or adopted in investigating the various research questions already set out above. In the main, this study engages an in-depth analyses of both primary and mostly, secondary sources in finding evidence to substantiate the overall claim and arguments in this study. To this extent, the doctrinal research method featured as the dominant methodology for this thesis. However, to supplement these documentary sources, limited interviews were conducted. The reason for this very limited use of empirical sources is based on financial and time constraints. Nevertheless, the few responses from these interviews are referenced accordingly (see section 3.5.2 of chapter 3 below). In order to appreciate the suitability of the doctrinal method to this study, the following methodological approaches discuss not just the pattern or choice of materials but a clear delineation of the materials or sources that will be explored in relation to the research questions. These approaches include the analytical, empirical, multidisciplinary and comparative research approaches.

1.7.1 Analytical approach

The necessity of this approach is owing to the fact that this research is (to a large extent) library based. Therefore, primary and secondary sources from libraries were examined, including: statutes, laws, international, regional and domestic human rights legislations, judicial authorities, books, articles/journals, published and unpublished works, materials sourced from internet/website and reports. In this regard, the analytical approach was adopted in order to clearly analyse both primary and secondary sources with a view to addressing each of the research questions set out above. It is therefore not surprising that this approach features in all chapters of this study.

1.7.2 Empirical approach

This approach was resorted to at the time when it was necessary to conduct interviews with the aim of eliciting responses from NGOs/CSOs working under the AHRS or their affiliate partners. However, this was only necessary in chapter 3 of the thesis where the role of NGOs in driving compliance under the AHRS was extensively discussed. While it must be conceded that this type of approach presents opportunity for intensive data collection, analysis of data bases and empirical analysis of primary sources, this thesis (for the reasons stated earlier) conducted only two sections

of interviews. These interviews were carried out electronically: that is, by means of telephone conversations with respondents, email correspondences and WhatsApp chats. However, for cases where this was not possible, I then resorted to have a personal contact with some of the interviewees at agreed venues. The interview that was conducted was based on list of typed questions developed in line with the research ethics committee protocols guidelines. In this regard, the interview questions, list of participants, participant information and informed consent form was duly submitted to the research ethics committee of the University of Pretoria together with an application form for ethical clearance approval which was subsequently granted. These questions (as was attached to my application for ethical clearance approval) were given to NGOs representatives' resident in Nigeria.

1.7.3 Multi-disciplinary approach

As could be seen in subsequent chapters of this study, this research is multi-disciplinary. In this respect, the research also employs the multi-disciplinary approach in order to navigate through the field of international human rights law, sociology, political science, good governance and democracy. Chapter four and five is particularly evident in this context as application of this method was useful in critiquing the possibility of whether an engagement of CS in raising domestic cost (through national electoral processes and protest) can contribute in improving compliance under the AHRS. The findings from this question are already addressed in chapter 5 below.

1.7.4 Comparative approach

For purposes of drawing inspirations and lessons from other human rights regions, the role played by CS under the European and Inter-American human rights systems was investigated in chapter four below. In this context, statutory provisions and caselaws/decisions from the human rights bodies under the both regions and relevant literature were critically appraised. The aim is not to engage an in-depth analysis of the differences, similarities and peculiarities in the two regions *vis-à-vis* the AHRS. Rather, the rationale for this approach is to find whether there is an aspect in the practices of these regions that allow an entrenched and unfettered engagement of domestic constituencies in the process leading to embeddedness of regional rights decisions and policies into national systems. In otherwords, this approach helps to interrogates whether CS has actually contributed in raising domestic cost of non-compliance leading to improvement in compliance

with human rights decisions in these systems. In this context, chapter 4 and 6 discuss the findings in details. However, at the end of chapter 4, part of my conclusion was that having examined and compared the different dynamics operational in the three regional human rights systems, there are lots of lessons and inspiration to be drawn, particularly from the Inter-American human rights system to justify the need for engagement of CS in raising domestic cost to improve compliance under the AHRS.

1.7.5 Purpose of research

As could be seen from above, the methodology and approaches as linked to the research questions in this study have been discussed. These discussions do not stand to explain the purpose for this research as the purpose could mostly relate to the goal, targeted audience and motivation for the study. Hence, methodology may answer the questions of which materials/sources (either secondary or primary) should be used to address the research questions, approaches may relate with how the research questions would be addressed but research purpose will determine the research questions based on the research motivation. In brief, research purpose may for instance either describe the current position of ‘XYZ’ or to project an argument for a change of a current position or practice of ‘XYZ’.¹⁵²

In the context of this study, the two research purposes that guide the entire framework of this thesis are descriptive and normative. Owing to the fact that this thesis aims at finding a complementary domestic mechanisms that can improve the prospect of member states’ compliance with regional human rights decisions, this study in chapter 3 describes the current practice or basic workings of the AHRS with the view to establishing the absence or limited engagement of domestic apparatus in follow-up on compliance. The thesis further proceeded in chapter 4 to describe and analyse the workings of the European and Inter-American human rights systems in relation to the potential effect of the role or engagement of CS in not only promoting compliance but effectiveness of the both systems. The lessons from the latter regions then form the basis where in chapter 5, the thesis suggests and discusses certain domestic modalities (direct and indirect CS engagement) that can be explored as potential mediums to bend and coax states political will. The discussion in chapter 5 reflected the normative purpose for this study.

¹⁵² See generally, C Dent ‘A law student-oriented taxonomy for research in law’ (2017) 48 *Victoria University of Wellington Law Review* 371-388.

1.8 Scope and limitation of study

This study focuses on how engagement of CS can improve compliance with decisions of human rights supervisory mechanisms under the AHRS. As discussed above, a detailed examination on the role of CS in improving compliance in other human rights regions was carried out in chapter four with a view to drawing lessons for the AHRS.

However, the scope of this study was limited primarily to how engagement of CS can be explored to increase domestic cost of non-compliance by exploring certain domestic mechanisms - electoral processes and CS direct mobilization (protest). Therefore, this study was not concerned about the role of other actors, for instance-government and its agencies, human rights NGOs and CSOs that are already engaged in the activities (which includes follow-up on individual communications) of the AHRS. While the thesis identifies other domestic tools that can be equally explored in raising domestic cost – such as strike, boycott, call for referendum, lobby for impeachment, dialogue and consultations, the study only limits itself to a discussion on CS direct and indirect engagement through elections and protests.

As another limitation of this thesis, the framework of the research is not focused on any specific case study but references were made to cases and human rights situations in different countries under the AHRS. This study was also limited to decisions on communication from the supervisory mechanisms under the AHRS; however, owing to the long period of existence and expansive jurisdiction of the African Commission, its decisions are more frequently referred to in this thesis. Only in limited occasions were the decisions of the Court and Committee referred to. Furthermore, it needs to be pointed out that in few instances, references (where necessary) were also made to decisions from other human rights tribunals at the sub-regional level in Africa.

1.9 Outline of chapters

Chapter one comprises the background of study, problem statement, research question, literature review, theoretical framework, methodology, outline and overview of chapters.

Chapter two examines theories which explain factors that motivate state for compliance with international treaty obligations. Upon examination of the different theories, the liberal theory is adopted as the theory that is most consistent and suitable to the focus of this study. See section 2.4 of chapter two below for details.

Chapter three provides details with respect to the first and second research questions. In this chapter, the question as to where the balance of pressure for compliance with decisions of the AHRS lies as between international and domestic forces is addressed. In this context, the chapter examines the basic workings of the AHRS with the aim of knowing not just the sources of pressure but the tools that are often employed in driving compliance under the AHRS. At the end, the chapter concludes that the current source of pressure for compliance under the AHRS is external as the wider domestic communities are not involved in the affairs of the African regional system as well as follow-up process leading to compliance.

Under chapter four the role of CS in enhancing compliance and effectiveness of the European and Inter-American human rights systems is discussed. Through analytical approach, this study investigate to know whether the European and Inter-American human right systems are more effective than the AHRS, if so, it then further examined to know what domestic mechanism(s) contributed or accounted for the high level of compliance and effectiveness recorded in the both regions. After an examination of the different dynamics operational in these regions, the chapter finds an appreciable engagement of CS in the affairs of the system. Hence, the chapter concludes that there are relevant lessons and inspirations that can be drawn to enhance the AHRS practices and operations with respect to widening the space for CS engagement.

Chapter five discusses the possibility of how engagement of CS can be explored to increase the internal legitimacy of the sources of pressure for compliance under the AHRS. And for this purposes, I examined two major types of CS engagement: direct and indirect engagement. Direct engagement relates to the role of CS in raising domestic cost through protest while the indirect engagement relates to how human rights and issues of compliance can be framed as matters of political considerations during elections. So as to raise electoral cost against erring governments that refused to pay attention to issues of societal needs – which may also include non-compliance with rights decisions

Chapter six highlights the major findings of the entire research work, draw conclusions and recommendations.

CHAPTER TWO: THEORETICAL FRAMEWORK: THEORIES ON COMPLIANCE

2.1 Introduction

One issue that has attracted the curiosity of many scholars of international law (IL) and international relations (IR) is the question of what mechanisms or factors motivate states to comply with international obligations and by extension, international human rights law.¹

Despite the assertion of Louis Henkin that ‘almost all nations observe almost all of their obligations almost all of the time’,² the question, what factors determine state compliance with international obligations still remains a theoretical puzzle. Unlike the national legal systems with relatively strong enforcement mechanisms, international law has no central coercive authority to induce state government’s response. Given this lack of established enforcement measures at the international level, the question of which mechanism drives compliance with international obligations deserves scholarly attention.³ Thus, identifying a theory that explains the role of wider CS as one of the potential factors that drives compliance has become even more important.

In the above context, this chapter seeks to set out the theoretical framework for this thesis. In doing this, some compliance theories will be briefly examined. Then, the theory that has the potential to explain how CS can increase domestic cost of non-compliance and become drivers of state compliance with decisions of the African human rights supervisory mechanisms will be adopted as the applicable theory for this thesis. In the context of this thesis (as discussed in section 2.4 below), the liberal theory fits this mold.

¹ K Raustiala & A-M Slaughter ‘International relations and compliance’ in W Carlsnaes *et al* (eds) *Handbook of international relations* (2002) 529-545; J Goodliffe & DG Hawkins ‘Explaining commitment: states and the Convention against Torture’ (2006) 68 *The Journal of Politics* 358-371; OA Hathaway ‘Why do countries commit to human rights treaties?’ (2007) 51 *Journal of Conflict Resolution* 588-621; E Neumayer ‘Qualified ratification: explaining reservations to international human rights treaties’ (2007) 36 *Journal of International Legal Studies* 397; A Chayes & AH Chayes *The new sovereignty: Compliance with international regulatory agreements* (1995) 1-28; TM Franck *Fairness in international law and institutions* (1995) 7-79; JL Goldsmith & E Posner *The limits of international law* (2005) 23-224; AT Guzman ‘A compliance-based theory of international law’ (2000) 90 *California Law Review* 1823-1886; HH Koh ‘Why do nations obey international law?’ (1997) 106 *Yale Law Journal* 2635-2658; OA Hathaway ‘Between power and principle: An integrated theory of international law’ (2005) 72 *University of Chicago Law Review* 469-500.

² L Henkin *How nations behave* (1979) 47.

³ See generally, M Burgstaller *Theories of compliance with international law* (2005) 1.

The theories to be examined are, for purposes of this research, categorized into two broad heads: constructivist/normative and rational choice theories.⁴ Under these categorizations, the following approaches or models are discussed under the constructivist theory. These are: the managerial model otherwise called the ‘Chayeses managerial model’, legitimacy and fairness approach by Franck, ‘transnational legal process’ model by Harold Koh and spiral model by Risse, Ropp and Sikkink. In addition, the realism, institutionalism and liberal approaches or models are discussed under the rational choice theory.

For structural purposes, this chapter is divided into two primary substantive sections. The first section briefly discusses the relevant theories that explain the mechanisms that motivate state compliance while the second section explains the reasons for adopting the liberal theory for this study and then concludes.

2.2 General basis for understanding of compliance

Along a wide range of discussion on what motivates states to comply with their international obligations, Kingsbury explains the central bearing for compliance as follows:

Concepts of compliance depend upon understandings of the relations of law, behavior, objectives, and justice. These relations are of central importance to the real-world problems with which international lawyers are habitually concerned, and must be theorized before there can be any true theory of compliance.⁵

⁴ There is no hard and fast rule for this categorization; the choice of classification is a question of personal structural style, for instance, see the different categorization of theories in the following literature: C Soohoo & S Stolz ‘Bringing theories of human rights change home’ (2008) 77 *Fordham Law Review* 470 (categorizing theories into two: realist and constructivists); K Raustiala ‘Compliance and effectiveness in international regulatory cooperation’ (2000) 32 *Case Western Reserve Journal of International Law* 399 (categorizing them into three: rationalist or utilitarian state-actor theory, norm-driven or sociological theory and domestic or liberal theory); Koh acknowledges five types of classifications: coercion, self-interest, legitimacy, communitarianism, and discursive legal processes, see, H Koh ‘Bringing international law home’ (1998) 35 *Houston Law Review* 633-634; H Koh ‘How is international human rights law enforced?’ (1999) 74 *Indiana Law Journal* 1397; another scholar’s work capture three models, for this, see I Hurd ‘Legitimacy and authority in international politics’ (1999) 53 *International Organization* 379; Checkel recognizes two approaches which includes the ‘rationalist’ (which includes: coercion, cost/benefit calculations, and material incentives) and ‘constructivist’ (also includes: social learning, socialization, and social norms), for details, see JT Checkel ‘Why comply? Social learning and European identity change’ (2001) 55 *International Organization* 553; Ayeni also recognized two broad categories: rational choice and constructivist or normative. See V Ayeni ‘Introduction and preliminary overview of findings’ in V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 1-13; see also Burgstaller (n 3 above) 85.

⁵ B Kingsbury ‘The concept of compliance as a function of competing conceptions of international law’ (1998) 19 *Michigan Journal of International Law* 356.

In a more specific manner, Burgstaller offers three main reasons that motivate states to comply: first, states might comply to avoid being sanctioned or punished within the framework of rule enforcement; second, a cost-benefit analysis of states' self-interest; and third, states acceptance that the rule to be complied with and the institution from which the rule emanates is legitimate and offers prospect for future cooperation.⁶ In the following, details of the above analysis will be explained in the theories discussed below.

2.3 Taxonomy of theories on compliance

Flowing from the discussions in section 2.1 above, it must be noted that the theories below explain different mechanisms that drive compliance with international obligations as contained in treaty agreements and not specifically with respect to compliance with rights decisions from human rights monitoring/supervisory mechanisms. Owing to the scarcity of scholarship in the latter context, one may find an empirical framework and insights from the following theories which could be adapted and applied in explaining the factors that may motivate member states compliance with human rights decisions from supervisory mechanisms which exist, (in this context) under the AHRS.

2.3.1 Constructivist/normative theory

Constructivism and normative theory operates and applies within the arena of IR particularly with respect to the dynamics of social values, ideas and norms that construct and influence state's identity and preference at the international level.⁷ Scholars whose approach fall under this category argue that a state's compliance with treaty obligations is not determined by state self-interest or some sort of political and economic calculations or relative influence of domestic forces. They contend that what matters is an understanding of the influence and significance of ideas of international law and 'the persuasive powers of legitimate legal obligations' which seems to be lacking in other theories.⁸

As a starting point, the theory on rule legitimacy which is a strand of constructivism proposes that a rule or an international norm attracts greater compliance when the rule is perceived by national

⁶ Burgstaller (n 3 above) 85-93; M Burgstaller 'Amenities and pitfalls of a reputational theory of compliance with international law' (2007) 76 *Nordic Journal of International Law* 46-52.

⁷ See generally S Akarsu 'Constructivism vs normative theory vs neorealism' available at https://www.academia.edu/9273883/Constructivism_vs_Normative_Theory_vs_Neorealism (accessed 16 October 2018).

⁸ OA Hathaway 'Do human rights treaties make any difference?' (2002) 111 *The Yale Law Journal* 1955.

state actors to be legitimate and possess features of legitimacy from a legitimate institution. As Franck argues, ‘legitimacy is a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process’.⁹

Against the above background, Franck uses ‘legitimacy’ as a basis to argue that the determinant for compliance with international law or norm is the potential norm’s ‘compliance pull’ arising from a question of whether the norm is perceived to be legitimate by the people to whom it applies.¹⁰ The central bearing for norm driven or legitimacy theory is that gross violation of human rights norms (which is considered legitimate and fair) amount to ‘greater gravity of a trespass against a major public policy of the community’.¹¹ One major argument in this approach is not whether member states have the incentive to comply, rather, whether states consider (a) the norm or the specific rights decision to be fair enough and (b) whether the issuing institution is legitimate for its decision to deserve compliance. These align with Franck’s assumed question of whether international law is fair as opposed to the question of whether states do comply with international obligations or not.

According to Franck, when the above factors are inherent in a rule or norm, then, compliance is likely. To determine whether a rule or norm is legitimate and fair, Franck identifies four factors that should be taken into consideration. These factors are: ‘rule determinacy, symbolic validation, coherence and adherence’.¹² Owing to the challenge of non-compliance earlier discussed (see section 1.1 and 1.2 of chapter one above), Franck’s postulation could be understood to mean that African states do not always comply because they perceive the rights institutions and their outputs (which relates to the quality of the decisions) to be illegitimate, this is owing to claims that most decisions are overwhelmingly influenced by western powers.¹³ Much as this theory promotes

⁹ TM Franck *The power of legitimacy among nations* (1990) 24.

¹⁰ Burgstaller (n 3 above) 101.

¹¹ Franck (1995) (n 1 above) 124; Hathaway (n 8 above) 1959.

¹² TM Franck ‘Legitimacy in the international system’ (1988) 82 *American Journal of International Law* 705, 712; for related literature, see PR Trimble ‘International law, world order, and critical legal studies (1990) 42 *Stanford Law Review* 811, 833.

¹³ This forms the major argument of C Odinkalu as discussed in section 1.1 of chapter 1 above; see also F Viljoen *International human rights law in Africa* (2012) 294 (referencing a comments from Zimbabwean delegate over the Commission’s resolution issued against Zimbabwe. A statement which queries the Commission’s credibility on the assumption that its agenda and general decisions are being influenced by western governments).

certain features relevant to this study, for instance, a consideration of legitimacy by CS as one of the bases for exerting pressure to induce states' compliance, a more encompassing approach/theory will be most appropriate in the context of this thesis. For example, a theory which recognizes a disaggregation of the state structure and identifies CS as one of the domestic forces that can raise domestic cost against erring states. For these reasons, while this theory may provide useful insights in framing my overall arguments, it does not capture the entire focus of this study. From a different perspective, the Chayese in their managerial theory,¹⁴ argue that states have a tendency to comply with international rules except for the existence of certain defects, inherent pitfalls or some other external variables embedded in the rules which could potentially dissuade state actors from complying. Further into their argument, they claim that the following factors could be responsible for state non-compliance: lack of proper interpretation to ambiguous norms or rule ambiguity and 'indeterminacy of treaty language' (in the context of this study, lack of clarity or vagueness of rights decisions), limitation on state capacity to meet requirement for compliance (budgetary constraints), time lags, unanticipated and most times - unavoidable social, economic and political changes (for instance, change of government, epidemic outbreak and poor domestic reception towards the rights decisions).¹⁵ In the above regards, in order to improve compliance, the Chayeses' present two models: enforcement and managerial models. They however suggest that the 'enforcement model' should be replaced with the 'managerial model' because the latter involves the use of 'iterative process of discourse among the parties, treaty organization and the wider public'.¹⁶

In this context, they further recommend that states can adopt certain mechanisms to help in improving compliance. These mechanisms include: transparency, reporting, monitoring, dispute settlement, strategic review and strengthening capacity for compliance, etc.¹⁷ This model also envisions a situation (as opposed to means of sanction and coercion by powerful states) where strong nations persuade violating states to comply by providing some kinds of cooperative, technical or financial assistance or information on security aids and mutual interpretative dialogue

¹⁴ Chayes & Chayes (1995) (n 1 above) 15; Chayes & Chayes 'On compliance' (1993) 47 *International Organization* 204.

¹⁵ Chayes & Chayes (1995) (n 1 above) 9-17.

¹⁶ Chayes & Chayes (1995) (n 1 above) 25.

¹⁷ Chayes & Chayes (1995) (n 1 above) 135.

to violating laggard countries that lack the wherewithal to meet their human rights obligations.¹⁸ For instance, a state may fail to comply with international obligations for reasons of budgetary constraints and other internal limitations. Going by Chayeses' model, the non-compliant state can then be encouraged by a stronger nation with the required assistance needed for compliance. Although the Chayeses' model is quite compelling, it leaves open the question whether powerful nations really do care about human rights violations of individuals in relatively smaller countries especially when such violations do not affect the object of cooperation. In another sense, it may be asked: should powerful nations or external bodies be more concerned about violations and non-compliance with adverse decisions than the affected individuals which constitute the wider CS in the non-compliant state? In view of these concerns, the theory cannot sustain the main thrust of this thesis since the theory explains and therefore favors a role for external actors' more than internal actors – the very model that this thesis hopes to move away from.

As another strands of the constructivist or normative theory, Koh in his theory on transnational legal process, argues that compliance is triggered when a repeated transnational legal process (involving domestic and international actors or partners) which leads to internalisation of norms occurs. While this iterated legal process among cooperation partners could over time lead to internalisation of norms, Koh identifies certain factors that could influence compliance. These factors are categorized as follows: power, coercion, self-interest, communitarian and legal process.¹⁹ These factors may occur in the following sequence beginning from interaction, interpretation and internalisation. Koh further explains this process thus:

One or more transnational actors provoke an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system. The aim is to bind that other party to obey the interpretation as part of its internal value set. Such a

¹⁸ Raustiala (n 4 above) 407; with regards to several arguments on the ineffectiveness of deterrence measures for compliance with environmental regulations, see C Rechtschaffen 'Deterrence vs. cooperation and the evolving theory of environmental enforcement' (1998) 71 *Southern California Law Review* 1181-1187, 1203-1216 (arguing, amidst different criticisms, that deterrence measures has some plausible records for compliance however, it is suggested that integrating some constructive features of cooperative model for compliance is more flexible and tenable); SP Baumgartner 'Does access to justice improve countries' compliance with human rights norms? - an empirical study' (2011) 44 *Cornell International Law Journal* 452.

¹⁹ Koh (1999) (n 4 above) 1407-1408, 1416-1417.

transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties: future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process²⁰

This iterative interaction as Koh believes, could crystalize over time to norm internalisation through judicial interpretations and legislative reforms, acceptance or reception of norms by political elites and domestic forces. When this happens, the final stage of this iteration becomes norm obedience, acceptance or compliance. Indeed, Koh enjoins a broader CS to be engaged in fostering compliance by exploring different mechanisms which include: not just power, coercion, rule legitimacy, communitarian factors and legal process but a combination of all of these factors and processes.²¹

As could be deduced from the above, member states compliance with rights decision could be triggered by transnational legal process involving different layers: the court from where the decision emanates, the domestic political structures acting through the executive, legislature and the judiciary and the domestic constituents who then generates self-reinforcing pattern of compliance - to raise domestic cost of non-compliance against state actors. As could be seen from the above, Koh's theory presents certain tenets similar to Franck's legitimacy approach (as discussed above) particularly as it relates to norm internalisation (a sort of legitimacy) arising from transnational interactions. In other words, compliance could be induced through a repeated transnational process involving state – through the domestic institutions and non-state actors. And in this process, the tools that may be explored to induce compliance as stated earlier may include power, coercion, self-interest and legal process. From the above explanations, the simple question that comes to mind is: where lies the place of CS as a potential domestic player in raising domestic cost independent of elements of coercion, power and interaction with state actors? Obviously, the interest of domestic constituency is undermined; therefore, this theory does not fit the focus of this study.

As another ambit of the constructivism/normative theory, Risse, Ropp and Sikkink argue that states may change their behavior towards compliance with treaty norms in different phases. At

²⁰ Koh (1997) (n 1 above) 2646; for related work on this model, see Koh (1998) (n 4 above) 623; Koh (1999) (n 4 above) 1397; HH Koh 'A United States human rights policy for the 21st century' (2002) 46 *Saint Louis University Law Journal* 293.

²¹ Koh (1999) (n 4 above) 1407-1408, 1416-1417.

the beginning, states that are involved in repressive policy with high level of apathy towards compliance, may over time change their behavior when subjected through the different phases of socialisation – when they begin to adopt a more democratic and human rights policies. Theorists of this model acknowledge that the process of migrating from norm violation and non-compliance with human rights decisions to acceptance of norms, institutionalisation and consequently internalisation of norms may involve a five-phase progression that finally leads to state compliance,²² this process is called a ‘spiral model’ of human rights change.

These progressions occur through stages of: ‘repression, denial, tactical concession, prescriptive status and rule-consistent behavior’ which then lead to norm obedience as the end result.²³ The application of these processes starts when government repression has become a common practice. In consequence, government refusal to address violation and non-compliance with rights decisions then trigger the concern of human rights activists who explore their informational status in politics to pressure government for change. At the beginning, government denies repression, and then later concedes to make some tactical concessions. Domestic actors then leverage on government initial concession to demand for more change of behavior. For instance, government may be asked to transform national legislature and to improve on human rights practices to conform to international standard. With consistent pressure from domestic actors, states may begin to adopt a rule consistent behavior by internalising human rights norms and improve behavior towards rights decisions. This model emphasises the role of transnational human rights activists using different mechanisms to persuade government to comply.

As indicated above, the tenets embedded in all these strands of constructivism theory as discussed do not present a suitable theoretical framework for this thesis. First and most importantly (in addition to the reasons earlier discussed) they all lack the features to explain how CS can employ domestic tools and raise domestic cost which threatens state actors to comply with rights decisions and change behavior towards human rights norms. Second, the constructivist theorists consider the state as a unitary entity; therefore, they could not envisage the possibility of disaggregating the state from the different components embedded in it. This is one stirring aspect of the liberal theory (discussed below) that recognises the state’s components (rather than the

²² R Linde ‘Statelessness and Roma communities in the Czech Republic: Competing theories of state compliance’ (2006) *13 International Journal on Minority and Group Rights* 343-344.

²³ T Risse, SC Ropp & K Sikkink *The power of human rights* (1999) 8-16; Baumgartner (n 18 above) 451.

state as a unitary actor) as drivers or pressure sources of compliance. In the following, the models under the rational choice theories are discussed.

2.3.2 Rational choice theories

Rational choice theorists centrally maintain that compliance is a function of state self-interest, material incentives based on cost-benefit calculations and institutional capacity. Variants of rational choice theories include realist, institutionalist, and liberal models.

(a) Realist theory

For realist theorists, compliance is a question of state choice, coercion and influence of external powers. This choice is determined either by state self-interest or the interest of a more powerful state.²⁴ As Hathaway explains, ‘if compliance with international law occurs, it is not because the law is effective, but merely because compliance is coincident with the path dictated by self-interest in a world governed by anarchy and relative state power’.²⁵ For the most part, however, realist theorists are somewhat pessimistic about compliance being a function of domestic engagement or mobilisation of any sort. They focus on: (a) coercion by dominant states and compliance by coincidence: that is, (in their conception of compliance) no state is believed to change rights behavior in response to human rights treaty independent of some exogenous factors²⁶ or (b) where compliance is induced by a particular incentive (most times, when economic gain is anticipated) beneficial to state’s interest either in a short or long-term analysis.²⁷ In all, the main assumptions of the realist theory is that compliance is based on state self-interest, incentives, influence of hegemonic power, economic benefit, reputational concerns, coercion, coincidence, coordination and cooperation. One attribute that distinguishes this theory from others is the fact that the realist approach strongly indicate that state obedience to requirement of international human rights law is likely a function of coincidence or coercion rather than impact of the law or other domestic

²⁴ See the following: OR Young ‘The effectiveness of international institutions: Hard cases and critical variables’ in JN Rosenau & E-O Czempel (eds) *Governance without government: Order and change in world politics* (1992) 160; HJ Morgenthau *Politics amongst nations: The struggle for power and peace* (1978); OR Young *Compliance and public authority: A theory with international applications* (1979); Henkin (n 2 above); H Simon *Models of man: Social and rational-mathematical essays on rational human behavior in a social setting* (1957) 200-204.

²⁵ Hathaway (2002) (n 8 above) 1945-1946.

²⁶ Goldsmith & Posner (n 1 above) 111-117; A Moravcsik ‘The origins of human rights regimes: Democratic delegation in postwar Europe’ (2000) 54 *International organization* 217, 220-221.

²⁷Linde (n 22 above) 343.

factors. In other words, international human rights treaty does not affect state behavior except when the interest of the state or powerful state will be at stake for acting otherwise.²⁸

All these considerations underlie the central arguments by some scholars whose works focus on compliance with international human rights law. For instance, Guzman states that compliance is determined by the question of state reputation, retaliation, reciprocity, and threat of sanction or through effective international tribunals.²⁹ Hafner-Burton and Hathaway similarly assert that states respect and comply with their international obligations (as contained in treaties that have been ratified) either to avoid the attendant result of ‘collateral consequences’ or for purposes of other economic incentives.³⁰ In a more precise manner, Raustiala contends that compliance is a function of a change in state behavior arising from nature of the problem (problem structure); the choice of solution (solution structure) adopted by state putting into consideration the ‘cost -benefit associated with different behavior’.³¹ Similarly, Goldsmith and Posner argue that ‘the best explanations for when and why states comply with international law is not that states have internalised international law, or have a habit of complying with it or are drawn by its moral pull, but simply that states act out of self-interest’³².

From the realist perspective, state complies when the benefit of compliance far outweighs the anticipated cost of non-compliance. Therefore, the *raison d’être* for state’s action is based on a calculation of self-interest and other factors stated above which can resultantly influence social behavior of state towards compliance.³³ This implies that beyond state self-interest, it is argued

²⁸ See generally the views expressed by Hathaway (2002) (n 8 above) 1946-1947.

²⁹ AT Guzman (2000) (n 1 above) 1849 (where he comprehensively explained how international law influences state social behavior); AT Guzman ‘International tribunals: A rational choice analysis, (2008) 157 *University of Pennsylvania Law Review* 171-236 (he argues that international tribunals are one of the tools or sources for promoting compliance with international norms); AT Guzman ‘The design of international agreements’ (2005) 16 *European Journal of International Law* 579; Guzman (2000) (n 1 above) 1823 (where he argues that states are rational and self-interested entity, hence they consider reputational cost as factor to decide whether or not to comply with international rules). For a review of Guzman’ work, see A Geisinger and M Stein ‘Rational choice, reputation, and human rights treatise’ (2008) 106 *Michigan Law Review* 1129-1142.

³⁰ Hathaway (2005) (n 1 above) 506 (he argues that in addition to other cost of non-compliance, state also put into consideration other collateral consequences which includes foreign aids, trade and other consequential benefit attached for being a member of a treaty); EM Hafner-Burton ‘Trading human rights: How preferential trade agreements influence government repression’ (2005) 59 *International Organization* 633.

³¹ Raustiala (n 4 above) 405.

³² Goldsmith and Posner (n 1 above) 225.

³³ B Chapman ‘The rational and the reasonable: Social choice theory and adjudication’ (1994) 61 *University of Chicago Law Review* 41; for further analysis of rational choice theory, see P Anand *The nature of rational choice and the foundations of statistics* (1991) 199-210; AK Sen ‘Rationality and uncertainty’ (1985) 18 *Theory and Decision*

by realists that norm internalisation through actor's social identity ('logic of appropriateness' LoA) cannot influence compliance because state action is driven by 'logic of consequences' (LoC).³⁴ In this context, it could be asked: if states engage cost benefit calculations in the build up to the decisions on whether to comply or not, could CS not leverage on the cost benefit analysis to raise higher cost of non-compliance to such a level where compliance becomes most attractive? After all, as Donnelly argues:

[A]lthough international action has had, and continues to have, an impact on the realization of human rights; its role is ultimately subsidiary. The fate of human rights is largely a matter of national, not international action [not the influence of hegemony powerful states as realists claim]³⁵

On a final note, as realist theorists contend, state motivation for compliance is a function of a diligent calculation of the cost-benefit (as it concerns anticipated gains or losses) for compliance or non-compliance.³⁶ As sound as these arguments may appear, this theory does not present a plausible platform in the context of this thesis.

This conclusion is drawn from the fact that first, realist theorists assume that the state is a monolithic independent entity (primary actor) having a round of iteration with other states alike within the international community, meanwhile, the focus of this thesis is driven into considering CS as potential drivers of compliance exploring domestic tools to raise domestic cost of non-compliance against violating state. Second, this version of rational choice theory has more explanatory power in monitoring and punishing uncooperative behavior of cooperation partners within the sphere of international relations where mechanisms for reciprocity, cooperation benefits, reputational considerations and sanctions are visible. On the contrary, the possibility that these enforcement mechanisms will be applicable in the domain of international human rights law

109, 110-11; D Chong 'Rational choice theory's mysterious rivals' (1995) 9 *Critical Review* 37-57; Ferejohn and Satz 'Unification, universalism, and rational choice theory' (1995) 9 *Critical Review* 71.

³⁴ This term 'logic of consequence' (LoC) implies that states actions are majorly depended on calculation of expected returns or interests and alternative choices as 'measured against prior preferences', these preferences may be materially or economically, or politically valued. In contrast therefore, 'logic of Appropriateness' (LoA) refers to when human action is driven by a sense of social identity and values, for instance, when members of society choose to follow a rule because the rule is perceived to be natural, valid, moral, legitimate and ethical. Then, it can be said that their actions are driven by (LoA). For this, see JG March and JP Olsen 'The institutional dynamics of international political orders' (1998) 52 *International Organization* 949-952; A Alkoby 'Theories of compliance with international law and challenge of cultural difference' (2008) 4 *Journal of International Law and International Relations* 166.

³⁵ J Donnelly 'Human rights: The impact of international action' (1988) 24 *International Journal* 241.

³⁶ See for instance, A Hasenclever, P Mayer & V Rittberger 'Theories of international regimes' (1997) 55 *Cambridge Studies of International Relations* 26.

and by extension human rights decisions is unlikely; this is due to the fact that the nationals and residents of states are the obvious beneficiaries of compliance and in most cases, the potential victims of non-compliance with human rights decisions.³⁷ Therefore, the possibility that other cooperation partners' or powerful states will employ these mechanisms to punish another state for violating the human rights of the latter's own nationals and residents is unlikely.

(b) Institutional theory

In some parts, institutionalist theorists share similar assumptions with realist theorists by arguing that (a) states are considered as rational primary actors of IR within the international system (b) they also consider a game theoretic approach of iterative co-ordination with other states within a particular institutional framework as the basis for compliance.³⁸ However, institutionalists reject to a great extent, the pessimistic viewpoints of realist theory about compliance. They believe, contrary to realist underpinning assumptions, that states conscientiously come together to establish institutions, norms and principles within a particular legal framework where actors' interest converge, these institutions then make rules and regulations that guide the conduct and behavior of its members which consequently lead to compliance.³⁹

They further posit that a number of factors may account for state's commitment to international institutions or rules. These factors may include state cooperation, reputation, coercion and reciprocity.⁴⁰ Within this cooperation framework, member states may comply with institutional rules because the rules are perceived to be an offshoot of the institutions created by them.⁴¹ Owing to this sense of engagement in the establishment of the institutions - which denotes sense of ownership and legitimacy of the institutions, there is the likelihood that member states may tend to change their social behavior in response to institutional rules.⁴²

³⁷ Baumgartner (n 18 above) 447-448.

³⁸ Burgstaller (n 3 above) 99.

³⁹ RO Keohane *After hegemony* (1984); D Snidal 'The limits of hegemonic stability theory' (1985) 39 *International Organisation* 579.

⁴⁰ AM Slaughter 'International relations, principal theories' in R Wolfram (ed) *Theories in Max Planck Encyclopedia of Public International Law* (2011) 37.

⁴¹ RO Keohane *After hegemony: Cooperation and discord in the world political economy* (1984); see also Snidal (n 39 above) 579; Baumgartner (n 18 above) 447-448.

⁴² Keohane 'International relations and international law: Two optics' (1997) 38 *Harvard International Law Journal* 490.

From the institutionalists perspective, compliance with international human rights obligations occurs in diverse ways, as Powell states:

...by rewarding states that develop reputations for adherence to international rules; by creating greater interdependence between states thereby raising the cost of cheating; by increasing the amount of available information to ensure effective monitoring of adherence and early warning of cheating; and by reducing the transaction costs of individual agreement thereby making cooperation more profitable for self-interested states.⁴³

The question remains: to what extent does institutionalist theory determine compliance with human rights treaties and by extension human rights decisions? Baumgartner states that ‘all of these incentives are considerably less strong in the area of human rights than they are with regards to treaties that involve a true *quid pro quo* among treaty partners’.⁴⁴ Owing to the fact that this theory has limited impact in area of international human rights protection, it therefore contrasts the focus of this thesis and cannot form the theoretical framework.

(c) Liberal theory

Liberal theory maintains (to some extent) the same creeds like its rational choice counterparts: realism and institutionalism. The major point of divergence is that liberal theory does not promote the state-centric approach which forms one of the core assumptions of the rational choice theory. Liberal theorists are primarily concerned about the formation of state structure and preferences, these preferences represent the interest of non-state actors.⁴⁵ In this regard, liberal theory advocates the need for the state structure to be disaggregated in order to identify all components embedded in it. This argument is due to the fact that a state is designed to function in a representative capacity, to respond and be accountable to the interest of the domestic non-state actors,....[their] ‘underlying identities, interests, and power of individuals and groups inside and outside the state apparatus’.⁴⁶ As a result, recognising domestic institutions within the state helps to determine which domestic groups or individuals with the potentials to influence state

⁴³ C Powell ‘United States human rights policy in the 21st Century in the age of multilateralism’ (2002) 46 *Saint Louise University Law Journal* 421-425.

⁴⁴ Baumgartner (n 18 above) 448.

⁴⁵ A Moravcsik ‘Taking preferences seriously: A liberal theory of international politics’ (1997) 51 *International Organization* 513, 516-520.

⁴⁶ Moravcsik (n 45 above) 518.

preferences.⁴⁷ However, while it is believed that individuals and group mobilisation can with ease influence state policy in democratic states, it is doubtful if ‘individual preferences can hold sway in autocracy or military regime’.⁴⁸ Due to the relevance placed on the role of individuals and domestic groups within a state as one of the causal agents for compliance, liberal theory argues that their impact in advancing human rights in democratic states is more likely than in undemocratic states.⁴⁹ However, this argument could also be framed differently. For instance, if in the international arena, domestic preference is what emerges as the state’s interest, even when it may not be the preferences of the majority (which democratic ideals would suggest should be the case) - it is still the case that the state is inanimate entity so that it does not have any real interest of its own. Therefore, what comes out at the end, in reality, is the interest of the most powerful domestic constituency, which may or may not be the majority view. So that either ways, it is the individual preferences of domestic constituencies, all else equal, that emerge as state interest whether in a democracy or in an autocracy or military regime.

Writing on the importance of the liberal theory under the European Human Rights regime, Moravcsik extensively posits as follows:

A Liberal analysis of the European human rights regime suggests that the distinctive institutional practices on which its remarkable record of success rest depend on the prior convergence of domestic practices and institutions. The unique mechanisms of the European system, in particular its finely- grained system of individual petition and supranational judicial review, function not by external sanctions or reciprocity, but by ‘shaming’ and ‘coopting’ domestic law-makers, judges and citizens, who then pressure governments for compliance. The decisive causal links lie in civil society: international pressure works when it can work through free and influential public opinion and an independent judiciary. The fundamental social, ideological and political conditions that give rise to active civil societies and representative political institutions, which in turn contribute

⁴⁷ AM Slaughter ‘International law in a world of liberal states’ (1995) 6 *European Journal of International Law* 503, 517; AM Slaughter Burley ‘International law and international relations theory: A dual agenda’ (1993) 87 *American Journal of International Law* 205, 228-229.

⁴⁸ Moravcsik (n 45 above) 518.

⁴⁹ Hathaway (n 8 above) 1954; RO Keohane ‘When does international law come home?’ (1998) 35 *Houston Law Review* 699, 709-711 (arguing that the presence or absence of liberal democracy in a country is an important variable to consider in determining the question of when a theory of international law becomes internalized into domestic law).

decisively to the extraordinarily high rate of membership and compliance enjoyed by the European human rights regime, are distinctive to advanced industrial democracies⁵⁰

Baumgartner similarly maintains that ‘as far as implementation of human rights norms [is concerned], liberal theory focuses on the existence of individuals and groups that are able and willing to pressure the government to comply with its human rights commitments’.⁵¹ In this regard, it is suggested that for a proper enforcement of international human rights decisions; individuals and groups should be engaged to raise domestic cost against non-compliant states, to have space for supranational litigation at international or regional tribunals and to ensure that international decisions are enforced by domestic courts even when laggard governments are resistant.

For the liberal theorists, the claim of individuals and their relative powers are considered as the driving force behind government policies. Therefore, the determinant for compliance is not on the basis of state self-interest as realists maintain, rather as a result of pressure from domestic constituents whose direction, the state follows.⁵² The reason for this conclusion flows from the underlying argument that every state is deeply-rooted in an ‘independent domestic and transnational society that decisively shapes the basic purposes or interest that underlie its policies, its interaction with other states and ultimately, with regards to international conflict and order’.⁵³

From all indications, liberals tend to advance the significant role and impact of domestic structure: individuals, corporations, non-governmental organizations, trans-national networks and groups with political and economic ideology, as driving forces behind state compliance with international obligations. They further argue that these domestic components exist in liberal states and they operate in an ‘international zone of law’ and not in a ‘zone of politics’.⁵⁴

From the above, it can be deduced that liberalists are concerned about respect for rule of law, disaggregation of state structure to identifying the domestic units embedded in it and reverence

⁵⁰ A Moravcsik ‘Explaining international human rights regimes: liberal theory and Western Europe’ (1995) 2 *European Journal of International Relations* 158.

⁵¹ Baumgartner (n 18 above) 449-450.

⁵² Moravcsik (n 45 above) 520 (arguing that ‘the configuration of interdependent state preferences determines state behavior’).

⁵³ A Moravcsik ‘Liberal theories of international law’ 83-84 available at https://www.princeton.edu/~amoravcs/library/int_law.doc. (accessed 9 November 2017).

⁵⁴ Slaughter (1995) (n 47 above).

for domestic structure. All these factors are critical in determining change in state behavior towards compliance.⁵⁵

To further understand the deepness of the liberal theory, the following underpinning assumptions give some salient insights.⁵⁶ These assumptions are discussed as follows:

(a) The liberals assume that society is made up of different components that determine the tides of politics in the world. These components include the individuals and constituted groups whose ultimate aim is to promote their independent interests. It is further argued by liberals that ‘under specified condition, individual incentives [and not the state-self-interest] may promote social order and the progressive improvement of individual welfare’.⁵⁷ This assumption should not be perceived to mean that states’ role as primary agents of international law is undermined’, admittedly, ‘once state interests are determined, governments do pursue them in a rational unitary fashion, however, the underlying sources of those interests is social rather than systemic’.⁵⁸

Again, at the international level, it is unclear if the individual driven standard (as opposed to state centric-approach) is sustainable in view of the general knowledge, that in most cases, states are the parties to international treaties, therefore, ‘while many treaties now address the rights and duties of individuals, only a few agreements actually establish rights and obligations that may be directly enforced by individuals’.⁵⁹ However, in the context of the predictions of this theory, the presence of domestic constituencies should not be understood to mean cessation of the state, rather, what comes as the state interest should be understood as the interest of vibrant and powerful domestic constituency. This is owing to the fact that the state is inanimate and as such, does not possess its own will or self- interest but the people do.

⁵⁵ LR Helfer & AM Slaughter ‘Toward a theory of effective supranational adjudication (1997) 107 *Yale Law Journal* 273-331; Moravcsik (n 45) 513; Raustiala (n 4 above) 409-410.

⁵⁶ For scholarly works on this theory, see for example, Slaughter (n 47 above) 507-510; AM Slaughter Burley ‘Law and the liberal paradigm in international relations theory’ (1992) *American Society of International Proceedings* 180-186; AM Slaughter Burley ‘International law and international relations theory: A dual agenda’ (1993) 87 *American Journal of International Law* 227; AM Slaughter AS Tulumello and S Wood ‘International law and international relations theory: A new generation of interdisciplinary scholarship’ (1998) 92 *American Journal of International Law* 367; Moravcsik (n 45 above) 513; A Moravcsik ‘Liberal international relations theory – A social scientific assessment’ Weatherhead Center Working Paper Series No. 01 (2001).

⁵⁷ Slaughter Burley (1993) (n 56 above) 227.

⁵⁸ Burgstaller (n 3 above) 166; Slaughter Burley (1993) (n 56 above) 227.

⁵⁹ Burgstaller (n 3 above) 186.

This assumption places emphasis on the fact that liberal theory ‘rests on a bottom-up view of world politics in which the quest of individuals and societal groups’ are considered most critical. They form the basis for states preference in world politics and international relations. This is due to the understanding that political strength is inherent in domestic and transnational CS, ‘understood as an aggregation of rational individuals with differentiated tastes, social commitments, and resource endowments’.⁶⁰

Understanding this assumption from a sociological perspective, it can be admitted that ‘socially differentiated individuals’ define their material and ideational interests independently of politics and then advance those interests through political exchange and collective action’.⁶¹ A key insight to this assumption is the identity of socially domestic individuals and the group as determinants of state policy and therefore, the driving force behind state compliance with international obligations.

(b) As it concerns the second assumption, all governments whether military dictatorship, oligarchies or democracies, represent some fragment of domestic society. In this context, state policy, all things being equal, is determined by interest of the domestic society. Under this assumption, liberals tend to establish a correlation between the individual and domestic group actors on the one hand and transnational society and states’ behavior on the other hand.⁶² Simply put, this assumption presents two issues for consideration: pattern of interest and whose interest takes precedent. Is it the interest of CS or government office holders?⁶³ However, considering the major arguments of the liberal theory as discussed above, every type of government reflect certain domestic interest; which in effect implies that the collective interest of CS will prevail only when they are able to exert more influence and pressure on the government. But where the CS is relatively less powerful and cannot exert such interest, the interest of the office holders and or their influential friends becomes the state interest.

This assumption further presents, as earlier mentioned, a ‘bottom–up’ approach where the state, *stricto sensu*, is not considered as the primary actor in domestic politics but a ‘representative institution constantly subject to capture and recapture, construction and reconstruction by

⁶⁰ Burgstaller (n 3 above) 166.

⁶¹ Burgstaller (n 3 above) 166-167.

⁶² Burgstaller (n 3 above) 166.

⁶³ Burley (n 47 above) 228.

coalitions of social actors'.⁶⁴ This is not to mimic the relevance of state structure because, in certain circumstances, they still act either as a 'unitary actor' or a disaggregated structure.⁶⁵ In consequence, States may not necessarily or automatically 'possess constant and homogenous conceptions of security, sovereignty, or wealth *per se*', rather they pursue particular interpretations/ interest and sometimes a combination of numerous interest - say for instance: 'security, welfare, and sovereignty preferred by powerful domestic groups or institutions and practices'.⁶⁶

(c) Slightly different from others, the third assumption is concerned about the state behavior *vis á vis* pattern of state preferences. By implication, this theory assumes that interest of social groups and individuals determine the make-up of state preferences in its international trading or transactions.⁶⁷

A further analysis of this assumption reveals a three-fold variant: ideational, commercial and republican variants.⁶⁸ While ideational liberals focus on acceptance of 'domestic social identity and value' as a factor that determines state preference, commercial liberals stress that market forces, its dynamics in domestic and international economy determine the behavior of state and by consequence, its policy preference. In another vein, the republican liberal approach which is directly linked with the focus of this thesis emphasises the ways in which domestic institutions and other related factors aggregate certain demands which aligns with domestic interest, and transform them into state policy'.⁶⁹ The essential element of republican liberalism is the fact of democratic representation which again, answers the question of whose social preferences matters.

Furthermore, liberal theory identifies two kinds of states. And in determining whether successful mobilisation of CS in leveraging on rights decisions from regional courts would improve rights protection and compliance, a discussion on the effects of the liberal theory in these categories of

⁶⁴ Burgstaller (n 3 above) 167.

⁶⁵ Burgstaller (n 3 above) 168 (arguing that in area of foreign policy, there exist strong co-ordination among state officials and political leaders, however, in a disaggregated sense, state acts through different domestic components: executive, courts and central banks (CB), these components perform 'semi-autonomous foreign policies of disparate societal interests'. See also Slaughter Burley (n 47 above) 512-514.

⁶⁶ See generally, the reviewed work by JG Ruggie 'Continuity and transformation in the world polity: Toward a neorealist synthesis' (1983) 35 *World Politics* 261-285.

⁶⁷ Burgstaller (n 3 above) 166.

⁶⁸ Moravcsick (1997) (n 45 above) 513.

⁶⁹ Moravcsick (1997) (n 45 above) 530.

states would be necessary. These states includes liberal and non-liberal states. Liberalists (particularly Slaughter and Moravcsik) argue that liberal states are more disposed to comply with international legal obligations than non-liberal states.⁷⁰ The rationale behind this argument, perhaps, could be that liberal theory considers ‘state’s identity as somehow exogenously or permanently given’.⁷¹ Similarly, as it concerns the effectiveness of supranational tribunals, Helfer and Slaughter argue that democratic states tend to comply more with decisions of supranational tribunals than undemocratic regime.⁷²

They further contend that the democratic culture of member states of the Council of Europe greatly contributed to the incremental success of the European Court of Human Rights (ECtHR).⁷³ As sound as the above arguments may appear, the liberal theory seems to have fallen short in some respect. For instance, what are the parameters to determine a liberal state?⁷⁴ Can compliance records of a state automatically translate the identity of that state from non-liberal to a liberal state? This may seem not possible because, the fact that more compliance records are expected in democratic states does not mean that all compliant states are more democratic or *vice versa*. The following example may explain this point more clearly. For instance, if you consider that that the United States’ compliance record in international law is not very positive and the fact that both Zimbabwe and Nigeria have been known to comply more with decisions of regional bodies (especially when it suits their fancy), an application of the parameters could lead to the false conclusion that Zimbabwe and Nigeria are liberal states whereas the US is not. And that conclusion becomes a fallacy owing to the fact that the parameters for reaching such a conclusion are not realistic. As a further analysis on this point, Okafor reports that some level of compliance with the African Commission recommendations was recorded during the military era in Nigeria

⁷⁰ See generally, Burley (n 47 above) 1990; OA Hathaway *The cost of commitment* (2003); E Alvarez ‘Do liberal states behave better? A critique of slaughter’s liberal theory’ (2001) 12 *European Journal of International Law* 184-190; Moravcsik (n 45 above) 513; AM Slaughter (n 47 above) 503.

⁷¹ AM Slaughter ‘Government networks: ‘The heart of the liberal democratic order’ in GH Fox & BR Roth (eds) *Democratic governance and international law* (2000); AM Slaughter ‘A liberal theory of international law’ (2000) 94 *American Society of International Proceedings* 249; Burgstaller (n 3 above) 179.

⁷² Helfer & Slaughter (1997) (n 55 above) 298-337; LR Helfer & AM Slaughter ‘Why states create international tribunals: A response to Professors Posner and Yoo’ (2005) 93 *California Law Review* 906.

⁷³ Helfer & Slaughter (1997) (n 55 above) 298-337.

⁷⁴ AM Slaughter (2000) (n 71 above) 201; AM Slaughter ‘A liberal theory of international law’(2000) (n 71 above) 249 (arguing that ‘We should not explicitly limit global institutions to liberal states or develop domestic and international doctrines that explicitly categorize or label entire states as such’. On the second ambit, she goes on to say ‘I do subscribe to a distinction between liberal and non-liberal states as a positive predictor of how states are likely to behave in a variety of circumstances, including within or toward international institutions’).

yet the latter was not a democratic state as at then.⁷⁵ So why should the question whether a state is liberal or not be the parameter in measuring compliance with international human rights obligations? This question has attracted concerns from scholars in the field of international law and international economic law respectively.⁷⁶

First, Jacobson and Weiss argue with regards to international environmental laws, that liberal democratic states have the potential to comply with their international obligations but that is only one among many other factors that contribute to change of state behavior to comply. In this regards, Jacobson and Weiss identify other factors which include: the content of the treaty, the international environment generally and the ‘peculiarity in each country, history and culture, physical and economy sizes’, capability, role and impact of international and domestic non- state actors (NGOs and CSOs) and among others.⁷⁷

Second, with regards to Slaughter’s argument on liberal democracy, Simmons on compliance with monetary agreements responds as follows:

There is no reason to expect that democracy alone provides the stability that economic agent’s desire. On the contrary, popular participation along with weak guarantees for fair enforcement of property rights can endanger these rights. It is true that these two variables are positively correlated, but they are certainly conceptually distinct, and many have very different impacts on the decision to comply with article VIII obligations . . . , the evidence presented here suggests that the quality of being democratic actually contributes little or nothing when other factors are held constant.⁷⁸

Drawing insight from the above conceptualizations, Slaughter’s claim about the effect of liberal democracy on compliance has been dwarfed by critics as too restrictive. For some, the assertion that compliance is dependent on democratic structure of a state is questionable because national structure fluctuates; they are neither permanently liberal nor illiberal.⁷⁹ Besides, a country may wear a democratic outlook yet compliance level might be abysmally low or *vice versa*. But then

⁷⁵ See O Okafor ‘The African human rights system: Activist forces and international institutions’ (2009) 42 *Law and Politics in Africa, Asia and Latin America* 289-292.

⁷⁶ Alvarez (n 70 above) 198-208.

⁷⁷ Jacobson & Weiss ‘A framework for analysis’ in Weiss & Jacobson (eds) *In engaging countries: Strengthening compliance with International environmental accords* (1998) 529-535.

⁷⁸ B Simmons, ‘Money and the law: Why comply with the public international law of money?’ (2000) 25 *Yale Journal of International Law* 323-359; see also art VIII of the International Monetary Fund (IMF) Articles of Agreement (as amended); SM Saiegh *Is there a democratic advantage: Assessing the role of political institutions in sovereign borrowing* (2001).

⁷⁹ Koh (1999) (n 4 above) 1404-1405.

again, can it not be argued that the liberal or illiberal nature of states is in a continuum of sorts? So that for instance, it can be asked if: the United States under Donald Trump really a classical liberal state? Or is The Gambia or Nigeria under its current leadership really an illiberal state? These explain the fluidity in state structure; hence, any determination of compliance based on liberal or illiberal structure of a state must be taken with a pinch of salt.

Another aspect for which this theory has been criticized is the claim that (as earlier stated) states with liberal democracy tend to be more committed to rule of law as a signal for respect for domestic institutions which by consequence leads to 'vertical enforcement through domestic courts'.⁸⁰ In essence, this model advocates for a more suitable international enforcement mechanisms at the national level through the national courts.

In the above regard, the claim about reliance on domestic courts for enforcement of international rules has been called to question. Eyal Benvenisti raises concern about the possibility of these national courts (when exposed to executive interference), manipulating or narrowing their judgment by resorting to mere technicalities to favor government interest.⁸¹ As it concerns foreign policy, many liberal courts are not willing to be involved in 'judicial review' of any sort. This is because judges of national courts are caught in a somewhat Prisoner's Dilemma (PD), which implies that:

National courts are the prisoners in the classic prisoner's dilemma. If they could have been assured that courts in other jurisdictions would similarly enforce international law, they would have been more willing to cooperate. They might have been ready to restrict their government's free hand, had they been reassured that other governments would be like- wise restrained. But in the current status of international politics, such co-operation is difficult to achieve, and rational judges act like the prisoner who cannot be sure that his or her fellow prisoner will cooperate.⁸²

Again, arising from the above assertion, it may be asked: whether human rights practices raise a PD situation? For instance, does the domestic court of one state lose anything because the national court of another state fails to protect the rights of its citizens as guaranteed under international

⁸⁰ Burgstaller (n 3 above) 182 (asserting that 'vertical enforcement is the most secure means of assuring compliance with international agreement and that means is most likely to be available in a community of liberal states').

⁸¹ E Benvenisti 'Judicial misgivings regarding the application of international law: An analysis of attitudes of national courts' (1993) 4 *European Journal of International Law* 160-162; see also E Benvenisti 'Judges and foreign affairs: A comment on the institut de droit international's resolution on the activities of national courts and the international relations of their state' (1994) 5 *European Journal of International Law* 423; K Knop 'Here and there: International law in domestic courts' (1999) 32 *New York University Journal of International Law and Politics* 501.

⁸² Benvenisti (1993) (n 81 above) 175.

treaties? Is the above assertion not more applicable to situations of reciprocity? So that where as in the case of human rights, the argument would be that implementation or compliance as the case may be, does not necessarily need to be a function of reciprocity as other factors discussed above could be the motivation for national courts to exercise incentive towards compliance. Going by this, it can then be argued that Benvenisti's argument above is not valid in the context of this thesis.

Having critiqued Slaughter's position on liberal democracy and the vertical enforcement of international norms through domestic courts, Benvenisti suggests that the strongest indicator for increasing application and interpretation of 'international law is a community-wide commitment to co-operation' such as:

The model of the European Communities is the best evidence for the effect that changing commitments can have on judges' willingness to cooperate. . . . Judges cannot alone bring about this new understanding, but once such a new understanding takes place, the courts will surely follow suit and then their decisions will enhance the inclination to cooperate.⁸³

Despite the various criticism against liberal theory assumptions, the theory harmonises fairly well with the research questions (see section 1.3 of chapter one above) and the focus of this thesis particularly as it recognises the significance of wider domestic community as a potential mechanism that can drive compliance with international human rights obligations.

2.4 Adopted theory for this thesis

The central focus of this thesis is to investigate how a shift from the unitary perception of the state to interaction with a disaggregated state structure can be achieved by investigating *inter alia* : (a) whether state compliance level can be raised by increasing the legitimacy sources of pressure for compliance in the AHRS (b) whether an entrenched engagement of CS can increase domestic cost that can consequently improve compliance with decisions of human rights supervisory mechanisms in Africa.

In the above regard, several theories have been discussed; different approaches, criticism, and justification have been examined. However, to justify the overall claim of this thesis, the liberal theory is more suitable and is therefore adopted as the theoretical frame for this research. It needs to be pointed out that the liberal theory is considered most appropriate for a number of reasons

⁸³ As above 175.

but most importantly: the theory argues that the state structure can be disaggregated and deconstructed to allow the components embedded in it to pressure state actors to align their policies towards compliance with human rights decisions. On this point, Slaughter states that:

The result . . . is a ‘negarchy’, a liberal political order between anarchy and hierarchy in which power is checked horizontally rather than vertically. These divisions and deliberately created frictions are further designed to create space for individuals and groups to interact with and influence state institutions, rather than being subjects of their rule.⁸⁴

In essence, society is understood as built up of different strata. However, for individuals to determine the policy of state as demanded by the liberals, the state-centric structure has to be disaggregated, this in turn, enables CS embedded in the state to become one of the key causal agents for change of state behavior towards rights decisions. In this context, CS becomes the transmission belt and the domestic actor with increased domestic abilities to influence external decisions and to check government excesses which may include lack of respect for rule of law and by extension – compliance with rights decisions.

2.5 Conclusion

The main thrust of this chapter was to set a theoretical tone for the rest of the thesis by identifying the theoretical framework upon which the study is based. In this context, several theories spanning the fields of IR and IL have been examined under sections 2.1-2.2 above. The chapter having reviewed the main assumptions, strength and weakness of these theories concludes that a variant of the rational choice theory, that is, the liberal model is applicable and thus, forms the theoretical frame for the rest chapters of this thesis.

As shown in the body of this chapter, under the European human rights system (as discussed in chapter four below), Moravcsik finds application of the liberal approach to be critical in the advancement and success of the system with particular reference to the growth and effectiveness of the European Court on human rights (ECtHR).⁸⁵ Similarly, Cavallaro and Brewer predict (in the context of the IAHRs) that the effectiveness of a human rights tribunal could be influenced from the moment when the tribunals practices, jurisprudence and adjudication becomes a focal point around which CS mobilization for rights protections and compliance can be improved.⁸⁶

⁸⁴ Slaughter (1995) (n 47 above) 535.

⁸⁵ Moravcsik (n 45 above) 158.

⁸⁶ 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* 769.

These arguments do not only relate to the rest of the thesis but also form the crux of the broader discussions in the next chapters (particularly in chapter four and five below).

However, the liberal theory should not be seen to be flawless, as stated above, several criticisms have been offered by commentators. In addition, Kabata in analyzing the impact of the liberal theory, finds less relevance with respect to how it relates to domestic impact of human rights practices in Kenya.⁸⁷ Despite the flip sides of the liberal theory, it holds sway in the context of this thesis, and as such, it will be employed as a guard and a theoretical platform for the rest of this study.

⁸⁷ F Kabata 'Impact of international human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, (2015) 315-317.

CHAPTER THREE: THE CURRENT PRACTICE OF THE AFRICAN HUMAN RIGHTS SYSTEM

3.1 Introduction

The foundation for existence, operations and practices of the African human rights system (AHRS) is based on the normative framework provided by the African Charter and other human rights related instruments and institutions.¹ The Charter has provided a legal framework for the promotion and protection of human and peoples' rights as evidenced from the jurisprudence of the three principal supervisory mechanisms.² These mechanisms which are created under the auspices of the African Union (AU) are meant to *inter alia*: interpret the provisions of the Charter, protect and promote human rights and to supervise or monitor whether a particular state has failed or refused to respond to rights obligations as contained under the relevant normative instruments which the state must have ratified.³ Incidentally, all African states who are members of the African Union (AU) and have also ratified the Charter, are now, state parties under the AHRS (with exception of Morocco yet to ratify the Charter).⁴ While state parties under the AHRS continue to adopt and ratify new human rights treaties, thereby indicating commitment towards protection and

¹ The African Charter was adopted on 27 June 1981 and came into force on 21 October 1986. For the texts on this and other human rights instruments in Africa, see C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016); also available via <http://www.pulp.up.ac.za/legal-compilations/compendium-of-key-human-rights-documents-of-the-african-union-sixth-edition> (accessed 17 March 2018).

² These mechanisms include: the African Commission on Human and Peoples' Rights (the Commission), the African Court on Human and Peoples' Rights (the Court) and the African Committee of Experts on the Rights and Welfare of the Child (the Committee). It is pertinent to note that the Commission and the Committee perform quasi-judicial functions while the other supervisory mechanism is established wholly as a judicial institution. Notwithstanding this distinction, they are primarily established to monitor the implementation of human rights treaties already ratified by members' state and to provide redress for victims whose rights as contained in the African Charter have been violated by their respective states. See arts 30 & 45 of the Charter, art 2 of the protocol establishing the Court and art 32 of the African Children's Charter. For introductory background and overview of operations of the African human rights system and its mechanisms from 1986-2016, see 'A guide to the African human rights system: Celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986 – 2016' available via <http://www.pulp.up.ac.za/pulp-guides/a-guide-to-the-african-human-rights-system-celebrating-30-years-since-the-entry-into-force-of-the-african-charter-on-human-and-peoples-rights-1986-2016> (accessed 18 March 2018).

³ See arts 30 & 45 of the African Charter for the establishment of the African Commission; art 1- 4 of the Protocol to the African Charter on the establishment of the Court and arts 32 & 42 of the Children's Charter on the Rights and Welfare of the Child. For comprehensive details on the mechanisms, see Heyns & Killander (n 1 above) 29, 41 & 80.

⁴ With the readmission of Morocco (after 33 years of denunciation of its membership) in 2017, the current membership of the AU is now 55.

promotion of human rights,⁵ evidence that such commitment is often translated into concrete practice leading to effective protection and promotion of human rights and by extension, compliance with rights decisions issued by the system's supervisory mechanisms remains to be seen.⁶

Despite states' expressed commitment to fulfil their rights obligations contained in the relevant rights treaties they have ratified, several findings on the level of state parties' compliance with rights decisions under the AHRS reveal that compliance level has remained relatively poor.⁷ For instance, Wachira and Ayinla note with regards to decisions and recommendations published by the African Commission on Human and Peoples' Rights (Commission) as follows: '...the attitude of state parties since the Commission's inception two decades ago, by and large has been generally to ignore these recommendations with no attendant consequences'.⁸

⁵ There has been varying arguments on whether treaty ratification boost states' incentive to comply at all time. In this context, Neumayer argues that the impact of treaty ratification at the domestic level depends on the role of active civil society groups and their linkages with transnational actors. In another perspective, Hathaway contends that treaty ratification has neither any significant effect at the national level nor the potential for change of state behavior. In essence, human rights conditions may become worse while incentives for non-compliance increases after ratification. For details, see generally, E Neumayer 'Do international human rights treaties improve respect for human rights?' (2005) 49 *Journal of Conflict Resolution* 925-953; OA Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935, 1935 - 2042; 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; 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 'governments often ratify human rights treaties as a matter of window dressing radically decoupling policy from practice and at times exacerbating negative human rights practices'); For list of signed and ratified treaties, see <https://www.au.int/web/ar/treaties>; <http://www.achpr.org/instruments/achpr/ratification/> (accessed 23 August 2018).

⁶ See for instance, F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human & Peoples' Rights 1994-2004' (2007) 101 *The American Journal of International Law* 8-12; D Abebe 'Does international human rights law in African courts make a difference?' (2016) 56 *Virginia Journal of International Law* 564; for the literature on poor implementation of decisions, see R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 350.

⁷ As above.

⁸ 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* 466-467; F Viljoen 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 2; see also SBO Gutto 'The compliance with regional and international agreements and standards by African governments with particular reference to the rule of law and human and peoples' rights' in P Anyang'Nyongo *et al* (eds) *New Partnership for Africa's Development (NEPAD): A new path?* (2002); V Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five selected African states' unpublished LLD thesis, University of Pretoria, 2018 395.

This position raises serious question about the credibility and legitimacy of the system.⁹ Thus, it may therefore be asked what has been the cause of this perennial challenge of non-compliance and what factors can improve compliance with rights decisions independent of the supposed consequences of treaty ratification?

As discussed in section 1.1 of chapter one of this thesis, some scholars suggest that part of the reasons for this lingering problem of non-compliance is that other than NGOs/CSOs, the wider CS is not aware of the practice of the AHRS and therefore not engaged in the drive for compliance.¹⁰ Thus, compliance matters have been continuously driven by NGOs/CSO and in some ways, the human rights monitory bodies-particularly the Commission.

In view of the above, this chapter is structured to examine the basic workings and operations of the AHRS with a view to investigating the current status or extent of state parties' compliance level with decisions of the monitoring bodies under the AHRS. This will be done by looking deeply into the activities of the system: first, by giving precedence to the views of the mechanisms (particularly the Commission and the Court),¹¹ and second, to undertake an analysis of the key findings from the literature on status of compliance in the AHRS.¹² The results from these tasks will be explored to address certain curiosity and perhaps, unanswered questions about the AHRS.

⁹ See F Viljoen *International human rights law in Africa* (2012) 340 (stating that 'the energy devoted towards securing an effective African human rights systems amounts to nothing if the system does not make a difference to nationals and others living in member states').

¹⁰ This does not imply that non-compliance is only as a result of lack of knowledge and engagement of wider civil society in the affairs of the AHRS, see section 3.4.1 below for factors predictive of compliance; For the literature arguing that most Africans lack knowledge about the workings of the AHRS, see C Odinkalu 'Why more Africans don't use human rights language' (2000) 2 *Human Rights Dialogue* 4; BK Murungi 'To whom, for what, and about what? The legitimacy of human rights NGOs in Kenya' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 37-48; J Ron, D Crow & S Golden 'Human rights familiarity and socio-economic status: A four-country study' (2014) 11 *Conectas Human Rights* 1-14; M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: Introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 8; R Murray & D Long 'The implementation of findings of the African Commission on human and Peoples' rights(2015) 75-109; OC Okafor *The African human rights system, activist forces, and international institutions*(2007)152, 253.

¹¹ In order to know the views of the mechanisms concerning issues of state parties' compliance with their decisions, this study evaluated the Commission and Court's activity reports for a period covering 2012-2018 with the aim of ascertaining what the institutions often report about state behavior towards compliance. Arising from this, the study finds that even the monitoring bodies are also concerned about poor attitude of member states towards compliance.

¹² The findings from existing literature has revealed that non-compliance has been a perennial issue and not a recent occurrence. Arising from this, it is now proper to suggest that the need for a complementary mechanisms to improve compliance has become even more important than ever.

For instance, in view of the above, it might be necessary to ask: have not scholars complained about challenges of non-compliance in the AHRS since over a decade ago? If so, what is now the current state of compliance? Has there been any significant improvement? If no, have measures not been taken by stakeholders to address this challenge of non-compliance? In other words, what are stakeholders (the Commission, the Court and perhaps NGOs) currently doing or saying about issues of states' non-compliance? If despite the efforts of these stakeholders, there is still no improvement in compliance status, what then is the problem? What have these stakeholders been doing wrong - or if not wrong, what do they need to do in addition to what they have been doing? All these questions will become a building block in examining the role of non-state actors who have been driving compliance under the AHRS. The chapter will further examine the effectiveness of the tools that have often been explored by non-state actors or compliance stakeholders¹³ in driving compliance under the AHRS. This is with a view to knowing whether or not, the tools or strategies being explored by these stakeholders have become waned or no longer effective, so that the need for a complementary domestic tool becomes necessary in improving compliance.

In terms of structure, the chapter is divided into two substantive sections. The first substantive section briefly discusses the operations of the AHRS and the status of compliance with decisions from the principal supervisory mechanisms.¹⁴ The aim of the first section is to explain how the system currently operates and to further determine whether or not the current operating system is effective or is broken. This will then help to determine whether a different or complementary operating system is required to improve compliance.

The second substantive section presents an analysis of the role of NGOs/CSOs and the Commission as among the major stakeholders in driving compliance under the AHRS.¹⁵ Under

¹³ In the context of this thesis, I employ the term 'compliance stakeholders or actors' to refer - particularly to NGOs/CSOs and other actors who have been engaged or involved in any forms of follow-up with the aim of persuading or pressuring state parties' towards compliance under the AHRS.

¹⁴ This will help to verify the accuracy of my assumption (in chapter one of this thesis) that compliance level with respect to decisions of region bodies in Africa is low.

¹⁵ My analysis on the Commission's role in follow-up will be assumed to generally apply to the other mechanisms on the basis that the Commission has, first of all, existed for a longer time and thus, has received and presided over a good number of communications than the other mechanisms, secondly - it has equally been more involved in follow-up on decisions than the other supervisory mechanisms, thirdly - it has a wider relationship and engagement with human rights NGOs/CSOs and other stakeholders. Therefore, the role of the Commission will be analysed against the background of its promotion and protective mandates especially as it relates to follow-up on decisions through on-site visit, appointment of special rapporteurs, issuance of country specific resolutions, letters of urgent appeals, referrals to the court.

this section, I attempt an examination of the various patterns and tools that these stakeholders/actors have been using in follow-up on decisions. My aim is to determine the following questions: (a) What does the Commission do when a state refuses or fails to comply with its recommendations issued at merits level and request for provisional measures? (b) Who does the Commission report to when a state fails to comply with adverse rights decisions?¹⁶ (c) What are the tools/strategies or options available for the Commission in driving or pressuring states towards compliance? (d) Who do NGOs/CSOs often call on or run to when a state fails or refuses to comply? (e) What are the lobbying or advocacy tools that NGOs often use in driving compliance?¹⁷ (f) Which sections of the public do NGOs often speak to when a state violates the provisions of the Charter: external or domestic? In all, this section will address the first to third research questions set out in section 1.3 of chapter one of this thesis. The concluding section will summarize the main arguments and findings discussed in this chapter.

3.2 Historical background of the AHRS

Arising from the ‘yearnings of African leaders to pull out of the shackles of colonialism and to pave way’ for the integration and unity among African states the then Charter of the Organisation of African Unity (OAU) was adopted in 1963 by 32 independent African States.¹⁸ Over the years, the OAU membership has grown with an addition of other 21 members making a total number of

¹⁶ The answer to the question of who the Commission (and of course, the other regional monitoring bodies) is accountable to could be deduced from the relationship between the Commission and the AU Assembly of Heads of State and Government, the Executive Council and perhaps NGOs working under the system. For details, see generally, arts 45(2), 58 of the Charter, art 45(3) of the Children’s Charter, art 31 of the Court’s protocol, art 9(1)(e) of the AU Constitutive Act; Viljoen (2012) (n 9 above) 38, 45-86, 179-190, 340 (arguing that ‘apart from being formally accountable to the AU, in practice the Commission is held accountable more consistently by NGOs’); DH Moore ‘Agency cost in International human rights (2004) 42 *Columbia Journal of Transnational Law* 498 (arguing that NGOs ‘promote and monitor human rights compliance’).

¹⁷ Some notable INGOs are known for the use of the advocacy strategy of ‘naming & shaming’ in pressuring states and lobbying relevant stakeholders to raise cost against a ‘shamed’ state. These INGO include Amnesty International and Human Rights Watch. For details on the use of this strategy, see K Roth ‘Defending economic, social and cultural rights: Practical issues faced by an international human rights organization’ (2004) 26 *Human Rights Quarterly* 63; S Hopgood *Keepers of the flame: Understanding amnesty international* (2006); D Zagorac ‘International courts and compliance bodies: The experience of amnesty international’ in T Treves *et al* (eds) *Civil society, international courts and compliance bodies* (2004); DR Davis A Murdie & CG Steinmetz ‘“Makers and shapers”: Human rights INGOs and public opinion’ (2012) 34 *Human Rights Quarterly* 204; Moore (n 16 above) 498; see sections 3.6.1 – 3.6.4 below for a discussion on general and specific application of naming and shaming to drive compliance.

¹⁸ FO ‘Wara *Bibliographical pathfinder: African system for the protection and promotion of human rights* (2002) available at <http://hrlibrary.umn.edu/bibliog/africanpathfinder.html> (accessed on April 14 2019); RC Liwanga ‘From commitment to compliance: Enforceability of remedial orders of African Human rights bodies’ (2015) 41 *Brooklyn Journal of International Law* 104.

53.¹⁹ The primary objectives of the OAU was to end all forms of colonialism on the African continent, foster unity among African States, uphold states sovereignty, defend territorial integrity and independence, promote internal and international cooperation for purposes of development and among others.²⁰ However, the framework of the OAU Charter did not expressly provide for protection and promotion of civil and political rights of the people of Africa. Thus, ‘massive violation of human rights were either completely ignored’²¹ or not adequately addressed in Africa. As scholars have noted, the express omission of human rights protection under the OAU Charter was in line with one of the OAU operating principles of non-interference with states internal affairs and respect for states sovereignty and territorial integrity.²² However, owing to pressure from international, regional and national stakeholders (mostly international human rights NGOs, CSOs and CS) on the need for an encompassing regional instrument for effective protection of human rights,²³ the African Charter was adopted in 1981 and came into force in 1986.²⁴

The foundation of the AHRS now rest strongly on the African Charter which serves as the primary normative instrument for the operations of the system and so far, the Charter has given birth to a number of other regional rights instruments and institutions for effective operations.²⁵ Currently, the three major institutions established to interpret the Charter and to supervise human rights protection under the AHRS are the Commission, Court and the Committee. The operations of these institutions are discussed in the next subsection.

3.3 The operations and workings of the supervisory mechanisms

The discussion under this subsection is limited to relevant issues concerning this thesis particularly with respect to the operations or activities of the supervisory mechanisms as it concerns individual communications or complaints. Therefore, matters of structure, composition, and other secretariat duties of the mechanisms will not be given attention. Above all, this subsection is aimed at

¹⁹ Liwanga (n 18 above) 104.

²⁰ See arts 2 & 3 of the Charter of the OAU 1963.

²¹ Liwanga (n 18 above) 105; for details on rights and freedom which maybe generally termed ‘civil and political rights’, see arts 2-24 of the African Charter.

²² For list of the OAU principles, See art 3 of the OAU Charter; Liwanga (n 18 above) 105; Engaging African-based human rights mechanism – A handbook for NGOs and CSOs (International Commission of Jurists -ICJ, 2018) 17 available at <https://www.acdhrs.org/2018/11/handbook-for-ngos-csos/> (accessed 18 April 2019).

²³ A handbook for NGOs and CSOs (n 22 above) 15.

²⁴ Heyns & Killander (n 1 above) 29-40.

²⁵ See for instance the African Charter on the Rights and Welfare of the Child, A protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights and among others. For a general overview of major human rights documents, see Heyns & Killander (n 1 above) 2 -165.

addressing particularly the second and third research questions: How much does domestic pressure currently contribute to improving compliance with AHRS decisions on individual communications? And what place does CS currently have in the AHRS and to what extent is CS willing to defend the integrity of the system? In other words, the latter question will determine the issue of whether CS can currently claim ownership of the system and pressure state parties towards compliance.

(a) The Commission

Art 30 of the African Charter establishes the African Commission as an institution with quasi-judicial functions. The primary purpose of the Commission is to promote and protect human rights on the African continent.²⁶ Going by this primary objective, the Commission is saddled with the responsibility to monitor arrays of human rights as provided under the AU Constitutive Act, the African Charter and other related human rights instruments.²⁷ Generally, the mandate of the Commission could be said to cover four key areas: to interpret the provisions of the Charter, to promote human rights, to protect human rights and to perform all other duties incidental to its mandate as may be assigned to it by the AU Assembly under the AU Constitutive Act.

As the workings of the Commission demands, these roles could be performed either in its protective or promotional capacity.²⁸ For instance, under its protective mandate, the Commission leverages on its individual complaints system to: (a) receive communications from state, individuals or NGOs on alleged violation of rights and issues recommendations when it finds that a state has violated the provisions of the Charter as it relates to rights of individuals under the AHRS²⁹ (b) where for instance, the victim alleged circumstances of imminent danger and urgent threat, the Commission may issue provisional measures³⁰ and request the violating state to comply so as to preserve the subject matter of the case pending the final determination of the

²⁶ See art 45 of the Charter.

²⁷ See art 3 of the AU constitutive Act, arts 45 – 59 of the African Charter; see generally human rights documents in Heyns & Killander (n 1 above).

²⁸ Note the Charter does not expressly divide the Commission's mandate into protective and promotional. However, this categorization can be deduced from the wordings of art 45 and most importantly, the both terms have evolved in the literature, see similar usage in Viljoen (n 9 above) 300, 345.

²⁹ See art 55(2) of the Charter.

³⁰ Provisional measures are issued when a communication presents a picture of urgent threat and danger, the Commission may order for interim or provisional measures requiring the state to do or refrain from doing the act complained of pending the final outcome of the case. The essence of this procedure is to avoid a situation where the recommendation for remedial orders is not rendered nugatory, see rule 98 of the Rules of Procedure.

communication on merits (c) in some instances, the Commission may issue letters of urgent appeals urging violating states to address human rights situation in accordance with the provisions of the Charter and in line with international human rights standard.

The promotional mandate of the Commission involves activities like: examination of state reports, appointment of special mechanisms, promotional visits, adoption and issuance of resolutions and other activities that are designed to promote the effectiveness of the system.³¹ These roles are guided by the Charter, the 2010 rules of procedure of the African Commission and the Commission's guidelines.³² For instance, under the state reporting system, art 62 of the Charter requires each state party to report (once in every two years) measures that have been taken to give effect to the provisions of the Charter and recommendations or any other request from the Commission.³³ States' reports 'have crystalized into reports' which the Commission receives and considers during its ordinary session which form the basis of constructive engagement and dialogue with the reporting state.³⁴

Art 54 of the Charter requires the Commission to submit its activity report to each ordinary session of the Assembly of Heads of State and Government. The state reporting process avails the Commission the opportunity to engage each state in a constructive dialogue on a wide range of issues - most importantly on the question of whether (or not) and to what extent, has a particular state implemented relevant obligations under the Charter. The outcome from the examination of each state's report forms the Commission's activity report which is forwarded to the Assembly of Heads of State and Government for further action.³⁵

As part of its promotional mandate, the Commission is also authorised under rule 97 of the Rules of Procedure 2010 (ROP) to appoint 'special working groups, committees and rapporteurs for each communication from among the members of the Commission' and sometimes, with an addition of an external expert member. It needs to be pointed out that these special mechanisms do not directly generate recommendations and decisions that require compliance by state parties. However, they

³¹ Details are provided in the handbook for NGOs and CSOs published by International Commission of Jurist (ICJ) (n 22 above) 60 -66; other promotional activities may include seminars, conferences, and symposia, see rules 69 – 71 of the Commission's ROP 2010.

³² For a quick glance on these instruments, see Heyns & Killander (n 1 above) 29, 168 – 203.

³³ See also rules 73-76 of the Rules of Procedure.

³⁴ See the handbook for NGOs and CSOs (n 22 above) 60.

³⁵ See art 54 of the Charter; for measures on action to be taken on communications, see arts 58 & 59 of the Charter.

are relevant bodies that maybe appointed to assist the Commission in reaching its recommendations that require states' compliance. For instance, special mechanisms are 'subsidiary bodies' appointed by the Commission to 'consider questions of seizure, admissibility and the merits of any communications and make recommendations to the Commission'.³⁶ They also guide the Commission in reaching a decision on other matters arising from the Charter.³⁷

As may be asked: By which medium(s) does the Commission follow-up or engage with national stakeholders and NGOs/CSOs with respect to issues relating to violation of provisions of the Charter and by extension, questions of non-compliance. As provided under art 46 of the Charter, the Commission is permitted to explore any appropriate medium of investigation in the effective discharge of its mandate under the Charter. Therefore, as part of the strategy to follow-up on recommendation,³⁸ the Commission indirectly monitors (through special rapporteurs who are also members of the Commission) state parties' compliance by examining state reports, conduct fact finding missions, issuance of resolutions (particularly Country-specific resolutions), referral of cases to the African Court (when the need arises) and to report facts of states parties' non-compliance to the AU Assembly of Heads of State and Government and Executive Council for appropriate sanctions.³⁹ Details of all these follow-up mechanisms are discussed in section 3.5.1 below.

In the above regard, it can be argued that most of the activities that take place during the Commission's sessions and inter-sessions,⁴⁰ provide moments of dialogue between the Commission and state actors or delegates. For instance, missions which may either be protective

³⁶ See rule 97(2) of the ROP; Viljoen (n 9 above) 369 – 378.

³⁷ Viljoen (n 9 above) 369 – 378; for details, see generally J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 247; M Evans & R Murray 'The Special Rapporteurs in the African system' in Evans and Murray (eds) *African Charter on Human and Peoples' Rights: The system in practice 1986-2006* 280.

³⁸ See rule 112 of the 2010 ROP.

³⁹ See art 30, 45 – 59 of the Charter; Viljoen (n 9 above) 300 – 390; A handbook for NGOs and CSOs (n 22 above) 51-66; see also *Advocacy before the African human rights system – A manual for attorneys and advocates* (2016) available at <https://www.ijrcenter.org/wp-content/uploads/2016/11/Advocacy-before-the-African-Human-Rights-System.pdf>; see also, the history of African Commission on Human and Peoples' Rights available at <http://www.achpr.org/about/history> (accessed 19 April 2019).

⁴⁰ The break between sessions is called the Commission's inter-session period where the day to day business of the Commission is carried out. As noted 'while the Commission meets as a unit during sessions, Commissioners (either individually or in groups) engage in various activities and undertake visits/missions in the inter-session period', for this, see the handbook for NGOs and CSOs (n 22 above) 56.

or promotional could generally provide opportunity for the Commission to have interpersonal dialogue with states delegates and stakeholders on human rights issues arising from the Charter.⁴¹

As discussed in section 3.5.2 below, other than the role of the Commission in taking advantage of these mechanisms to follow-up on decisions, NGOs (with observers' status with the Commission) also carry out series of advocacy measures in exerting pressure for compliance. For instance, NGOs may explore the strategy of naming and shaming in piling pressure on a respondent state that has failed or expressed unwillingness to comply with decisions from the Commission and its sisters' institutions at the regional level.⁴² Further details on the role of NGOs in follow-up on decisions from the supervisory mechanisms are discussed in section 3.5.2 below.

Generally, the recommendations of the Commission are 'arguably not considered as legally binding',⁴³ nevertheless state parties are morally obligated to comply with the Commission's recommendations as part of states' commitment under the Charter. Interestingly, the provisions of the 2010 Rules of Procedure of the Commission and the AU Constitutive Act imply that state parties 'must respect and comply' with all decisions and policies of the AU as contained in the Charter and other related instruments or otherwise face sanctions.⁴⁴ It can therefore be argued that the Commission's recommendation becomes legally binding on state parties when the recommendations form part of the activity report submitted to the AU Assembly and especially, when the latter has adopted and caused the recommendation to be published.⁴⁵

The above analyses, other than revealing the basic workings of the Commission, have further shown that the Commission's decision on merits from individual communications, provisional measures and letters of urgent appeals are all aspects of the Commission's work that give rise to compliance obligations from member states while other established processes like examination of state reports, promotional visits and resolutions create opportunities for the Commission to discuss or dialogue on a wide range of relevant issues, part of which may include a discussion on state compliance.⁴⁶

⁴¹ See the handbook for NGOs and CSOs (n 2 above) 64; see generally Viljoen (n 9 above) 301 - 390.

⁴² On the relationship between NGOs and the supervisory mechanisms, see generally Viljoen (n 9 above) 289 – 410.

⁴³ See for instance, A handbook for NGOs and CSOs (n 22 above) 58; Viljoen (n 9 above) 339.

⁴⁴ See rules 112, 118 of the Commission's 2010 ROP and art 23 of the AU Constitutive Act for measures for imposition of sanction.

⁴⁵ As above; for a more detail discussion, see Viljoen (n 9 above) 339.

⁴⁶ See A handbook for NGOs and CSOs (n 22 above) 51 -66.

(b) The Court

Seeing how the Commission has advanced the course of human rights on the African continent, stakeholders became desirous of the need to further ‘improve the effectiveness of the Commission’ and by consequence, the AHRS.⁴⁷ To this extent, agitation for the need to establish a judicial organ that can complement the quasi-judicial mandate of the Commission became a subject of concern within the human rights community. At the OAU meeting of Assembly of Heads of State and Governments held in 1994, ‘the idea to consider the establishment of an African Court to protect and promote human rights took a positive dimension. By June 1998, the Protocol to the African Charter on Human and Peoples’ rights establishing the African Court on Human and Peoples’ Rights (the Court’s Protocol) was adopted and became operational in 2004 after ratification by 15 state parties’.⁴⁸ In order for the Court to assume jurisdiction over a state, the latter must not only be a state party to the Charter but must have separately ratified the Court’s Protocol. As at the time of writing, 30 AU member states have ratified the Court’s Protocol.⁴⁹ Currently, the African Court is the only established regional monitoring body with judicial powers to supervise states parties’ implementation of the Charter. As stated in art 2 of the Court’s Protocol, the Court is established to complement the protective mandate of the Commission. Similar to the Commission, the Charter is the primary constitutive instrument guiding the affairs of the Court; however, the Court is, permitted to resort (when necessary) to any other relevant human rights instruments or treaties which the state in question has ratified.⁵⁰

In terms of jurisdiction, the Court can assume jurisdiction on contentious and advisory matters.⁵¹ The Court’s contentious jurisdiction is inspired by art 3(1) of the Court’s Protocol which empowers the Court to adjudicate on cases and disputes arising from the question of interpretation and

⁴⁷ For areas in which the Commission has recorded good numbers of progresses as well as areas of concern that also requires improvement, see the Commission’s activity report available at <http://www.achpr.org/search/?t=826> (accessed 18 April 2018).

⁴⁸ See generally Viljoen (n 9 above); handbook for NGOs and CSOs (n 22 above).

⁴⁹ As at April 2019, 30 States have ratified the Protocol: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d’Ivoire, Comoros, Congo, Gabon, The 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 <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court> (accessed on 18 April 2019).

⁵⁰ See art 7 of the Court’s Protocol.

⁵¹ See arts 3 & 4 of the Court’s Protocol; for details on the Court’s contentious and advisory proceedings, see <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21>; <http://www.african-court.org/en/index.php/cases/2016-10-17-16-19-35> (accessed 18 April 2019).

application of the provisions of the Charter or any other relevance instrument. This could be extended to mean that when there is a need for interpretation and application of any provisions of the Charter, the Court's contentious jurisdiction may be invoked to determine whether or not and to what extent, a state party has fulfilled rights obligation as provided by the Charter. The Court's contentious jurisdiction has been tested in many respects,⁵² for instance, in *Nobert Zongo and others v Burkina Faso* – case concerning assassination of four journalists in December, 1998.⁵³ Part of the issues before the Court was to determine whether the applicants' rights under arts 1,3,4,7 and 9 of the Charter and provisions of other relevant international human rights instruments had been violated. In this context, the Court found that the respondent state failed to take necessary measures to protect the Applicants' rights as enshrined in the African Charter and other international rights instruments.⁵⁴ Also, in *Dexter Eddie Johnson v Republic of Ghana*,⁵⁵ the Court's contentious jurisdiction was again tested to determine *inter-alia* whether the imposition of a mandatory sentence of death violates the provisions of arts 4, 5 and 7 of the African Charter and other international rights treaties. In course of the hearing, the respondent state requested the Court to determine whether the applicant's application meets the requirement of admissibility under article 56(7) of the Charter and arts 5 and 6 of the Court's Protocol. Upon evaluation of arguments from both parties, the Court found the applicant's application inadmissible.⁵⁶

Similar to decisions of national courts, the decision of the African Court is binding and constitute judicial precedent for subsequent adjudication, thus, respondent states must comply with every aspect of decisions issued by the Court.⁵⁷ Therefore, decisions of the Court ought to have better prospect for enforcement and compliance from state parties against whom the Court's contentious jurisdiction has been sought. Again, it must be noted that the decision of the Court is issued when all parties would have been heard on merits and evidence have been adduced to establish that

⁵² For list of recent decisions under the Court's contentious jurisdiction, see <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#latest-decisions> (accessed 18 April 2019).

⁵³ Application number 013/2011; for details on the entire proceedings of this case, see <http://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Application%20No%20013-2011%20Beneficiaries%20of%20late%20Norbert%20Zongo-Ruling%20on%20Reparation.PDF> (accessed on 18 April 2019).

⁵⁴ See para 109 of the Court's judgment.

⁵⁵ Application number 016/2017.

⁵⁶ See paras 56 & 57 of Judgment.

⁵⁷ Art 30 of the Court's Protocol

violation of provisions of the Charter had occurred.⁵⁸ Upon such findings, the Court shall ‘make appropriate orders to remedy the violation, including the payment of fair compensation or reparation’.⁵⁹ The Court is further permitted to order provisional measures (even before the hearing of the substantive case) in a situation of ‘extreme gravity and urgency’ in order to avoid any imminent danger or irreparable damages to the victim.⁶⁰ As what some scholars would term ‘arbitral jurisdiction of the Court’, the Courts is also allowed by its rules to encourage parties to explore medium for ‘out of court’ settlement (amicable settlement) subject to the provisions of the Charter.⁶¹

In its advisory jurisdiction, the Court has the competence to provide its opinion on any matters of law in relation to any provision of the Charter or any other relevant human rights instrument. The Court exercises this power at the instance of any state party to the AU, AU, AU organs or other human rights stakeholders - NGOs/CSOs recognized by the AU.⁶² In essence, the Court’s power in this regard is to clarify issues relating to the scope of substantive rights or states parties’ obligation under the Charter. However, ‘the subject matter for which the Court’s opinion is sought must not be pending before the Commission or the Court’; this perhaps is to avoid conflict of interest.⁶³ While an ‘advisory opinion of the Court does not have a binding effect’, it has such a persuasive weight that has the potential to guide future precedent and references.⁶⁴

Unlike the Commission, access to the Court’s contentious jurisdiction is somewhat limited. For instance as provided by art 5 of the Court’s Protocol, the Court is only permitted to exercise its contentious jurisdiction on matters brought by either of the following: ‘the Commission, the state parties that have presented a case before the Commission, a state party against which a case has been presented to the Commission, a state party whose citizen is a victim of human rights violation, African intergovernmental organizations, an interested state party who desire to seek for joinder and NGOs/CSOs with observers status with the Commission and individuals’.⁶⁵ However, the

⁵⁸ See generally the Court’s Protocol particularly arts 5, 6, 8 & 10.

⁵⁹ See art 27 of the Court’s Protocol.

⁶⁰ See art 27(2) of the Court’s Protocol.

⁶¹ Art 9 of the Court’s Protocol; see also Liwanga (n 18 above) 116 (states that the African Court has three jurisdiction: advisory, arbitral and contentious jurisdiction)

⁶² Arts 3-4 of the Court’s Protocol; the statistics of the Court’s advisory opinion proceedings as at October 2018 reveal that 12 cases have been finalized and 1 case pending; for details on cases for which the Court’s advisory opinion has been sought, see <http://www.african-court.org/en/index.php/cases/2016-10-17-16-19-35> (accessed 18 April 2019).

⁶³ See art 6 of the Court’s Protocols and art 56 of the Charter for provisions on admissibility of cases.

⁶⁴ Engaging African-based human rights mechanism – A handbook for NGOs and CSOs (n 22 above) 72.

⁶⁵ See generally Viljoen (n 9 above) 411 – 466.

rights of NGOs/CSOs and individual to directly approach the Court is subject to the provisions of art 34(6) of the Court Protocol which provides thus:

At the time of the ratification of this protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive petitions under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.

The purport of art 34(6) is to the effect that non-state actors – individuals and NGOs can only access the Court if the state against whom the action is brought has not only voluntarily accepted the jurisdiction of the Court but has clearly made declaration accepting the competence of the Court to receive complaints from individuals and NGOs. This restriction has inarguably hampered adjudication, wider participation and of course, the effectiveness of the Court in promoting and protecting human rights in member states. For instance, as of August, 2019, out of the 30 state parties to the Court’s Protocol, only 9 states have made such declaration in line with art 34(6).⁶⁶ This restriction raises a lot of concern about the supposed intention of having a Court that can perform judicial functions aimed at addressing human rights violations especially in areas where the Commission’s powers may be limited. In a more complicated manner, drawing from the experience in the case involving *Ingabire Victoire Umuhoza v The Republic of Rwanda*, a state declaration in accordance with art 34(6) is not irrevocable as any of the state party to the Protocol can unilaterally withdraw prior declaration without any consequences, provided that such withdrawal will not prevent the Court to continue adjudication on other pending cases against that particular state.⁶⁷

In view of the above discussion on limited access to the Court, the only indirect route by which NGOs/CSOs can bring cases before the ‘Court is through litigation by the African Commission’.⁶⁸ For instance, when the Commission considers that a state has refused or is not willing to comply with its recommendation (or ‘order’ for provisional measures) within a period of time as stipulated

⁶⁶ As at April 2019, nine states have made declaration in line with art 34(6), the states are Benin, Burkina Faso, Côte d’Ivoire, Gambia, Ghana, Mali, Malawi, Tanzania and Tunisia, for details, see <http://www.african-court.org/en/> (accessed 18 April 2019).

⁶⁷ Application No.003/2014, Rwanda withdrawal (while the case was still pending) was in reaction to a case brought by an individual. Arising from Rwanda’s declaration of interest to withdraw, the Court ruled that a state party must give one year’s notice of any such withdrawal and that Rwanda’s withdrawal will not affect cases already pending before the Court.

⁶⁸ A handbook for NGOs and CSOs (n 22 above) 73.

in rule 112(2) of the Commission's ROP, the Commission is empowered under rule 118 to refer the case to the Court pursuant to art 5(1) (a) of the Protocol.⁶⁹ This window is not only open to NGOs/CSOs but it generally allows the Commission to bring cases involving states parties to the Court for purposes of adjudication. The Court may (when the circumstances of the case demands) adopt and order provisional measure on such cases brought by the Commission.⁷⁰ It is important to note that the rationale for establishment of the Court is to complement the protective mandate of the Commission.⁷¹ Therefore, the judicial powers of the Court could be inferred from the judicial and binding effect of the Court's outputs: the decisions issued and orders for provisional measures which require states compliance or implementation.⁷²

(c) The Committee

The UN Convention on the right of the Child (UNCRC) is a global treaty for the protection of the rights of the Child to which all African states have since ratified.⁷³ Certain concerns about inadequate representation in the process leading to adoption of the Convention inspired African leaders to consider the need for a home grown human rights instrument that can address human rights violations and abuses of the Child in the African region. Thus, the African Charter on the rights and welfare of the Child (the African Children Charter) was adopted in July 1990 and became operational on 29 November 1999. As at August 2019, 41 member states of the AU have ratified the Children's Charter.⁷⁴ The Children's Charter has an independent mechanism (the Committee) established to supervise the implementation of the provisions of the Children's Charter as it concerns the rights of children in Africa.⁷⁵ In addition to the Commission and the Court, the Committee is the third supervisory human rights institution. Its mandate is to supervise the implementation of Children's rights under the AHRS.

⁶⁹ See for instance, the case of the *Commission v Libya* - App. No 002/2013.

⁷⁰ Art 27(2) of the Court's Protocol.

⁷¹ See art 2 of the Court's Protocol.

⁷² Engaging African –based human rights mechanism – A handbook for NGOs and CSOs (n 22 above) 70-72.

⁷³ The Final approval of the (UNCRC) from UN member states came when the UN General Assembly unanimously adopted the text of the Convention on the Rights of the Child in November 1989, the Convention on the Rights of the Child (1989) is ratified by all of the world's nations except the United States of America (USA), details available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en; www.kidsrightsindex.org/Methodology/FAQs; <https://www.economist.com/the-economist-explains/2013/10/06/why-wont-america-ratify-the-un-convention-on-childrens-rights> (accessed 18 April 2019).

⁷⁴ Details available at <http://www.achpr.org/instruments/child/ratification/> (accessed 18 April 2019).

⁷⁵ See art 32 of the African Children's Charter.

Art 42 empowers the Committee to *inter alia* promote and protect the rights enshrined in the Children's Charter.⁷⁶ Similar to the Commission, the mandates of the Committee are carried out during and in - between sessions. While most of the activities are carried out during plenary, the Committee is also permitted to create and delegate special mechanisms to carry out certain task during and outside the Committee's sessions. Most of the major Committee's activities during sessions are guided and regulated by the Children's Charter. For instance, art 43 provides for the state reporting system – where state parties' to the Children's Charter are required to report to the Committee through the AU Secretary General on measures that have been adopted in giving effect to the provisions of the Charter and the overall efforts towards promotion and protection of rights.⁷⁷ Art 44 provides for the authority of the Committee to receive communications while art 45 allows the Committee to resort to any appropriate medium of investigation in order to elicit information or to know measures states parties have undertaken towards implementing the provisions of the Charter.

Similar to the Commission, the communication procedure of the Committee is adversarial in nature and could result in issuance of recommendation on remedial orders when a state is found to have violated any provisions of the Children's Charter. However, for cases that portray likelihood of imminent danger and urgency, the Committee has powers to make orders for provisional measures against the violating state. As part of follow-up process on communications and provisional measures, the Committee is expected to forward a copy of the request for the provisional measures made to the violating state to the AU Assembly, AU Peace and Security Council and the AU Commission. These organs are expected to take necessary measures to pressure the recipient state for compliance or implementation.

As it concerns the decisions of the Committee, a report reflecting details of the case and decision or provisional measures ordered must be sent to the AU Assembly for consideration and adoption, unless this is done, the Committee's decisions cannot be made public. Other aspects of the Committee's adjudication may include creating the avenue for parties to explore amicable settlement (the Committee is allowed to assist with free legal services to the victim when

⁷⁶ For a comprehensive view on the Committee's mandate, see art 42(a) - (d).

⁷⁷ For details on state reports and other ancillary reports (initial, periodic and complementary reports and concluding observations), see Viljoen (n 9 above); see also handbook for NGOs and CSOs (n 22 above) 78 – 80.

circumstances demands for it), to receive *amicus curiae* briefs from individuals and organisations upon fulfilment of certain requirements.

Apart from the Committee's commitment to the AU Assembly in accordance with the Children's Charter and other relevant rights instruments, NGOs and CSOs (having observers' status with the Committee) are also known for promoting the effectiveness of the Children's Charter in many respect. For instance, when a respondent state fails or becomes unwilling to comply with the Committee's recommendations, these non-state actors (who may have been responsible in litigating cases on behalf of the victim), create awareness to draw the attention of the public to such decision as well as the poor attitude of state towards compliance, exert pressure on the violating state by naming and shaming and lobbying relevant bodies to raise cost against the respondent state. As part of the pressure for compliance, NGOs/CSOs with observers' status with the Committee may submit complementary reports aimed at presenting factual and accurate information which may be used to counter or cross-check any perceived omissions or inaccuracies in the states' official reports. Accordingly, 'The consideration of state reports by the African Committee of Experts also ends in the release of concluding observations aimed at improving the relevant state's implementation of the Children's Charter'.⁷⁸ In all, NGOs and CSOs are known for monitoring the extent of state parties' implementation of concluding observations and general provisions of the Children's Charter – which also entails respondent state parties' compliance with decisions issued by the Committee.

As could be drawn from the above discussion, the AHRS is established for the protection and promotion of human rights within the African continent. This objective is currently being driven by the normative framework set out in the Charter and other relevant rights instruments. And more importantly, by the roles of: (a) the supervisory mechanisms - they follow-up decisions to assess the extent of measures states have undertaken to ensure that rights decisions are complied with and may consequently forward/report outcomes of non-compliance to AU Assembly and Executive Council for appropriate actions/sanctions against a non-compliant state (b) the role of NGOs in pressuring states to comply with decisions through mobilization of shame which may entails calling on on (mostly) regional and international stakeholders to raise international cost (see discussion on the role of NGOs in sections 3.5.2 and 3.6 below). Again, drawing from the above

⁷⁸ Engaging African-based human rights mechanism – A handbook for NGOs and CSOs (n 22 above) 79 -80.

analyses, it may be necessary to ask if CS currently have a place in the current workings of the system's mechanisms as to claim ownership of the AHRs. As this chapter progresses, we shall soon find out (among other things) whether (a) CS is currently engaged or has a place in the activities of the AHRs, and (b) whether engagement and mode of operations of NGOs/CSOs and the Commission in follow-up on decision under the system have actually improved compliance.

3.4 Status of compliance with decisions of supervisory mechanisms

There are growing concerns in the literature about the status of member states' compliance with their international human rights obligations under the AHRs.⁷⁹ This concern may be borne out of the understanding that the effectiveness of the AHRs partly depends on state parties' voluntary compliance with decisions issued by the institutions created by the state parties. As stated in section 3.1 above, part of the objectives of this chapter is to examine the rate of member states compliance with the decisions of the supervisory bodies. In pursuit of this, the findings from some key compliance based scholarship will be relied upon in addition to reports on status of states parties' compliance which are contained in the recent activity reports of the Commission and Court.

For instance, over a decade ago, Viljoen and Louw⁸⁰ analyzed the extent of state compliance with decisions of the Commission issued from 1994-2003. First, they report that from 1987 up to mid - 2003, the Commission concluded about 122 communications.⁸¹ Out of these numbers, 46 of the cases were declared admissible. They further report that 'out of the 46 admissible cases', the Commission found states to be in violation of the provisions of the Charter in 44. These numbers were categorized and discussed in the order of either 'full compliance,' 'non-compliance' 'partial compliance' '*sui generis*' and 'unclear cases'.⁸²

Second, they report that out of the 44 cases decided against states within the period of their research, full compliance was recorded only in 6 (14%) cases of the decisions issued by the

⁷⁹ See for instance, Viljoen & Louw (n 6 above) 8-12; Abebe (n 6 above) 564; for the literature on poor implementation of decisions, see Murray & Mottershaw (n 6 above) 350; Murray & Long (n 10 above) 4; 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, 82; Ayeni (n 8 above).

⁸⁰ Viljoen & Louw (n 6 above).

⁸¹ Viljoen & Louw (n 6 above) 23; F Viljoen, 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human Rights Law in Africa* (2004) 385,438-439.

⁸² *Achutan (on Behalf of Banda et al.) v Malawi* (2002) AHRLR 144 (ACHPR 1995); *Aminu v Nigeria* (2000) AHRLR 248 (ACHPR 2000); *Civil Liberties Organization v Nigeria* (2000) AHRLR 188 (ACHPR 1995); *Comm'n nationale des droits de l'homme et des libertes v Chad* (2000) AHLR 66 (ACHPR 1995); for details, see Viljoen & Louw (n 18 above) 23, 26-29.

Commission.⁸³ While under the following categorizations, the figures vary; for instance, report of non-compliance was recorded in 13 cases,⁸⁴ partial compliance - (14 cases), *sui generis* - (7 cases) and unclear cases - (4 cases). These results then suggest that compliance status arising from the decisions of the Commission for the period covered in their findings is poor.⁸⁵

In addition to the findings on status of compliance as discussed above, Louw also investigated the extent of member states' compliance with the 'views' of the United Nations Human Rights Committee (HRC). As a result, she notes that member states (under the AHRS) fully comply in 9 (29%) of the total numbers of 31 cases finalized against 13 African states as at 2003. Out of the 31 cases, partial compliance was recorded in 6 (19%) while non-compliance was recorded in 16 (52%) of the 31 cases. As a result, she concludes that 'state compliance level with the findings of both the African Commission and the HRC is poor'.⁸⁶

In 2016 (about a decade after Viljoen and Louw's finding of low rate of compliance), Abebe undertook an empirical investigation on status of compliance with decisions from some of the human rights bodies at the regional and sub-regional level for a period ranging from 1988 -2015.⁸⁷ His report focuses on a total number of 337 selected human rights claims from the monitoring bodies covered by his research. Of these, over 14% of the 337 cases were dismissed on 'exhaustion grounds' remaining only 152 cases. Of these 152 cases, member states were found to be in

⁸³ *Pagnouille (on behalf of Mazou) v Cameroon* (2000) AHRLR 57 (ACHPR 1997); *Amnesty International (on Behalf of Banda and Chinula) v Zambia* (2000) AHRLR 325 (ACHPR 1999); *Constitutional Rights Project v Nigeria* (2000) AHRLR 248 (ACHPR 1999); *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999); *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000); *Forum of Conscience v. Sierra Leone* (2000) AHRLR 293 (ACHPR 2000); for details on these cases, see Viljoen & Louw (n 26 above) 29-33.

⁸⁴: *Lawyers Committee for Human Rights v Zaire*, (2000) AHRLR 71 (ACHPR 1994); *Free Legal Assistance Group v Zaire* (2000) AHRLR 74 (ACHPR 1995); *Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995); *Union interafricaine des droits de l'homme v Angola*, (2000) AHRLR 18 (ACHPR 1997); *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Rights Int'l v Nigeria* (2000) AHRLR 254 (ACHPR 1999); *Avocats sans frontiers (on Behalf of Bwampamye) v Burundi* (2000) AHRLR 48 (ACHPR 2000); *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000); *Civil Liberties Org. v Nigeria* (2001) AHRLR 75 (ACHPR 2001); *Law Offices of Suleiman (I) v Sudan* (2003) AHRLR 134 (ACHPR 2003); *Law Offices of Suleiman (II) v Sudan* (2003) AHRLR 144 (ACHPR 2003); *Doebbler v. Sudan* (2003) AHRLR 153 (ACHPR 2003); *Purohit v. Gambia* (2003) AHRLR 96 (ACHPR 2003).

⁸⁵ Abebe (n 6 above) 544-546, 550.

⁸⁶ Louw (n 79 above) 81-82 (she notes further that if states' compliance rate with the Commission's decisions of 14% is compared with the compliance rate with the HRC 'views' of 52%, then the simple conclusion would be that African states comply more with the views of HRC than that of the decisions of the African Commission).

⁸⁷ Abebe's analysis was based on a review of 'the entire caseload of international human rights claims across the African court system:' as provided by the African human rights case law analyser. The African Commission, the Court, the Economic Community of West African States Community Court of Justice (the ECOWAS Court), the East African Court of Justice (EACJ) and the Southern African Development Community Tribunal (SADC) are the institutions referred to as 'African court system'. For details, see Abebe (n 6 above) 532, 544-549.

violation in 113 cases. On the status of compliance, he reports that ‘relatively few of these 113 judgments were actually enforced and according to available data, state compliance rates are poor’.⁸⁸

In a more recent analysis on the status of compliance with respect to reparation orders, Ayeni investigates the level of states compliance to reparation orders in 32 selected decisions issued by the regional and sub-regional human rights tribunals (against five selected state parties) under the AHRS from a period ranging from year 2000 - 2015.⁸⁹ To streamline these cases, the Commission had 12 cases, the Court - 2 cases, and the Committee – 1 case.⁹⁰ The remainder of the 17 cases is spread amongst cases decided by the sub-regional tribunals (which are not the focus of this thesis). He further notes that the 32 decisions issued have 75 reparation orders. Out of the 75 reparation orders,⁹¹ the regional human rights monitoring bodies have 39 reparation orders while the sub-regional tribunals have 36.⁹² This breakdown is necessary because Ayeni’s focus is on member states’ compliance with reparation orders as against prior discussions on compliance with ‘decisions’ of human rights monitoring bodies.

⁸⁸ For details, see Abebe (n 6 above) 532; for other related literature on member states non-compliance with the Commission’s recommendations, see Viljoen (2004) (n 8 above) 13; see also R Murray ‘Decisions by the African Commission on individual communications under the African Charter on Human and Peoples’ Rights’ (1997) 46 *International and Comparative Law Quarterly* 428; EA Ankumah *The African Commission on Human and Peoples’ Rights* (1996) 24, 74-75; C Anyangwe ‘Obligations of states parties to the African Charter on Human and Peoples’ Rights (1998) 10 *African Journal of International and Comparative Law* 625.

⁸⁹ Ayeni (n 8 above) 103.

⁹⁰ For list of cases before the Commission, see the following: *Jawara v The Gambia (Jawara case)* (2000) AHRLR 107 (ACHPR 2000); *Kazeem Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000); *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998); *Civil Liberties Organisation & 2 Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001); *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Purohit & Moore v The Gambia (Gambia Metal Health case)* (2003) AHRLR 96 (ACHPR 2003); *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006); *Zimbabwe Lawyers for Human Rights & ANZ v Zimbabwe* Communication 284/2003; *Zimbabwe Lawyers for Human Rights & IHRDA v Zimbabwe* Communication 292/04; *Scanlen & Holderness v Zimbabwe* Communication 297/2005; *Gabriel Shumba v Zimbabwe* Communication 430/2012; *Noah Kazingachire & Others (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe* Communication 295/04. For list of cases before the African Court, see *Mtikila & Others v Tanzania* (Application 009&011/2011); *Alex Thomas v Tanzania* (Application 005/2013); *Hansungule & Others (on behalf of children in Northern Uganda) v Uganda* Communication 2/2009, for details, see Ayeni (n 8 above) 103 -131 & 395.

⁹¹ Ayeni (n 8 above) 23, 104 (Ayeni defines reparation orders as the ‘remedial obligations imposed on states by both judicial and quasi-judicial HRTs’). He further explains that ‘most human rights cases have multiple reparation orders and some of these orders are multilayered...’ This explains the reason why in 32 cases, 75 reparation orders were sifted for his analysis.

⁹² See Ayeni (n 8 above) 103-128. For details of cases examined under the regional human rights bodies, see also Ayeni (n 8 above) 103-231 & 395.

Drawing from the above breakdown, Ayeni provides details of the status of compliance with these reparation orders as follows:⁹³ (see Table 3.1 below)

- (a) The Commission has total numbers of 27 reparation orders. Out of these numbers, full compliance rate was recorded in 5 of the reparation orders (19%), partial compliance recorded in 9 (33%) while in 13 of the reparation orders (48%), non-compliance was recorded.
- (b) The Court has a total of 7 reparation orders. Full compliance: Nil (0%); partial compliance: 2 of the reparation orders (29%) and non-compliance: 5 (71%)
- (c) The Children’s Committee has a total of 5 reparation orders. Full compliance: Nil (0%), partial compliance: 5 cases (100%) and non-compliance: Nil (0%)

The above analyses are reflected in table 3.1 below:⁹⁴

Table 3.1: Breakdown of status of compliance with reparation orders from the African regional supervisory mechanisms

| List of the HRTs | Full compliance | Partial compliance | Non-compliance | Total No. of orders |
|------------------------------|-----------------|--------------------|----------------|---------------------|
| Regional HRTs | | | | |
| African Commission | (5) 19% | (9) 33% | (13) 48% | 27 |
| African Court | 0% | (2) 29% | (5) 71% | 7 |
| African Children’s Committee | 0% | (5) 100% | 0% | 5 |
| <i>Overall percentage</i> | (5) 13% | (16) 41% | (18) 46% | (39) 100% |

Source: modified from Ayeni’s work (n 8 above) 128.

A strict view on the above records indicates that rate of non-compliance with reparation orders (except from the Committee) is relatively high. For instance, non-compliance was recorded in 18 (46%) of the total cases; full compliance was recorded in 5 (13%) cases while in 16 (41%) cases - partial compliance. Even from a broader perspective, Ayeni’s overall findings also reveal that non-compliance with reparation orders ‘was more prevalent’ at least in 41 (55%) out of 75 reparation

⁹³ Ayeni (n 8 above) 128.

⁹⁴ See Ayeni (n 8 above) 198-199.

orders issued in 32 selected cases.⁹⁵ This then suggest that compliance level with reparation orders is relatively low.

Arising from the above discourse and considering that these decisions emanate from the supervisory mechanisms, would it not be better to find out if the mechanisms themselves are concerned about the question of whether (or not) their decisions are frequently complied with. Do supervisory mechanisms also consider that there are inadequate responses from member states or challenges of non-compliance with their decisions? In response this question, the thesis examined the Commission's activity reports from the period of 2012 -2018. The aim is to know what the Commission has reported about the attitude of member states towards compliance with its recommendations. It must be noted that the Commission's activity reports emanate from the evaluation of state reports through the reporting system provided by the Charter as already discussed above. Alongside, I also made reference to the African Court's response (contained in its 2018 activity report) over the status of compliance with its decisions. The essence of this is to know exactly what the mechanisms have been, and still currently saying about compliance with their decisions.

My analyses cover a total numbers of 13 activity reports of the Commission within a period of 6 years (2012 – 2018). As reported, the Commission decided 38 communications on the merits, while 52 provisional measures were issued on different communications (see Table 3.2 below for details).⁹⁶ As Table 3.2 below reveals, the Commission continues to lament that compliance level with its decisions and request for provisional measures on communications is relatively low.⁹⁷ Similarly, as reflected in the Court's 2018 activity report, the Court gave judgments on the merits in 21 cases and ordered 20 provisional measures (no Table provided for the Court). The Court's report on the extent of implementation of the decisions and provisional measures does not only shows a poor attitude of state parties towards submission of reports on measures already taken towards compliance but also reveal a general poor rate of compliance with the Court's outputs,⁹⁸

⁹⁵ Ayeni (n 8 above) 113

⁹⁶ See from 32nd activity report – 44th activity reports of the Commission.

⁹⁷ It must be noted that there are possibilities that a state may have complied with a decision or even taken some measures to address the remedy ordered by the Commission yet no report has been submitted to the Commission in accordance to art 62 of the Charter. Therefore, this conclusion is subject to review.

⁹⁸ See Court's activity report of 1 January – 31 December 2018, Ex, CL/1126(XXXIV) 8 – 55.

in some cases; the respondent states clearly express their unwillingness towards compliance with the Court’s decisions and other compliance obligations.⁹⁹

Table 3.2: Commission’s response to state compliance on merits decisions and provisional measures issued

| Report | Period | Sessions | Numbers of decisions on merits | Numbers of provisional measures issued | Commission’s remark on state of compliance with decisions on merits | Commission’s remark on state of compliance on provisional measures issued |
|-------------------------------------|-------------------------------|--|----------------------------------|--|---|---|
| 44th Activity report ¹⁰⁰ | 15 November 2017 – 9 May 2018 | 23rd Extra ordinary session (EOS) and 62nd Ordinary session (OS) | 1 | 5 | The Commission laments that compliance rate is relatively low | No state response on provisional measures |
| 43rd Activity report ¹⁰¹ | June to 15 November 2017 | 22nd EOS and 61st OS | 1 | 2 | As above | Relatively low |
| 42nd Activity report ¹⁰² | January to May 2017 | 21st EOS and 60th OS | No decision issued on the merits | 7 | Laments the low compliance | √ |

⁹⁹ *Ingabire Victoire Umuhoza v Tanzania* Application 003/2014; *John Lazaro v Tanzania* Application 003/2016.

¹⁰⁰ 44th activity report: the decision issued at merit level is *Kwoyelo Thomas v Uganda* (Communication 431/12). The cases for which 5 provisional measures were ordered are *Mohamed Wageeh Eid Taman & others v Egypt* Communication 669/17; *Fadhil Al Mawla Husni Ahmed Ismail and 19 Ors (Represented by Freedom and Justice Party of Egypt) v Egypt* Communication 670/17; *Nnamdi Kanu and the Indigenous People of the Biafra v Nigeria* Communication 680/17; *Atemnkeng Richard (Represented by Mbufor Fonju John Law Firm) v Cameroon* Communication 688/18 and *Jean Ping v Gabon* Communication 692/18.

¹⁰¹ 43rd activity report: the decision issued at merits level is *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v Uganda* Communication 339/2007 and the 2 provisional measures are ordered in the following cases: *Shereen Said Hamd Bakhet v Egypt* Communication 658/17 and *Ahmed Mustafa & 5 Others (Represented by Justice for Human Rights-& AMAN Organisation) v Egypt* Communication 659/17.

¹⁰² 42nd activity report: the 7 provisional measures ordered during the 21st EOS and 60th OS are: *Abu Bakar Abdul Majeed v Egypt* Communication 645/16; *Mahmoud Zakaria Amin Abdel Rehim v Egypt* Communication 647/16; *Kum Bezeng and 75 others (represented by Professor Carlson Anyangwe) v Cameroon* Communication 650/17; *Franck*

| | | | | | | |
|-------------------------------------|----------------------------|----------------------|---|---|---|----------------------|
| | | | | | rate of state parties with its decisions | |
| 41st activity report ¹⁰³ | May – November 2016 | 20th EOS and 59th OS | 1 | 8 | Relatively low | √ |
| 40th activity report ¹⁰⁴ | December 2015 – April 2016 | 19th EOS and 58th OS | 7 | 8 | Expresses concern over states’ failure to report on implementation measures | No express statement |

Diongo Shumba (represented by All4 rights) v Democratic Republic of Congo Communication 652/17; *Ahmed Abdul Wahab Al Khateeb v Egypt* Communication 654/17; *Les femmes de lieke Lesole parties civiles dans l’affaire Basele Lututula, alias colonel Thom’s et autres (représentées par Action Contre l’Impunité pour les Droits Humains) c République Démocratique du Congo Comm.* 655/17; *Anas Ahmed Khalifa v Arab Republic of Egypt* Communication 656/17.

¹⁰³ 41st activity report (of the Commission’s 20th EOS and 59th OS): Decision issued on merits include *IHRDA v DRC* Communication 393/10. The 8 provisional measures ordered are: *Dr. Hazem Mohammed Farouk Abdul Khaliq Mansour v The Arab Republic of Egypt* Communication 617/16; *Mr. Fadel El-Mawala Hosny Ahemad (Represented by Justice for Human Rights (JHR), and Aman Organization) v Egypt* Communication 621/16; *Essam Ahmed Mahmoud El-Haddad (Represented by Abdullah Ahmad Mohammad Al-Haddad and the Alliance for Human Rights) v Egypt* Communication 627/16; *Khalid Mohamed Al Maghawry Mohamed Zakaria & Another (Represented by Dalia Lotfy) v Egypt* Communication 629/16; *Abdul Basseer Abdul Raouf Abdul Haleem & Another (Represented by Dalia Lotfy) v Egypt* Communication 630/16; *Mohammed Abdel Hay Faramawy & Mostafa Abdel Hay Faramawy (Represented by Dr. Abdel Hay Faramawy and 3 Ors) v Egypt* Communication 637/16; *Amed Farooq Kamel Mohammed (Represented by Mr. Farooq Kamel Mohammed and 3 Ors) v The Arab Republic of Egypt* Communication 639/16; *Sharif Hassan Jalal Samak (Represented by the Organisation of European Alliance for Human Rights and AMAN Organisation) v The Arab Republic of Egypt* Communication 640/16.

¹⁰⁴ 40th activity report (of the Commission’s 19th EOS and 58th OS): Decisions reached on merits includes: *Ezzat & Enayet v Egypt* Communication 355/07; *ICJ v Kenya* Communication 385/10; *Me Theogene Muhayeyezu v Rwanda* Communication 392/10; *Jose Alidor Kabambi v DRC* Communication 408/11; *Mack Kit v Cameroon* Communication 423/12; *DawitIssak v Eritea* Communication 428/12 and *Ngandu v DRC* Communication 433/12. The cases for which 8 provisional measures were issued are: *Dr. Osama Yassin (Represented by European Alliance for Human Rights) v Egypt* Communication 586/15; *El Sayed Mossad v The Arab Republic of Egypt* Communication 591/15; *Patrick Gabaakanye (represented by Dingake Law Partners, DITSHWANELO and REPRIEVE) v Botswana* Communication 600/16; *Lofty Ibrahim Ismail Khalil and 3 others v Egypt* Communication 602/16; *Abdul Rahman Osama (represented by European Alliance for Human Rights & 2 others) v Egypt* Communication 610/16; *Prince Seraki Mampuru (on behalf of Bapedi Mamone Community under the leadership of Kgosi Mampuru III) v South Africa* Communication 609/16; *Omar Hegazy’s (Represented by the Organization of European Alliance & 2 Others) v Egypt* Communication 611/16 and *Ahmed Mohammed Aly Subaie v Egypt* Communication 612/16.

| | | | | | | |
|-------------------------------------|----------------------|----------------------|---|---|--|--|
| 39th activity report ¹⁰⁵ | May to November 2015 | 18th EOS and 57th OS | 5 | 9 | No report on implementation of decisions | Response from Burundi on provisional measures with respect to comm. no. 472/14 (<i>Family of late Audace Vianney Habonarugira v Burundi</i>) |
|-------------------------------------|----------------------|----------------------|---|---|--|--|

¹⁰⁵ 39th activity report comprising of the Commission's 18th EOS and 57th OS: cases on which decisions on merits were issued: *Mouvement du 17 Mai v DRC* Communication 346/07; *Jean Marie Atangana Mebara v Cameroon* Communication 416/12; *INTERIGHTS & Ditshwanelo v Botswana* Communication 319/06; *OMCT and LIZADEEL v DRC* Communication 325/06 and *Equality Now v Ethiopia* Communication 341/07. The 9 provisional measures issued concern the following cases: *Dr Mohamed Ibrahim Al-Beltagy v Egypt* Communication 575/15; *Saad Esmat Mohamed Al Hossieny & 6 autres (représentés par AED) v Egypt* Communication 576/15; *Dr Hossam Aboubakar Elseddik Eishahhat Abouelezz v Egypt* Communication 578/15; *Amer Mosaad Abdou Abdel Hameed & Anor (represented by EAHR) v Egypt* Communication 580/15; *Abdalla Mahmoud Mohamed Hajazi and Others (represented by John Jones Q.C and Others) v Libya* Communication 581/15; *Israa Mahfouz Mohamed Al Taweel v Egypt* Communication 584/15; *Family of Late Audace Vianney Habonarugira v Burundi* Communication 472/14; *Samia Shanan & Tarek Shanan (represented by European Alliance for Human Rights) v Egypt* Communication 558/15; *Yasser Ahmed Ahmed Aboeita (represented by European Alliance for Human Rights) v Egypt* Communication 559/15.

| | | | | | | |
|-------------------------------------|--------------------|----------------------|---|---|--|---|
| 38th activity report ¹⁰⁶ | January – May 2015 | 17th EOS and 56th OS | 4 | 6 | Kenya reported measures taken to implement decision on comm. 276/03 – <i>Endorois case</i> | No response from Egypt and Sudan on provisional measures issued; Ethiopia contested the rationality of the provisional measures issued on comm. 507/15 – <i>Andargachew Tsege and Yemsrach Hailemariam (represented by Reprive and Redress)</i> ; Despite Provisional measures on comm. 512/15 transmitted 16 February 2015, Egypt executed Mahmoud Hassan Abdel-Naby on 7 March 2015 |
|-------------------------------------|--------------------|----------------------|---|---|--|---|

¹⁰⁶ As contained in the 38th activity report, the following decisions were issued on merits: *The Nubian Community in Kenya v Kenya* Communication 317/2006; *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06; *Hawa Abdallah (Represented by African Center for Justice and Peace Studies) v Sudan* Communication 401/11 and *Mbiankeu v Cameroon* Communication 389/10. Provisional measures were also issued in the following cases: *Abubakkar Ahmed Mohamed and 28 Others (Represented by X and Y) v Ethiopia* Communication 455/13; *Ibrahima Halawa and 493 Others v Egypt* Communication 501/15; *Andargachew Tsege and Yemsrach Hailemariam (Represented by Reprive and REDRESS) v Ethiopia* Communication 507/15; *Dr. Amin Mekki Medani and Farouq Abu Eissa (Represented by FIDH, ACJPS, OMCT & REDRESS) v Sudan* Communication 511/15; *Mahmoud Hassan Ramadan Abdel-Naby and 57 Others v Egypt* Communication 512/15 and *Mohammed Bakri Mohammed Harun and 7 Others v Egypt* Communication 563/15.

| | | | | | | |
|-------------------------------------|--------------------------|----------------------|---|-------------------------|--|--|
| 37th activity report ¹⁰⁷ | June – December 2014 | 16th EOS | 2 | 4 | Calls on state parties to ‘respect and honour decisions and recommendations of the Commission’s communications...’ | No express comment |
| 36th activity report ¹⁰⁸ | November 2013 – May 2014 | 15th EOS and 55th OS | 3 | 1 | Urges state parties to implement the decisions of the Commission | |
| 35th activity report ¹⁰⁹ | April – October 2013 | 14th EOS and 54th OS | 6 | No provisional measures | Expresses concern over lack of states political will to implement the Commission’s decisions | Lamented Ethiopia’s failure to respect the order on provisional measures |

¹⁰⁷ 37th activity report (of the Commission’s 16 EOS): the cases for which decisions were adopted at merits level were not published in the report. The 4 cases for which provisional measures were ordered includes: *La Famille de Feu Audace Vianned Habonarugira v Burundi* Communication 472/14; *La Famille de Feu Jackson Ndikuriyo v Burundi* Communication 473/14; *La Famille de Feu Jean Claude Ndimumahoro v Burundi* Communication 474/14 and *La Famille de Feu Medard Ndayishimiye v Burundi* Communication 475/14.

¹⁰⁸ 36th activity report (of the Commission’s 15th EOS and 55th OS): the 3 cases for which decisions were issued on merits are: *Titanji Duga Ernest (on behalf of Cheonumu Martinet and Others) v Cameroon* Communication 287/04; *Monim Elgak, Osman Hummeida & Amir Suliman v Sudan* Communication 379/09 and *Tsatsu Tsikata v Ghana* Communication 322/06. Provisional measures issued in the following case - *Eskinder Nega and Reeyot Alemu (represented by Media Legal Defence Initiative, Freedom Now and Lincolns Inn) v Ethiopia* Communication 461/13.

¹⁰⁹ 35th activity report: the 6 cases for which decisions on merits were issued are: *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v DRC* Communication 259/02; *Pierre Mamboundou v Gabon* Comm 320/06; *INTERIGHTS, ASADHO and Advocate O Disu v DRC* Communication 274/03; *Front for the Liberation of the State of Cabinda v Angola* Communication 328/06; *Abdelhadi Ali Radi and others v Sudan* Communication 368/09; *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Zimbabwe 13 others* Communication 409/12.

| | | | | | | |
|--|----------------------------|----------------------------------|---|---|--|---|
| 34th activity report ¹¹⁰ | November 2012 – April 2013 | 13th EOS and 53rd OS | 3 | | Urges state parties' to implement decisions of the Commission | No express statement on provisional measures issued |
| Combined 32nd and 33rd activity reports ¹¹¹ | February - October 2012 | 11th, 12th EOS, 51st and 52nd OS | 5 | 2 | Reports to AU Executive Council of Botswana's blatant refusal to comply with respect to communication 313/05 | |

Source: extracted from the Commission's activity report – 2012 -2018.¹¹²

From the above discourse, it is obvious that member states' poor attitude towards compliance with the 'Commission recommendations as reported by Viljoen and Louw over a decade ago does not seem to have improved as state compliance level under the AHRS has consistently remained poor. Arising from this, it is now important to further investigate to know what the problem is. What could be the potential factors responsible for this lingering challenge of non-compliance? Could it be a problem associated with the current regime or the pattern and strategies by which compliance is being driven – that is, the mode of follow-up on decisions by non – state actors? Or could not this be associated with where the pressure for compliance currently lies as between external and internal legitimacy of the sources of pressure?

¹¹⁰ 34th activity report: the 3 decisions on merits are: *Access to Justice v Nigeria* Communication 270/03, *Me. Mamboleo v Congo* Communication 302/05 and *Debalorivhuwa Patriotic Front v South Africa* Communication 335/07.

¹¹¹ Combined 32nd and 33rd activity reports: the 5 decisions issued on merits are: *Gabriel Shumba v Zimbabwe* Communication 288/04; *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication 295/04; *HRDA v Ethiopia* Communication 301/05; *Dino Noca v DRC* Communication 286/04; *Christopher Byagonza v Uganda* Communication 365/08. The 2 cases for which provisional measures were issued are: *Sudanese Civilians in South Kordofan and Blue Nile (represented by Sudan Democracy First Group, REDRESS, Human Rights Watch, INTERIGHTS and Enough Project) v Sudan* Communication 402/11 & 420/12 and *David Mendes (represented by the Centre for Human Rights) v Angola* Communication 413/12.

¹¹² See Commission's activity reports available at <http://www.achpr.org/search/?t=826> (accessed 27 April 2019).

In addressing these questions, the roles and strategies/tools that NGOs and the Commission often employ in follow-up on decisions under the AHRS are discussed in sections 3.5 and 3.6 below. The aim is prove or disprove the following assumptions (linked to the hypothesis set out in chapter 1 above): first, it is assumed that the pattern of follow-up on decisions and the tools or strategies often employed in pilling pressure for compliance in the AHRS are mostly external. Second, the strategies or tools that NGOs frequently employ in driving compliance are either becoming wane or not sufficient to secure compliance from member states under the AHRS. Therefore, in order to improve compliance, a domestic mechanism might be needed to complement the existing pattern of follow-up under the AHRS. Prior to the discussion on the roles of these non-state actors, other related issues are discussed in the next subsections.

3.4.1 Factors predictive of compliance

Worried by the recurring challenge of non-compliance, scholars have identified different variables that may be responsible for non-compliance as well as several other factors that could likely improve compliance with rights decisions under the AHRS. Liwanga predicts that non or partial compliance may be as a result of ‘politicization of the postadjudicative phase’ coupled with lacks of punitive measures against respondent states, ‘absence of judicial enforcement mechanisms at both regional and national level, lack of participation of domestic courts in the enforcement of international decisions, the notion of respect of state’s sovereignty’.¹¹³ As commonly seen in the literature, factors related to: non-binding nature of decisions from the Commission, lack of clarity in its findings, limited publicity about the works of the supervisory mechanisms, limited good will from member state towards compliance and lack of follow up mechanisms or policy to monitor and report stage(s) of implementation or status of compliance with decisions have often been identified as variables that could be linked with states’ apathy towards compliance.¹¹⁴

With respect to potential factors that may trigger compliance, Viljoen and Louw identify certain variables, which in their analyses could be associated with the following: (a) the treaty body (the Commission), complainant or victim(s) and respondent states (b) the role of constellation of non-state actors: NGOs who exert international pressure and the media. In all, they *inter alia* find that instances of change of government (from dictatorship to democracy), stability of government,

¹¹³ Liwanga (n 18 above) 103.

¹¹⁴ Murray & Mottershaw (n 6 above) 351; Wachira & Ayinla (n 8 above) 470-471.

engagement of the media, NGOs using international pressure, proper follow up mechanisms by NGOs and treaty body, accelerated hearing of communication, and the maturity of the rights institutions could be considered as key factors that may foster better compliance.¹¹⁵ Similar to this, Ayeni observes that resilient ‘commitment to compliance, low-cost, specificity of the remedy and limited remedies, the existence of free, stable and democratic system of governance in the state required to implement the decision, the effectiveness of follow up by the HRTs and NGOs; and political transition or regime change subsequent to the decision’ are key indicators of compliance.¹¹⁶

From an implementation perspective, it is observed that much of the recommendations contained in the 2017 African regional implementation report are tailored towards the need to consider a synergy between the regional institutions and national domestic actors as one of the potential factors for improving implementation and compliance.¹¹⁷ A critical review on these factors mentioned above will indicate that up until now, a consideration for the need for engagement of domestic tools as the potential mechanisms for improving compliance has not been fully appreciated. This study is on the journey that will determine whether (or not) an engagement of domestic constituents will improve compliance better.

3.4.2 Potential challenges associated with computation of compliance records

Owing to the fact that measuring compliance rate is largely dependent on assessment of steps government has taken in response to human rights decisions, it is therefore practically challenging to report findings in accurate terms especially as it concern categorization of partial compliance from full compliance.¹¹⁸ For instance, taking Viljoen and Louw analyses as an example in this context, it is observed that cases categorized under ‘full compliance’ occur when a state with respect to recommendation of the Commission, ‘has implemented them all or has unequivocally expressed the political will to comply with their substance and has taken significant steps in the

¹¹⁵ Viljoen & Louw (n 8 above) 12-21.

¹¹⁶ Ayeni (n 8 above) 308; for similar factors, see HS Adjolahoun ‘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 321-323; Murray & Long (n 10 above) 10-26.

¹¹⁷ See Report of the regional seminar on the implementation of decisions of the African Commission on Human and Peoples’ Rights in August 2017, Dakar Senegal available at http://www.achpr.org/files/news/2018/08/d344/report_regional_seminar_eng.pdf (accessed 20 October 2018).

¹¹⁸ Viljoen & Louw (n 6 above) 26; Abebe (n 6 above) 550; Ayeni (n 8 above) 123.

process'.¹¹⁹ Cases grouped under 'non-compliance' refer to cases in which state takes no step to implement any of the Commission's decisions or even refuse to accept the recommendation on legal grounds.¹²⁰ Cases under 'partial compliance' refer to a situation where the state takes steps to implement some but not all parts of the recommendations.¹²¹ While their choice of categorization present a lot of insights in understanding the different elements in distinguishing compliance from non-compliance, certain challenges generally associated with assessing compliance status needs to be mentioned.

First, Viljoen and Louw acknowledge that discerning the political will of a state is difficult. This is because, a state agent might have taken meaningful steps to fully implement a particular decision, awaiting government final bureaucratic approvals yet this effort might not be tagged as 'full compliance'. Second, they also note that state compliance categorized under '*sui generis*' has no reference to implementation of the Commission's recommendation. Rather, such compliance only reflects 'a transition from an undemocratic and repressive to a more stable and democratic system of government'.¹²² Third, they further admit that 'categorizing state's response as 'partial compliance' is even more problematic than it is for 'full compliance' primarily because a finding of 'partial compliance' most often indicates that the process of implementation is still ongoing'.¹²³ In view of all these, a question may be asked: Is it possible that cases hitherto grouped under partial or non-compliance could later result to full compliance? If so, what categorization do such cases fall into?

Secondly, Posner and Yoo note that measuring compliance is beyond the mere academic exercise of defining what amounts to 'compliance' or not.¹²⁴ Similar to earlier observations, they contend that measuring compliance is complex owing to the fact that the outcome could either be full, partial or mixed. In addition, assessing state level of implementation could be subject to the nature of dispute before the Court.¹²⁵ Noting the above challenges in the literature, Ayeni argues as follows:

¹¹⁹ Viljoen & Louw (n 8 above) 5.

¹²⁰ As above.

¹²¹ Viljoen & Louw (n 80 above) 6.

¹²² Viljoen & Louw (n 6 above) 26-29; Abebe (n 6 above) 550-551.

¹²³ Viljoen & Louw (n 80 above) 6.

¹²⁴ EA Posner & JC Yoo 'Judicial independence in international tribunals' (2005) 93 *California Law Review* 27-29.

¹²⁵ Posner & Yoo (n 110 above) 28.

This ‘all or nothing approach’ ... conflates ‘pending compliance’ with ‘non-compliance’[S]uch characterisation is not only unfair to the state but also inaccurate as far as the actual rate of non-compliance is concerned.¹²⁶

To bypass the traditional style of computing compliance records (as could be seen in Viljoen & Louw’s template) which could result to a situation where non-compliance may either be likely overstated or aggregate compliance is understated or *vice versa*, Ayeni developed a ‘concept of aggregate compliance’.¹²⁷ By this, he 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 analyses. By applying this formula, aggregate compliance is then ‘equal to the summation of the rates of full compliance and half the rate of partial compliance’.¹²⁸ In the context of his analysis, even with the application of the ‘aggregate compliance model’ in the computation of compliance results, the above figures (in Table 3.1 above) with respect to state responses to reparation orders clearly reveal that the ratios of state compliance with reparation orders are low.

While the compliance statistics discussed in section 3.4 above reveal an overwhelming low rate of state compliance level, there are possibility that most states may have taken certain measures to address most of the cases that fall under non or partial compliance, yet these efforts have not been reported in accordance with the requirement of art 62 (reporting procedure) of the Charter. In other words, if appropriate measures are taken by states parties to always report their efforts towards compliance, perhaps, the above compliance scores or statistics recorded in the literature would have been raised a bit higher.

Despite the above challenges on categorization of compliance patterns and inadequate or inconsistent reporting practices by state parties, these burgeoning of scholarship provide a better template for assessing state compliance status.

3.5 Follow-up on decisions under the AHRS: the role of non-state actors

The process of adjudication under the AHRS begins with the communication procedure leading to the reporting stage and ends with follow-up on decisions until compliance is achieved. Follow-up on decisions entails different steps undertaken by drivers of compliance in assessing the measures

¹²⁶ Ayeni (n 8 above) 206

¹²⁷ Ayeni (n 8 above) 130.

¹²⁸ For detail analysis of the aggregate compliance computation, see Ayeni (n 8 above) 207-208.

a respondent state has put in place in giving effect to the provisions of the Charter. Currently, there is no systematic mechanism that has been created to follow-up decisions when a given state fails or expresses unwillingness to comply with rights decisions under the AHRS. Owing to the fact (as discussed earlier) that the decisions from the African rights mechanisms are, up till now, not generously being complied with by state parties, I then intend (in this section) to discuss how certain non-state actors under this system have followed-up on decisions in order to cajole states to comply. The aim of this is to find out what tools do these actors deploy in driving compliance and most importantly, who do these non-state actors engage or report to when a respondent state continues to ignore the decisions of the mechanisms. In the following subsection, I discuss (in no particular sequence) the pattern and tools the Commission often employ in follow-up on decisions under the AHRS.

3.5.1 The role of the Commission in follow-up to ensure compliance with decisions

At the national level, follow-up on decisions is usually not within the framework of domestic courts, it is the party and their legal representatives in whose favor a judgment is given that reports to the Court on whether or not the judgment has been given effect. In contrast, as has been the practice under the AHRS, the Commission has been involved in follow-up on decisions by exploring different tools or mediums: Communication procedure, reporting procedure, missions, issuance of country-specific resolutions, referral of communication to the African Court and appointment of special rapporteurs. While the Commission is, strictly speaking not empowered by the Charter to follow-up decisions, a strict interpretation to art 46 of the Charter requires the Commission to ‘resort to any appropriate method of investigations’. This could then imply that the Commission can engage any appropriate medium to ensure the realization of its mandate.¹²⁹

As a result of the above provisions, the Commission may either choose to explore the above mediums to *directly or indirectly* follow-up on decisions¹³⁰ or resort to the option of forwarding any report concerning a state’s non-compliance with rights decision to the AU Assembly of Heads of States and Government and the AU Executive Council for appropriate sanctions to be levied

¹²⁹ See generally Viljoen (n 9 above) 340 – 341; in following up on communication 393/10 – *Institute for Human Rights and Development in Africa and others (IHRDA) v Democratic Republic of the Congo (DRC)*, the Commission’s Chairperson sent a letter to Anvil Mining Company which contributed to the violation alleged in this case, in that letter, the company was urged to facilitate measures for compliance, for this, see 44th activity report para 30.

¹³⁰ I implore the term ‘directly’ to explain the Commission’s direct involvement in mission visits while the term ‘indirectly’ relates to follow-up on decision through the work of its special rapporteurs on specific task.

against the non-compliant state. How the Commission has positioned itself in follow-up on its decision and the resultant effect will now be briefly discussed.

(a) Communication procedure

In achieving the mandate of promoting and protecting human rights of people on the African continent,¹³¹ the Commission is allowed to receive communication from individuals or NGOs who allege violation of rights. When majority of the Commission members are satisfied that the communication relates to a state party under the Charter and that the nature of the alleged violations falls within the rights provided by the Charter, the Commission will then be seized of the communication. The next hurdle will be to subject the communication to admissibility test as provided by art 56 of the Charter.¹³² Once the Commission is satisfied that the communication meets the admissibility requirements, it will then notify the parties to present argument to advance the merit of the complaint.¹³³

The Commission while considering the communication on the merits is guided by the pleadings of the parties or oral presentations. The Commission's decision will be based on the question of whether the applicant's communication has merit and whether the alleged act of the respondent state amounts to violation of the state's obligation under the Charter. Upon a finding of violation of the provisions of the Charter and other relevant rights instruments, the Commission issues recommendation on remedies that the respondent state should comply with. Where the Communication alleges the need for urgent attention, the Commission may issue an order requesting the respondent state to take provisional measures to do or immediately refrain from the act complained of.¹³⁴ As part of the practice of the Commission, letters of urgent appeals can also be sent to violating states in situation where no communication has been filed. Letters of urgent appeals are similar to provisional measures as they both seek to avert an imminent danger or irreparable loss that may be occasioned if urgent measures are not taken.¹³⁵

¹³¹ See art 45 of the Charter.

¹³² The criteria are as follow: The author of the communication must state his/her name notwithstanding any request for anonymity, the communication must be compatible with the AU Constitutive Act and that of the African Charter, the communication must not be written in disparaging language, the communication must not be based exclusively on news from the mass media, the applicant must have exhausted all local remedy except when it is not available or unnecessarily delayed, the communication must have been submitted within a reasonable time from when local remedy were exhausted or when the violation occurred (if no local remedies are unavailable) and must not be a subject of a case already settled in accordance with the principle of the Charter of the UN or the AU or the African Charter

¹³³ See rule 89 of the ROP.

¹³⁴ See rule 98(1) of the ROP.

¹³⁵ See the Commission's 42nd to 44th activity reports covering a period from 2017 to May 2018.

The important question is to know what the Commission does when a respondent state fails or refuses to comply with the Commission's decisions (including provisional measures and letters of urgent appeals) under the individual communication procedure. There are a number of options open to the Commission. First, where the communication relates to cases or complaints which reveal serious and massive violations of the rights of a particular victim or group of people, the Commission shall be required to bring such situation to the attention of the AU Assembly. The latter may then require the Commission to take 'an in-depth study of the facts of the case and make factual reports followed by the Commission's findings and recommendations'.¹³⁶

Second, when a respondent state fails or refuses to comply with the Commission's decisions on merits, the Commission shall prepare a report accompanied with its recommendation in accordance with art 53 of the Charter; the report shall be forwarded to the concerned state party through the Commission's Secretary. The Commission, as part of its activity report will submit a copy of the report to the AU Assembly.¹³⁷ The report, after due consideration by the AU Assembly shall be 'published by the Chairman of the Commission'. At this stage, the Commission's recommendation to the AU Assembly becomes arguably binding on member states.¹³⁸ As provided under the AU Constitutive Act:

'any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of political and economic nature to be determined by the Assembly'.¹³⁹

It must be noted that while the AU Assembly plays the supreme role of monitoring the decisions and policies of the AU as well as member states' compliance, the work of the Executive Council of the AU is also critical in triggering compliance or implementation under the AHRS.¹⁴⁰ However, owing to the long standing 'AU principle of non-interference in the internal matters of other states' on the basis of states' sovereignty (except for certain grave circumstances), it remains to be seen how these sanction measures can be effectively utilized in improving compliance.¹⁴¹

¹³⁶ See art 58 of the Charter.

¹³⁷ See rule 97 (2) (3) of the ROP; see also arts 52 -54 of the Charter.

¹³⁸ Viljoen (n 9 above) 181, 339.

¹³⁹ Art 23 of the AU Constitutive Act.

¹⁴⁰ Art 13 of the Constitutive Act.

¹⁴¹ Art 4(g) of the AU Constitutive Act. However, under certain circumstances of war, crimes, genocide and crimes against humanity, the non-interference AU principle can be suspended to allow intervention from the Union, see art 4(h) and (j).

Notwithstanding this observation, any AU declaration against a member state has the potency not only to exert moral pressure but can equally attract the attention of regional and international spectators which may result in exposing the target state to negative spotlights and global blackmail. Therefore, states parties' may prefer to heed to the Commission's early call for compliance so as to avoid regional blacklisting and by consequence - the wrath of the AU Assembly and Executive Council.

(b) Reporting procedure

The 'reporting procedure is an established procedure that obligates state party to the Charter to submit reports on measures it has taken to give effect to the provisions of the Charter'. For instance, as provided, each state party to the Charter shall then undertake to:

Submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.¹⁴²

In the context of this discussion, while it is admitted that reporting procedure is not dependent on the communication procedure discussed above, there is a link between both procedures that is relevant in follow-up for compliance. For instance, first and foremost, during its reporting procedure, the Commission takes advantage of 'the state's own documentation of its Charter-related achievements, challenges and failures within the period reported' to engage state delegates to discuss on a wide range of matters, part of which may have emanated from the communication procedure – for instance, issues about state compliance.¹⁴³ Second, owing to the fact that 'states are to submit to the Commission, reports on measures that have been taken' over a range of relevant issues which may also include the question of non-compliance, this then provides an avenue for the Commission to have a sort of feedback from states parties' on extent of implementation with its recommendations.

Other than the period a state is expected to report in accordance with art 62 of the Charter, there are instances where the Commission specifically requires a time frame within which a particular state is to report on the measures, it has taken towards implementation.¹⁴⁴ However, it needs to be

¹⁴² Art 62 of the Charter.

¹⁴³ Engaging African –based human rights mechanism – A handbook for NGOs and CSOs (n 22 above) 60.

¹⁴⁴ See the following cases, Comm. 251/2002 – *Lawyers for Human Rights v Swaziland*; *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); *Purohit and another v Gambia* (2003) AHRLR 96 (ACHPR 2003); Comm. 294/04 - Zimbabwe Lawyers for Human Rights & IHRDA/ Zimbabwe; Comm. 266/03 - *Kevin Mgwanga*

noted that the Commission is not consistent with this practice; it may order ‘a report back period’ of three months¹⁴⁵ and in another instance, it may remain silent on timeframe for a respondent state to report.¹⁴⁶

NGOs also leverage on the state reporting mechanism to scrutinize the correctness of what is reported to the Commission with respect to states’ compliance status. This is done when interested NGOs (especially those that represented the victim in a case for which a particular state report is being considered) submits an independent report (shadow report)¹⁴⁷ which helps the Commission in assessing the accuracy or otherwise of the state’s report. After due consideration of the state report *vis-à-vis* NGOs’ shadow report, the Commission comes up with its Concluding Observations on issues that require urgent attention and other matters that may enhance implementation of its decisions.¹⁴⁸

These observations accompanied by the state party’s report must be included in the Commission’s activity reports which is to be forwarded to the AU Assembly and Executive Council for appropriate actions,¹⁴⁹ and as provided by the Commission’s ROP, the ‘Commission shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the implementation of the decisions of the African Union, to any situations of non-compliance with the Commission’s decisions’.¹⁵⁰ As Viljoen notes, state reporting procedure has given leeway to the Commission to engage a practice where it follows up on decision by inquiring from states parties on the level of compliance with decisions issued with respect to violations of rights of victim as provided under the Charter.¹⁵¹

Gunme et al v Cameroon; Comm 297/05 - Scanlen & Holderness v Zimbabwe; Comm. 373/09 - Interights, IHRDA and Association Mauritanienne des Droits de l’Homme v Mauritania.

¹⁴⁵ See Comm. 276/03 276/03 - *Centre for Minority Rights Development (Kenya) & Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya.*

¹⁴⁶ For a detail discussion, see *A human rights defenders’ guide to the African Commission on Human and Peoples’ Rights* - IHRDA & ISHR (2012) 39-40.

¹⁴⁷ Shadow reports as often submitted by NGOs are meant to highlight and provide an independent assessment of human rights situation in a particular country as well as updates on whether or not the state has taken any measures in addressing the situation. This becomes a helping tool for the Commission to reach and come up with its concluding observations.

¹⁴⁸ On the Commission’s mandate to issue its concluding observations and follow-up on implementation, see rules 77 & 78 of the ROP; see also *The handbook for NGOs and CSOs* (n 22 above) 61-62.

¹⁴⁹ Rule 92(3) & 112(9).

¹⁵⁰ Rule 112(8), 78 (1)-(3) ROP.

¹⁵¹ Viljoen (n 9 above) 341.

While the Commission and NGOs have explored this established procedure (state reporting process) in pressuring respondent states to be on their ‘toes’, it remains to be seen how it has actually improve states’ attitude towards compliance with human rights decisions.

(c) Missions or visits

As earlier discussed, the Commission is allowed to explore any appropriate means of investigation¹⁵² in discharging its mandate under art 45 of the Charter. This provision is further strengthened by the Commission’s ROP which authorizes the Commission to carry out any program of promotional and protective activities in the execution of its mandate.¹⁵³ In the context of this, the Commission embarks on missions or pay visits to state parties as one of the ways of following-up on the level of states’ implementation with decisions. Missions in this sense, could be protective or promotional.¹⁵⁴ Protective missions are generally carried out by the Commission in the execution of its protective mandate and it could either be on-site or a fact-finding mission. The Commission embarks on an on-site mission to either initiate or ‘explore a medium for amicable settlement’ or to investigate certain facts in relation to the allegations contained in a complainant’s communication. However, ‘where the communication apparently reveals the existence of serious and massive violation by a respondent state, the Commission is required to embark on a fact – finding mission in order to investigate the alleged violation in in-depth’.¹⁵⁵ It needs to be further emphasized that the Commission could also embark on a fact finding mission even in absence of a formal communication.¹⁵⁶

Promotional visits¹⁵⁷ are not necessarily related to communication on alleged violation of rights, however, the Commission explores promotional visits to ‘create or improve awareness on the African Charter and the workings of the African regional human rights system’.¹⁵⁸ Promotional visits present opportunity for the Commission to have direct contact and sort of inter-personal interaction with states’ officials and stakeholders to discuss the need to ratify (if the host state is yet to ratify) the Charter and other relevant rights instruments and to further persuade the state on

¹⁵² See art 46 of the Charter.

¹⁵³ This can be deduced from the provisions of rules 69 & 81 of the ROP.

¹⁵⁴ On mission report, see generally M Killander ‘Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 574 - 578.

¹⁵⁵ Engaging African –based human rights mechanism –A handbook for NGOs and CSOs (n 22 above) 64.

¹⁵⁶ As above.

¹⁵⁷ See rule 69 -72 ROP; Viljoen (n 9 above) 379.

¹⁵⁸ Viljoen (n 9 above).

the need to comply with decisions issued by the system's mechanisms and other obligations contained by the Charter. While it may be argued that protective missions are only aimed at promoting protective mandate same way promotional mission are directed towards the Commission's promotional mandate, Viljoen observes that it may be impossible to 'draw a watertight dividing line between the Commission's 'promotional' and 'protective' activities'.¹⁵⁹ Nevertheless, the Commission's primary objective for embarking on missions (whether protective or promotional) is to follow-up on states parties to either see the need to ratify existing relevant rights treaties or comply with their obligations as provided under the Charter and other rights related instruments operational under the AHRS.

In fairness, the Commission has utilized opportunities of embarking on missions to follow-up in assessing human rights situations and extent of compliance with rights decisions by states parties under the AHRS – albeit with varying results. As could be seen from the following examples (not by any means exhaustive), the Commission has embarked on several missions with the aim of promoting effectiveness of the AHRS. First, in 2002, the Commission embarked on a fact finding mission in relation to series of reports (from NGOs) about massive violations of human rights in Zimbabwe arising from the state's constitutional review process or referendum and land redistribution policies.¹⁶⁰ The mission was not only a part of the authorized Commission's activities at the 29th ordinary session of the Commission held in Libya but also relates to communication 245/02 – *Zimbabwe Human Rights NGO Forum v Zimbabwe*.¹⁶¹ The essence of this mission was to conduct an in-depth investigation and to gather necessary information that would help the Commission in reaching a fair conclusion and recommendation. During this visit, the Commission had an intensive interaction and dialogue with government officials and relevant domestic stakeholders as well as human rights CSOs. And at the end, the Commission came up with a report which contains series of recommendations: the need to amend the State's 'Public Order and Security Act and the Access to information Act in order to meet international standard', to establish an independent institutions that can credibly prevent or monitors violations of rights

¹⁵⁹ Viljoen (n 9 above) 295.

¹⁶⁰ See report of Zimbabwe fact – finding mission 2002 available at http://www.achpr.org/files/sessions/34th/mission-reports/zimbabwe/achpr34_misrep_zimbabwe_2002_eng.pdf (assessed on 22 April, 2019); also as discussed in *Advocacy before the African human rights system* (n 39 above) 41.

¹⁶¹ The communication relates to series of reports of political violence, intimidation on members of opposition political parties, widespread invasion of farmland owners followed by constitutional review and parliamentary elections of the year 2000.

independent of the state's police force, review or amendment of the provisions or sections of national laws that inhibit NGOs public participation in public voters' education and human rights counseling.¹⁶² Despite the fact that Zimbabwe's government gave consent for the Commission's visit on fact-finding, these recommendations were never complied with.

Second, as part of the Commission's role in follow-up, it also embarked on a promotional visit to Nigeria in 2009 with a view to discussing issues relating to the need to foster cordial relationship between the Commission and the Nigerian government, particularly with respect to the issue on the need to make a 'declaration under art 34(6) of the African Court's protocol accepting the competence of the Court' to entertain complaints from individuals. Up till date, the Commission's request with respect to making declaration under art 34(6) has not been complied with. Even during the Commission's 2016 mission, most of the issues discussed in the 2009 visit were again reiterated, yet the situation remains.¹⁶³

The above underline the challenges associated with member state compliance not only with decisions on communications but also with other general outputs from the Commission. However, in the case involving *Amnesty International (on behalf of Banda and Chinula) v Zambia*, compliance was facilitated by the Commission's promotional visit to Zambia.¹⁶⁴ Similarly, in *Forum of Conscience v Sierra Leone*¹⁶⁵ the Commission's promotional mission in the year 2000 was reported to have contributed to the drafting and passage of legislation granting soldiers in the state military force the right to appeal against the orders of the military court martial.¹⁶⁶ As part of the fruits of the promotional visit to Botswana over the case of *Modise v Botswana*, Dankwa reports that the 'agreement reached in principle by the president that citizenship will be granted to Modise

¹⁶² See art 46 of the Charter.

¹⁶³ See Killander (n 154 above) 574-578; the Commission's press statements at the conclusion of the promotional visit available at <http://www.achpr.org/press/2016/12/d335/> (assessed on 22 April 2019); it needs to be pointed out that the objectives of the 2016 mission are: to promote the African Charter and other rights instruments, to strengthen the relationship between the Commission and Nigeria with respect to rights guaranteed under the Charter, engage in dialogue with the Nigerian government on measure the latter has taken to implement the provisions of the Charter and the Commission's recommendations in the 2009 mission report and the recommendations contained in the Commissions' Concluding Observations and among other issues.

¹⁶⁴ Comm No 212/98, AHRLR 325, a case concerning an alleged unlawful deportation of William Steven Banda and John Luson Chinula from Zambia and Malawi in violation of the provisions of the Charter; see Viljoen & Louw (n 6 above) 9; for the statement made by the Commission on the mission visit, see Zambia promotion visit 2008 available at <http://www.achpr.org/states/zambia/missions/promo-2008/> (accessed on 22 April 2019).

¹⁶⁵ Comm No. 223/98, 2000 AHRLR 293 (ACHPR 2000) – a communication relating to soldiers that were unlawfully tried by a court martial without the right to appeal to a higher court.

¹⁶⁶ Viljoen & Louw (n 6 above) 11- 12; see also Sierra Leone: Promotion mission 2004 available at <http://www.achpr.org/states/sierra-leone/missions/promo-2004/> (accessed 22 April 2019).

has been complied with'.¹⁶⁷ The Commission follow-up activities in the context of this discussion was also apparent in the case *Malawi African Association et al v Mauritania* where the Commission issued recommendation with expansive remedies. Although, the state has only partially complied with the recommendation, the case provides a clear framework for NGOs and the Commission continued engagement with the government of Mauritania.¹⁶⁸

So far, the Commission has considered missions as a valuable opportunity to dialogue and persuade states parties towards implementation of decisions and to give effect to the provisions of the Charter, therefore, it can be argued that when there are issues of importance - including questions of non-compliance that a particular state has refused to address, the Commission may take advantage of missions to open up dialogue with the violating state so as to discuss the way forward - a situation where the Commission is using its own means at the regional level rather than relying on domestic actors to follow-up on decisions and pressure states into compliance.

(d) Issuance of country-specific resolution

As part of the Commission's activities during its session, the Commission is mandated 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights...'.¹⁶⁹ In view of this, the Commission may be required to issue a resolution urging a violating state to as a matter of urgency address human rights concerns. According to Viljoen:

'...resolutions are important normative tools that inform the obligation of states and the promotional and protective mandate of the Commission...resolutions directed at a particular states in which pertinent human rights violations are addressed may serve a quasi-protective function, especially in the absence of individual communications against those states'¹⁷⁰

Resolutions may take different forms: administrative – dealing with the Commission's procedural matters as well as the relationship between the Commission's internal mechanisms and other stakeholders particularly NGOs/CSOs; country-specific resolution – which relates to a particular state's human rights situation based on complaints/statements or press releases by mostly

¹⁶⁷ VO Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* 335-382; Viljoen & Louw (n 6 above) 10-11.

¹⁶⁸ Communication 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (2000).

¹⁶⁹ Art 45 of the Charter.

¹⁷⁰ Viljoen (n 9 above) 379-380.

NGOs/CSOs or thematic resolution – which only concerns a specific human rights theme or a substantive human rights content as covered by the Charter.¹⁷¹

The focus of this discourse will be based on country-specific resolution because it is often considered by the Commission as one of its vital tools in pressuring (by means of naming and shaming) a violating or non-compliant state to comply with human rights decisions. As Viljoen notes ‘country-specific resolutions have also been used as a vehicle to encourage compliance with decisions’.¹⁷² Issuance of country-specific resolution is not only a tool explored by the Commission to persuade a state party to comply, NGOs also leverage on it as a basis to call on or lobby stakeholders to raise cost of non-compliance against a respondent or violating state. So far, resolutions calling on a member state to enforce or implement the Commission’s decisions have become a common item in the Commission’s activity report which is forwarded to the AU Assembly for further consideration.¹⁷³ For further details on the effect (or otherwise) of the use of country-specific resolution in follow-up on decision, see discussion in section 3.4.4 below.

(e) Referral of cases to the African Court

The authority of the Commission to refer cases to the Court is drawn from the Commission’s ROP which provides thus:

If the Commission has taken a decision with respect to a communication submitted....and the Commission considers that the state has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in rule 112(2), the Commission may submit the case to the Court...¹⁷⁴

This option of referral allows the Commission to access the Court even against a state party that is yet to accept (as stated by the Court in Libya’s case) the competence of the Court to allow individual applications in pursuant to art 34(6) of the Court’s Protocol. Other advantages of this process is that human rights NGOs without observers’ status with the Commission can bring action before the Commission and such application can further be transmitted to the Court and any

¹⁷¹ Viljoen (n 9 above) 379-382.

¹⁷² Viljoen (n 9 above) 342.

¹⁷³ Almost on a regular basis, the Commission reports details of resolutions issued and adopted in its activity report, for instance, see the Commission activity report of 34th -36th & 38th available at <http://www.achpr.org/search/?t=826> (accessed 29 April 2019); see rule 59 of the ROP.

¹⁷⁴ The rule also extends the Commission’s power to refer its request for provisional measure which is yet to be complied with to the Court and any communication before the Commission can be referred to the Court at any stage of the proceeding, see generally rule 118 of the ROP.

decision reached by the Court, unlike the Commission's recommendation, remains binding. As an example of this, the African Commission approached the Court seeking *inter alia* provisional measures requesting the government of Libya to immediately take urgent measures to stop state security forces or agencies from the use of unjustified dangerous force against protesters. Prior to this, the Commission had condemned and issued provisional measures requesting the Libya government to stop violation of citizens' rights guaranteed under the Charter, upon refusal to comply with the provisional measures, the Commission quickly referred the case to the Court. In a swift response, the African Court ordered provisional measures ordering the Libya government to refrain from any act that will affect the rights of people as guaranteed under the African Charter and other international human rights instruments which Libya is a state party to.¹⁷⁵

From the above, notwithstanding Libya's refusal to comply, it can be assumed that one of the ways by which the 'Commission follow-up and drives compliance with decisions under the AHRS could be to resort to the Court's jurisdiction' when it perceives or considers that a respondent state has failed or refuse to comply with recommendations of the Commission. Therefore, the Court's jurisdiction is sought for purposes of giving a judicial stamp or authority that can perhaps be 'considered by the respondent state as binding' and ought to elicit compliance.

(f) The Commission's indirect role in follow-up through its special rapporteurs

As could be drawn from the discussion so far, the Commission's business does not end at the point when a recommendation is issued on merits against a state party upon a finding of violation of the Charter. The Commission also engages in several other activities aimed at following-up a violating state to comply with its recommendation and provisional measures as provided under the Charter. These activities are not always carried out by the Commission as an entity, there are internal mechanisms that are appointed and often engaged by the Commission to carry out specific task on specific areas of concern, and they are called the special mechanisms. It needs to be pointed out that while the Commission may function as an entity during the inter-sessions, members of the Commission function individually either as Country Rapporteurs or Special mechanisms – holders of specific mandates.

¹⁷⁵ See App. No. 002/2013 – *The African Commission on Human and Peoples' Rights v Libya* available at <http://www.african-court.org/en/images/Cases/Judgment/Judgment%20App1%20%20002-2013%20African%20Commission%20v%20Libya-%20Engl%20.pdf> (accessed 26 April 2019).

Currently, the Commission has three categories of special mechanisms: first, the Special Rapporteur – who is usually a member of the Commission holding a specific mandate in a thematic area, the Special Rapporteur works closely with relevant stakeholders (which includes CSO/NGOs and government agencies). Special Rapporteurs can be assigned with specific mandates in different thematic areas: for example, Special Rapporteurs on: Freedom of expression in Africa, human rights defenders, refugees, asylum seekers, rights of women in Africa, prisons and conditions of detention in Africa, migrants and internally displaced persons in Africa, among others.

Second, the Working Group – this involves a group of Commissioners and other external members who are assigned to gather information and ‘conduct an in depth study’ on specific thematic area with a view to formulate appropriate recommendation that will guide the Commission on the ways to improve protection of rights in the specific thematic areas. Third, the Commission also set up different committees comprised of the Commission’s Commissioners and an independent expert members. The Committee’s operations are not very different from that of the Working Group of the Commission. The current existing Committees may include (among others): the ‘Committees on the protection of the rights of People living with HIV and Committee on Prevention of Torture’ in Africa (CPTA).¹⁷⁶ The latter committee is responsible in facilitating the effective implementation of the ‘Robben Island Guidelines’ and other instruments relating to prohibition and prevention of torture and other kinds of ill – treatment.

In 2012, CPTA embarked on a promotion mission to Mauritania to discuss with government officials and relevant stakeholders to know the measures the state has taken to prevent torture, implement decisions of the Commission¹⁷⁷ and to comply with all other obligations that the state is committed to under the Charter as well as other human rights instruments.¹⁷⁸

As it concerns the role of special rapporteur in follow-up on decision, rule 112 makes provisions for the role of special rapporteur on a communication in follow-up on the Commission’s recommendation as follows: First, ‘the rapporteur for the communication or any of the

¹⁷⁶ See generally A handbook for NGOs and CSOs (n 22 above) 56-57; ‘A human rights defenders’ guide to the African Commission on Human and Peoples’ Rights’ (2012) 29-30 available at https://www.ihrda.org/wp-content/uploads/2012/10/ishr-ihrda_hrds_guide_2012-1.pdf (accessed 30 April 2019).

¹⁷⁷ See Comm 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 - *Malawi Africa Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l’Homme and RHADDHO, Collectif des Veuves et Ayant Droit, Association Mauritanienne des Droits de l’Homme v Mauritania*.

¹⁷⁸ See generally the Report of the promotion mission of the Committee for the Prevention of Torture in Africa in Mauritania 2012 available at http://www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf (assessed 25 April 2019).

Commission member shall monitor the measures taken by the state party to give effect to the Commission's recommendations on each communication', Second, the rapporteur is empowered to take any appropriate action which may also include advising the Commission on any further action that can be taken, third, the rapporteur shall present to each ordinary session, a report on implementation of the Commission's recommendations. Arising from this report, the Commission shall bring any reports on states' non-compliance with its decisions to the notice of the Executive Council for further action, and finally, the Commission shall then include reports of all follow-up activities' in its activity report.

In brief, the activities of Special Rapporteurs are to alert the Commission about violation taking place in states parties, they also help to initiate, conduct and submit reports on outcomes of missions, publish and release press statements on cases of massive violations. For example, in one instance, the Commission's Special Rapporteur on Human Rights Defenders engages different advocacy and mobilisation tools which includes issuance of press release and statements to condemn and bring to the notice of the public the assassination of one Floribert Chebeya – a human rights advocate and director of human rights NGO in the Democratic Republic of Congo (DRC). This Special Rapporteur persistently requested the government to take urgent steps to investigate and bring to book the perpetrators of the crime. The pressure mounted by the Special rapporteur, the African Commission, the UN Special Rapporteur and other international stakeholders may have had positive effects in the measures undertaken by the Congolese government to initiate an investigation which resulted in prosecution and sentencing of several police officers.¹⁷⁹

The above discourse has revealed that the Commission is not only one of the major promoters of human rights under the AHRS but its activities have evolved over the years in a manner that it can now be considered (directly or indirectly) as one of the major players that pressure states parties to comply with rights decisions and other obligations as guaranteed under the Charter. Notwithstanding the overwhelming argument in the literature that the Commission has no institutionalized follow-up mechanism to detect and report the extent, in which a state party has complied with decisions, in practice, the Commission and NGOs play major roles as follow-up mechanisms in pressuring state for compliance. As Viljoen observes, 'the Commission has shown increasing concern about and interest in implementation and has started to engage in a limited

¹⁷⁹ See A human rights defenders' guide to the African Commission (n 146 above) 30.

follow-up of decisions, by utilizing the reporting procedure, its own decisions, resolutions, promotional visits, and on-site missions'.¹⁸⁰ Beyond its follow-up activities, the Commission often times, creates awareness about violation of rights through press releases and speeches, and in some cases, it may either call on the concerned states to address alleged violations or call on AU for intervention.¹⁸¹ However, the important question is to know whether or not these measures have actually been effective in securing state compliance.

From the entire discussion about the follow-up role of the Commission, certain observations are worth paying attention to: first and most importantly, it seems from the above analyses, that the authority of the Commission does not seem to be adequate in securing compliance as often as expected, hence compliance level has remained low despite the efforts and several measures it has undertaken. A second observation is that the Commission's authority does not seem to be the motivation that influences compliance realities from states parties under the AHRS. Therefore, the Commission resorts to different follow-up measures (as discussed above) which also includes collaborative engagement with officials of member states, national human rights institutions (NHRIs), international/regional bodies and NGOs/CSOs (both foreign and local). Perhaps, the reason (as discussed in section 3.6.2 below) might be that these non-state actors (NGOs/CSOs, NHRIs international stakeholders, etcetera) are among the regular participants (audience) at the Commission's sessions and inter-sessions, hence, the Commission could depend on these actors – particularly NGOs in the realisation of its mandate. The third observation is that the Commission relies on the political organs of the system - the AU Assembly and Executive Council to sanction erring states. In all, the Commission's engagement and interaction with the wider segment of the African society (CS) is yet to be seen.

A lesson to learn from the workings or the follow-up pattern of the Commission is that when a state fails or refuses to comply, the Commission may: (1) utilize its outputs to engage state actors to discuss a wide range of issues which often times includes compliance with rights decisions (2) call on AU political organs to sanction erring state parties or collaborates with non-state actors to pressure violating states towards compliance. In view of all these analyses, can the balance of pressure for compliance with the decisions of the AHRS be said to lie on the influence and

¹⁸⁰ Viljoen (n 9 above) 341.

¹⁸¹ The Commission's statements and press releases on human rights situations are available via <http://www.achpr.org/search/?y=2019&t=835%7C924> (accessed 25 April 2019).

authority of internal domestic forces (wider CS)? To ask differently, does CS actually have a place in the activities of the AHRS? These questions will be determined by the end of this chapter. However, in the next section, the role of NGOs in litigation and follow-up on decision decisions under the AHRS is discussed with the aim to further investigate *inter alia* where the balance of pressure for compliance lies as between external (international and regional constituents) and internal forces (domestic constituents – CS).

3.5.2 The operations and roles of NGOs in litigation and follow-up under the AHRS

The AHRS is inarguably meant to promote the course of human rights in the African continent in a similar manner of operations like its European and Inter-American counterparts. In achieving and sustaining this objective, the system has encouraged a collaborative engagement between its supervisory mechanisms and human rights stakeholders especially NGOs/CSOs. Currently, NGOs have become a major collaborator with the system's mechanisms (especially with the Commission) in the promotion and protection of human rights in Africa.¹⁸² In engaging with the Commission in submission of a communication for and on behalf of a victim, NGOs do not need to be clothed as a body with observer status by the Commission. However, for an NGO to be engaged in other important matters like: attendance of the Commission's sessions, to propose items (on matters of interest) to be included on the agenda of the session, to have access to the African Court directly or indirectly, initiate a draft of a resolution and lobbying for its adoption, issue statements at the public session, allow to participate and make formal contributions at the state reporting process, allow to present shadow or alternative reports when necessary, such an NGO must have been formally recognized by the Commission as among the human rights organizations with observers status.¹⁸³

¹⁸² For general reading on the operations of NGOs under the AHRS, see See R Murray 'The role of NGOs and civil society in advancing human security in Africa' in A Abass (ed) *Protecting human security in Africa* (2010); Viljoen (n 9 above) 383, 405-406; A Motala 'Non-governmental organizations in the African System' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in Practice 1986-2000* (2004) 246-279; M Kaldor 'Transnational civil society', in T Dunne & NJ Wheeler (eds) *Human rights in global politics* (1999) 195; BS Baek 'RHIS, NHRIs and human rights NGOs' (2012) 24 *Florida Journal of International Law* 236; also see African Commission on Human and Peoples' Rights available at <http://www.achpr.org/network/> (accessed on 24 April, 2019).

¹⁸³ For details on NGOs role with the mechanisms, see Viljoen (n 9 above) 360 -361, 383 & 405; for criteria on grant of observer status, see resolution on the criteria for granting and maintaining observer status to non-governmental organizations working on Human and Peoples' Rights in Africa available at <http://www.achpr.org/sessions/59th/resolutions/361/> (accessed 24 April 2019).

No doubt, the effectiveness of the African human rights monitoring bodies has further been strengthened by the engagement of NGOs in virtually all aspect of the workings of the system. Accordingly, Murray and Long explain the role of NGOs/CSOs thus:

CSOs have pushed for findings to be ‘embedded’ at the national level and often employ a range of activities and strategies to apply pressure on States to implement them such as raising issues through the media, dissemination of information to the general public, and the translation of decisions into local language [and in other instances, NGOs] assisting victims in bringing cases have a responsibility that arguably goes beyond the litigation process and to follow up and try to secure implementation¹⁸⁴

So far, NGOs/CSOs have established a forum commonly called the ‘NGO Forum’ which is hosted by the African Centre for Democracy and Human Rights Studies (ACDHRS). The primary objectives of this forum is to ‘foster closer collaboration between and among NGOs and with the African Commission and other African human rights mechanisms, for the purpose of promoting and protecting human rights in Africa’.¹⁸⁵ The role of NGOs permeates all aspects of the operations of the mechanisms (see discussion in section 3.3 above). However, in the context of this chapter, the role of NGOs/CSOs will be discussed under two headings: the roles in litigation and their role in follow-up on decision from post litigation.

(a) NGOs role in litigation of cases

The practice under the AHRS on the promotion and protection of human rights requires a victim alleging violation of human rights by a state party to the Charter to bring a communication to the Commission. This communication can be presented by the victim of the alleged violation or by a human rights organization – NGOs/CSOs.¹⁸⁶ While NGOs without observers’ status can submit communication to the Commission, certain restrictions make it difficult for NGOs to directly access the Court in contentious matters. For instance, art 5 provides: ‘the Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with art 34(6) of this Protocol’.¹⁸⁷ Details about NGOs limited access to the Court have been discussed in section 3.3 above.

¹⁸⁴ See Murray & Long (n 10 above) 108 -109.

¹⁸⁵ For brief overview of the NGO Forum, see NGOs forum available at <https://www.acdh.rs.org> (assessed on 23 April 2019); see also A handbook for NGOs and CSOs engagement (n 22 above).

¹⁸⁶ See rules 93(1) (3) & 94(2) of the ROP.

¹⁸⁷ See particularly art 5(3) of the Court’s Protocol.

Despite these constraints, one simple observation as could be seen below is that NGOs have not relented in their advocacy drive in terms of litigating cases before the regional mechanisms and follow-up on decisions or recommendations with the aim of facilitating compliance.

In order to establish the extent of NGOs involvement in litigating cases under the AHRS, a sample of selected cases (see below for selection criteria) has been generated from the African human rights case analyser - operated by the Institute for human rights and development in Africa (IHRDA) and the websites of the supervisory mechanisms. These websites provide the details and statistical summary of the cases presented below.¹⁸⁸ The results of my analyses are as follows: (1) As for the Commission: I examined a total number of 212 sample of selected cases submitted to the African Commission against member states from a period ranging from 1988 to 2017. Of these numbers, NGOs submitted to the Commission a total number of 122 cases, representing 57.5%, while 83 (39.2%) of these cases were submitted by the victims in their personal capacity. In this analysis, 4 (1.9%) cases were submitted to the Commission in a representative capacity. These details and other related analysis are contained in Table and Graph 3.3 below. (2) As for the Court: a total of 217 cases were presented before the Court as at June 2019, of these numbers; NGOs presented about 12 of the cases which represent 5.5% of the total number. Far from the numbers of cases involving victim participation at the Commission, the analysis from the Court's cases reveals that victim participated in the submission of about 203 (93.5%) of the total cases while in

¹⁸⁸ See generally, African human rights case analyser operated by the Institute for human rights and development in Africa (IHRDA) and the African Commission, Court and Committee websites for statistical summary and details of cases (pending, finalized or declared inadmissible), available at <http://caselaw.ihrda.org/doc/search/>?; <http://caselaw.ihrda.org/doc/search/?m=83>; <http://caselaw.ihrda.org/doc/search/?m=83%3A85>; <http://en.african-court.org/index.php/cases#finalisedcases>; <http://www.achpr.org/communications/>; <http://en.africancourt.org/index.php/cases#pending-cases>; <http://en.african-court.org/index.php/cases#statistical-summary>; <https://www.acerwc.africa/> (accessed 22 August, 2018). The criteria for selection of the cases are as follows: for the Commission - only cases submitted either by individual victims personally, or in representative capacity by other person(s) on behalf of victims or by NGOs representing a victim(s) as contained in the African human rights case analyzer database provided by IHRDA and the Commission's website. Cases where facts are not clear about the capacity in which the case was submitted were not selected. The cases selected only concern communications against member state in Africa within the period covered. For the Court: All the cases analysed in the IHRDA website and cases that were categorized as pending (155 cases) or finalised (58 cases) and cases transferred to the African Commission (4) under the African Court website on statistical summary of cases were all considered in my analysis. For the Committee: All cases provided under the human rights cases analyzer by IHRDA (3 cases) together with other cases in the table of cases listed in the Committee's website form my analysis.

3 (1.4%) cases were presented by the African Commission.¹⁸⁹ These details are captured in Table and Graph 3.4.below. (3) As for the Committee: I examined total of 10 selected sample of cases (from 2005-2016)¹⁹⁰ that were presented before the Children’s Committee and my analysis reveals that NGOs participated in 6 (6%) of the cases while 4 (4%) of the cases were presented in a representative capacity on behalf of the victims (no Table or Graph for this).¹⁹¹

The essence of the above analyses is to show the percentages of cases in which NGOs have featured in litigation within the period covered as against the cases in which they were not. From the above, it can be argued that while NGOs participated significantly in litigating cases on behalf of victims of rights violation at the Commission and Committee, the number of cases submitted by NGOs at the Court remains relatively low, this may be primarily attributed to the restrictions (as discussed above) on access to the Court by non-state actors.

Table 3.3: List of cases presented to the Commission involving NGOs in terms of litigation on behalf of victims

| Application by | Frequency | Percent |
|------------------|-----------|---------|
| Behalf of Victim | 3 | 1.4 |
| NGO | 122 | 57.5 |

¹⁸⁹ Details of these cases are available at <http://en.african-court.org/index.php/cases#statistical-summary> (accessed 26 July 2019). It is important to note that of the 217 cases, 58 of the applications have been finalized, 155 of the applications are still pending as at the time of this writing and 4 of the applications have been transferred to the African Commission.

¹⁹⁰ Comm 001/com/001/2005 *Michelo Hunsungule and others (on behalf of children in northern Uganda) v The government of Uganda* (finalized); Communication 002/comm/002/2009 *IHRDA and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The government of Kenya* (finalized); No 003/Com/001/2012 *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense Des Droits de l’homme (Senegal) v Senegal* (finalized); No. 004/Com/001/2014 *Institute for Human Right and Development in Africa v Malawi* (pending); No. 005/Com/001/2015 *African Centre of Justice and Peace Studies (ACJPS) and People’s Legal Aid Centre (PLACE) v the Republic of Sudan* (finalized); Communication 006/Com/002/2015 *The Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon* (finalized); Communication 007/Com/003/2015 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* (finalized); Communication 008/Com/001/2016 *Dalia Lotfy on behalf Ahmed Bassiouny v Egypt* (declared inadmissible); Communication 009/Com/002/2016 *Dalia Lotfy on behalf Sohaib Emad v Egypt* (declared inadmissible); Communication 010/Com/003/2016 *Etoungou Nko’o on behalf of Mr and Mrs Elogo Menye and Rev Daniel Ezo’o Ayo v Cameroon* (declared inadmissible).

¹⁹¹ Details of these cases are available at <https://www.acerwc.africa/table-of-communications/> (accessed 26 July 2019).

| | | |
|-------------------------|-----|-------|
| Representative Capacity | 4 | 1.9 |
| Victim | 83 | 39.2 |
| Total | 212 | 100.0 |

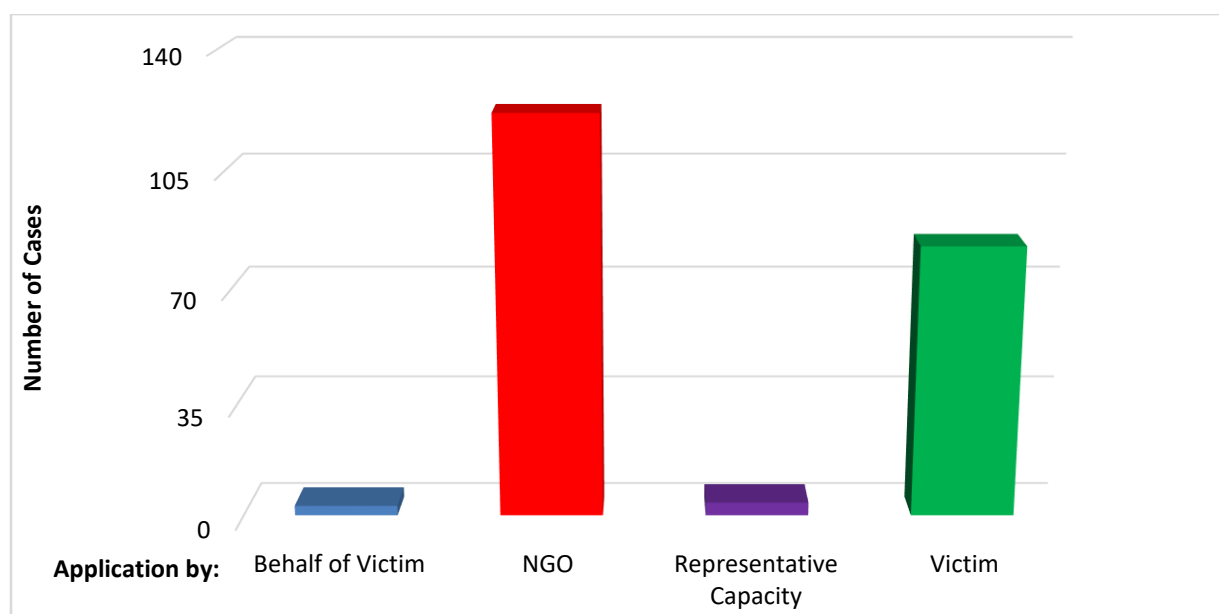
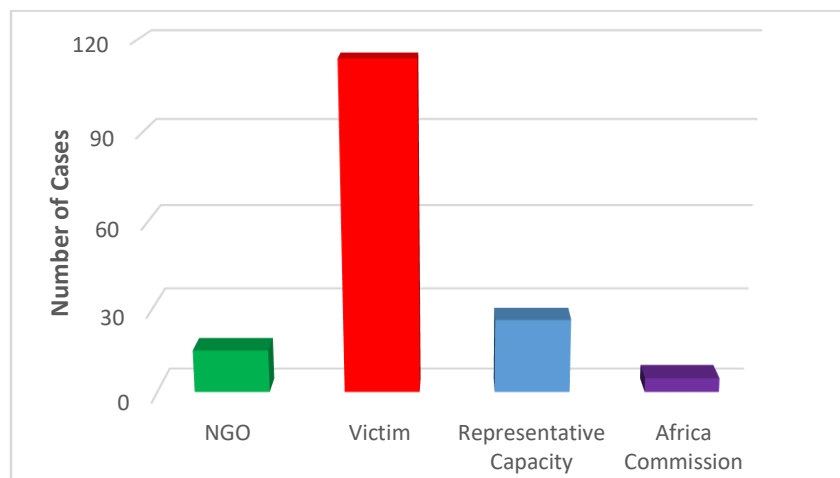


Table 3.4: List of cases presented to the African Court by NGOs in terms of litigation on behalf of victims

| Application | Frequency | Percent |
|--------------------|-----------|---------|
| NGO | 12 | 5.5 |
| Victim | 203 | 93.5 |
| African Commission | 3 | 1.4 |
| Total | 217 | 100.00 |



The above presentation may inspire the question whether states comply better when a case is submitted by NGOs and whether NGOs are able to make states comply faster? As earlier reported by Viljoen and Louw, out of the six cases of full compliance, NGOs submitted communications on behalf of victims whose rights were violated in five of the cases before the Commission.¹⁹² While in the remaining case, Interights (a London based NGO) participated during and after the proceeding at the Commission. This finding prompted the authors to argue that ‘NGOs engagement (using both international and domestic pressures) may have contributed to the full compliance recorded in the six cases’ covered in their analyses.¹⁹³ However, there is need to be cautious of any assumption to the effect that NGOs presence (in submission of cases) always have the potential to influence higher compliance because compliance could be a function of coincidence or any other reasons unconnected with NGOs involvement in litigation.¹⁹⁴ For instance, as it may be asked: are there no cases pursued by NGOs in which violations were found yet states refuse to or partially complied with? Good examples of these are the cases involving

¹⁹² Viljoen & Louw (n 80 above) 28.

¹⁹³ Viljoen & Louw (n 80 above) 28-29.

¹⁹⁴ Ayeni (n 8 above) 202 (arguing 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’).

Zimbabwe Human Rights NGO Forum v Zimbabwe,¹⁹⁵ *Zimbabwe Lawyers for Human Rights & IHRDA v Zimbabwe* and many others.¹⁹⁶

Interestingly, Viljoen and Louw further report that cases of non-compliance also featured the presence of NGOs. At least, in seven out of the thirteen cases of non-compliance, NGOs were involved in the submission of cases and participation in the proceedings.¹⁹⁷ Notwithstanding these mixed records, Viljoen and Louw observe that ‘NGOs contribute significantly to contextualizing complaints in this way, increasing the prospects for compliance’.¹⁹⁸ This they do by means of ‘lobbying’ and engaging ‘public opinion campaigns’ to pressure states to comply with their international obligations.¹⁹⁹

In contrast to earlier findings, Ayeni finds a total of 49 reparation orders in the cases in which NGOs were involved in submission of cases. Of the 49 reparation orders, 6 cases (12%) recorded full compliance, 3 cases (13%) - partial compliance and 30 cases (61%) – non-compliance. His analysis further reveals that 27% of the total reparation orders which did not feature the involvement of NGOs in submission of cases recorded full compliance. In all, Ayeni reports that compliance with rights judgment is not solely dependent on NGOs role in submission of cases as other factors related to the nature of the case, the respondent state and the human rights tribunals are equally relevant in the compliance calculus. As of fact, there is no ‘correlation between compliance in the selected states and NGOs involvement’ in the litigation process.²⁰⁰ The intent of this sub-section is not only to emphasize on compliance status of the cases undertaken by NGOs but to also show how the latter have been engaged in submitting communications, in follow-up outcome of cases and how they apply pressure for compliance.

From all indications, viewing from the details in the tables and graphs above, there seems to be an overwhelming involvement of NGOs in litigation of cases at the Commission and Committee.²⁰¹ In this context, some vital questions deserve attention, for instance, how do NGOs go about following-up on decisions after litigation? What do NGOs do when a state refuses or fails to

¹⁹⁵ Comm. 245/2002.

¹⁹⁶ Comm. 293/04; for cases involving NGOs in submission and active participation in proceedings yet no records of compliance, see Viljoen & Louw (n 6 above) 28.

¹⁹⁷ Viljoen & Louw (n 6 above) 28.

¹⁹⁸ Viljoen & Louw (n 6 above) 29.

¹⁹⁹ See generally, T Treves ‘Introduction to civil society, international courts and compliance bodies’ in T Treves *et al* (eds) *Civil society, international courts and compliance bodies* (2005) 1-7.

²⁰⁰ Ayeni (n 8 above) 200-201.

²⁰¹ As above.

comply with decisions? What mechanisms or tools do NGOs use to pressure states for compliance? My expectation is that an examination of these questions ought to give some insights on the possible reasons why non-compliance has persisted despite NGOs efforts in follow-up and mobilization of different advocacy tools in pressuring states to comply with human rights obligations. In view of this, these questions are discussed in the next sub-section and in the following section 3.6 below.

(b) The role of NGOs in follow-up of orders and decisions

Having demonstrated the overarching roles played by NGOs in litigation (not so much with the Court) under the AHRS in section 3.5.2 above, it will then be necessary to examine the role of NGOs in follow-up on decisions after litigation under the AHRS. Following-up a decision entails a process of tracking the extent of implementation or steps/measures a state party has undertaken in complying with the findings of the monitoring bodies under the AHRS and other obligations covered by the Charter. As stated above, the general perception is that the Commission lacks a formal follow-up mechanism to detect whether or not states have indeed complied with decisions issued.²⁰² This therefore means that reports on the extent to which member states have complied with decisions from the monitoring bodies are not easily assessable.²⁰³ As Viljoen notes, ‘when there is no empirical evidence of non-compliance, no consequences arise from a state’s (sometimes even blatant) disregard for a decision taken and remedy ‘ordered’ by the Commission’.²⁰⁴ Decades ago, this situation has earned the Commission so many criticisms from scholars. For instance, as it concerns the argument that the AHRS does not have an institutionalized enforcement and follow-up mechanism, Welch has described the system and the Charter as an institution without ‘teeth’.²⁰⁵ For Udombana, the Commission is nothing but a ‘toothless bulldog’.²⁰⁶ However, having analysed

²⁰² Viljoen (n 9 above) 340.

²⁰³ For this concern, Eno observes as follows: ‘Unlike other regional and global human rights bodies, the Commission has not developed any follow-up mechanism to ensure implementation of its recommendations. ... This has been very frustrating especially for the victims who have to pursue the execution of the decisions on their own. Because there is no pressure from the Commission, states have tended to turn a blind eye to the recommendations and a deaf ear to the victims’ pleas for compliance’; see R Eno ‘The place of the African Commission in the new African dispensation’ (2002) 11 *African Security Review* 63, 67.

²⁰⁴ Viljoen (n 9 above) 340; Wachira & Ayinla (n 8 above) 466 (arguing that the attitude of state parties ‘since the Commission’s inception two decades ago, by and large has been generally to ignore these recommendations with no attendant consequences’).

²⁰⁵ See CE Welch *Protecting human rights in Africa - Role and strategies of non-governmental organizations* (1995) 151-153.

²⁰⁶ See for example NJ Udombana ‘Towards the African Court on Human and Peoples’ Rights: Better late than never’ (2000) 3 *Yale Human Rights and Development Law Journal* 45 - 64; see also the Commission’s Report (para 25) with

the progress made so far by the Commission and the challenges it hopes to overcome, Viljoen on a more optimistic approach notes that ‘should the Commission overcome these challenges, it may well justify a metaphoric leap from the caution of the cat to the fearful symmetry of the tiger, or, to domesticate the metaphor, the roaring and much feared African Lion’.²⁰⁷

In the African context, the absence of a general culture by African states who are under the AHRS to willingly respect and comply with rights decisions issued by the system’s mechanisms implies that NGOs that had filed communications and litigated on cases also had to take up the role of following up decisions issued on merits. Commenting on the role of NGOs in follow-up of cases, Viljoen and Louw state that: ‘NGOs, more than other potential players, have assumed a significant role in follow-up efforts’.²⁰⁸ Although, as has been observed by Murray and Long, lawyers and human rights NGOs rarely includes follow-up drive in their advocacy and litigation strategies, the common practice (before now) is to focus on litigation and assume the job has been concluded.²⁰⁹ But as funders begin to be more conscious and result driven – perhaps to justify the essence for funding litigation - NGOs/CSOs began to develop and include follow-up mechanisms in their litigation plans even before human rights cases are filed or submitted.²¹⁰

Currently, follow-up as one of the post-litigation strategies by human rights NGOs has become a common phenomenon in the compliance tool box often explored to pressure respondent states for compliance.²¹¹ Therefore, in following up a decision, ‘NGOs have been instrumental in applying

regards to Communications at the 53rd ordinary session in April 2013, stating that the lack of state political will to implement the Commission’s findings ‘exacerbate’ the impression that the Commission is likened to a toothless bulldog’.

²⁰⁷ F Viljoen ‘From a cat into a lion? An overview of the progress and challenges of the African human rights system at the African Commission’s 25 year mark’ (2013) 17 *Law Democracy and Development* 314.

²⁰⁸ Viljoen & Louw (n 6 above) 29.

²⁰⁹ Murray & Long (n 10 above) 116-117.

²¹⁰ Murray & Long (n 10 above) 116-117.

²¹¹ CC Barker ‘Tackling the evaluation challenge in human rights: Assessing the impact of strategic litigation organizations’ working paper No. 55, September, 2010, Hertie School of Governance available at www.hertie-school.org/fileadmin/images/Downloads/working_papers/56.pdf. (accessed 11 April 2018); I Byrne ‘Did Mrs Grootboom get her house?: Challenge of enforcing economic and social rights judgments’ (2010) 16(2) *Interights Bulletin* 87; D Donald & E Mottershaw ‘Evaluating the impact of rights litigation on policy and practice: A case study of the UK’ (2009) 1 *Journal of human rights practice* 339-361; P Gready ‘Reasons to be cautious about evidence and evaluation: Rights-based approaches to development and the emerging culture of evaluation’ (2009) 1(3) *Journal of Human Rights Practice* 380-401; I Gorvin ‘Producing the evidence that human rights advocacy works: first steps towards systematized evaluation of human rights watch (2009) 1 *Journal of Human Rights Practice* (2009) 477-487; Murray & Long (n 33 above) 116-117.

pressure on and lobbying states at the domestic and international levels, so as to influence them to comply'.²¹²

Analyses from the literature also confirm evidence of how NGOs follow-up steps significantly contributed to some extent, the success recorded with regards to the Commission's recommendations. On the basis of this, the role of NGOs in follow-up on cases can be considered as one of the most significant compliance indicators under the AHRS.²¹³ In other words, it can therefore be implied that instead of the authority and influence of the wider CS community and domestic institutions being the primary factors for compliance, it appears, the influence and by extension, the authority of regional and international stakeholders themselves (this includes NGOs) in follow-up that is being considered as major factors and influence for compliance in the context of practical reality under the AHRS.

Drawing from the above, the question remains, owing to the fact that compliance is largely depended on the voluntary will of member states: what factor triggers a state's willingness to consider compliance as a more benefitting option? If NGOs are one of the major drivers of compliance, what mechanisms do NGOs use to pressure states to comply? As discussed below, NGOs exert international pressure through mobilization of naming and shaming against a violating states who may then choose to consider compliance as a better option after a cost-benefit analysis.²¹⁴

²¹² Viljoen & Louw (n 6 above) 28-29.

²¹³ See for instance NGOs intensive follow-up for compliance in *Modise v Botswana Communication* (2000) AHRLR 25 (ACHPR 1994) and *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000), *Lekwots case* (2000) AHRLR 183 (ACHPR 1995) and among others, for details, see Viljoen & Louw (n 80 above) 10-12,29; see also Ayeni (n 8 above) 225 -227, 269; Viljoen & Louw (n 6 above) 28-29; Murray & Long (n 10 above) 108-109.

²¹⁴ My interview with Mr Gambo Wada - Advisor, Migration Program with Action Aid, Nigeria, on 22 November 2018, reveals that NGOs use the following mediums in pressuring states who refuse to comply: (a) 'NGOs use donor countries to put pressure on government to comply with human rights principles (b) the Western countries for example, the 'US have a serious stance on countries with poor human rights records. They may refuse to invest or provide aid in such countries in form of sanctions' (c) 'they also use human rights reports to first highlight countries human rights records, [however] when these efforts fails, they resort to condemnation and sanctions. Also, the way and manner donor countries respond to human rights issues depends on their economic and political interest' (d) 'considering the incentives associated with respecting such calls from a donor countries and weak internal frameworks within domestic constituencies, international pressure is often resorted to especially when it concerns regional cases'. This is similar to the response from Timothy Adewale of SERAC Nigeria dated 30 November 2018. Timothy responded as follows: 'In order to raise international pressures, we usually link up with our international partners such as transparency international and Amnesty International. Due to their large international audience and vastness, they help us to blow up our complaints to other parts of the World. Another strategy we often used to pressure, for instance, the Nigerian Government is to engage different international developmental partners: United States Agency for International Development (USAID) and the UK department for International Development (DFID) either from the British or the US. Because the Nigerian government is partly funded by these bodies, they respond to any pressure from them to

In the following section, this mechanism (naming and shaming) and other tools often employed by NGOs in follow-up on decisions within the AHRS will form the discussion next.

3.6 Advocacy tools often employed by NGOs during follow-up on decisions

As it has become a common knowledge, NGOs are known for exploring all advocacy tools within their disposal in the protection of human rights under the AHRS. For instance, they create awareness and sensitize the public with the aid of the mass media on issues relating to violation of the Charter. Therefore, in order to understand the dynamics involved in the follow-up practices of the NGOs working to improve compliance and effectiveness of the African system, certain aspects of their operations and the mechanisms they often employ in driving compliance under the AHRS need to be discussed. As a result, it may therefore be asked: how do NGOs go about this business; what apparatus or mechanisms do NGOs generally use to pressure states to comply with decisions? Part of the argument in this section is that NGOs employ different tools in naming and shaming violating states in pressuring the latter for compliance. Therefore, in the next subsection, I discussed the general understanding of how this strategy could be applied in exerting pressure for compliance.

3.6.1 An understanding of the general application of ‘naming and shaming’ as one of the NGOs tools in follow-up

Studies have shown that human rights NGOs often generate pressure by naming and shaming a non-compliant state in order to stimulate government response towards the implementation of rights decisions and promotion of human rights.²¹⁵ As Dietrich and Murdie note, at the global level, Amnesty International (AI) and Human Rights Watch (HRW) are the major users of ‘naming and shaming’ strategy against target states.²¹⁶ One major effect of this strategy is that it changes public

avoid aid reductions, this was the kind of pressure used particularly in the case of *SERAP v UBEC* (ECW/CCJ/APP/12/07). More so, as it concerns cases - for instance, from the African Commission, pressure from regional and international stakeholders is most frequently resorted to; for related literature, see Davies, Murdie & Steinmetz (n 17 above) 201; AM Murdie & DR Davis ‘Shaming and blaming: Using events data to assess the impact of human rights INGOs’ (2012) 56 *International Studies Quarterly* 3.

²¹⁵ ME Keck & K Sikkink *Activists beyond borders: Advocacy networks in international politics* (1998); T Risse & K Sikkink ‘The socialization of international human rights norms into domestic practices: Introduction’ in T Risse, S Ropp & K Sikkink (eds) *The power of human rights: International norms and domestic change* (1999) 1, 7.

²¹⁶ S Dietrich & A Murdie ‘Human rights shaming through INGOs and foreign aid delivery’ (2017) 12 *The Review of International Organisation* 1-9; Murdie & Davies (n 214 above) 199-224; J Ron, H Ramos & K Rodgers ‘Transnational information politics: NGOs human rights reporting 1986-2000’ (2005) 49 *International Studies Quarterly* 557-588.

opinion about a human rights situation which would have eluded the masses and the global community. This is possible, when for instance; the ‘naming and shaming’ strategy is linked to a call on the public, international community, aid donors, and regional institutions to pressure the target state to act in a particular manner. As Dietrich and Murdie further reveal, donor partners would always express concern about consistent news in the national and global news headlines about the poor human rights situations in partners’ countries.²¹⁷

In the above context, Clark defines ‘naming and shaming’ as: ‘the act of framing and publicizing human rights information in order to pressure states to comply with human rights standards’.²¹⁸ For Hawkins, ‘human rights pressures’ are ‘non-violent activities carried out by transnational networks ... with the primary purpose of improving individual rights by creating economic and political costs for a repressive government’.²¹⁹

Drawing from the above analyses in the literature, the possible assumption would be that NGOs are funded by donors and interested stakeholders in advancing human rights in African and this could also imply that NGOs may be funded to take up litigation on behalf of victims of human rights violations. This then means that NGOs could be expected to follow-up decisions to ensure that compliance is achieved.²²⁰ Therefore, donor agencies or funders of NGOs activities in the above regard may be interested in raising costs against a state that is not willing to comply with outcomes of human rights litigation. If so, by which tool or strategy will NGOs lobby stakeholders or funders to raise cost of non-compliance against non-compliant states? In addressing this question, commentators state that ‘naming and shaming’ strategy as often used by INGOs²²¹ has become a phenomenon for promoting human rights. It is further argued that naming and shaming

²¹⁷ Dietrich & Murdie (n 216 above) 3.

²¹⁸ A Clark ‘The normative context of human rights criticism: Treaty ratification and UN mechanisms’ in T Risse *et al* (eds) *The persistent power of human rights: From commitment to compliance* (2013) 125, 126.

²¹⁹ D Hawkins *International human rights and authoritarian rule in Chile* (2002) 20.

²²⁰For list of some funders of the Institute of Human Rights and Development in Africa, see <https://www.ihrda.org/donors/> (accessed on 21 October 2018); Sources of funding for amnesty international, see <https://www.amnesty.org/en/about-us/how-we-run/finances-and-pay/> (accessed 21 October 2018); for other list of European funders of human rights NGOs, see <https://www.fundsforngos.org/featured-articles/list-european-funders-human-rights-projects-ngos/> (accessed 21 October 2018); For sources of funding from human rights watch, see <https://www.hrw.org/financials> (accessed on 20 October 2018).

²²¹ Amnesty International and Human Rights Watch are specifically and globally known for their naming and shaming campaigns. See Hopgood (n 17 above); Roth (n17 above) 63; K Sikkink ‘Human rights, principled issue-networks, and sovereignty in Latin America’ (1993) 47 *International Organization* 411-441; R Price ‘Transnational civil society and advocacy in world politics’ (2003) 55 *World Politics* 579-606.

has become almost an indispensable ‘principal weapon of choice among many international organizations and governments’.²²²

Roth emphatically describes ‘naming and shaming’ tool as ‘the core methodology’ which is often used by human rights NGOs including HRW.²²³ It seems as global information technology gains momentum (due to NGOs and INGOs information endowment); this mechanism (naming and shaming) will remain one of the most potent weapons against repressive governments in the hands of both national and international NGOs. In the context of this discussion, it is necessary to understand the dynamics of how NGOs operate while using ‘naming and shaming’ as a device in raising international cost for compliance.²²⁴

First, within the domestic sphere, NGOs generate information on account of human rights violations and on the strength of that information symmetry; they publicize extent of violation of human rights for the awareness of the domestic and international communities.²²⁵ Second, at ‘the international level, with the aid of international media’, they attract international concern to state’s violation of human rights and non-compliance with rights decisions,²²⁶ thereby making the target state open to global condemnation, spotlight and criticism. To avoid international backlash of any sort (for example, loss or reduction of foreign aid and economic benefits), the target state may become susceptible to change of human rights practices at home.²²⁷ Therefore, these combined

²²² J Meernik *et al* ‘The impact of human rights organizations on naming and shaming campaigns’ (2012) 56 *Journal of Conflict Resolution* 233; See also J Franklin ‘Shame on you: The impact of human rights criticism on political repression in Latin America (2008) 52 *International Studies Quarterly* 187 (arguing on the importance of naming and shaming that it is ‘the most commonly used weapon in the arsenal of human rights proponents’).

²²³ Roth (n 17 above) 63.

²²⁴ For related literature, see HP Schmitz ‘From lobbying to shaming: The evolution of human rights activism since the 1940s’ (unpublished paper prepared for the international studies association meeting 2002), available at <http://isanet.ccit.arizona.edu/noarchive/Schmitz.html> (accessed 11 April 2018); J Bandy & S Jackie ‘Coalitions across borders: Transnational protest and the neoliberal order’ in J Bandy & S Jackie (eds) *Coalitions across borders: Transnational protest and the neoliberal order* (2004); C Bob *The marketing of rebellion insurgent and media, and international activism* (2005), also available via <http://www.tandfonline.com/doi/abs/10.1080/10584600802197640> (accessed 11 April 2018); Ron, Ramos & Rodgers (n 216 above) 557,559; C Franklin (n 222 above) 187, also available via <http://scholar.google.com/citations?user=TH3nHB0AAAAJ&hl=en> (accessed 11 April 2018); Hafner-Burton (n 5 above) 689; Murdie & Davis, (n 214 above) 1-16.

²²⁵ Davis, Murdie & Steinmetz (n 17 above) 204.

²²⁶ Two instances (not by any means exhaustive) that can be linked to this are the cases of Nigeria – over the execution of Ken Saro-Wiwa and Ogoni others which attracted several costs in the forms of sanctions and Zimbabwe – over the unlawful eviction of landowners and series of violations in the build-up of the year 2000 elections, this form part of the issues in the Communication before the Commission by Zimbabwe Human Rights NGO Forum. The facts of these cases are stated elsewhere in this chapter.

²²⁷ Keck & Sikkink (n 215 above).

pressure from ‘below and above’ is what Keck and Sikkink describe as ‘boomerang’ effect of transnational network which could expectedly lead to change of human rights behavior by a government.²²⁸

This general application of ‘naming and shaming’ fits into the ‘boomerang or spiral model’ of human rights approach under the constructivist and normative theories popularized by Keck and Sikkink and Risse, Ropp and Sikkink as discussed in chapter two above.²²⁹ The above process captures an interplay of national and transnational actors on the one side and the target state on the other side with the former pressuring the latter towards compliance with human rights obligations by raising both domestic and international costs (pressure from below and above) against non-compliant states (see particularly section 2.3.1 of chapter two for details on the theories for compliance).²³⁰

From the above discussions, it can be argued that NGOs are the mediators bringing both domestic and international pressures to bear for change of state behavior towards human rights violations. As one author notes ‘by encouraging domestic and international audiences to see a regime as repressive and joining on the shaming process, human rights organizations (HRO) perform a key role in achieving human rights improvement’.²³¹ However, in the African context, NGOs often employ the strategy of naming and shaming in following up on decision. In the following subsections, I discussed how NGOs explore these mechanism to exert pressure as part of follow-up on decisions under the AHRS.

3.6.2 Naming and shaming: one of the mechanisms often employ by NGOs in follow-up on decision under the AHRS

This sub-section aims to examine one of the ways or strategies that NGOs often explore in driving compliance under the AHRS. In this context, owing to the assumption that African states do not take decisions from the regional bodies seriously, NGOs as a major collaborator then step in to advance certain advocacy measures which also includes exerting international pressure through the strategy of naming and shaming a target state to induce compliance. NGOs efforts in this regard

²²⁸ As above.

²²⁹ See generally, T Risse, SC Ropp & K Sikkink *The persistent power of human rights* (2013); T Risse, SC Ropp & K Sikkink (n 215 above).

²³⁰ Keck & Sikkink (n 215 above) (1998); A Brysk, ‘From above and below: Social movements, the international system, and human rights in Argentina’ (1993) 26 *Comparative Political Studies* 259; Risse & Sikkink (1999) (n 215 above) 1, 7.

²³¹ Davies, Murdie & Steinmetz (n 17 above) 206.

are expected to yield better results in terms of improved compliance under the AHRS. However, it may be necessary to know whether in the African context, if African states really comply with their rights obligations as a result of the consequences of whatever mechanisms or tools NGOs use to exert pressure?

This questions will be broadly discussed by looking at the effect of the regular tools NGOs rely on in ‘naming and shaming’ member state for compliance. In doing this, emphasis will be placed on: (1) the effect of NGOs statements and calls made during the Commission’s sessions (2) how NGOs leverage on some of the workings of the system (mostly, the Commission’s outputs) in mobilizing and pressuring state to comply. In essence, the assumption is that NGOs also employ some of the Commission’s outputs to pile pressure to induce or encourage states compliance. For instance, NGOs often use statements and calls (made during the Commission’s sessions), the Commission’s ‘country-specific resolutions, shadow or alternative reports’ presented at the public session of the Commission to directly and indirectly shame violating or non-compliant states, which could push the latter to comply. However, owing to the widely assumption that states care about their reputation, would not the strategy of naming and shaming work better in states that actually care about their reputation? In the above regard, the question of whether and to what extent has NGOs mobilization of naming and shaming improved compliance in the African system is discussed below.²³² This is done by looking at certain tools that aids NGO naming and shaming strategy.

(a) NGOs statements and calls as part of the tools used in ‘naming and shaming’ states for compliance

This section aims at addressing one of the underlying arguments in this thesis. For instance, as discussed in section 1.2 of chapter 1 above, the general assumption is that the AHRS depends almost exclusively on external factors for compliance. This then suggests that both the actors driving compliance and the mechanisms they often use in driving compliance or their general pattern of follow-up are all external. In view of this, this section will examine to know, not just the aim and the potency of statements made by NGOs during Commission’s sessions but most importantly, the audience that these statements are being directed to. This will help to determine

²³² According to Biegon, ‘country-specific resolutions shine a spotlight on and seek to mobilize public pressure against repressive practices and gross human rights violations and abuses’, see JK Biegon ‘The impact of the resolution of the African Commission on Human and Peoples’ Rights’ unpublished LLD thesis, University of Pretoria, (2016) 36, see also F Ougergouz *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 549.

whether NGOs statements made during Commission's sessions are directed to external or local audience. In addition, the discussion will also demonstrate how NGOs statements made during the Commission's sessions can help to shame and persuade state to comply.

As part of the activities of the Commission session, NGOs with observers' status²³³ are not only entitled to be invited to attend the activities of the Commission, they are also permitted to issue or make statements at the public sessions of the Commission. These statements are often related to pressing human rights issues occurring either in their home states, other states or a specific country under the AHRS.²³⁴ Besides the opportunity to make statements at the public sessions, the NGO forum which is usually convened prior to the commencement of the Commission ordinary session also provides the opportunity for NGOs to make and present statements, and after due consideration of all statements, the NGO forum may present a joint statement to the Commission on the situation of human rights in African with a request to the Commission to call the respective states to address the violations complained of.²³⁵

As earlier stated, statements issued by NGOs are reflections of range of issues²³⁶ which may include: reports of occurring violations, general human rights situations and questions relating to non-compliance with rights decisions.²³⁷ At the Commission session, participants – especially

²³³ As at the Commission's 63rd ordinary session, the total number of NGOs with observers' status was increased to 518 available at http://www.achpr.org/files/sessions/63rd_os/info/communique63/63rd_os_final_communique_eng.pdf (accessed 25 July 2019).

²³⁴ For details, see sessions of the Commission, available at <https://www.achpr.org/sessions> (accessed 25 July 2019).

²³⁵ Details about the operations of the NGOs forum – hosted by the African Centre for Democracy and Human Rights Studies (ACDHR) are available at <https://www.acdhrs.org/ngo-forum/> (accessed 25 July 2019).

²³⁶ See Press release NGO forum April 2019 available at <https://www.acdhrs.org/2019/04/prngos-forum-april-2019/> (accessed on 24 April 2019).

²³⁷ I present few instances (by no order of sequence) where NGOs have leveraged on presentation of statement on human rights situation within African states to call on the violating state or the Commission/Committee to urge the state to do the needful, see for instance, statement made by Amnesty International at the 56th ordinary session of the Commission on the human rights situation in ten African states particularly, South Africa, see Oral statement by Amnesty International available http://www.achpr.org/files/amnesty_international.pdf (accessed 25 April 2019); statement made by human rights watch at the Commission's 56th ordinary session over human rights situations in Nigeria and Uganda, see NGOs statements available at <http://www.achpr.org/sessions/56th/ngo-statements/33/>; http://www.achpr.org/files/human_rights_watch.pdf (accessed on 25 April 2019); statement made by Zimbabwe human rights NGOs at the Commission's 56th ordinary session over human rights situations in Zimbabwe. For details, see statement by Zimbabwe human rights forum available at http://www.achpr.org/files/zimbabwe_lawyers_for_human_rights_zlhr.pdf (accessed on 25 April 2019); statement made by international service for human rights protection (ISHR) on the 63rd Ordinary session of the Commission. The statements concern attacks on human rights defenders and state's policies that hampered the operations of NGOs in Burundi and Democratic Republic of Congo, for details, see ACHPR 63: The situation of human rights defenders in Africa available at <https://www.ishr.ch/news/achpr63-situation-human-rights-defenders-africa> (accessed on 26 April 2019).

NGOs – are allowed to make statements on each item on the agenda and in some cases, a joint statement may be issued under the aegis of the NGO forum. It must be noted that NGOs can also make oral statement and may publicly confront a state party on issues relating the human rights situation in that country.

The important question is who these statements are directed to. What do these statements aim to achieve. First, it is argued that NGOs statements are ultimately aimed at publicizing and drawing the attention of the public to states’ continued violation of human rights and sometimes, issues of non-compliance with decisions. Second, NGOs press statements (whether at the Commission’s session or not) have the potential to exert moral pressure on the target state especially when it begins to gain wide media coverage that attracts the attention of the public (at home and abroad) and relevant stakeholders. In other words, NGOs statements are part of the tools often used in naming and shaming a violating state with the aim of encouraging compliance. However, in the African context, it is not clear whether the African public - other than the regular audience and participants at the Commission’s sessions – get to know about these statements. Therefore, the only section of the public that can leverage on NGOs statements in pressuring for compliance are the regular audience (and their allies) of the Commission’s session who are mostly from regional and international communities.²³⁸ Again, does this not drive home the point that the pressure for compliance lies more on the authority and influence of external forces?

(b) Global publicity, mobilization and country-specific resolutions as tools often employed by NGOs in exerting international pressure through naming and shaming

Having discussed how NGOs often utilize the Commission’s public session to make statements in relation to human rights violations and further call on stakeholders for intervention, I turn to a discussion of how NGOs often leverage on some aspects of the Commission’s work (country-

²³⁸ In explaining the nature of audience at the Commission’s session, the 64th ordinary session of the Commission held between 24 April -14 May 2019 will serve as an example. At the 64th session, the following stakeholders were in attendance: AU members, representatives of AU organs and institutions, United Nations High Commissioner for human rights, the Commission members and secretariat, NHRIs, international and inter-governmental organisations, The International Committee of the Red Cross (ICRC) and among others. From this list, it can be argued that the regular audience and participants at the Commission’s session are mostly stakeholders from external communities (external communities in the sense that CS and domestic institutions in African states are not on the regular list of participants at the Commission’s sessions). For details, see Final Communiqué of the 64th ordinary session of the African Commission on Human and Peoples’ Rights, Arab Republic of Egypt 24 April – 14 May 2019, available at https://www.achpr.org/public/Document/file/English/64OS%20Final%20Communique_ENG.pdf (accessed on 25 July 2019).

specific resolutions) to follow up on decision. This option is often resorted to in exerting pressure (mostly international) to elicit compliance from a respondent state. In the African context, it is likely that NGOs who engage in the litigation process may subsequently assume the responsibility to follow-up implementation or compliance with the decision issued by any of the system's mechanisms. As discussed in section 3.3 above, the Commission's outputs may present the opportunities to pressure or encourage state to comply. This could be done by exploring the option of relying on the Commission's country-specific resolution to name and shame the target state.²³⁹ In this context, Viljoen and Louw report on how the Commission follows-up on decisions:

[In] absence of coercive measures, the mobilization of shame is one of the only tools available to a treaty body to apply pressure against state parties on the international level [because] most state parties attach importance to their reputation in the international community.²⁴⁰

This process aims at drawing the attention of the public at home and abroad to the human rights happenings with the expectation that the public will change their perceptions about their government. But the most important question is whether the public (other than the human rights defenders) even get to know about these strategies. This and other issues relating to the question of whether and to what extent the African public know about the human rights practices are addressed in this thesis.²⁴¹

In the context of the AHRS, one of the major concerns in this chapter is to examine whether and to what extent has this strategy improves compliance. With regards to the effectiveness or positive sides of the use of international pressure through the mobilization of naming and shaming by NGOs, Viljoen and Louw note that of the 6 cases of full compliance (as discussed above), international pressure mounted by national and international NGOs contributed to compliance recorded in 3 cases (*Zambian Deportation, Modise v Botswana and Sierra Leone Coup cases*).²⁴² On the other hand, they also reported that in 13 cases for which non-compliance was recorded, NGOs also exerted pressure in 2 (*Mauritanian Widows case and case on behalf of Bwampamye v Burundi*) out of the 13 cases of non-compliance.²⁴³ In view of all these analyses from the literature, it can be assumed that effective follow-up on decision is carried out by NGOs through the

²³⁹ Viljoen (n 9 above) 379-381; see also Biegon (n 232 above) 156-221.

²⁴⁰ Viljoen & Louw (n 6 above) 29.

²⁴¹ See discussions in chapter 1 and 5 of the thesis.

²⁴² See Viljoen & Louw (n 6 above) 29-30.

²⁴³ See Viljoen & Louw (n 6 above) 29-30.

application or mobilization of naming and shaming state parties in order to improve states' level compliance and change of behavior towards rights protection in Africa. However, it appears that the strategy does not attract the desired results in all cases. The following examples explain instances where the strategy could not achieve the intended result.

For instance, NGOs engaged visible and consistent 'naming and shaming' campaign against the Nigerian government with respect to the case involving the latter and International PEN & ors (on behalf of Ken Saro-Wiwa).²⁴⁴ This case was filed and submitted by International PEN (an NGO) but was later consolidated with similar other communications filed by other NGOs: Constitutional Rights Project (CRP) and Interights. These NGOs alleged unlawful arrest, unfair treatment in custody and refusal to give fair trial to Ken Saro-Wiwa and others who were arrested following a riot that took place during a public meeting organised by the movement for the survival of the Ogoni Peoples (MOSOP).

Owing to the exigency and sensitive nature of this case, these NGOs (CRP, PEN and Interights) engaged the 'naming and shaming' strategy against the Nigerian government which consequently, attracted the concern of the United Nations (UN), European Union (UN) and the Commonwealth. Despite the intensity of these pressures and 'the *note verbale* faxed from the Commission's secretariat to the Nigerian government asking for stay of execution', the ultimate aim of these pressures was lost²⁴⁵ as Ken Saro-Wiwa and eight others were executed.²⁴⁶ Drawing from this instance, does this not justify the claim that international pressure itself may not always yield the expected outcome? And if so, has not the need for a complementary locally legitimate mechanism in driving compliance under the African system arisen?

Similarly the case decided by the Commission: *SERAC v Nigeria* also witnessed wide negative publicity against the Nigerian government and Shell Petroleum Development Company (SPDC). In this case, international pressure (in applying the naming and shaming approach) was mounted against SPDC and the Nigerian government through series of calls made by AI calling on the UK, and the Netherlands governments to quickly commence criminal action against SPDC and the Nigerian government for alleged offences of complicity and conspiracy to commit murder, rape

²⁴⁴ See Comm. No. 137/94,139/94, 154/96,161/97 9 (joined) 2000 AHRLR 212, para.113, 114, 116,122 (ACHPR 1998); for details on the case, see http://www.achpr.org/files/sessions/24th/communications/137.94-139.94-154.96-161.97/achpr24_137.94_139.94_154.96_161.97_eng.pdf (accessed 21 October 2018).

²⁴⁵ Hafner-Burton (n 5 above) 690-694; Bob (n 224 above) 395-415.

²⁴⁶ See Biegon (n 232 above) 183-189; Bob (n 224 above); Ayeni (n 8 above) 122-132.

and torture against the Ogoni people. Despite the pressure mounted on the Nigerian government, the Commission's decision in this case is yet to be fully complied with. To further justify the application of naming and shaming on the Nigerian government by AI in the above *SERAC's* case, Mark Dummeth, an AI's researcher, asserts that 'the Nigerian government's [repressive action] against the Ogoni people culminated in the execution 22 years ago of nine Ogoni men, including Saro-Wiwa, who had led the protests. Their deaths sparked a global outcry with claims that their trial had been unfair'.²⁴⁷

Also, in the death penalty case against Botswana, NGOs also explored the use of naming and shaming strategy to pressure the Botswana government for compliance. In 2015, the Commission issued a decision holding that hanging as a means of execution violates art 5 of the African Charter and therefore, the government of Botswana has violated the provisions of the Charter arising from the alleged complaints challenging the procedure of death penalty. This case was not only presented by Interights and Ditshwanelo (NGOs) on behalf of Oteng Modise Ping but they also mobilize to pressure the Botswana government to comply with the decision. However, despite the series of pressures from the international community arising from 'NGOs mobilization and advocacy campaigns', death penalty laws and execution of convicts' remain.²⁴⁸ For instance, as reported: 'The government of Botswana says it will only rethink the death penalty if the public and not the European Union demanded an end to the capital punishment laws...'²⁴⁹ This is an approach, from the perspective of the Botswana government, which seem like de-legitimation of the Commission's authority and the sources the Commission look up to for support - the supposed influence of external forces who exert international pressure to drive compliance. In a similar finding, Ayeni reports that in the *Jawara v The Gambia* case, intense international pressure – through the mechanism of naming and shaming -- was also engaged to influence the government of the Gambia to take certain measures, yet the decision has not been fully complied with.²⁵⁰

²⁴⁷ Amnesty International 'Amnesty seeks criminal inquiry into Shell over alleged complicity in murder and torture in Nigeria' see <https://www.theguardian.com/global-development/2017/nov/28/amnesty-seeks-criminal-inquiry-into-shell-over-alleged-complicity-in-murder-and-torture-in-nigeria>; <https://www.amnesty.org/en/latest/news/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/> (assessed 21 October 2018).

²⁴⁸ See 'Botswana dismisses EU calls for end to death penalty' (2016) available at <https://mg.co.za/article/2016-06-01-00-botswana-dismiss-eu-calls-for-end-to-death-penalty> (accessed 21 October 2018).

²⁴⁹ As above.

²⁵⁰ Ayeni (n 8 above) 132-133, it must however be noted that the state has partially complied with some parts of the reparation orders.

The argument as demonstrated above is that non-state actors that are concerned with improving compliance prospect under the AHRS have prioritised the use of external tools instead of domestic tools in the drive for compliance. The instances cited above are cases from the African Commission. However, the claim for overreliance by NGOs/CSOs on external prowess in coaxing states political will for compliance is not limited to cases from the African Commission. For instance, in *Ingabire v Rwanda* the applicant (a leader of an unregistered opposition party) was sentenced to a 15-year imprisonment for alleged offences of complicity in acts of terrorism and sectarianism.

In 2017, the African Court found Rwanda to have breached the applicant's rights to freedom speech and adequate defence as enshrined under the Charter as well as other related rights instruments. From the government point of view, the activities and political ideology of the applicant are capable of igniting another genocide. While the case was still ongoing, the government announced its intention to withdraw earlier acceptance of direct individual applications to the Court. The government reaction in this manner has inaguably attracted the concern of both regional and international communities.

In one instance, the European Parliament through a resolution called on the Rwandan government to *inter alia* 'as a matter of urgency proceed with the review of its declaration allowing individuals and NGOs to file complaints with the African Court on Human and Peoples' Rights and to restore and reintroduce it'.²⁵¹ Despite global campaigns by transnational coalitions of regional and international NGOs, there are no indication that Rwandan government has reverted to *status quo*.

The *Talibé* case²⁵² decided by the Committee attracted huge cooperation from both local and international audiences. The case concerns up to 100,000 children (otherwise known as talibé) within the age of 4-12 years who are being regularly subjected to abuse by their Quranic school instructors (*marabouts*). Most critical of this is that these children are being forced into begging for money to fulfil daily quotas and their education demands. Thus, *talibé* spent more time begging than learning in their Quranic schools (*daraas*). This practice has continued despite government

²⁵¹ See European Parliament resolution of 6 October 2016 on Rwanda, the case of Victoire Ingabire (2016/2910(RSP)) available at http://www.europarl.europa.eu/doceo/document/TA-8-2016-0378_EN.html (accessed 4 November 2019). It needs to be pointed out that as far as the African Court is concerned, the role of NGOs/CSOs in follow-up on decision for compliance was also prominent in the following cases (these are few among other examples): *Norbert Zongo and others v Burkina Faso* – App No 013/2011, *Mtikila and others v Tanzania* – App No. 011/2011, *Alex Thomas v Tanzania* – 005/2013 and *Konaté v Burkina Faso* – App No 004/2013.

²⁵² Decision No 003/Com/001/2012.

legislations criminalizing forced begging of children, hence the communication further alleges that the Senegalese government has made little or no efforts to enforce these laws. Arising from this, the Committee found multiple breaches of several provisions of the African Children's Charter and recommended that the Senegalese government should take necessary measures to address the violation, including but not limited to ensuring that all *daaras* are regularly inspected to ensure that the standard set out in the Children's Charter and other relevant state's legislations are met.²⁵³

The significant aspect of this case in the context of this thesis is to state that NGOs and other stakeholders²⁵⁴ have shown considerable concern in follow-up to ensure compliance yet there is no indication that the rates of abuses of *talibés* have reduced. In addition, a draft bill which aims to establish a legal standard for *daaras* has been approved by the council of ministers in June 2018 but the state's national assembly has not performed the necessary legislative function for its passage. As HRW notes, there are still 'scores of *talibés* – often shoeless, dirty, or sick – begging in Dakar, Louga, and Saint-Louis, often directly in front of law enforcement officers or government buildings. In addition 'judicial officials and social workers in multiple regions said they receive dozens of *talibé* abuse victims and runaways every year'.²⁵⁵

As earlier mentioned in section 3.6.2 above, NGOs in some instances have leveraged on the Commission's country-specific resolutions (which the Commission usually adopts for purposes of shining spotlight against violating government) to pressure government for compliance. This medium, as will be seen in the selected cases below, has often times been explored by NGOs in pressuring member states for compliance under the AHRS. According to Viljoen, a country-specific resolution can be explored as a mechanism to drive compliance with decisions on communications.²⁵⁶

²⁵³ See para of the Committee's decision available at <https://www.acerwc.africa/table-of-communications/> (accessed 4 November 2019).

²⁵⁴ See for instance the role played by the Complanants in this case-Centre for Human Rights (Pretoria), Rencontre Africain Pour La Defense des Droits de l' Homme (RADDHO), a Coalition of Senegalese human rights groups, the Platform for the promotion and protection of human rights (*la Plateforme pour la Promotion et la Protection des Droits Humains*, PPDH), human rights watch and, among others.

²⁵⁵ See Human rights reports titled 'Senegal: Make talibe children a campaign focus' (2019) available at <https://www.hrw.org/news/2019/02/01/senegal-make-talibe-children-campaign-focus> (accessed 4 November 2019); Senegal: 'There is enormouse suffering': Serious abuses against talibe children in Senegal, 2017-2018' available at <https://alliancecpha.org/en/child-protection-news/senegal-there-enormous-suffering-serious-abuses-against-talibe-children> (accessed 4 November 2019).

²⁵⁶ Viljoen (n 9 above) 342.

Ordinarily, the essence of adopting resolution is to set out steps and direct a state to take measures to comply with a particular rights decision or to address specific issues raised in the resolution. Therefore, as it is the practice under the AHRS, the Commission uses its resolution to expose the human rights ills in a country with a view to attracting public concern and pressure on the target state to align their policy with the provisions of the Charter. This is not to determine whether or not the issuance of resolution by the Commission actually has the potency to force the target state to comply but to explain how issuance of resolution aids NGOs mobilization of naming and shaming in the context of the AHRS.

As Biegon explains, one of the effects of a country-specific resolution is that it ‘shines a spotlight on and calls international attention to the undesirable human rights situations’.²⁵⁷ Often times, as observed in sub-section 3.3.2 above, NGOs facilitate the drafting and adoption of the Commission’s country-specific resolution, it can therefore be argued that NGOs play a major role in not just bringing information about rights violations in countries, they also contribute largely to the process leading to the drafting and adoption of the Commission’s country-specific resolution, perhaps to aid their naming and shaming campaign. Few examples below (from the Commission’s cases) explain how NGOs have explore the Commission’s resolution to attract global spotlights on target countries, ultimately with the aim of eliciting compliance.

For instance, in *International PEN v Nigeria* (on behalf of Ken Saro-Wiwa) discussed above, NGOs leveraged on Resolutions 11 and 16 issued by the Commission to pressure the Nigerian government.²⁵⁸ Similarly, in *Zegveld v Eritrea* – Resolution 91 was relied upon to pressure the Eritrean government,²⁵⁹ and in the *Endorois* case – NGOs leveraged on Resolution 257 to pressure the Kenyan government. Drawing from these cases, it can be argued that the Commission’s resolutions became the vital tools for NGOs mobilization of naming and shaming against these states.

As Biegon notes (with respect to the Nigerian case above), the resolutions issued were part of a large global campaign involving both coercive sanctions, naming and shaming against the Nigerian

²⁵⁷ Biegon (n 232 above) 155.

²⁵⁸ For a broader discussion on both resolutions, See Biegon (n 232 above) 187; see also Viljoen & Louw (n 6 above) 1, 6.

²⁵⁹ For fact of the case, see (2003) AHRLR 85 (ACHPR 2003)

http://www.achpr.org/files/sessions/34th/comunications/250.02/achpr34_250_02_eng.pdf (accessed 21 October 2018).

government. The failure or refusal of the Nigerian government to comply with the Commission's request for stay of execution and the resolutions issued gave international actors the impetus to raise international costs against the Nigerian government.²⁶⁰ In the Eritrea case, the Commission's decision ordering the release of 11 former government officials was followed by two resolutions calling on the Eritrean government to comply with previous decisions. Viljoen notes that:

In response to Eritrea's failure to implement the finding in the Eritrea detention case, the Commission condemned the continued detention of the victims and called on the government to 'immediately free' the victims...in this resolution, the Commission makes it clear that non-compliance with its finding and recommendations constitute a breach of the state's obligations under the African Charter and the AU Constitutive Act.²⁶¹

In the above case, the mobilization efforts of naming and shaming and wide public campaigns by NGOs – mostly AI - triggered the concerns of both regional and international stakeholders. In the *Endorois* case, the Commission found the government of Kenya to be in violation of the Charter by forcing the indigenous people of the Endorois community from their ancestral land. In addition to other efforts geared toward securing compliance, the Commission issued resolution 257 which called on the government of Kenya to comply with the decision given in 2009. As it has become a common practice, AI relied on both the Commission's decision and resolution in attracting international concern by calling on the EU and external funders to put into consideration the issue concerning 'the human rights of the 'Sengwer in Embobut Forest', and that the consequences of relevant jurisprudence, in particular the Ogiek case at the African Court...' in their dealing with the Kenya's government.²⁶² Similarly, noting the role of international influence in pressuring the Kenyan government for compliance, Viljeon notes that:

International mobilisation has been a salient characteristic of the implementation strategy. MRG [Minority Rights Group International] and the EWC [Endorois Welfare Council] have used opportunities in international fora, including the UN Permanent Forum on Indigenous People, to raise awareness about the *Endorois* case and the status and need for implementation. In addition to MRG, ESCR- Net, other international civil society organisations such as Human Rights Watch

²⁶⁰ See Human Rights Watch 'World report 1997 – Nigeria' available at www.refworld.org/docid/3ae6a8bf20.html (accessed 20 October 2018).

²⁶¹ Viljoen (n 9 above) 342.

²⁶² Amnesty International 'Families torn apart: forced eviction of indigenous people in Embobut forest, Kenya, available at <https://www.amnesty.org/download/Documents/AFR3283402018ENGLISH.PDF> (accessed 21 October 2018).

drew attention, through its advocacy campaigns, to the fact that the Commission's ruling in the *Endorois* case had not been carried out.²⁶³

From the above analyses, the Commission's decisions and resolutions became the useful tools for NGOs/CSOs mobilization of naming and shaming campaigns against the target states as a way of driving compliance. As Biegon reports, NGOs have given significant relevance to the Commission's resolutions and decisions at the regional and global levels – as within the AU, United Nations Human Rights Commission (UNHRC), Human Rights Commission (HRC), European Parliament (EP) and the European Union (EU).²⁶⁴ The above analyses support the underlying argument that as part of the workings of the AHRS, the Commission's resolutions and decisions can be considered as 'veritable tools for NGOs mobilization' in pressuring African states for compliance. However, whether this practice can and has actually 'translated government rhetoric into practical manifestation' in improving compliance with rights decisions is yet to be seen.²⁶⁵ While it may have been questioned by some African states that NGOs influence the Commission's country-specific resolutions to aid their shaming advocacy at the instance of their 'western donor',²⁶⁶ the resort to Country-specific resolution as a mechanism to drive compliance is not peculiar to the African system.²⁶⁷

²⁶³ 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) 383-384.

²⁶⁴ Biegon (n 232 above) 215-218.

²⁶⁵ See for instance, 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* 769 (arguing that 'effectiveness of human rights tribunal could be influenced from the moment when the tribunals practices, jurisprudence and adjudication becomes a focal point around which CS mobilization for rights protections and compliance can be improved').

²⁶⁶ See particularly Zimbabwe response to resolution 89 adopted at the Commission's 38th session as contained in the 20th annual activity report, Annex III, para 3, 6; Viljoen (n 9 above) 386.

²⁶⁷ The act of mobilizing public pressure to raise international cost has also served a useful purpose under the Inter-American human rights system especially to check violations and improve member state response to public opinion and country reports of the Inter-American Commission during the dictatorship period, it has further be argued in the literature that country-specific resolutions of the UN Human Rights Council (HRC) and its predecessor UN Commission on Human Rights (UNCHR) has attracted high level of positive response from repressive states and aid reduction from financial institutions such as the World Bank; for this, see generally, T Farer 'The rise of the Inter-American human rights regime: No longer a unicorn, not yet an ox' (1997) 19 *Human Rights Quarterly* 510,512; see also Biegon (n 232 above) 155-157; J Lebovic & E Voeten 'The politics of shame: The condemnation of country human rights practices in the UNCHR' (2006) 50 *International Studies Quarterly* 861; J Lebovic 'The cost of shame: International organizations and foreign aid in the punishing of human rights violators' (2009) 46 *Journal Of Peace Research* 79.

In all, the ‘naming and shaming’ strategy has ‘gained significant traction’ going by its frequent use by NGOs under the AHRS.²⁶⁸ In view of this, it can be argued that NGOs raise international cost by a way of naming and shaming target states with the aid of the following tools: statements and calls, global publicity in exposing the level of violations to the public both at home and abroad with the aid of the media and leveraging on the Commission’s country-specific resolution. In further explanation to the use of this strategy, Murdie and Urpelainen state that shaming campaigns are often relied on by NGOs in situations where the probability of raising domestic costs is limited.²⁶⁹ While this point could explain the reason for the seeming frequent reliance on the naming and shaming strategy in raising cost (mostly, international), the knowledge of whether domestic cost can also be as effective as international cost seems to be lacking within the operational framework of NGOs working under the AHRS. I will proceed to the next section in order to explain the potential factors that determine the effectiveness or otherwise of the ‘naming and shaming’ approach.

3.6.3 Factors that determine the effectiveness or otherwise of the naming and shaming strategy

Biegon identifies that human rights naming and shaming may have direct or indirect effects. He states that the results of naming and shaming may be direct when the outcome from its application leads a state, for instance, to release political prisoners, to comply with an order for stay of execution or to re-open investigation for purposes of further trial or fact findings. That is to say, the result of an application of naming and shaming would be said to be direct, when there is an evidence of ‘an immediate and acknowledged shift in state repressive practices’.²⁷⁰ In another sense, effects of naming and shaming could be indirect when the target state resorts to some sort of engagement with the shaming agents or the ‘content of the criticism’, or empowering and supporting the cause of domestic constituencies’.²⁷¹

While it may be admitted that the result from the application of naming and shaming may (or may not) attract immediate positive response from states, it needs to be pointed out that state compliance

²⁶⁸ Biegon (n 232 above) 156.

²⁶⁹ A Murdie & D Peksen ‘The impact of human rights INGO activities on economic sanctions’ (2013) 8 *The Review of International Organisation* 33-53; CM Barry, SR Bell, KC Clay, ME Flynn & A Murdie ‘Choosing the best house in a bad neighborhood: Location strategies of human rights INGOs in the non-western world’ (2015) 59 *International Studies Quarterly* 86-98.

²⁷⁰ Brysk (n 230 above) 259, 273.

²⁷¹ Biegon (n 232 above) 159.

could sometimes, be a function of coincidence. For instance, a state may, after a cost-benefit analysis of a judgment (that is, putting into considerations other political factors), decide whether to comply or not. If the decision to comply coincides with NGOs mobilization of naming and shaming, then the latter may attribute the act of compliance to the application of naming and shaming the state rather than acknowledging that such act of compliance was based on state's voluntariness. Although, looking at it from another perspective, the consistent act of naming and shaming a state may have also informed the need for the state to engage in a political assessment of the tribunal's judgment to determine whether it has the political will (or not) to comply.²⁷² Therefore, the cause and effect about compliance reality is always not easy to predict.

Besides the different effects of this strategy, the result of naming and shaming could either be positive or negative. Both outcomes, are to a large extent, unpredictable until after usage.²⁷³ Sometimes, application of naming and shaming a state does raise cost which threatens the target state to comply without hesitation. A good example of this is when naming and shaming animates certain unpalatable consequences - such as sanctions, aid reductions and other forms of economic, diplomatic and security embargoes.²⁷⁴ These consequences may become unbearable, thus, the target or recipient state may then consider compliance as a better option. In other times, the target state may be unconcerned about any attendant consequences and even unleash more violation without being mindful of any resultant cost. Therefore, in reality, though naming and shaming is

²⁷² See for instance, when Rwanda made the article 34(6) declaration, it was widely perceived that the efforts and advocacy works of CSOs in East Africa particularly - the litigation against Rwanda before the EACJ that propelled Rwanda to make the declaration. Well, when Rwanda decided to withdraw, it showed that its declaration and the litigation merely coincided, for CSOs statement on Rwanda's withdrawal, see 'Rwanda's withdrawal of its special declaration to the African court:setback for the protection of human rights (2016) available at <https://www.fidh.org/en/region/Africa/rwanda/joint-civil-society-statement-on-rwanda-s-withdrawal-of-its-article>; <http://www.southernafricalitigationcentre.org/2016/03/18/joint-civil-society-statement-on-rwandas-withdrawal-of-its-article-346-declaration-from-the-protocol-on-the-african-court-on-human-and-peoples-rights/> (accessed on 26 April 2019).

²⁷³ EM Hafner-Burton (n 5 above) arguing that international naming and shaming has contradictory outcomes. For some government, it is not all cheap talk; for instance, it could lead to change of government policy as the resultant effect. For others, it could result to negative unintended consequences where target state will be more repressive on citizens and political oppositions as the case in Ethiopia and Zimbabwe, it may also encourage domestic oppositions or terror groups to instigate act of violence against the repressive government in order to attract more spotlight as in the case of the movement for emancipation of the Niger Delta. In summary, he concludes that naming and shaming is not a cheat talk, it cannot also be said to be the panacea for all abuses. Target states may engage a better 'protections for citizens right but rarely stop or appear to have lessen acts of terror, worse terror sometimes increases after publicity'.

²⁷⁴ Biegon (n 232 above) 160; on a positive effect, see S Katzenstein 'Reverse-rhetorical entrapment: Shaming and naming as a two-way street' (2013) 46 *Vanderbilt Journal of Transnational Law* 1079.

used presumably to re-direct state behavior towards compliance with certain norms (in this context, human rights decisions), the result has not always satisfy the aim of the users: as it may either change state behavior for good or bad.²⁷⁵ In the next sub-section, both results (positive and negative effects) are discussed independently.

(a) Potential positive effects of naming and shaming strategy

Human rights naming and shaming campaign as a way of raising international cost of non-compliance is not always ‘cheap talk’ as some scholars assume. Hafner-Burton and Murdie are both advocates of this argument. They assert that there is a ‘correlation’ between application of naming and shaming and a resulting effect that leads to change and improvement in human rights practices in a target country.²⁷⁶ This gives the impression that naming and shaming does raise cost which has the potency to stimulate state compliance.

Other commentators, though with varying views, argue that naming and shaming has a multifaceted effect in virtually all aspects relating to improvement of human rights. For instance, Watchman maintains that naming and shaming exposes the human rights ills of a government and it is the ‘right thing to do’ in bringing repressive government to check.²⁷⁷ Krain reports that it has ‘significance ameliorative effects’.²⁷⁸ Murdie and Peksen observe that it has the potential to protect and advance socio-economic rights of women.²⁷⁹ In addition to other findings, DeMeritt argues that the application of naming and shaming has the chances of reducing the frequency and severity of state instigated killings and forced disappearances.²⁸⁰

In another dimension to this argument, Dietrich and Murdie note that the effect of naming and shaming (positive or negative) will be determined based on the question of whether the ‘target country is an aid recipient’, if so, whether, ‘the donor country is a minor power states or major power states’, they conclude that naming and shaming will be most ‘effective if the target state

²⁷⁵ Biegon (n 232 above) 160.

²⁷⁶ Hafner-Burton (n 5 above) 689; A Murdie ‘The impact of human rights NGO activity on human rights practices (2009) 4 *International NGO Journal* 421.

²⁷⁷ A Wachman ‘Does the diplomacy of shame promote human rights in China’ (2001) 22 *Third World Quarterly* 257, 265.

²⁷⁸ M Krain ‘J’accuse! Does naming and shaming perpetrators reduce the severity of genocides or politicides?’ (2012) 56 *International Studies Quarterly* 574.

²⁷⁹ A Murdie & D Peksen ‘Women’s rights INGO shaming and the government respect for women’s rights’ (2015) 10 *Review of International Organizations* 1.

²⁸⁰ J DeMeritt ‘International organizations and government killing: Does naming and shaming save lives?’ (2012) 38 *International Interactions* 1.

depends on donor aid from minor powerful states'.²⁸¹ This is also similar to Franklin's position. On his part, Franklin argues that naming and shaming could record the 'highest level of influence' when it pushes the target state to re-direct its prior policy and behavior to conform to human rights standard and best practices.²⁸² In his findings on the impact of naming and shaming in selected Latin American countries, Franklin reports that those countries with high level of reliance on international aid and investment were more disposed to the impact of naming and shaming. In those countries, the level of political repression, torture and government induced disappearances became reduced as a result of consistent naming and shaming campaigns.²⁸³ The latter positions give the impression that naming and shaming strategy does not have blanket effects all over and in every situation.

(b) Potential negative effects of naming and shaming strategy

As stated earlier, naming and shaming as mechanism for raising international cost of non-compliance may attract an undesirable outcome to the user. While it is often difficult to find a conclusive 'cause and effect' or a causal relationship between the application of the strategy and consequent response from the target state, scholars' opinion vary as some argues that the strategy has the potential to make a state, for example, intensify torture of detainees, close media outlets, or increase clandestine executions'.²⁸⁴ Brysk observes that human rights criticism in Argentina increased cases of secret executions especially in the 1970s and 1980s.²⁸⁵ Others argue that the application of naming a state could stimulate some sort of paradoxical results in seemingly different versions. For instance, Hafner-Burton states:

Global publicity from NGOs, the news media, or the UN could have the accidental side effect of providing incentives for groups to orchestrate acts of violence large enough to

²⁸¹ Dietrich & Murdie (n 216 above) 6-8, their conclusion is influenced by the fact that ('while small or minor power states have limited influence in world politics, major power states are in dominant positions of influence that shape critical global issues such as trade and International security, among other important policy areas').

²⁸² Franklin (n 222 above) 187 (arguing that naming and shaming is 'the most commonly used weapon in the arsenal of human rights proponents').

²⁸³ Franklin (n 222 above); for similar findings related to countries in Latin American countries, see D Weissbrodt & M Bartolomei 'The effectiveness of international human rights pressures: The case of Argentina 1976-1983' (1991) 75 *Minnesota Law Review* 1009; Brysk (n 230 above) 259; S Ropp & K Sikkink 'International norms and domestic politics in Chile and Guatemala' in T Risse *et al* (eds) *The power of human rights: International norms and domestic change* 172; J Cavallaro & S Brewer 'Never again: The legacy of the Argentine and Chilean dictatorships for the global human rights regime' (2008) 39 *Journal of Interdisciplinary History* 233.

²⁸⁴ Biegon (n 232 above) 162.

²⁸⁵ Brysk (n 230 above) 259, 273.

attract the spotlight. Governments react to these security challenges by repressing human rights even further, setting spirals of violence in motion.²⁸⁶

The above reveals another version of the effect of the naming and shaming strategy. Accordingly, Hafner-Burton explanation is that the strategy (naming and shaming) might incentivize certain groups to engage in activities loud enough to attract global attention thereby causing security challenges and threat to national security. In the process, governments are forced to respond by inflating more repressive acts as reaction to the security challenges and not necessarily with the intention to undermine the consequences of naming and shaming but for the concomitant security challenges caused by such groups. In other words, the incentives to inflate is on those who seek global attention and not necessarily with the aim to undermine the effect of the strategy.

Another version that may seem likely in the African context is that instances might arise when a state indicates willingness to comply with a specific human rights decision or to address human rights situation in a particular context - either to remedy the violation or avoid reoccurrence of the same violation. Then suddenly, the state turns around and continues to increase violation in ways and manners that appear different from earlier forms or pattern of violations. An example of this is when the military government in Nigeria allowed the visit of the Commission's delegate in 1997. As Okafor notes, 'the acceptance of this mission by the executive in Nigeria at a time when it was controlled by the Army, is significant evidence of the proposition that the executive was clearly concerned to act in ways that pleased the Commission, in ways that might soften the Commission's censure (however non-binding that was)'.²⁸⁷

In actual sense, this gesture could have been interpreted to mean that the government is willing to embrace human rights change so as to give immediate effect to Resolutions 11 and 16 and to facilitate the release of the Ogoni 19. However, it later turned out that the government allowed the visit to cushion the effect of the global spotlight, distract and lower the chances of further criticisms and to feign change of behavior towards human rights to the national, regional and international communities.²⁸⁸ Similar scenario also played out in the Gambia when the former President Yahya Jammeh made tactical concession by allowing a peaceful environment for the 46th Commission's

²⁸⁶ Hafner-Burton & Tsutsui (n 5 above) 693.

²⁸⁷ Okafor (n 10 above) 117-119; Viljoen (n 9 above) 346.

²⁸⁸ Okafor (n 10 above) 117-123; see also Biegon (n 232 above) 187; Viljoen (n 9 above) 346-347.

ordinary session which seem like the government readiness to comply with resolutions 13, 17 and 145 earlier issued against the Gambian government. But alas, the human rights situation became worse especially as the government noticed that naming and shaming campaigns from local, regional and international communities have been relaxed.²⁸⁹

To further explain the potential negative effect of the naming and shaming strategy, it important to find out where in the African context has the strategy fail to achieve its desire results. The Nigeria scenario earlier discussed is one example of this. As Okafor notes, the Nigerian government witnessed countless numbers of human rights criticisms during the reign of Abacha²⁹⁰ by the application of the naming and shaming strategy that was explored by NGOs.²⁹¹ As stated earlier, one of the major human rights ills that occur in Nigeria during the Abacha's era was the arrest, detention and final execution of the foremost human rights activists: Ken Saro-Wiwa and other Ogonis. And the Nigerian government's repressive actions became a subject of global concern when in 1995, Ken Saro-Wiwa and nine others were executed. All the efforts and pressure exerted by NGOs (both foreign and local), international news media, international and regional bodies (particularly the Commission) to stay execution of the human rights activists, no positive results were achieved.²⁹² The above situation is not any different in countries like the Zimbabwe²⁹³

²⁸⁹ For details on the use of naming and shaming in the Gambia, see Biegon (n 232 above) 189-194.

²⁹⁰ OC Okafor 'Modest harvests: On the significant (but limited) impact on human rights NGOs on legislative and executive behavior in Nigeria' (2004) 48 *Journal of African Law* 23; For details on shaming, see Human rights watch *The dawn of a new dark age: Human rights abuses rampant as Nigerian military declares absolute power* (1994); Viljoen & Louw (n 6 above) 26.

²⁹¹ See Human Rights Watch 'World report 1995 – Nigeria' available at <http://www.refworld.org/docid/467fca9c1e.html> (accessed 12 April 2018).

²⁹² See *International Pen & Others (on behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); for another cases where international pressure was brought to bear includes but not limited to *SERAC v. Nigeria* (the Ogoni case) see also, 'Note verbale to Minister of foreign affairs regarding Saro-Wiwa communications' reprinted in Murray & Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 475; For a brief overview of international action on Nigeria during this awful human rights era, see human rights watch *World report 1997-Nigeria* available at www.refworld.org/docid/3ae6a8bf20.html (accessed 12 April 2018); for a brief review of NGOs role in Nigeria, see for instance, human rights watch 'World report 1996 – Nigeria' (as clearly summarized by human rights watch as follows: 'Despite severe constraints on their activities and a persistent government campaign of arrest and harassment of their staff, Nigerian human rights groups continued to document and publicize abuses due to the courage and commitment of their local activists') available at <http://www.refworld.org/docid/3ae6a8a31c.html> (accessed 12 April 2018); See also Okafor (2004) (n 283 above) 23; Okafor (2007) (n 10 above) 122, (stating that '[t]hese local actors pressured the African system to pass every single one of these resolutions that were generated against the relevant Nigerian junta, although the African Commission was in itself willing to pass the said resolutions, pressure from the activist forces was quite important in ensuring that the resolutions were in fact passed and did contain sufficiently strong language').

²⁹³ Hafner-Burton & Tsutsui (n 5 above) 692-711; Biegon (n 232 above) 201-208.

and Kenya.²⁹⁴ All these underscore the underlying argument that naming and shaming strategy may have little or no effect in states that do not care about their reputation in all fronts.

Above all, as NGOs continue to ‘fast shoot’ and escalates their naming and shaming strategy on target states, the implication is that the attention of powerful states and donor agencies will be drawn to the human rights happenings in the target state. By consequence, NGOs naming and shaming campaigns may likely push western governments and donor agencies to place some forms of sanctions (aid reductions and different forms of embargoes) as a way of raising cost against the target state. Details on the probable consequences or aftermath of NGOs naming and shaming (sanction) are discussed in the next sub-section.

3.6.4 Sanction as one of the consequences of ‘naming and shaming’ campaign

When naming and shaming is used as a mechanism to lobby international stakeholders to raise international cost against member states for non-compliance, so many consequences might arise, for instance, there are possibility that donor countries may be wary to continue aid disbursement to a recipient country and may either cut off, reduce or bypass aid channels.²⁹⁵ It may also result in some other kinds of sanctions: economic, security, ban on foreign travel and among others. While a discussion on the probable consequences of naming and shaming (sanction) is useful for an understanding of the impact of NGOs follow-up, this study encounters constraint of lack of data or evidence of cases where member state compliance under the AHRS was influenced by the application of sanctions or aid reductions.

The only close instances found in the literature where sanctions were imposed relate to the cases involving (a) the 19 other Ogoni activists in Nigeria and massive violation of rights of the Ogoni People under the leadership of MOSSOP. It must be noted that the sanctions in this case are not also directly linked to non-compliance with the Commission’s decision but the underlying situation; and (b) Eritrea – which relates to Communication No 250/2002 *Liesbeth Zegveld and Mussie Ephrem v The Government of Eritrea* – concerning compliants of unlawfull detention,

²⁹⁴ See for example S Brown & R Raddatz ‘Dire consequences or empty threats? Western pressure for peace, justice and democracy in Kenya’ (2014) 8 *Journal of Eastern African Studies* 44-57; Hafner-Burton & Tsutsui (n 5 above) 692,710.

²⁹⁵ Dietrich & Murdie (n 214 above) 1-24; DR Mekonnen, MV Reisen & P Dan ‘The EU libson treaty and EU development cooperation: Consideratons for revised EU strategy on development cooperation in Eritrea’ available at http://www.eepa.eu/wcm/dmdocuments/publications/Aid_to_Eritrea_and_Lisbon_Treaty_-_van_Reisen_and_Mekonnen.pdf (accessed 22 October 2018) (discuss extensively on whether or not sanctions and aid should continue to flow into Eritrea government in the face of gross human rights violations).

violation of rights and failure to improve human rights situations and reports of non-compliance to decisions from both national, regional and international tribunals; (c) Zimbabwe which also relates to Communication 245/02 *Zimbabwe Human Rights NGO Forum v Zimbabwe* – the case alleged massive violation, countless reports of eviction of landowners and political related crisis arising from the aftermath of the national referendum leading up to the parliamentary elections in the year 2000. In the next paragraphs, sanction and aid reduction are discussed with respect to how they apply in addressing questions relating to compliance and human rights violations generally. For this, Nigeria, Eritrea and Zimbabwe are discussed as examples.

Decades ago, international sanctions were often used to advance democratization and protection of rights against states' aggression and repression. In recent times, evidence abound that the scope of sanctions seems to have been broadened to include diplomatic embargoes, economic isolation (though, in rare cases) and security or military restrictions.²⁹⁶ Most of these sanction measures could be ordered by western states (the US, UK and among others) or institutions (EU, EP and United Nations Security Council – UNSC) as part of the consequences of NGOs naming and shaming campaigns.

First, using Nigeria as an example, the idea of imposition of sanction came as part of the aftermath of the execution of Ken Saro-Wiwa and others (as discussed above) and failure to address human rights situations despite calls from INGOs/NGOs and pressure from the international community. As a result, several stringent sanctions – which includes aid withdrawal were slammed on the Nigerian government.²⁹⁷ As Clifford notes, Nigeria was suspended by the Commonwealth, and several other diplomatic sanctions were equally imposed by western countries including the US. [However] '...the severest sanction was the international boycott of Nigerian oil which was never seriously considered'.²⁹⁸

²⁹⁶ For contributions of authors with respect to different types of sanctions, see NC Crawford & A Klotz *How sanctions work, lessons from South Africa* in NC Crawford & A Klotz (eds) (1999) 3, 25-45, 103-129 & 195; See generally, N Crawford 'Trump card or theater? An introduction to two sanctions debates' in NC Crawford & A Klotz (eds) *How sanctions work, lessons from South Africa* (1999) 4; for details of country-specific resolutions shining spotlight on some Africa countries, see Biegon (n 232 above) 173-198.

²⁹⁷ See Human Rights Watch recommendation and calls made to international bodies to on the sanction measures against the Nigerian government over the Ogoni issue, avail at <https://www.hrw.org/reports/1995/Nigeria.htm> (accessed 26 April 2019).

²⁹⁸ Bob (n 224 above) 408-409.

Second, sanction measures were also taken against Eritrean government arising from the government failure to improve human rights, release political prisoners and comply with the Commission's decision in the case of *Zegveld & another*. As a result of all these, human rights NGOs and activists' mobilized intensive advocacy campaign of naming and shaming against the Eritrean government which consequently attracted the attention of the public (more from the international arena). The essence was to pressure the Eritrean government to transform human rights practices to conform to regional and international human rights standard and to also comply with the Commission's recommendation and resolutions.²⁹⁹ In addition, Eritrea was subjected to face different pressures from NGOs and the international agencies for failure to comply with the recommendations issued by the UN Working Group on Arbitrary Detention.³⁰⁰ Some 'human rights activists even went as far as calling on EU to cut aid if Eritrea fails to improve human rights'.³⁰¹

For these reasons together with other history of non-compliance with decisions from regional and other human rights bodies as well as failure to improve on the poor human rights situations of the country, the UN Security Council issued and adopted resolutions 1907 of 2009 and 2023 of 2011. These resolutions contain sanction measures which are in the form of: 'arm embargoes, travel ban, asset freeze on political and military elites and blocking of income flow to Eritrea'.³⁰²

The third example is Zimbabwe where sanction measures were invoked as a result of reports of series of violations, political violence especially against political opposition members that occur following the Constitutional referendum and the parliamentary and presidential elections in 2002. The tension in Zimbabwe became heightened with the evasions of farm owners by war veterans with the aid of the state police. These violations and intimidation on opposition party members

²⁹⁹ *Liesbeth Zegveld and Mussie Ephrem v The Government of Eritrea*, ACHPR, Communication No 250/2002, 19th activity report of the ACHPR; *Article 19 v Eritrea*, ACHPR, Communication No 275/2003, 22nd activity report of the ACHPR, Annex II and resolutions 91 and 177.

³⁰⁰ *Mahmoud Sherifo et al v Eritrea*, UN Working Group on Arbitrary Detention, UN Doc E/ CN4/2003/8/Add1, 54 (2002), 5 March 2002; see also UN Working Group on Arbitrary Detention, Opinion No 23/2007, adopted on 27 November 2007; DR Mekonnen, Reisen & Dan (n 295 above) 338.

³⁰¹ See call on the government of Eritrea from Amnesty International 'Eritrea: Release former finance minister immediately and unconditionally' (2018) available at <https://www.amnesty.org/en/latest/news/2018/09/eritrea-release-former-finance-minister-immediately-and-unconditionally/> (accessed 21 October 2018); see also Eritrea shadow report to the Commission on the 62nd Ordinary session in 2018, available at <https://www.amnesty.org/download/Documents/AFR6481612018ENGLISH.PDF> (accessed 21 October 2018).

³⁰² See Mekonnen, Reisen & Dan (n 295 above) 338.

and human rights defenders continued unabated as the state's electoral processes were alleged to have been hijacked by the ruling party – ZANU PF. Within these periods, NGOs have through wide publicity alerted both regional and international constituencies on update about the poor human rights situation in Zimbabwe and thus, the human rights situation became a subject of international discourse. As a result, the Commonwealth suspended Zimbabwe for a period of one year which was later extended, the US and UK have both imposed partial travel ban on the leadership of Zimbabwe's government.³⁰³

Despite the different regime of sanctions imposed on these countries, reports of human rights violations and non-compliance with decisions for which the sanction measures were invoked remain unattended. As could be said of President Mugabe (the former President of Zimbabwe), NGOs mobilization of naming and shaming which was perceived to have attracted these sanctions was considered by the then president and members of the ruling political party as an act that was ill motivated by group of 'covetous and bigoted big powers [western countries] whose hunger for domination and control of other nations and their resources knows no bounds'.³⁰⁴ Thus, any expectation that the sanction measures discussed above would have influenced the Zimbabwean government under the then leadership of President Mugabe to comply with decisions or improve on human rights situation is unlikely. Especially, as a segment of the Zimbabwean public (especially members of the ruling party) thinks that the opposition party – Movement for Democratic Change (MDC) – had lobbied for those western sanctions to unseat the ruling government that had refused to uphold policies that suit the economic interest of the West. In the Zimbabwean context, the sanction measures were considered by the government and their political allies as western tools utilized by the 'EU and US for their post liberation neo-colonial agenda in Africa' which must be resisted.³⁰⁵ As Hove observes, the sanctions imposed on Zimbabwe by the

³⁰³ All these narration could also be found in the 2002 Fact – Finding Mission of the African Commission 2-10 available via http://www.achpr.org/files/sessions/34th/mission-reports/zimbabwe/achpr34_misrep_zimbabwe_2002_eng.pdf (accessed 26 April 2019).

³⁰⁴ See report by N Nkomo on Mugabe's speech before the UN General Assembly 'In UN address, Mugabe tells Britain, US 'Shame, shame, shame' (2013) available at <https://www.voazimbabwe.com/a/in-un-address-mugabe-tells-britain-america-shame-shame-shame/1757831.html> (accessed 27 April 2019).

³⁰⁵ M Hove 'The debates and impact of sanctions: The Zimbabwean experience' (2012) 5 *International Journal of Business and Social Science* 73 – 82.

West had ‘serious repercussions on Zimbabweans’ rather than the purported aim it is met to serve.³⁰⁶

On the potential general effects of sanction, Morgan & Schwebach argue that ‘sanction may work occasionally but majority views from a political perspective, hold that it does not work in bringing change of government policy ... that foolish sanctioners may pay dearly for little gain’.³⁰⁷ In other words, sanction does not always attract the result expected from the imposers, arguably, the effect of sanction will depends on so many factors: the nature of sanctions, the sanction institutions, the socio-political framework in the target state and the economic or government interest attached to the subject matter that is being sanctioned, and most importantly, the value for reputation by the recipient or sanctioned state. Similarly, Pape’s observes that sanctions rarely work, but the main reason why sanction fails or has less effect is because of the ‘nature of the target’. He further argues that leaders in an authoritarian state can ‘slough the cost of sanctions off onto weaker segments of the society’.³⁰⁸

From a constructivism point of view, dialogue and ‘constructive engagement’ seem to possess a better potential for change of state behavior than punitive measures such as sanctions. It is also important to note that application of sanction - in the form of economic isolation could sometimes become ‘counter-productive’ [as it may] dampens economic growth in the recipient country.³⁰⁹ Another factor or instances where the effect of sanction may be limited is when a target state has an alternative economic linkage with other countries or agencies whose bilateral relationship with the sanctioned state has remain unbroken. For instance, in the Nigerian case, HRW observes that despite the arrays of sanctions and the continued deteriorating human rights situations, ‘the European Development Fund has promised substantial assistance, including funds for export

³⁰⁶ As above.

³⁰⁷ TC Morgan and VL Schwebach, ‘Fools suffer gladly: The use of economic sanctions in international crises’ (1997) 41 *International Studies Quarterly* 27, 28, 47.

³⁰⁸ RA Pape *Why economic sanctions do not work* (1997) 106-107.

³⁰⁹ Particularly the government of US and UK feel that constructive engagement would do better; see Crawford (n 289 above) 15; in a related discussion, see T Maloka ‘Sanctions hurt but apartheid kills: The sanctions campaign and black workers’ available via https://www.researchgate.net/.../304751293_Sanctions_hurt_but_apartheid_kills_ (accessed 12 April 2018); see also M Voorhes *Black South Africans’ attitudes on sanctions and divestment* (1988); and M Orkin, ‘Politics, social change, and black attitudes on sanctions’ in M Orkin (ed) *Sanctions a gainst apartheid* (1989) 80–102.

promotion and hard currency facilities for the Nigerian government. Other beneficiaries of this largess include the telecommunications industry, news agencies, and universities'.³¹⁰

Despite the use of these mechanisms, there is no consensus evidence from the literature to establish whether or not naming and shaming and by consequence – sanction have indeed changed government behavior in countries where its potency was tested.³¹¹ At least, from the records, the imposition of sanctions in Nigeria, Eritrea and Zimbabwe have had little or no effect.³¹²

From the discussion so far, the following lessons can be deduced (1) the AHRS depends almost exclusively on external factors in driving compliance (2) that the authority of the actors and the potency of the mechanisms or strategy being employed in follow-up and in driving compliance do not seem to possess a compelling force to always induce compliance from member states under the AHRS. At this point, the important question is to know what extent has NGOs/CSOs over-reliance or preference for external interventions as sources of pressure enhances the prospect of improved rate of compliance. Put in a clearer way, is the prospect for compliance more likely when non-state actors explore the use of external opinion and forces in follow-up? To respond to this question, in addition to the arguments in sections 3.6.2-3.6.4 above, insights will be drawn from Viljoen's work on domestic enforcement of the decisions of the African Commission.³¹³ In 2017, arising from his analysis on the relevance of CS and community engagement in enhancing compliance, the author noted that there was little indication of compliance in the *Gambian Mental Health and Darfur*³¹⁴ cases despite the high presence of external engagement in the process of

³¹⁰ See Human Rights Watch report on the violation of rights of the Ogoni people (n 290 above).

³¹¹ For literature on different views about the effect of sanctions, see DA Baldwin *Economic statecraft* (1985); GC Hufbauer *et al*, *Economic sanctions reconsidered: History and current policy* (1990); LL Martin, *Coercive cooperation: Explaining multilateral economic sanctions* (1992); WH Kaempfer and AD Lowenberg, *International economic sanctions: A public choice perspective* (1992); KR Nossal, *Rain dancing: Sanctions in Canadian and Australian foreign policy* (1994); A Klotz, *Norms in international relations: The struggle against apartheid* (1995); I Eland, 'Economic sanctions as tools of foreign policy' in D Cortright and GA Lopez (eds) *Economic sanctions: panacea or peacebuilding in a post-cold war world?* (1995) 29–42; M Mastanduno, *Economic containment: CoCom and the politics of East-West trade* (1992); ES Rogers 'Using economic sanctions to control regional conflicts' (1996) 4 *Security Studies* 43–72; RA Pape 'Why economic sanctions do not work' (1997) 22 *International Security* 90–136; J Stremlau 'Sharpening international sanctions: Toward a stronger role for the United Nations' *Report to the Carnegie Commission on Preventing Deadly Conflict* (1996).

³¹² See Bob (n 224 above) 408; Mekonnen, Reisen & Dan (n 295 above) 324-325 (arguing that despite the UNSC sanctions and the Courts' decisions against Eritrean, the EU still provides aid to Eritrea).

³¹³ Viljoen (n 263 above) 351-397.

³¹⁴ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) AHRLR 153 (ACHPR 2009).

litigation and follow-up which was ‘never embedded domestically and did not benefit from the involvement of local civil society actors’.³¹⁵

In contrast, in *Ogoniland and Endorois* cases, there were some positive evidence as indication of partial compliance from the states government which could be partly attributed to embedded domestic engagement of domestic constituencies in the litigation and follow-up process.³¹⁶ As a result, a conclusion was drawn to the effect that ‘...implementation is enhanced by the continuous engagement by and involvement of domestically located and embedded NGOs and community groups, acting with the support of international civil society’.³¹⁷ Viljoen’s analyses give impression that exploring and exercising preference for external instead of domestic options has little or no correlation in improving the chances of better compliance. On the contrary, the engagement of wider domestic forces in follow-up on decisions has the potential to enhance the prospect of compliance and implementation. At this juncture, the thesis will proceed in the next section to examine whether or not the current practices or mechanisms that are being employed in driving compliance align with the theoretical framework, focus and the hypothesis set out in this thesis.

3.7 The suitability or otherwise of the liberal theory in the current workings of the AHRS

The liberal theory is discussed in detail in section 2.3.2 and 2.4 of chapter two above as the adopted theory that presents not only the framework for this thesis but also gives credence to the hypothesis as set out in chapter 1 above. As discussed in chapter two above, the liberal theory predicts a disaggregation of the state so that all the components embedded in the state are identified, this way, the character of the state as a unitary entity ceased to exist upon deconstruction of the state unitary structure. As liberal theorists explain, upon deconstruction of the state unitary structure, the collective interest of different segments³¹⁸ emerges as the interest of the state. By this, an entrenched engagement of the wider society in the policy decision process of the state becomes likely.

³¹⁵ Viljoen (n 263 above) 394.

³¹⁶ As above.

³¹⁷ Viljoen (n 263 above) 395.

³¹⁸ The different components of the state include: the national parliament, domestic judicial system and civil society - understood to mean the wider society outside the government which include the media, electorates, professional, unionists, masses etc.

Inspired by the prediction of the liberal theory, the hypothesis as mentioned in chapter 1 above predicts that upon disaggregation of the state, an entrenched engagement of the wider CS³¹⁹ in the workings of the AHRS increases the possibility of improving the effectiveness of the AHRS and by consequence – compliance with rights decisions from the system’s supervisory mechanisms. This then necessitated the need to inquire if the current workings of the system - particularly as it relates to individual communication and the follow-up process, fit the approach of the liberal theory and of course, the hypothesis. At this point, a brief summary of the workings of the system is needed.

As discussed in section 3.3 above and as have been clearly displayed in diagrams 3.5 and 3.6 below, the AHRS in the context of this study operates in a circle that has different players which I categorized into four groups: the first group comprises of the AU, its organs and the supervisory mechanisms under the AHRS, the second group concerns the states parties under the AHRS, the third group comprises of NGOs and their regional and western allies while the fourth group concerns the ‘African People’(CS) and domestic institutions established therein in whose interest the AHRS exist.

In the workings of the system with respect to individual communication and the follow –up process for compliance, the practice is that when there is an allegation of violation or upon failure by a state party to comply with decisions of the supervisory mechanisms, the mechanisms are empowered to report to the AU Assembly and the Executive Council in order to sanction the non-compliant state. The supervisory mechanisms are further allowed to explore any appropriate mediums to monitor states implementation of decisions. As a result of this, often times, the mechanisms – especially the Commission has taken advantage of state reporting system and other activities to follow-up on states’ implementation.

While the Commission and its sisters’ bodies use these extra mediums to follow-up on decisions, their major compliance collaborator – NGOs (who often times represent the victim in the submission of cases) also pressure states to comply, this they do by exploring different advocacy tools. And when a state continues to violate rights of victims or ignore the decision issued by any of the mechanisms, the NGOs may then call on the Commission to beckon on the AU - ‘the so called regional enforcement organ or sanctioner’ - to punish the respondent state. Another option

³¹⁹ See chapter one for interpretation of terms.

NGOs can explore is to call on the international community and report states' continuous acts of violations and non-compliance, this option may lead to sanctions and other negative consequences that may affect regional and international relations. In all of these, if violations or non-compliance continues, other segments of the wider CS are not engaged or consulted just like the AU and the international community (external 'punishers').

So far, compliance level as discussed in section 3.4 above is still relatively low despite these measures. While the reasons for continuous reports of non-compliance may vary, there are concerns that the AU may not effectively apply the 'stick and carrot' approach on states parties' owing to the long standing AU principle of non-interference with the internal affairs of states.³²⁰ And besides, the AU Assembly and Executive Council (supposed regional 'sanctioner') are made up of Heads of State or accredited representative of the State and Ministers of Foreign Affairs of States appointed by the President or Heads of States. It may be doubtful, how in the spirit of solidarity and sense of oneness, the AU Assembly and Executive Council can effectively punish 'one of their own'. However, in a 2018 report where the African Court decries states parties' non-compliance, it was reported that:

The AU has convicted some African countries for violating the decision of the African Charter on Human and Peoples' Rights (ACHPR) or other international human rights instruments to which they are parties On the other hand, the African Court on Human and Peoples' Rights has expressed its intention to file a complaint against a decision of the AU Executive Council that prohibits it to disclose the names of countries that do not comply with its decisions.³²¹

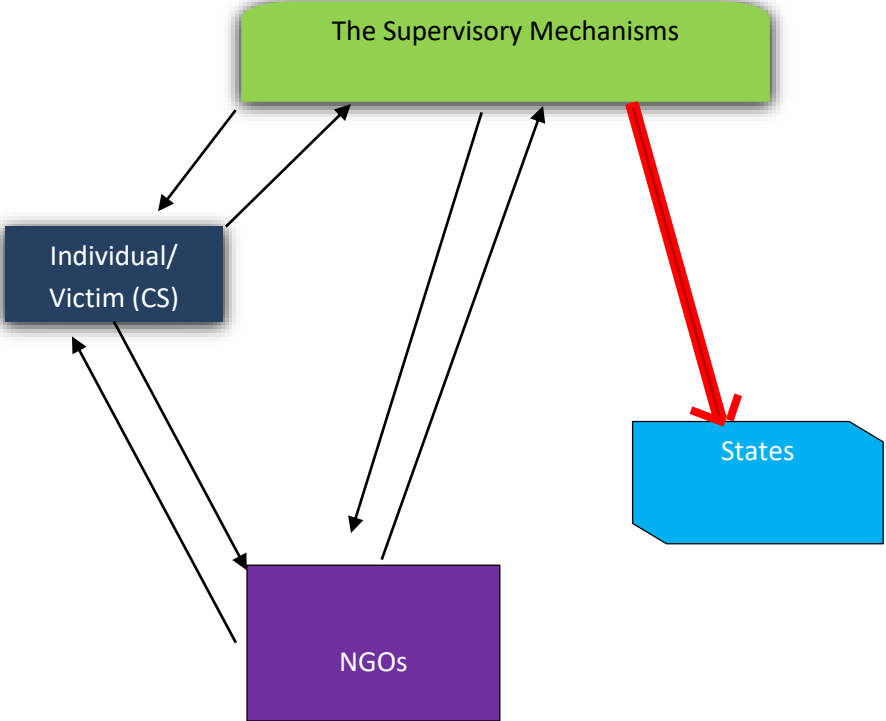
Much as this study could not find any evidence on how the AU Assembly and Executive Council have invoked their powers to punish states parties for non-compliance with decisions, the above statement from the Court indicates that the 'sanctioner' may not have been silent in their role in sanctioning erring states parties over re-occurring complaints or reports of non – compliance.

As can be deduced from the discourse in this subsection, the current workings of the AHRS *vis-à-vis* the different engagement measures for compliance does not align with the approach of the liberal theory and by extension – the focus and hypothesis for this thesis. (See diagram 3.5 and 3.6 below)

³²⁰ Art 3 of the OAU Charter.

³²¹ See report titled: 'African Court says some countries do not comply with its decisions' available at <https://allafrica.com/stories/201807020061.html> (accessed 26 April 2019).

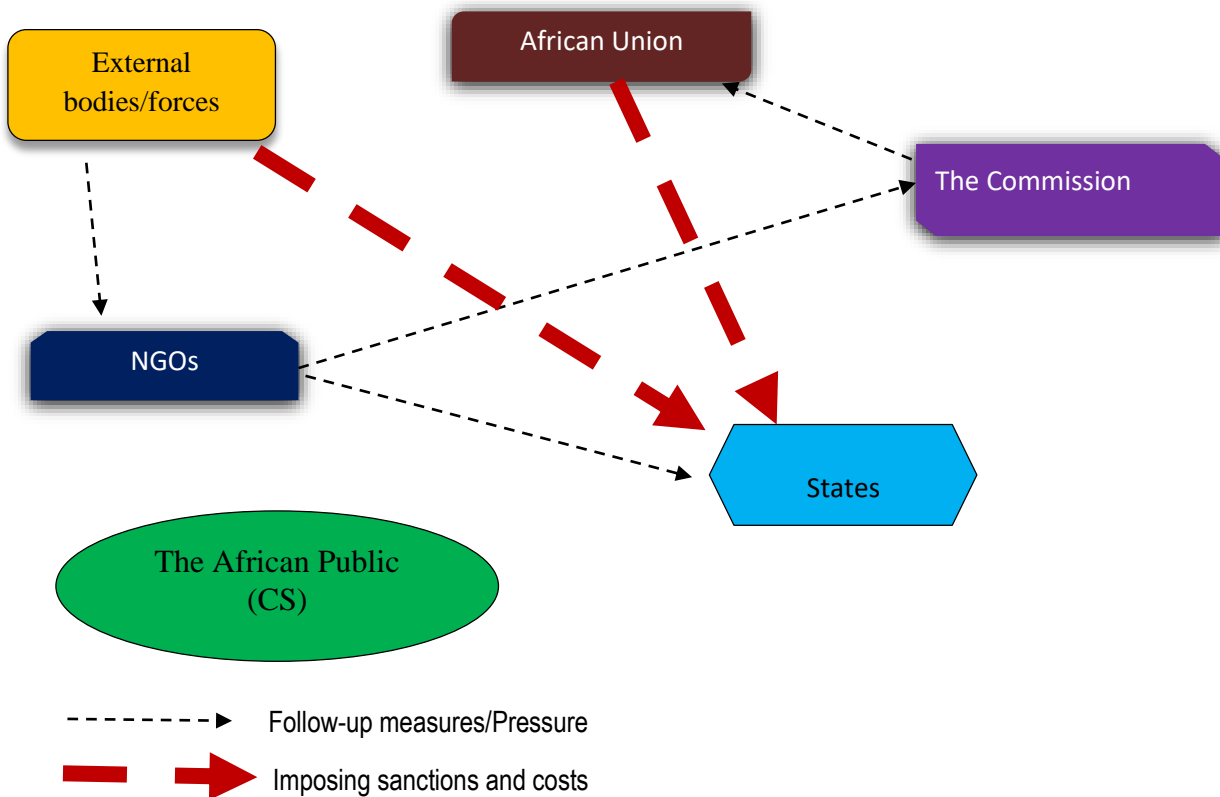
Diagram 3.5: The circle and pattern of engagement and interaction amongst players in the workings of the AHRS on individual communication.



→ Pattern of interaction amongst players on individual Communication

→ Decisions/Judgments

Diagram 3.6: The circle and pattern of engagement and interaction amongst players in the follow-up on decisions/compliance process on individual communication.



3.8 Conclusion

At the beginning of this chapter, three major issues were intended to be addressed. First, what has been the status of state compliance level under the AHRS, second, if compliance level has not improved from 2007 when Viljoen and Louw reported it was low, then what have stakeholders (non-state actors) been doing towards improving compliance? Third, is there evidence of engagement of the wider domestic CS in the follow-up process under the AHRS and if no, will engagement of CS improve compliance? All these questions relate to the first - third research questions which seek to know among other things: where the balance of pressure for compliance currently lies as between the international and domestic fronts and what place does CS currently have in the AHRS as to claim ownership of the system.

In response to these questions, this chapter discusses (in section 3.3 above) the basic workings of the AHRS particularly as it relates to follow-up or engagement in compliance process over decisions issued on individual communication. Then sections 3.4 and 3.5 discuss compliance status of decisions under the AHRS as well as follow-up measures. Overall, the thesis finds that compliance level is still relatively low despite stakeholders' efforts in follow-up on decisions to improve the chances of compliance with decisions. In terms of the pattern of engagement applied in following-up on compliance, the thesis also finds that NGOs and the Commission are the major players in follow-up on decision for compliance. They engage different tools, for instance, while the Commission may resort to other extra activities within its promotional and protection mandates to drive compliance, NGOs explore advocacy tools which includes naming and shaming strategy to pressure respondent states to comply. The thesis further finds a common trend where the Commission reports to AU Assembly and Executive Council to sanction violating respondent states. In pressuring states for compliance, NGOs often call on (a) the Commission to urge a respondent state to comply with a particular decision or take measures to address issues raised in their statements or reports on human rights situations (b) apply the naming and shaming strategy to pressure state in order to attract the attention of local and international spectators and lobby international stakeholders to raise international cost (sanctions) against non-compliant states.

In all of these, the thesis finds a gap in the workings of the AHRS as there seem to be no evidence of consistent engagement of wider domestic communities in the affairs of the system. In other words, a culture of an entrenched engagement of the broader domestic CS in the in the affairs of the AHRS – particularly, the communication procedure, follow-up and the entire compliance process is lacking. And in a manner of emphasis, there seem to be a disconnection of the African people and domestic institutions at the domestic level from the human rights practices at the regional level and as such, the current workings of the system do not suit the hypothesis for this thesis. This is the gap which I have used the remainder of this thesis to investigate with a view to finding how an entrenched engagement of domestic forces in the compliance process under the AHRS can complement the current practice so that compliance will not only be considered as a task for human rights NGOs and regional or international stakeholders but a combined efforts from both external and domestic forces. The assumption is that an entrenched engagement of domestic forces increases the chances of better compliance.

CHAPTER FOUR: INTERNAL LEGITIMACY AND COMPLIANCE UNDER THE EUROPEAN AND INTER-AMERICAN HUMAN RIGHTS SYSTEM

4.1 Introduction

In the preceding chapter, I tried to address the first research question by investigating where the balance of pressure for compliance currently lies as between the international and national (domestic) arenas. In doing this, I framed the hypothesis: that compliance level could be improved in human rights systems where there is an entrenched engagement of the wider civil society (CS) in the activities of the system and most importantly, the follow-up stage leading to compliance. In other words, CS could be considered as the potential domestic source of pressure and authority that can elicit compliance from states' parties in human rights regimes. My ultimate aim for this, is partly to find which source of legitimacy (whether external or internal legitimacy) that has a better link with compliance.¹

My take off point in testing the accuracy or otherwise of this hypothesis is the African human rights system (AHRS). As discussed in sections 3.7 and 3.8 of chapter 3 above, the practice under the AHRS presents a picture of high deference for external factors as sources of pressure for compliance. While, as I have argued earlier, this mechanism (external pressure) has been reported to have triggered compliance to a certain level under the AHRS, compliance level has, however remained low (see as discussed in section 3.4 of chapter 3 above).² This implies that either the

¹ My preference for the use of the term 'legitimacy' as a source of pressure is based on the assumption that states want to be legitimate and so if the wider domestic community is brought to a level where, in addition to everything else, human rights conduct of a state is taken into account in the determination of legitimacy, states will become more conscious and careful of their human rights conduct, therefore, compliance may be motivated by legitimacy cost and probable backlashes that may come from the wider CS within a particular member state. For detail discussion on the link between legitimacy and compliance, see section 4.6 below.

² There are quite a number of scholarship on compliance or implementation with rights decisions from the African regional human rights institutions, for instance, see F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human & Peoples' Rights 1994-2004' (2007) 101 *The American Journal of International Law* 8-12; D Abebe 'Does international human rights law in African courts make a difference?' (2016) 56 *Virginia Journal of International Law* 564; 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, 82; R Murray & D Long *The implementation of findings of the African Commission on human and Peoples' rights* (2015) 75-109; V Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five selected African states' unpublished LLD thesis, University of Pretoria, 2018, 395; for the literature on implementation of decisions, see R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African commission on human and peoples' rights' (2014) 36 *Human Rights Quarterly* 350.

current practice under the AHRS - that is, reliance on external factors as sources of pressure for compliance is no longer as effective as it used to be or has lost the potency in improving compliance under the AHRS, so that a need for an internal or domestic mechanism might be considered to complement the effect of the existing mechanisms.

Therefore, in achieving the primary objective of this thesis – that is, a consideration of the role of CS as a potential complementary source of pressure in improving compliance under the AHRS – there is a need to investigate whether reliance on internal legitimacy of domestic sources of pressure could increase the chances of improving compliance in the African system. To be explicit, this chapter will examine whether reliance on the internal legitimacy of domestic sources of pressure has indeed improved compliance in other regions. So that human rights actors (NGOs/CSOs) working to improve effectiveness and compliance under the AHRS, can shift from the current practice of deference for external legitimacy to reliance on internal legitimacy of domestic sources of pressure as the motivation for compliance.

Bearing in mind the assumption that compliance level under the European human rights system and Inter-American human rights system (E/IAHRS) is assumed to be higher when compared in the context of the AHRS,³ this chapter will investigate: (a) whether the current workings of the European and Inter-American systems give room for engagement of CS and domestic institutions in driving compliance (b) what domestic mechanism has contributed in improving compliance under the EHRS and IAHRS – that is, whether an entrenched engagement of domestic institutions and CS has contributed in improving compliance in the latter regions. And if so, the simple question would be whether compliance can be improved in the AHRS when deference for internal legitimacy (instead of external legitimacy) of domestic actors is taken to a level where domestic cost can be raised to punish acts of states' non-compliance with rights decisions.

To be precise, this chapter will find out whether or not compliance under the EHRS and IAHRS is motivated by a sense of legitimacy drawn from domestic constituents (the wider CS and domestic institutions) or from external forces or endorsement. At the end, the overall findings will either prove or disprove the above hypothesis (that is, whether compliance level could be higher when an entrenched engagement of the wider CS in the compliance process is higher). So that the argument would then be that the higher the deference for internal legitimacy as a pressure source, the higher the chances of compliance or *verse versa*.

³ See section 4.3 below for a discussion on compliance.

In terms of structure, this chapter is divided into two main sections. The first section discusses the historical background (in brief), the practices or workings of the E/IAHRS and the level of embeddedness (enhancing internal legitimacy)⁴ under the EHRS. Under this section, I will examine how the extent of engagement of domestic institutions and CS have influenced compliance with decisions under the EHRS. In the second section, I will equally examine how domestic actors under the IAHRS have contributed towards ensuring that decisions from human rights regional bodies are complied with despite intense resistance from averse - compliance constituencies (especially the military community). In addition, instances or factors that may likely render this hypothesis inapplicable in all the regions are also to be discussed under the second section. Then followed by this discussion, the question of whether (or not) deference for internal legitimacy could increase the chances of improving compliance is addressed. And finally, the chapter conclusion reflects a brief analysis of the entire discussions in this chapter as well as the overall findings.

4.2 The EHRS and IAHRS: A brief overview

This section briefly discusses the historical background leading to the emergence of the two systems as well as the practices (with respect to individual complaints or applications) of the various institutions that exist under these regions. The essence, is to lay a foundation for a broader discussion on the question of: whether engagement and interaction with domestic actors have contributed in improving compliance with rights decisions under the European and American systems.

4.2.1 The historical background and practice under the EHRS

Owing to the need to curb human rights violations after the Second World War and to create space for promotion and protection of human rights and political freedom of citizenry in Europe, the European Human Rights System (EHRS) was established based on the European Convention on Human Rights (ECHR). The ECHR was drafted in 1950 and came into force in 1953⁵ under the

⁴ This term is borrowed from the work of LR Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a deep structural principle of the European human rights regime' (2008) 19 *European Journal of International Law* 1. However, in the context of this discussion, the term is deployed to describe a process where domestic actors consciously engage domestic tools and processes to give substance or effect to decisions and other outputs from regional human rights institutions by infusing and integrating the regional case laws and Convention provisions into domestic legal systems. This could also for purposes of this thesis be referred to as a process of building and enhancing internal legitimacy of domestic actors.

⁵ The idea on the need for a human rights Charter was mooted at the 'Congress of Europe' held in The Hague on 7 May 1948 after the end of the World War. The ultimate aim of the Convention was to ensure that states' parties would

egis of the Council of Europe (CoE).⁶ The ECHR was aimed at addressing two major concerns: first, inspired by the Universal Declaration of Human Rights, political leaders and civil society groups considered the Convention as a potent instrument to guide against future reoccurrence of the massive human rights violations that occurred during the Second World War. Second, the Convention was also considered as a medium by which contracting states of the CoE are protected from any forms of communist subversion particularly within the Central and Eastern regions of Europe.⁷ Currently, the CoE has a total of 47 members as state parties that have ratified the ECHR.⁸ To achieve the ‘original dreams of the founding members’ of the Convention,⁹ the ECHR created first, the European Commission on Human Rights (defunct since 1998) and secondly, the European Court on Human Rights (ECtHR) in 1959. The latter is still operating as a human rights mechanism with the primary mandate of ‘ensuring that states obligations and engagements under the Convention’ are respected and implemented.¹⁰ The role of the Court is to provide judicial remedies when it finds a violation of any provisions of the Convention. In this regard, the Court can exercise jurisdiction to hear and determine cases brought by individuals or NGOs who allege violation of

‘never again’ violate the rights of the people in Europe with impunity, for details, see Report from Amnesty International UK ‘What is the European Convention on Human Rights’ (2018) available at <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> (accessed 26 May 2019); For further details, see K Boyle ‘The European experience: The European Convention on Human Rights’ (2009) 40 *Victoria University Wellington Law Review* 167-175; M O ‘Boyle & J Darcy ‘The European Court of Human Rights: Accomplishments, predicaments and challenges’ (2009) 52 *German Yearbook of International Law* 140.

⁶ The CoE should not be seen as the same with the European Union (EU). The former was formed in 1949 as a platform for fostering unity amongst countries in Europe after the Second World War. It has no link with the latter as there are currently 47 members of the CoE while the EU has 28 members. To become a state party under the CoE, EU members must ratify the ECHR since the EU itself is not a member to the Convention, for details on the CoE, see ‘The Council of Europe in brief’ available at <https://www.coe.int/en/web/about-us/who-we-are> (accessed 26 May 2019)

⁷ See Boyle & Darcy (n 5 above) 140.

⁸ With expectation that Kosovo will be next in line to sum the number to 48, for details, see Boyle (n 5 above) 169, For further details on the Council of Europe, its institutions and list of members, see the official website <https://www.coe.int/en/web/portal/47-members-states>;

https://en.wikipedia.org/wiki/Member_states_of_the_Council_of_Europe (accessed 4 June 2018); on Kosovo recent moves to join the EU, see Z Dessus *et al* ‘Kosovo EU candidate status: A goal within reach? (2017) Group for legal and Political Studies (discussion paper) 1-12, also available via http://www.epc.eu/documents/uploads/pub_7812_kosovoseucandidatestatus.pdf (accessed 17 September, 2018), (stating *inter-alia* that the recent signing of a Stabilization and Association Agreement (SAA) with the EU indicates that Kosovo is now more willing to proceed to the next stage of EU integration process).

⁹ See Preamble to the ECHR available at

<https://www.jus.uio.no/lm/coe.convention.on.human.rights.1950.and.protocols.to.1966.consoloidated/preamble.html> (accessed 26 May 2019).

¹⁰ See arts 1 & 19 of the Convention.

rights by member states.¹¹ As a matter of practice, the victim of rights violation does not need to be a citizen or resident of a state party under the Convention but it suffices if the subject matter for which the application is brought before the Court concerns violations of the Convention allegedly committed by a state party which ‘directly and significantly’ affected the victim. One vital aspect about the practice under the EHRS is the requirement for exhaustion of local remedies particularly as the applicant is required to substantially plead violation of the Convention before the national court of first instance.¹² As Spano notes, ‘applicants have to demonstrate that they have not only pleaded the Convention issue domestically, at least in substance, but done so in a manner that has realistically given the national judge the opportunity to consider the issue through a Convention lens’.¹³ This is an indication that the applicant/victim and the national court must be aware of the provisions of the Convention that has been breached and again, it then also signifies that there is a high level of awareness of the Convention rights at the domestic level (I discussed this in detail under sub-section 4.4.1 below).

Proceedings before the ECtHR starts with submission of an application on alleged violations and such an application may be lodged by the victim or a representative at no cost.¹⁴ However, in order to defray litigation expenses that may arise in the course of the proceedings, the applicant may wish to apply for legal aid. It is important to note that all applications submitted to the ECtHR must meet the standard set out in rule 47 of the Rules of Court 2018 (ROC).¹⁵ Upon receipt of an application, the Court has two duties: it must first determine if the application meets the requirements for admissibility as provided under art 35(1), of the ECHR.¹⁶ It must be noted that ‘admissibility decision may be taken by either a single judge, a three-judge committee, or a seven-

¹¹ Boyle (n 5 above) 170; K Weller *A brief history of the European Court of human rights* (2016) [online] available via <https://rightsinfo.org/brief-history-european-court-human-rights/> (accessed on 17 September, 2018).

¹² See art 35 of the ECHR.

¹³ R Spano ‘The future of the European Court of Human Rights – Subsidiarity, processed –based review and the rule of law’ (2018) 18 *Human Rights Law Review* 473 – 494.

¹⁴ See art 34 of the Convention and rule 35, 36(2) (3) respectively.

¹⁵ Rule 47 provides the format or content of an application, rule 47 can be read in conjunction with art 34 of the Convention which provides for individual applications.

¹⁶ For an application to meet the admissibility standard, such an application must meet the following criteria: Exhaustion of domestic remedies, six –month application deadline beginning from the date in which final judgment was given by the domestic Court, the application must relate to violation of any provisions of the Convention by a state party and there must be proof that the applicant has suffered significantly from the wrong committed by the state party, another vital aspect of this is that the applicant must have pleaded the violation of the Convention before the national Court; see also art 29(1) for a decision by the Chamber on admissibility and merits and rule 54(a) of the Rules of Court.

judge Chamber'.¹⁷ When an application fails to meet any of the admissibility requirements, 'it will be declared inadmissible and cannot proceed any further as there is no appeal from a decision given on grounds of inadmissibility'.¹⁸

Second, after the admissibility stage, the Court proceeds to determine the merits of the case. This, it does by assigning the case to one of the Court's five sections and after which, the state will then be notified of the complaints or allegations.¹⁹ At this point, both parties will be required to submit written observations (which may contain specific information or details including any claims for 'just satisfaction' by the applicant) to the Court either at the instance of the Chamber or President of the Section to whom the case has been assigned.²⁰ These observations may also relate to any other useful information that the parties may deem relevant to the case. The 'Chamber has the option to consider the admissibility and merits of the case separately or concurrently, but it must notify the parties' of whatever pattern it chooses.²¹ At the hearing, the applicant must be represented by a lawyer at each hearing of the Court.²² Before issuing decision on the merits, the Court, may wish to encourage parties to explore medium for a friendly settlement, however, when settlement cannot not be reached, the Court will then proceed to deliver judgment on the merits.²³ When a judgment is issued on the merits by the Chamber, 'there is a three-month period before the decision becomes final. Within this period, either or both parties may request that the application be referred to the Grand Chamber for further review, however, this happens only in a limited number of exceptional cases'.²⁴

The Court, where it finds a violation, awards 'just satisfaction' to the individual victim(s) and may further require the violating state to conceive individual or general measures in addressing the alleged violations - which often times, may require a state to amend legislation to avoid reoccurrence.²⁵ However, where the facts as stated in the complainant's application concerned the 'existence of a structural or systemic problem or other similar dysfunction which has given rise or

¹⁷ See arts 27 – 29 of the ECHR.

¹⁸ See details on the European Court as provided by International Justice Resource Centre (IJRC) available at <https://ijrcenter.org/european-court-of-human-rights/> (accessed 27 May 2019); see also arts 27–29 of the ECHR.

¹⁹ See rule 52-54 of the Court's Rule; art 26 of the ECHR.

²⁰ See rule 54(a) & 59 of the Court's Rule.

²¹ Read general provisions in rule 54a of the Rules of Court and art 29(1) of the ECHR.

²² Rule 35 & 36(2) (4) of the Rules of Court.

²³ See art 39.

²⁴ See arts 43 & 44 of the ECHR.

²⁵ See rules 60 & 75 on claims for 'just satisfaction' & art 41 of the ECHR; see also Boyle (n 5 above) 168.

may give rise to similar applications' before the Court, the Court may discretionally (or at the request of parties) initiate a pilot – judgment proceeding and renders a pilot judgment.²⁶ In all, it must be emphasized that the ECtHR does not have the 'authority to overrule a national decision or annul national laws' rather the respondent state will, as a matter of culture, reflect on the violation, think of the most appropriate remedy in a specific case and embark on measures that will stop reoccurrence of the alleged violation. The Court may also issue provisional or interim measures in exceptional cases when the applicant faces a real risk of irreparable danger or death.²⁷ As provided by Protocol 16 to the Convention, other than the Council of Minister (CoM), state parties to the Convention can now request the ECtHR for an advisory jurisdiction.²⁸ This then means that the highest national courts in contracting states who are party to the Protocol may approach the Court for an advisory opinion on the question of interpretation of any provisions of the Convention and any related protocols. However, the request for advisory opinion must relate to a case pending before a domestic court (further details on advisory opinion are discussed in subsection 4.4.1 below).²⁹

Under art 46 (1) of the Convention, state parties are bound to execute all judgments of the ECtHR. However, under the principle of subsidiarity,³⁰ states under the Convention are free to decide the means or measures in which judgment are to be executed. To ensure compliance, the CoM³¹ of the Council of Europe is saddled with the responsibility to supervise execution of judgments and follow up violating states parties on the extent of measures already taken towards compliance. And

²⁶ Rule 61 of the Rules of Court.

²⁷ Rule 39 of the Rules of Court.

²⁸ See generally Protocol 16 which came into force by 1 August 2018; rules 82 and 83 of the Rules of Court and arts 47, 48 & 49 of the ECHR.

²⁹ Protocol 16 brings the Jurisdiction of the ECtHR to have similar practice with Courts in other regions: the AHRS and IAHRs, see art 4 of the Protocol to the African Charter on establishment of the Court, art 2(2) of the Statute of the Inter-American Court of Human Rights read in conjunction with art 64 of the American Convention on Human Rights (ACHR).

³⁰ Subsidiarity is one of the guiding principles often referred to in the Court's case – law which implies that the Court's role is only restricted to matters that can only be handled at the regional level and not to second guess or dance into the arena of domestic functions. Therefore, subject to the supervisory roles of the CoM, the court affords states the deference to suggest specific individual or collective measures required for implementation of the Court's Judgment, for details, see G Dikov *Update: The European human rights system* (2018) at https://www.nyulawglobal.org/globalex/European_Human_Rights_System1.html (accessed 27 May 2019).

³¹ Note, one of the key bodies under the Council of Europe is the Committee of Ministers (CoM), the latter is an inter-governmental body comprising of foreign ministers (or their deputies) of member states who meets regularly at Strasbourg. The Committee is saddled with the task of monitoring execution of the ECtHR judgments created under the auspices of the ECHR.

when necessary, the CoM may suggest better steps that can transform a state party's human rights standard to conform to the Convention as interpreted by Strasbourg case laws.³² Put differently, the CoM may in some cases, 'adopt certain decisions or interim resolutions either to express her concern and dissatisfaction on the measures a state has taken' or to encourage and possibly suggest ways to guide states with respect to execution. When the CoM is satisfied with the measures a respondent state has taken, the Committee can then close the case.³³

4.2.2 The historical background and practice under the IAHRs

Drawing from the experiences of the Civil War in 'Central America and the dominance of authoritarian regimes in South America', there became need for advancement of human rights in the American Continents. Hence, the IAHRs emerged as the flagship in the development and advancement of contemporary human rights practices within the American continents since the creation of the Organization of American States (OAS) in 1948. Over the years, the IAHRs has continued to improve human rights jurisprudence as it provides numerous legal, institutional and political climates needed for addressing complaints and incidences of massive violations as well as resilient resistance to human rights changes especially from the military community and their political allies.³⁴ The IAHRs operates under the legal frameworks of the American Declaration of the Rights and Duties of Man³⁵ and the American Convention on Human Rights (ACHR).³⁶ These instruments (which are complemented by other specialized instruments) contain a wide range of fundamental rights which contracting states are obligated to respect in order to avoid re-occurrence

³² D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and International Relation* 52-53; P Leuprecht 'The execution of judgment and decisions' in R Macdonald, H Petzold & F Matscher (eds) *The European system for the protection of human rights* (1993) 791.

³³ Details on the workings of the CoM are available at <https://www.coe.int/en/web/cm/statutory-report> (accessed on 31 May 2019); it should be noted that the Parliamentary Assembly of the CoE also issues rapporteur reports that examine the level of state's implementation of the ECtHR decisions.

³⁴ See generally P Engstrom 'Rethinking the impact of the Inter-American human rights system' in P Engstrom (ed) *The Inter-American human rights system: Impact beyond compliance* (2018).

³⁵ The 1948 American Declaration on the Rights and Duties of Man was one of the foremost instruments designed for the promotion of human rights, unlike the Convention, there are arguments that the Declaration lacks a binding effect, however it applies to all member state of the OAS as the instrument with the authoritative interpretation of human rights obligations under the OAS Charter.

³⁶ The American Convention which was adopted in 22 November 1969 is legally binding on states' parties; the Convention empowers the IACtHR (which came into existence in 1979) to promote, protect and enforce all rights contained in the Convention; for a brief historical background of the IAHRs and its institutions, see JM Pasqualucci 'The Inter-American human rights system: Progress made and still to be made' (2009) 52 *German Yearbook of International Law* 184-218.

of violation. Currently, the IAHRs is established under the auspices of the ‘OAS which comprises 35 member states from North, Central and South America and the Caribbean’.³⁷

Similar to the structure of the EHRS prior to 1998, the Inter-American human rights system (IAHRs) has two supervisory mechanisms created by the Organization of American States (OAS): the Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court on Human Rights (IACtHR).³⁸ Just like the practice under the AHRs, states’ parties to the American Convention reserve the rights to (or not) recognize the contentious jurisdiction of the IACtHR in allowing cases to be brought against them.³⁹

The above structure implies that supranational litigation process under the IAHRs entails the following processes: first, any individual who allege violations of rights as enshrined in the Convention may take a petition to the Commission for redress. If the latter considers the complaints to be admissible and then finds a violation, it will issue a list of recommendations that the violating states must follow in order to remedy the violation.

Upon failure to remedy or comply with the decisions as issued or where for instance, the case cannot be resolved by a way of friendly settlements or contentious hearings; the Commission can then refer and transmit the case to the Court for further action.⁴⁰ In follow-up on decisions, the IACmHR may engage a wide range of activities, for instance (when necessary) - it may carry out on-site visits, publish country and thematic reports, appoint rapporteurs on specialized human rights issues. Similar to the practice under the AHRs, the IACmHR can also request for an advisory opinion from the IACtHR on any question of interpretation of provisions of the Convention and in

³⁷Note, only 24 of the member states are parties to the ACHR. 20 have accepted the compulsory Jurisdiction of the IACtHR: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Venezuela, Trinidad and Tobago later withdrew from the IACtHR’s jurisdiction when they denounced the ACHR. The ACHR has not been ratified by Canada and the United State; for the list of members of OAS, see, http://www.oas.org/en/member_states/default.asp (accessed on 24 June 2018). For details on the practices and procedure of the IACtHR, see Pasqualucci (n 36 above) 184-218.

³⁸ See art 33 which recognizes the Commission and the Court as supervisory organs under the ACHR, see also art 41 for the functions of the Commission and art 61 which provides for the jurisdiction and functions of the Court. As stated above, there are 20 states over which the Court may exercise its contentious jurisdiction.

³⁹ See art 62 of the ACHR; for list of countries that have accepted the compulsory jurisdiction of the IACtHR, see (n 37 above).

⁴⁰ 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* 768-784.

a similar vein, it may request provisional measures from the Court on behalf of any applicant whose complaints reveal imminent threat of harm or death.⁴¹

The second phase of litigation concerns the role of the IACtHR. In addition to its contentious jurisdiction, ‘the Court has the authority to grant provisional or interim measures and advisory opinions at the request of the Commission, states’ parties under the OAS and other relevant organs of the OAS’.⁴² Similar to the Commission’s practice discussed above, the Court will only entertain a case on the merits when all necessary admissibility requirements have been met.⁴³ When the Court finds a case to be admissible, it can then proceed to determine the merits of the case.⁴⁴ In doing this, the Court may convene a public hearing and receive testimony from live witnesses. Upon a finding of violation, it publishes its judgment setting out the violations and orders the state to carry out the necessary reparation measures. On mediums for follow-up on decisions, the Court is empowered to monitor compliance and issue periodic compliance orders when necessary (compliance patterns in both regions are discussed in section 4.3 below). Given that not all states can be brought before the court (see above for lists of states’ parties to the Court’s jurisdiction) and decisions may not be swiftly complied with by states that have accepted the Court’s jurisdiction, a simple question that comes to mind is whether any other body also play a role in follow-up on decision apart from the IACtHR itself. As gleaned from the literature, Engstrom notes that the IAHRs has several mechanisms for holding states accountable (for human rights commitment) through: courts’ ruling and evaluation of states’ compliance reports, ‘mobilization of public opinion around specific cases, raising awareness through media strategies and domestic litigation processes’.⁴⁵ As Engstrom further noted:

The IACmHR has developed a fairly comprehensive set of tools in addition to individual cases that range from public diplomacy in the form of press releases, public hearings, onsite visits, interim measures(precautionary mechanisms), to behind the scenes negotiations with state officials and individual petitioners. The IAHRs also performs a significant indirect advocacy role by providing

⁴¹ Art 63(2) provides for the Court’s power to order provisional measures at the request of the Commission; see art 64 which empowers the Court to render advisory opinion at the request of member states of OAS.

⁴² As above.

⁴³ The same admissibility conditions which applies to the Commission also apply *mutatis mutandis* to the Court, see art 48 of the ACHR.

⁴⁴ Art 63(1) of the ACHR.

⁴⁵ P Engstrom *The Inter-American human rights system: Notable achievements and enduring challenges* (2015) available at <https://ssrn.com/abstract=2670050> (accessed 10 July 2019).

an important platform for human rights NGOs, some of which have been very adept at integrating the IAHRs into their advocacy strategies in order to bring pressure for change in their domestic political and legal systems.⁴⁶

The above account on the achievements of the IAHRs should not be understood to mean that the latter system is a free zone human rights region that exist without challenges. Similar to the AHRs, the IAHRs has been confronted with several challenges ranging from the questions of: restriction on accessibility and low acceptance records of the Court's jurisdiction, legitimacy and effectiveness of the system's institutions and uneven or a growing apathy (mostly from the English - speaking Caribbean states) towards ratification of the ACHR and other regional human rights instruments.⁴⁷ Again, it may be asked: if the template and framework of the IAHRs are similar to the practice under the AHRs, are the compliance records in the both regions also similar? If no, what makes the difference? Are there other forms of engagement in the IAHRs that have not been considered in the workings of the AHRs? These and other questions as discussed in sections 4.4.2 and 4.6 below will determine the placement of legitimacy and its correlation with compliance.

4.2.3 Comparative case load

Having discussed the basic workings of the two systems in the above sub-headings, I discuss in this sub-heading how the systems have expanded in terms of adjudication of cases as a build up to further discussions on status of compliance with decisions from the systems mechanisms (see section 4.2 below). As I observed from the Court's reports, the ECtHR has (as at 2017) decided on examination of about '798,600 applications either through a judgment/decision or by being struck out of the list', and by 2018, the numbers have increased to 841,300.⁴⁸ In a more detailed analysis, the Court has presided over 'about 2,443,196 throughput of applications from 1959 – 2017'. The 2017 breakdown is as follows: applications that were either declared 'inadmissible or struck out - 752,415; applications allocated to judicial formation - 845,976; applications for which judgment was delivered - 48,933; total numbers of application decided; 798,610'. By 2018, the records have become slightly higher as '2,571,793 throughput of applications' were examined.

⁴⁶ As above.

⁴⁷ As above; Engstrom (n 34 above).

⁴⁸ For detailed statistical analysis of total number of applications received and cases decided by the ECtHR from 1959-2017/2018 (which also includes cases dealt with by the defunct European Commission before 1959), see overview of the ECtHR cases from 1959-2017/2018 available at https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf; https://www.echr.coe.int/Documents/Overview_19592018_ENG.pdf (accessed 30 May 2019).

The 2018 breakdown shows that: application allocated to a judicial formation were - 889,051; application declared inadmissible or struck out of the list - 792,438; applications for which judgment was delivered - 48,933 and the total number of application decided - 841,371.⁴⁹

The IACtHR has delivered a total number of 355 decisions/judgments from 1979-2018. Of these numbers, a total of 63 decisions/judgments were delivered from 1979-1999 but from the year 2000 to 2018, the number of judgments delivered within the latter period have exponentially increased to 292 which indicates that there is an unprecedented increase in number of cases for which decisions have been issued.⁵⁰ By way of comparison, the African Court on Human and Peoples' Rights has (as at May 2019) received a total of 202 applications for which 52 of these applications have been finalized while 146 are still pending and 4 were transferred to the African Commission on Human and Peoples' Rights.⁵¹ While it may be argued that the caseload of the latter court is significantly lower than the former, the fact must be noted that the African Court came into existence in 2004 and became operational in 2006. Arguably, there may have been a slow pace of growth in the other regional Courts in their beginning days. However, the high volume of caseload and extent of adjudication at the ECtHR and IACtHR is an indication of how sizeable these tribunals have become.⁵²

4.3 States parties' attitude towards compliance under the EHRS/IAHRS

As earlier explained in chapter one of this thesis, compliance occurs when a state's action or behavior conforms to a legal rule or a particular standard. In the context of this discussion, compliance may be said to have occurred when there is evidence of a change of behavior or practices by a state party in consequence of an adverse decision (whether intentionally or by coincidence) from any of the supranational human rights institutions under the EHRS and

⁴⁹ See as above; for detail information on the operations of the European Court and analysis of cases decided, see <http://www.echr.coe.int/pages/home.aspx?=#home>. For literature on the different analyses of increased caseload and jurisprudence of both the ECHR and IACtHR, see Cavallaro & Brewer (n 40 above) 779-783; Hawkins & Jacoby (n 32 above) 44 -76; 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* 961; C Hillebrecht *Compliance with human rights tribunals: An assessment* (2013) also available at <http://www.e-ir.info/2013/11/25/compliance-with-human-rights-tribunals-an-assessment/> (accessed on 24 June 2018); C Hillebrecht 'The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change' (2014) 20(4) *European Journal of International Relations* 1100 -1123.

⁵⁰ For information on the IACmH and IACtHR, see the following: <http://www.corteidh.or.cr/index.php/en> and <http://www.oas.org/en/iachr> (accessed on 24 June 2018).

⁵¹ Case statistics on the African Court is available at <http://en.african-court.org/index.php/cases> (accessed 29 May 2019).

⁵² Hillebrecht (2013) (n 49 above); Cavallaro & Brewer (n 40 above) 779-782; Hawkins & Jacoby (n 32 above) 46.

IAHRS.⁵³ In this section, I briefly discuss the varying pattern of states' approach towards compliance in both regions. However, due to material constraints, my facts are drawn from analyses in the existing literature and examination of compliance statistics in the 2016 annual report of the IACmHR (with respect to status of compliance with recommendations of the IACmHR).⁵⁴

As applicable in most jurisdictions, the moment decisions are issued, the executive may act as the 'gatekeeper' to put in motion all steps towards compliance within its domestic sphere.⁵⁵ The executive (depending on the nature of the tribunal's recommendations or orders) may also delegate other state agents to stop the violation for which decision has been given, avoid future occurrence and to fully comply with terms of the decision.⁵⁶ The tribunals' decisions may entail a target state to fulfill a wide range of responsibility as applicable and practicable in that jurisdiction. For instance, states may be tasked to pay (mostly seen in the European system): financial compensation or award 'just satisfaction' to the victim, or take individual or general measures to address violation. As mostly seen under the Inter-American system, states may be ordered to provide symbolic reparation such as: render a formal apology to victim(s) and family, erect a memorial, exhumes a corpse with a view to giving a symbolic burial and set up a DNA database for ease of identifying victims.⁵⁷ Generally, states may also be charged to bring its national laws in conformity with international treaties and standard - amend or repeal laws that are incompatible with human rights standards, to order a re-trial of domestic cases relating to regional tribunal's jurisdiction and

⁵³ K Raustiala, 'Compliance & effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 388; Hawkins & Jacoby (n 32 above) 39-40; for the literature on the distinction between compliance and effectiveness, see Y Shany *Assessing the effectiveness of international courts* (2014) 1-21.

⁵⁴ It should be noted that the 2017 and 2018 annual reports do not reflect statistics of compliance with the Commission's recommendation. Therefore, my preference for the 2016 annual report is because it analysed the status of compliance with the recommendations in the reports adopted by the Commission in the last preceding fourteen years available <https://www.oas.org/en/iachr/docs/annual/2016/docs/InformeAnual2016cap2Dseguimiento-en.pdf> (accessed 30 May 2019).

⁵⁵ Hillebrecht (2012) (n 49 above) 966-969.

⁵⁶ Hillebrecht (2014) (n 49 above) 7; A Huneeus 'Courts resisting courts: Lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 508-509 (arguing that when an injunctive order requires multiple actors to take actions towards compliance, it is less likely that compliance will be achieved).

⁵⁷ Huneeus (n 54 above) 507, 509-510; JE Haglund 'Domestic implementation of supranational court decisions: The role of domestic politics in respect for human rights' unpublished PhD thesis, Florida State University, (2014) 27; Hillebrecht (2013) (n 49 above); Pasqualucci (n 36 above) 184-283; JC Sims 'Compliance without remands: The experience under the European Convention on human rights (2006) 36 *Arizona State Law Journal* 643-645; Hawkins & Jacoby (n 29 above) 53-55; C Hillebrecht 'Rethinking compliance: the challenges and prospects of measuring compliance with International human rights tribunals' (2009) 1(3) *Journal of Human Rights Practice* 362-379.

hold violators accountable, order a re-instatement of the victim to status quo or reversal of state actions or policy and prohibit further re-occurrence and to release victims unlawfully detained.⁵⁸

From the literature, compliance approach with these remedies or orders vary in both regions. As Hawkins and Jacoby observe:

The IACHR essentially tells state violators, 'complete this list of remedies, and tell us when it's finished. We will then check what you have done'. By contrast, the ECtHR essentially tells states 'You've done wrong. Find a way to undo or compensate for the harm you've caused and to avoid future harm. When it's done, tell our designated third party [CoM] and they will check'⁵⁹

Drawing from the above and as it concerns the EHRS, the overwhelming views in the scholarship is that prior to the admission of new members (mostly members from the former Soviet Union bloc), compliance with rights decisions was a natural practice amongst members of the CoE. In explaining the reason why compliance was considered a natural phenomenon in the early days of the ECtHR, Warioba states as follows:

The states which established the system [Western Europe) were few and had been part of the Holy Roman Empire or had some sort of affinity with it. In other words they had the Christian Culture and as such their legal philosophy and practice were similar. Thus, international law developed from that time was not very different from the domestic law of the member states. Compliance with international law was therefore natural....even now with the decisions of regional courts, particularly where the States share common values, compliance is natural; for example decisions made by the European Court of Human Rights have all been complied with even in the absence of a mandatory enforcement mechanism⁶⁰

What can be inferred from the above is that the EHRS was not designed to improve contracting states' approach towards compliance rather compliance naturally resonates as a common feature amongst member states based on sense of ownership of the system, common values and democratic culture inherent within the European hemisphere.

As part of the factors that may have contributed to the effectiveness of the ECtHR in terms of high rates of compliance, Helfer and Slaughter identify *inter alia* (a) independent democratic

⁵⁸ For nature of remedy from the African human rights institutions, see Viljoen & Louw (n 2 above) 18; Ayeni (n 2 above) 224.

⁵⁹ Hawkins & Jacoby (n 32 above) 83.

⁶⁰ JS Warioba 'Monitoring compliance with and enforcement of binding decisions of international courts' (2001) 5 *Max Planck Yearbook of United Nations Law* 48.

institutions (as disaggregated units from the state's unitary posture) with an entrenched democratic culture for respect for the rule of law and responsiveness to citizen's interest; (b) existence of common or bounded values and traditions characterized by cultural and political homogeneity identity amongst states parties subject to the ECtHR; and (c) occurrence of minor nature of human rights violations within states in Western Europe.⁶¹

Similarly, Cavallaro and Brewer also note as follows:

Most salient, at the time [when the ECHR records of compliance were remarkably high] the European court exercised jurisdiction over a relatively homogeneous group of western European states in which democratic governance and the rule of law were already well established. Many states in the Council of Europe prior to the collapse of the Berlin Wall shared a specific commitment that existed not only in law, but in practice.⁶²

This unique foundation aiding states' parties approach towards compliance under the EHRS aligns with Moravcsik description of the European system. As Moravcsik notes:

The uniquely developed international institutions and practices of human rights protection in Europe - those elements that distinguish it most clearly from other such regimes throughout the world - are not designed to induce basic adherence to human rights on the part of illiberal governments, whether inside or outside European human rights regimes.....The unique success of the West European system lies not in the transformation of undemocratic regimes, but in the improvement of democratic ones. West European human rights regimes harmonize and perfect human rights and democracy among nations that already effectively guarantee basic rights, rather than introducing them to new situations. It is those countries in which individuals, groups or governments wish to employ international human rights regimes to strengthen their own democratic systems that benefit the most from them.⁶³

⁶¹ LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 331-336 (they also identified other factors responsible for effectiveness of supranational tribunal. These include functional capacity, independence from political institutions and interest, fact-finding capacity and quality of legal reasoning from decisions), see P Sieghart *The international law of human rights* (1983) 26 -27 (arguing that states 'within the same geographical region, sharing a common history and cultural tradition' tend to quickly reach a common agreement on the application of human rights provisions); N Ando 'The future of monitoring bodies – limitations and possibilities of human rights committee (1991-1992) *Canadian Human Rights Year Book* 171-172 (suggesting that the competence of the ECtHR and the IACtHR to the shared beliefs and convictions of all member states to the founding Conventions 'nurtured by a long tradition of common history, religion, culture and human values')

⁶² Cavallaro & Brewer (n 40 above) 769-772.

⁶³ A Moravcsik 'Explaining international human rights regimes: liberal theory and Western Europe' (1995) 2 *European Journal of International Relations* 7-159; L Wildhaber 'European Union, European Convention on Human Rights and human rights protection in Europe' (2008) International symposium on EU-integration and guarantee of

In the manner of compliance, Hawkins and Jacoby explain that European states often times ‘comply fully and quickly’ with adverse decisions and cases of non-compliance are rare and to a large extent - alien to the system.⁶⁴ In practice, the rate of non-compliance under the EHRS is minimal; the least result in quite a number of cases is partial compliance.⁶⁵

Conversely, in the context of the above debate, Cavallaro and Brewer maintain that in present-day reality, the above claims⁶⁶ do no longer seem to have strong explanatory effect in the present workings of the EHRS owing to the fact that compliance with the ECtHR decisions is not as swift as it used to be.⁶⁷ The reason, as they argue, is that upon the admission of a significant numbers of new members into the Council of Europe,⁶⁸ and within the circumference of these new membership, resistance to decisions of human rights tribunal has become a common place.⁶⁹ Besides the low attitude of the members of the former Soviet Union bloc towards compliance, some pockets of resistance have also been noted from the old core members of the Council of Europe, for example, the United Kingdom (UK).⁷⁰ Despite the reality of this observation, the

human rights session at Ritsumeika University, Kyoto (arguing against the claim that the Convention has departed from its original function to become a mechanism for changing the political character of these states (*Eastern European States who joined the European council after the cold war*). Accordingly, he states: that the Convention was and remains mainly an instrument for gently and incrementally encouraging, rather than for instigating, change and civilizing the member states).

⁶⁴ Hawkins & Jacoby (n 32 above) 38, 56 (arguing that ‘even in the three most recent years, arguably the busiest in the court’s history, full compliance was achieved in nearly 700 cases per year’).

⁶⁵ Hawkins & Jacoby (n 32 above) 56, 83 (on a general analysis, they find partial compliance as the most preferred choice in both regions).

⁶⁶ Particularly, claims made by Helfer & Slaughter (1997) (n 61 above) and other scholars which concern high rate of compliance with decisions of the ECtHR under the EHRS.

⁶⁷ Cavallaro & Brewer (n 40 above) 773; D Shelton ‘The boundaries of human rights jurisdiction in Europe’ (2003) 13 *Duke Journal of Contemporary and International Law* 143 (observing challenges of non-compliance and disrespect to the authority of the Court’s judgment as a result of growing violations of rights).

⁶⁸ Cavallaro & Brewer (n 37 above) 773 (As argued ‘these states possesses an attitude typified by grave violations and limited experience of the rule of law than Western Europe-has presented the ECHR with a significantly different political climate’).

⁶⁹ In 2006, the ECHR annual report reveals most of the cases of grievous violation of rights emanates from Russia and Turkey (who are part of the new in-take). Again, a perusal of the ECHR annual report in 2007 also shows that five of the roughly twenty newly admitted member states accounted for about 59% of the Court’s case docket at the end of 2007; while most cases awaiting compliance supervision by the CoM involves Eastern Europe member state and Turkey. For details, see Cavallaro & Brewer (n 40 above) 772-773; for details on the practices and procedure of the ECtHR, see annual report 2006 at 59-61,63 available at https://www.echr.coe.int/Documents/Annual_report_2006_ENG.pdf (accessed 24 June 2018), 2007 Annual Report at 136 available at <http://www.echr.coe.int> or https://www.echr.coe.int/Documents/Annual_report_2007_ENG.pdf (accessed 24 June 2018).

⁷⁰ See for instance, *Hirst v UK* (No 2) Application No. 74025/01 and *Green and MT v UK* Application No (s) 60041/08 and 60054/08.

ECtHR has recorded an admirable success and has become a pacesetter to other supranational tribunals.

In the context of the IAHRs, the 2016 annual report of the IACmHR reveals an overwhelming higher rate of 60.6% partial compliance with the recommendations in the reports adopted by the Commission in the last fourteen years preceding 2016.⁷¹ Similar to the 2016 report on status of compliance, Hawkins and Jacoby find partial compliance as the common response from respondent states with respect to the orders of the IACtHR.⁷² In a more detailed analyses, Hawkins and Jacoby identify the following percentage of compliance with decisions from the IACtHR: (a) orders charging state to apologize - 40% (b) request to repeal or amend legislation - 7% (c) orders requesting re-opening of cases, investigations, identify and punish perpetrators of violation - 17-19% (d) order to pay moral damages - 43%, material damages - 40% (e) order to pay court cost and other damages - 43%.⁷³ Drawing from their analyses, it could be observed that the orders requesting for amendment of state legislation slumped to a low level of 7%. Thus, the question that nags is: why is the order requesting legislative amendment recorded such a low level of compliance? Viewing this from the perspective of the liberal theory, it can be argued that the reason why compliance with orders requesting for amendment of state legislation slumped to a low level of 7% is because change of legislation by means of amendment or repeal is a matter within the legislative organ of the state and not within the purview of the executive and so may not be easy to implement when the state is treated as a unitary entity. Further explanation to this is discussed below.

While Hawkins and Jacoby overall analyses of compliance with orders of the IACtHR reveal a higher percentage of partial compliance,⁷⁴ they further note that one of the potential factors that

⁷¹ Note the 2017 and 2018 annual report of the Commission do not reflect statistics of compliance; details on the 2016 annual report of the Inter-American Commission is available at <https://www.oas.org/en/iachr/docs/annual/2016/docs/InformeAnual2016cap2Dseguimiento-en.pdf> (accessed 30 May 2019) para D; other statistics reflected in 2010 -2015 annual reports of the Commission also reveal a striking results of partial compliance, these reports are available at <https://www.oas.org/en/iachr/reports/annual.asp> (accessed 31 May 2019).

⁷² Hawkins & Jacoby (n 32 above) 56.

⁷³ Hawkins & Jacoby (n 32 above) 57.

⁷⁴ Hawkins & Jacoby (n 32 above) 56 (arguing that ‘partial compliance is the most common outcome observed in a significant majority of cases. In any given case, states rarely do all they are ordered to do. But by the same token, states rarely do nothing at all. Rather, they engage in partial compliance, i.e. complying with some compliance in any given case but not others’).

triggers executive's incentive towards compliance with regional court orders is when the costs of compliance is either low or minimal. This is explained more clearly in the following manner:

It is probably easiest for the state to pay monetary damages or apologize and walk away. Although the monetary cost for such damages can be higher than some of the other actions required of states, monetary costs probably do not require as many political capital expenses, coordination efforts, or reputational expenses as some of the other types of reparations.⁷⁵

In contrast and more importantly in the inter-American context, Huneeus argues that injunctive orders against the executive alone and those requiring legislative action are comparatively difficult and more costly to comply with, yet compliance rating with decisions against the executive arm alone is reasonably higher. For clarity, she further explains that when an order from a regional court is directed solely to the executive, the compliance rate from the executive in most cases, stands 'roughly' at a higher rate of 44% while an order charging both the executive and judiciary to jointly address an issue involving violation of rights could record a relatively lower compliance rate of 36%.

Similarly, when an order requires the executive and the public ministry (in charge of prosecution but operates independent of the executive and judiciary) to address a particular remedy or reparation order, compliance rate drops to 21.1%, and in the same vein, an action requiring the executive, legislature, judiciary and the public ministry to act in a particular manner recorded a compliance rate of 2%. Therefore, executive compliance rate increases when it is directly charged with the responsibility to address violation and could 'plummet' when a tribunal charges the executive and more actors to comply with its decisions.⁷⁶ Thus, executive higher rate of compliance with injunctive orders may not necessarily be associated with anticipated low or minimal cost in the compliance process as argued by Hawkins and Jacoby. Rather executive high incentive to comply may arise when a regional court's order is directed to only one actor at a time (instead of multiple actors - say the executive, legislature and judiciary jointly). In a more

⁷⁵ Hawkins & Jacoby (n 32 above) 59.

⁷⁶ Huneeus (n 54 above) 508-510 (arguing that 'orders that invokes action by the legislature and the executive, compliance rate stands at 22%')

affirmative manner, Huneeus states that ‘No state has ever fully complied with such orders’ involving three actors at the same time.⁷⁷

From the above discussion, it can be garnered that compliance under the EHRS is a common phenomenon as it has become a way of life and an enduring culture amongst the contracting states to the Convention. This democratic culture arose from an entrenched value for the system notwithstanding some pockets of resistance especially from the new members thereby prompting few cases of partial compliance. While partial compliance looms in the context of the Inter-American system, scholars argue that the success of the IACtHR depends largely on its ability to engage and connect with domestic actors: the social movements, human rights advocates, the media, domestic institutions and other segments of the wider domestic community who through publicity and legal processes pressure the government from within.⁷⁸

The important question arising from the analyses in this section, is to know what the examples from the European and American systems bear out with regards to the subject matter of this thesis. First, as stated above, the ECtHR does not order the states to take specific actions; the states already have a mature democratic culture that enhances compliance with court decisions. Therefore, compliance is not influenced by external factors. Second, while the IACtHR relies on the victims to report on status of compliance, Hawkins and Jacoby note that ‘the ECtHR only rarely does this with respect to payments of just satisfaction [and] victims play almost no role in monitoring the much more subjective aspects of individual measures’.⁷⁹ And as it concerns monitoring of general measures, no role is played by victims.⁸⁰ A lesson to be drawn from this is that the ECtHR does not bother itself about the measures a respondent state will take to address its findings. The states already know what to do. As seen from the literature and reports, the Court and stakeholders under the European system are mostly concerned about reform processes that are geared towards reduction of caseload and to aid speeding discharge of pending cases.⁸¹ In practice, the Court has

⁷⁷ Huneeus (n 54 above) 510; Hillebrecht (2014) (n 49 above) 1100-1123 (arguing that compliance depends on ‘coalition of domestic actors – executive, judiciaries, legislatures and civil society’).

⁷⁸ Cavallaro & Brewer (n 40 above) 770, Hillebrecht (2014) (n 49 above) 1106 (arguing that the ‘process of compliance depends on coalitions of domestic actors – executive, judiciaries, legislatures and civil society.’); K Alter *The new terrain of international law: Courts, politics and rights* (2013).

⁷⁹ Hawkins & Jacoby (n 32 above) 55.

⁸⁰ As above.

⁸¹ In addressing the challenges of: lack of prompt execution of judgments, volume of pending and repetitive cases, the EHRS has gone through several reform processes beginning from the adoption of Protocol No 14 adopted by state parties to the ECHR. However, nothing that the Protocol may be inadequate in addressing the issues of non or partial

little or no concern about non-compliance as it is not often considered as one of the challenges facing the system.

Thirdly, under the IAHRs, compliance is higher when an order is directed to a particular domestic institution instead of multiple domestic actors. This implies that when a domestic actor - acting as a disaggregated unit rather than, as a state unitary entity - takes up the task of complying, the probability of higher compliance is likely. Fourthly, there are chances that state compliance level can be improved when the legitimacy and authority of sources of pressure reside within the internal subsets of the state – particularly domestic institutions acting as disaggregated units.

Arising from all these narrations, it may therefore be argued that notwithstanding some peculiar challenges in the two systems, conventional wisdom suggests that state parties' approach towards compliance is reasonably fairer when compared with the African system.⁸² However, beyond the relatively high compliance status in these systems, the important question this chapter stands to investigate is: what are the triggers of the high level compliance enjoyed in the both systems especially the EHRS. As may further be asked: Is compliance under the European and American systems triggered by external forces or superior influences? What are the motivators for compliance under the EHRS and IAHRs? What motivate most states under the EHRS to exhibit democratic culture of compliance towards adverse decisions which have the potentials to question their sovereignty and self - rule determination? Do states under the IAHRs comply with decisions from their regional tribunals out of fear of sanctions or other external considerations? Are the regional human rights activities alien to national domestic actors living and operating within the American continents? Who do both systems rely on as source of pressure for execution of adverse

compliance, the Interlaken Process was established in 2010 to discuss potential mechanisms that can enhance effectiveness and compliance. Under the Interlaken process, stakeholders held meetings in Interlaken in 2010, Izmir in 2011, Brighton in 2012 and Brussels in 2015. The aim, especially the Brussel Declaration of 2015 is to map out an action plan for the realization of a range of issues including the questions of interpretation, applications and steps to be taken towards implementation of Convention rights at the national level. For details, see R Spano (n 13 above) 473-474; see also, D Forst 'The execution of judgments of the European Court of Human Rights: Limits and ways ahead (2013) 7 *The Vienna Journal on International Constitutional Law* (ICL Journal) 27 -28; also available at https://www.icl-journal.com/media/ICL_Thesis_Vol_7_3_13.pdf (accessed 4 June 2019). For details on reports, notes and opinions about these conferences/processes and other reforms, see the 2018 annual report of the ECHR available at https://echr.coe.int/Documents/Annual_report_2018_ENG.pdf (accessed 9 August 2019); see also 'Reforms of the Court: European Human Rights Court' available at <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=> (accessed 9 August 2019).

⁸² There are, however good reasons to assume *prima facie* that compliance under the EHRS is higher than the records under the IAHRs, thus, it can be argued that compliance level under the both systems is higher than the compliance status in the African system; for a brief note on compliance level under the EHRS, see Dikov (n 30 above).

judgments at the national level: is it the domestic institutions (as a disaggregated components) and wider CS or NGOs and their regional or external allies?

The responses to these questions will determine whether, compliance under the two systems is influenced by the internal configuration of disaggregated state actors and wider CS (enhancing internal legitimacy at the domestic level), or by the state acting as a unitary entity - as may be motivated either by the state's political will or external forces (which respond to external legitimacy).

In the following section, I discussed the framework of the two systems by analyzing the level of interaction and engagement with domestic institutions and CS with respect to supranational human rights litigation over adjudication of individual complaints. The aim is to find where the source of pressure/motivation for compliance in the European and Inter - American systems lie as between internal and external arenas.

4.4 Sources of pressure for compliance under the EHRS & IAHRs

Human rights decisions from supranational tribunals are generally directed at the state as a unitary entity. Therefore, in a literal sense, the states are supposed to directly or indirectly act as sources of pressure in providing the pathway for compliance. However, for administrative convenience (depending on a particular state's structure), often times, the executive arm of the state arguably plays a central role with regards to compliance under the EHRS and IAHRs. More often than not, they are 'simultaneously' the major actors with more domestic and international stakes for compliance.⁸³ This perhaps, is due to the fact that (a) they have the political clout and wherewithal for compliance; (b) they act as representative of the state both at international and domestic fora; (c) they are charged with conduct of foreign matters and policy, by virtue of which, they are seen as the 'state interlocutor throughout the litigation process before the court';⁸⁴ (d) they are the regional political players that determine effectiveness of the tribunals at home by ensuring that rights decisions attracts optimal changes either by introducing new policies or initiate reforms process.⁸⁵

⁸³ Hillebrecht (2014) (n 49 above) 7.

⁸⁴ Huneeus (n 55 above) 513.

⁸⁵ Haglund (n 57 above) 27 (arguing that the 'executive represents an actor of primary importance for the effectiveness of the regional courts'); Hillebrecht (2014) (n 49 above) 7 (arguing that the executive is the actor that is mostly responsible and with more stakes with respects to compliance with human rights decisions from the ECtHR).

Notwithstanding the significant role of the executive in a state's compliance cost-benefit calculations, the underlying argument in this thesis is that the probability of compliance is higher when the state's centric structure is deconstructed and unpacked, so that the collective interest of the disaggregated domestic institutions and CS within the state can become the interest of the state. Which then implies that the state being an inanimate structure with no self – interest, is then guided by the collective interest of the domestic constituents embedded within.⁸⁶

On this note, compliance in the context of this thesis, could be enhanced even when the state is not considered as a unitary actor. This is possible because while the executive may give directives to bureaucrats or state agents on measures towards compliance, it cannot perform the role of the legislature as the latter is responsible for formulating new policies and practices, amending or repealing existing laws to meet international human rights standards, adopting or domesticating international human rights laws into domestic legislations and carrying out certain oversight functions leading to compliance. And the judiciary on its part, interprets laws, apply international decisions as precedents in national courts, prosecute and punish perpetrators of human rights violations.⁸⁷

These wide ranges of responsibilities cannot be undertaken by the executive alone.⁸⁸ Apart from the efforts of these domestic units of government, different strands of CS also represent a platform that pressures government actors for compliance.⁸⁹ Therefore, in understanding the dynamics for state compliance under these systems, it is necessary to appreciate the significance and role of domestic institutions (acting as disaggregated components of states) and CS as potential sources of pressure in stimulating state actors' incentive to comply under the EHRS and IAHRs. This postulation aligns with the liberal theory which set out the theoretical framework for this thesis (see chapter two above).⁹⁰

⁸⁶ For the literature which focus on the role of domestic constituents in improving compliance, see Hillebrecht (2013) (n 49 above); Hillebrecht (2012) (n 49 above) 964-972; Huneeus (n 54 above) 493-533.

⁸⁷ It must however be noted that this sequence – (from the executive – legislature and to Judiciary) does not apply in all regimes as decisions of international mechanisms in some regimes must first pass through judicial processing in order to be executed

⁸⁸ See Huneeus (n 54 above) 508 – 510; for other literature arguing that compliance is a task often carried out by a constellation of actors, see Hillebrecht (n 49 above) 279-280; Hillebrecht (n 49 above); H Keller & A Stone Sweet *A Europe of Rights: The impact of the ECHR on national legal systems* (2008).

⁸⁹ Hillebrecht (2012) (n 49 above) 279-301; Hillebrecht (2013) (n 49 above).

⁹⁰ See discussion on the liberal theory in chapter two of this thesis.

In view of this, I discuss (in the next subsection) how the EHRS and IAHRs have explored the engagement of states' domestic institutions and CS in enhancing the embeddedness of the regional systems into states' domestic legal space. These actors have directly or indirectly acted as sources of pressure for compliance and consequently, their engagement have been assumed to have contributed in improving compliance.⁹¹

4.4.1 Engagement of domestic institutions and CS under the EHRS

Compliance process in the context of this discussion could be likened to a relay race.⁹² So that in the order of mutual interaction between domestic actors, it can be argued that compliance process moves from one actor to another as the baton continues to move in a continuous swing until full compliance is achieved. For instance, assuming a national court rules against the validity of a national legislation for being inconsistent with the ECHR, the baton automatically moves to the national parliament who may have to fill the gap. The race is completed, for instance - when the parliament initiates a bill for consideration and engages legislative debate for a new or an amended legislation and when such bill is eventually passed into law in compliance with the court's order. If otherwise, the baton comes back to either the court for further review or contempt proceedings. Again, in another sense, the baton may be taken over by CS (who are knowledgeable about this) who may then pressure for compliance. Compliance is therefore a function of a large stream of domestic ecosystem rather than a result of a state-centric approach. This position draws close to earlier findings of Anagnostou & Mungiu Pippidi. In their investigation on the relevance of domestic factors in fostering compliance, they conclude that:

[T]he greater the capacity and effectiveness of state institutions to enact laws and policies, as well as to enforce them in practice, the more efficacious and conducive they are likely to be pursuing the necessary reforms to comply with the Strasbourg Court's ruling too. In other words, state

⁹¹ Embeddedness through engagement of domestic institutions and CS enhances the possibility of internalization of the Convention and human rights practices into the national domestic systems which has the potential to improve compliance, for a wider discussion on the effect of norm internalization, see generally H Koh 'Why do nations obey international law' (1997) 106 *Yale Law Journal* 2599 – 2656.

⁹² A relay race is a racing game or competition where each members of the team take turns after each member's completion of his/her race or certain mileage of the apportioned meters within the relay lines. In clear terms, the race involves members of a team and each member is relieved by another member which is signaled by transfer of a baton in a continuous round until the game is over upon completion of the targeted meters. I have used this term to explain the shift in compliance responsibility from one actor to another until compliance is fully achieved. This is to further demonstrate that compliance is not a task that must only be carried out by one actor.

performance in human rights implementation is closely linked to the capacity and effectiveness of a government to enact laws and deliver policies more broadly⁹³

The foundation on the role of domestic institutions begins with art 46 of the Convention which urges all contracting states to abide by the ECtHR judgments on individual applications. In a more explicit manner, the Court states as follows:

As regards the requirements of [art] 46, it should first be noted that a respondent State found to have breached the Convention or its Protocols is under an obligation to abide by the Court's decisions in any case to which it is a party. In other words, a total or partial failure to execute a judgment of the Court can engage the State Party's international responsibility. The State Party in question will be under an obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded.⁹⁴

By implication, violating states are bound to comply with any order for 'just satisfaction' and adopt individual and general measures to avoid reoccurrence of the rights violation. To enhance compliance at the domestic level, the ECtHR allows, on the basis of the principle of subsidiarity, some measures of deference to contracting parties to adjust their legal order and choose the appropriate mechanisms needed to comply with the Convention.⁹⁵ However, as a result of the effect of several reforms, the ECtHR self-restrained approach where it consider itself incompetent to specify the measures to be taken in addressing violation is not always the case anymore as there are exceptional instances where the Court occasionally steps into the arena of national legal systems to indicate and suggest more specific measures to address violations.⁹⁶ In the context of

⁹³ D Anagnostou & A Mungiu – Pippidi 'Domestic implementation of human rights judgment in Europe: Legal infrastructure and government effectiveness matter' (2014) 25 *European Journal of International Law* 205-227.

⁹⁴ See for instance, the Court's affirmation of art 46 in the following cases *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (no. 2) Application No. 32772/02 (judgment of 30 July 2009) 85; See also the ECtHR case of *Castillo Algar v Spain* - Application No. 28194/95 (judgment of 28 October, 1998) 60; *Assanidze v Georgia* Application No. 71503/01 (judgment of 8 April 2004) 198; *Maestri v Italy* - Application No. 39748/98 (judgment of 17 of February 2004) 47.

⁹⁵ Subsidiarity principle is not expressly stated in the ECHR but have evolved from application of case laws of the ECtHR. For explanation of certain important interpretation principle, see Dikov (n 30 above).

⁹⁶ See D Kosar & J Petrov 'The architecture of the Strasbourg system of human rights: The crucial role of the domestic level and the constitutional courts' (2017) 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 592-593; for related scholarship, see H Keller & C Marti 'Reconceptualizing implementation: The judicialization of the execution of the European Court of Human Rights' jurisprudence' (2015) 26 *European Law Journal* 795-800; P

art 46 above, the role of domestic institutions then arise from states' obligation to adopt general measures which may entail amendment of domestic legislations, review of domestic case law to suit precedents set out by Strasbourg case law or the Convention rights and changing administrative practices.

In view of the above, my discussion in this subsection will be focused mainly on state's domestic institutions and CS - that is, the national judiciary and parliament, national human rights institutions (NHRIs) and electorates. While this should not be considered as exhaustive of all sorts of domestic engagement under the EHRS, an analysis of their engagement will have the effect of justifying (or otherwise) the veracity of my hypothesis as stated above.

(a) Embedment under the EHRS through engagement of national judiciary

Considering the role of domestic institutions under the EHRS, domestic courts have been considered as one of the strongest allies and enablers within states' domestic web for improving compliance and enhancing legitimacy of the ECtHR.⁹⁷ Going by the principle of subsidiarity earlier explained, the role of the national court is significant in improving the level of member states compliance with the ECtHR decisions. As seen from the literature, the national courts employ convention-conforming interpretation standard to render a state legislation void when it fails to conform to the Convention and the Court's case law - this friendly disposition creates precedent which may influence a lower courts' subsequent decisions.⁹⁸ However, this should not be understood to mean that lower courts in this region always follow the higher court's position of the Strasbourg case law. As Kosar and Petrov note, lower courts (citing Poland as an example) could sometimes be more resistant and indifferent about the authority of the ECtHR than the higher courts (Polish Constitutional Tribunal and the Supreme Court in Poland).⁹⁹

Leach, 'No longer offering fine mantras to a parched child? The European Court's developing approach to remedies' in A Føllesdal, B Peters & G Ulfstein (eds) *Constituting Europe: The European Court of Human Rights in a national, European and global context* (2013); J Jahn 'Ruling (in)directly through individual measures? Effect and legitimacy of the ECtHR's new remedial power' (2014) 74 *Heidelberg Journal of International Law* 26.

⁹⁷ Kosar & Petrov (n 96 above) 604; Hillebrecht (2014) (n 49 above) 1107 (stating that national judiciary is perhaps one of the most important allies in a compliance coalition and that from the literature, independent judiciaries are seen as one of the most important indicators of successful compliance with the ECtHR's rulings).

⁹⁸ Kosar & Petrov (n 96 above) 604 -607.

⁹⁹ Conversely, in Czech Republic, the ECtHR pro-compliance judges ('who were appointed after the fall of communism) sits at the lowest and constitutional court while the ECtHR anti-compliance judges (who were appointed during the communist regime') occupies the appellant and supreme courts. In this situation, the response and disposition of courts towards compliance will be determined by the value attached to the jurisprudence and decision of the ECtHR by individual members of the Court, for details see Kosar & Petrov (n 96 above) 611.

Under the EHRS, states' courts have over the years shown resilient efforts in not only infusing the ECtHR case law into national legal system but also in monitoring the enforcement of Strasbourg decisions and issuing similar decisions at national level to enhance internal support and acceptance within their own states. This bottom-up approach and alliance have created a sort of compliance bond and partnership between the Strasbourg judges and their national counterparts *vis-à-vis* other branches of government within the European States.¹⁰⁰

Beyond the role of national court as one of the sources of pressure for compliance, they have also been considered as one of the mediums by which the European Convention is embedded into national legal systems of states parties. The engagement and interaction with national courts in the embedding process occurs in different ways. First, as required by art 35 of the Convention, an applicant who alleged violation of rights must explore and exhaust all possible local remedies which primarily implies that the national court must be approached. It is further required that the applicant must not have only pleaded violation of convention rights substantially but such plea of violation must be properly brought to the knowledge of the domestic judge so that the latter would be availed the opportunity to consider the merits or otherwise of the applicant's case taking into account the provisions of the Convention alleged to have been breached.¹⁰¹ This then means that other than increasing awareness and value of the Convention at the national level, the national court is also engaged to determine among other issues, the applicant's rights as enshrined in the Convention.

Second, as part of the ways to foster synergy between the national courts and the ECtHR, the latter may when necessary provide 'interpretational criteria that guides national decision makers' in the proper application of the Convention at the domestic level.¹⁰² One example of this is the case of *Barbulescu v Romania*¹⁰³ which concerns the question of whether or not it is proper for an employer to monitor an employee's usage of email in a work place. To provide guideline for national court's assessment, the Grand Chamber provided up to six criteria for national decision makers to consider under art 8 of the Convention when evaluating the fairness or otherwise of such

¹⁰⁰ Kosar & Petrov (n 96 above) 604-605; for related literature, see A Nollkaemper, 'The role of national courts in inducing compliance with international and European law – A comparison' in M Cremona (ed) *Compliance and the enforcement of EU law* (2012); Helfer (n 4 above) 125; HH Koh, 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1401.

¹⁰¹ Spano (n 13 above) 473-494.

¹⁰² Spano (n 91 above) 473-494.

¹⁰³ Application No. 61496/14 para 76; Spano (n 13 above) 473-494.

measures.¹⁰⁴ Arising from this analysis, it could be assumed that this kind of practice will ultimately enhance a sort of crossbreed between the regional and national courts which could result in enhancing effectiveness and by extension, compliance under the European system.

Third, another medium by which the Convention is embedded into national legal space is when national courts (as allowed by Protocol 16 to the ECHR) approach the ECtHR for an advisory opinion on questions relating to interpretation and application of any provisions of the Convention or its protocols.¹⁰⁵ The primary aim of this process is to guide and facilitate national courts' compliance with Convention rights especially when the ECtHR case law is either not adequate or where there is no case law that can serve as precedent. The request for an advisory opinion must not only be based on a case pending before the national court but it suffices if the latter is able to give reasons for its request and provides the ECtHR with the 'relevant legal and factual background to the pending case or the subject matter for which the opinion is being sought'.¹⁰⁶ Thus, protocol 16 which came into force in 1 August 2018 now allows the highest courts and tribunals as designated by contracting states to the Convention to request the ECtHR to give advisory opinions. It must be noted that the advisory opinion is delivered by the Grand Chamber and reasons must be given for refusal to accept the request for an advisory opinion. Again, if for instance, an opinion is not unanimous, any judge may issue a separate opinion with reasons. As also required by art 4 to Protocol 16, the 'Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing'.¹⁰⁷

After the decision, the advisory opinion is sent to the requesting 'national court or tribunal and to the high contracting party' to which the court or tribunal pertains. Advisory opinions are generally

¹⁰⁴ As above; the Court's guiding criteria in this context vary, for instance in *Ibrahim & others v UK* (application number 50541/08) - the Court's criteria was based on assessment of fairness in criminal cases under art 6; *Roman Zakharov v Russia* (application Nos 47143/06) - providing criteria for the assessment of domestic systems of targeted surveillance under art 8; see also *Von Hannover v Germany* (no 2) (application no. 40660/08 & 60641/08).

¹⁰⁵ See Protocol No 16 to the ECHR which came into force in 1 August 2018, available at <https://www.coe.int/en/web/tbilisi/-/entry-into-force-of-protocol-no-16-to-the-european-convention-on-human-rights> (accessed 23 August 2018); Forst (n 81 above) 28-29.

¹⁰⁶ See Forst (n 81 above) 28.

¹⁰⁷ See art 3 to Protocol 16 - CETS 214–Human Rights (Protocol No. 16), 2.X.2013 available at https://www.echr.coe.int/Documents/Protocol_16_ENG.pdf (accessed June 4 2019).

not binding.¹⁰⁸ The birth of Protocol 16 is to further enhance the ‘interaction between the ECtHR and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity’.¹⁰⁹

While the role of the national court is undoubtedly germane in the quest to foster synergy between the ECtHR and domestic institutions at the national level, optimal result in this context may not be achieved when the roles of other components within the national judiciary are not fully explored. This is because, engagement of national judiciary in the context of this discussion does not imply its role as a monolithic block. It also involves the role of other components or compliance actors within the judicial sphere (that is, a disaggregation of the court into national courts, individual judges, clerks and other officers of the courts). This includes: other courts of records - which comprises of tribunals, lower courts up to the highest courts -, the national judges, the secretariat (which includes the clerks or registrars) and special bodies/committees or departments. These actors independently or collectively play the role of ‘judicial gatekeepers’ in the internalization process of the European Convention rights into the state legal system which could resultantly lead to compliance.¹¹⁰

Therefore, having analysed how engagement and interaction with national courts is critical in building a legitimacy relationship between the regional and national systems, I will then briefly discuss how interaction with other domestic actors (within the national judiciary) also matter. Beyond the role of the national court, individual judges’ disposition towards the Strasbourg jurisprudence also matter in facilitating implementation of decisions and policies aimed at bringing the European Convention closer to the people of Europe. As Kosar and Petrov observe:

Individual justices’ attitudes, expertise in and openness towards ECHR law may also affect the constitutional court’s treatment of the ECtHR’s case-law. A constitutional court justice who is knowledgeable about the ECtHR’s case law and engages with it thoroughly may serve as a “hub” or an “entry point” for the Strasbourg jurisprudence...[in view of this] some countries even intentionally facilitated such “hubs” by appointing ex-Strasbourg judges to the constitutional court. From these “entry points”, the Strasbourg case law travels into the subsequent judgments of the given constitutional court and radiates to the ordinary courts. Even if these Strasbourg-friendly

¹⁰⁸ See as above art 1–11 to Protocol 16.

¹⁰⁹ See the ECtHR press release dated 4 April 2018 available at https://www.echr.coe.int/Documents/Press_Q_A_Advisory_opinion_ENG.PDF (accessed 4 June 2019).

¹¹⁰ For detail discussion of Koh’s transnational legal process theory, see chapter two of this thesis; Kosar & Petrov (n 96 above) 605.

justices are in the minority at the moment, they bring new arguments into the deliberation and, if separate opinions are allowed, may castigate the majority in their dissenting opinions. Such dissenting opinion also has an important signalling function: it signals to the party that lost before the constitutional court that it makes sense to lodge the application to the ECtHR. In addition, it sends signal to the ECtHR itself, which will surely subject such judgment of the constitutional court to serious scrutiny. This dual signaling function constrains the majority, as most constitutional courts will think twice before challenging the ECtHR openly.¹¹¹

Drawing from the above, there are reasons to suggest that compliance maybe higher in a national court headed by a pro-compliance judge especially if the judge was a former Strasbourg judge appointed to the national court.¹¹²

The role of the registry or secretariat of the national court is also critical in the implementation of ECtHR decisions. Apart from the ‘sifting role in processing individual complaints’, they render legal opinion which guide judges in application of Convention rule or the court’s case law.¹¹³ In some jurisdictions, there are special departments created to analyse the compatibility of an international law with national legislation, this is done by ways of translating and domesticating the ECtHR case laws into national legal system. In Czech Republic, the analytical department alerts the national justices on (a) updates of new adverse judgment (b) periodic reports of any judgment against other countries. At the request of a judge, the analytical department is expected to undertake an ‘individualized’ research about the Strasbourg jurisprudence with respect to a particular case under consideration.¹¹⁴ Similarly, Anagnostou and Mungiu-Pippid note that the implementation of the decisions of the ECtHR is facilitated by designated domestic structure with strong political and domestic influence. Using Austria as an example, they observe that the role of giving effect to the Convention is manned by the ‘Constitutional Service (Division V) of the

¹¹¹ See Kosar & Petrov (n 96 above) 612 -613.

¹¹² Kosar & Petrov (n 96 above) 613 (explaining that ‘several ECtHR judges from Central and Eastern Europe were in their 30s and early 40s when they joined the Strasbourg Court. That means that once their Strasbourg term had expired, they were still in their 40s or 50s and thus looking for another job. The Baltic States in particular tend to appoint their former ECtHR judges to their constitutional courts. For instance, Danutė Jočienė became a justice of the Constitutional Court of Lithuania in 2014 and Ineta Ziemele joined the Constitutional Court of Latvia in 2015’).

¹¹³ See Kosar & Petrov (n 96 above) 611; for details, see DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2012) 18.

¹¹⁴ Kosar & Petrov (n 96 above) 611 (explaining that the composition of members of the analytical department includes academics, former members of ECtHR’s registry, former law clerks of the Czech Constitutional Court and top ordinary courts and lawyers who practiced law in Czech Republic); for further details, see D Kosar ‘Selecting Strasbourg judges: A critique’ in M Bobek (ed) *Selecting Europe’s judges A critical review of the appointment procedures to the European courts* (2015) 120.

Austrian Federal Chancellery'. The task given to this special independent body is to collaborate with all 'relevant ministries and the constitutional court' to consider measures aimed at facilitating compliance with adverse decision issued by the ECtHR against Austria.¹¹⁵

Kosar and Petrov further emphasis on how the role of the national court's registry enhances chances of compliance with decisions of the ECtHR

[A] well - staffed Secretariat or a specialized analytical department can significantly improve the use of Strasbourg case law and be of help in overcoming eventual non-compliance with the ECtHR cases law caused by lack of awareness. This is particularly true in Central and Eastern Europe, where many top jurists in their fifties and sixties, including constitutional court justices, do not speak foreign languages fluently. As a result, they become dependent on reliable 'translators' of the ECtHR's case law [most of whom are clerks of the national courts].¹¹⁶

The services of the clerks working in the national courts' registry or secretariat are often needed in the translation and interpretations of Strasbourg cases not only to aid understanding but to also guide national judges towards application of Convention rights in a proper context at the domestic level. Owing to their relevance, there are instances where some pro – compliance judges in national courts have opted for the services of former staff members of the ECtHR's registry to help them in translation and proper application of Strasbourg case law.¹¹⁷ Arising from the above discussions, the simple question that comes to mind is whether the roles of the national judiciary and the disaggregated components make any difference in enhancing compliance, if so, would not a similar approach also enhance compliance under the AHRS?

(b) Embedment under the EHRS through engagement of national parliament

As discussed above, *prima facie*, compliance with rights decisions within the members of the CoE is high. However, the process of supervision of the execution of judgments is threatened by certain

¹¹⁵ Anagnostou & Mungiu – Pippidi (n 93 above) 205 – 227; for a related literature, see 'Domestic implementation of European Court of Human Rights judgments: Legal infrastructure and government effectiveness matter: A reply to Dia Anagnostou and Alina Mungiu-Pippidi' (2014) 25 *European Journal of International Law* 229-238 (arguing *inter alia* 'that low capacity countries attract judgments that are more difficult to implement. The analysis also uncovers a subtle relationship between time, institutional capacity, and checks and balances. High capacity helps willing politicians to implement judgments quickly. Yet, among judgments that have been pending longer, countries with higher capacity are no quicker to implement than lower capacity countries. By contrast, checks and balances initially slow down implementation but help to eventually ensure begrudging implementation')

¹¹⁶ Kosar & Petrov (n 85 above) 612; see generally Kosar (n 114 above) (2015).

¹¹⁷ See Kosar & Petrov (n 85 above) 611 (cited an instance where a Justice of the Czech Constitutional Court Kateřina Šimáčková has had at least one law clerk who previously worked at the ECtHR's Registry in her team since her appointment in 2013).

factors: exceptional resistance towards reception and application of Convention rights by some states, volume of repetitive cases lodged to the ECtHR which makes compliance with previous decisions difficult in some states and existence of ‘structural and systemic violations’ of Convention rights.¹¹⁸ To deal with these challenges, several reform processes or measures have been undertaken with the aim to: among others improve cooperation with national stakeholders, improve effectiveness and compliance, limit the number of cases submitted to the Court and enhance embedment of the Convention into national legal systems.¹¹⁹ In other words, the motive behind these measures justifies the assumption that an entrenched engagement with the Convention by stakeholders at home has the potentials to improve effectiveness and by consequence - compliance with states’ obligations under the ECHR. In view of this, I now turn to discuss how the level of interaction between the ECHR and national parliaments within member states of the CoE has contributed in enhancing embedment of the ECHR into national systems.

Forst notes that one of the mechanisms aimed at ‘improving state’s compliance with the ECtHR judgments is the enhancement of the role of domestic parliaments in the process of execution’.¹²⁰ In the expectation that a violating state should adopt general measures to remedy violation of the Convention rights, the role of national parliament becomes salient. Other than the need for national parliaments to amend or undertake a revision or adopt a new legislation in compliance with a particular Strasbourg case law, parliament as a disaggregated unit also exerts pressure on their government to ensure that appropriate measures are not just taken but adopted quickly. As a matter of practice, the national parliaments under the European system hold their government accountable to fulfil Convention obligations either during exercise of oversight function or through scrutiny (at plenary or committee’s level) on the practicability of the proposed measures government intends to take in addressing a violation.¹²¹ They may even be directly involved in identifying measures or be part of government’s committees that may be assigned for the formulation and review of

¹¹⁸ M O’Boyle ‘The future of the European Court of Human Rights’ (2011) 12 *German Law Journal* 1873; Forst (n 81 above) 24.

¹¹⁹ Details of these reforms are available at <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/work-completed/court-reform>; https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf; <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=> (accessed 4 June 2010), See Spano (n 13 above); Forst (n 81 above) 24 -25.

¹²⁰ See Forst (n 81 above) 30.

¹²¹ As above.

proposed government action plans. In this regard, Leach argues that national parliaments in the context of the ECtHR, exercise their role with respect to execution of the court's judgment in two ways: first, they can hold executive accountable for the fulfilment of their duty to implement the court's judgment, second, they ensure that national laws conform the court's case-law for purposes of compliance. However, he notes that 'the involvement of national parliaments in the implementation of the European Court Judgment is certainly underutilized'.¹²² In addition to the role of national parliaments discussed above, they create awareness through legislative debates about government's proposed measures towards implementation of an adverse judgment. Accordingly, Bodnar finds that the recent increase in parliamentary supervision of the implementation of the ECtHR decisions particularly as observed in the case of *Baczowski and others v Poland* is influenced by the legislative efforts of the national parliament by means of 'soft law' instruments (resolutions and recommendations).¹²³

In some jurisdictions, parliament either establishes an independent special committee within the parliamentary structure to supervise government execution of ECtHR decisions or collaborate with an established agency or committee (not accountable to the executive) for purposes of giving effect to the ECHR. To this extent, many states within the CoE have established 'designated special departments, committees or bodies to collaborate with parliamentary or affiliate bodies' for the purposes of ensuring proper execution of Convention rights and application of Strasbourg case law.¹²⁴ Most notable in this discussion are the examples (the UK and Austria) offered by Anagnostou & Mungiu – Pippidi in their analyses on the role of domestic legal infrastructure towards implementation of the ECtHR case law.¹²⁵ According to their narrations, the UK has a template that exemplifies how successful human rights compliance can be linked to an independent structure endowed with the authority to influence government ministries, parliaments and public

¹²² P Leach 'On reform of the European Court of Human Rights' (2009) 6 *European Human Rights Law Journal* 734.

¹²³ See contributions of A Bodnar 'Parliament and the European Court of Human Rights', conference organized by Middlesex University and the Helsinki foundation for human rights (Warsaw)⁴ available at www.mdx.ac.uk/__data/assets/pdf_file/0028/.../Warsaw-conference-report-FINAL.pdf (accessed 25 June 2018); A Donald & P Leach *The role of parliaments in the implementation of European Court on Human Rights judgment* (2016); The role of parliaments in implementing ECHR standards: overview of existing structures and mechanisms (2016) 2-13 available at <http://website-pace.net/documents/10643/695436/20142110-PPSDNotefondstandardsCEDH-EN.pdf/113ad45b-7ffd-4ee7-b176-7fb79ad32f93> (accessed 25 July); D Scriber & TH Slagter *Domestic institutions & supranational human rights adjudication: The ECtHR and the IACtHR compared* (2016) 6.

¹²⁴ Anagnostou & Mungiu – Pippidi (n 93 above) 205 – 227.

¹²⁵ As above.

agencies towards compliance with international laws. The main supervisory actor with respect to compliance at the domestic level is the Human rights division within the ministry of justice, it collaborates with the joint committee of human rights (JCHR) and the latter is composed of representatives of both House of Commons and the House of Lords. Accordingly, Anagnostou & Mungui-Pippidi note:

[That the JCHR can] systematically monitor, oversee, and provide regular guidance to the different branches of the state and the government on how to respond to adverse ECtHR's rulings. In addition, they are both endowed with substantial resources and high quality legal expertise in carrying out these tasks. Largely composed of members who are strong human rights proponents, the JCHR often urges the UK government to pursue full rather than minimal compliance. It is cardinally concerned with how effective, adequate, and expeditious the procedures are that it follows in facilitating parliamentary scrutiny of legislation and in ensuring the implementation of Strasbourg rulings¹²⁶

The interaction between the ECtHR and the UK parliament and the parliamentarians provides guidelines for legislative debates.¹²⁷ Thus, the ECtHR case law is often referred to as guidelines for legislative debates and parliamentary committee deliberations in the UK.¹²⁸ This approach manifested during a consideration of the investigatory power bill which the UK Parliament introduced in 2016. The bill concerns the 'interception of communications and the acquisition and retention of communications data'.¹²⁹ During the legislative process and considerations, the parliamentarians were guided by an ECHR memorandum submitted by the sponsoring government's department. The memorandum contained certain references to the ECtHR case law and the need to take into account the provisions of art 8 and other regulatory framework with respect to the interception of communications.¹³⁰ In the context of the above discussions, some

¹²⁶Anagnostou & Mungui – Pippidi (n 93 above) 222; see generally House of Lords and House of Commons Joint Committee of Human Rights on the need to enhance parliament's role in relation to human rights judgments, 15th report of session 2009 –2010, HL paper 85, HC 455 (2010), at 10 and 52–56.

¹²⁷ M Amos 'The value of the European Court of Human Rights to the United Kingdom' (2017) 28 *European Journal of International Law* 763 -785.

¹²⁸ Amos (n 127 above) (stating that 'Parliamentary joint committee on human rights scrutinizes every government bill for its compatibility with human rights'); on how Parliament improves human rights to conform to ECHR standard, see Norton 'A democratic dialogue? Parliament and human rights in the United Kingdom' (2013) 21 *Asia Pacific Review* 141.

¹²⁹ See Investigatory power bill available at <https://services.parliament.uk/bills/2015-16/investigatorypowers.html> (accessed 17 June 2019); see Amos (n 127 above) 771.

¹³⁰ Amos (n 127) 770 -773; it must be noted that there are special committees (within the national parliaments) responsible for human rights matters in different states, for instance, Hungary – Committee on justice, Montenegro –

lessons can be drawn: first, the voluntary commitment by national parliamentarians to ensure that parliamentary policies and processes align with the ECHR standard could resultantly boost parliamentary incentives to pressure for compliance. Second, this bottom-up relationship between the regional institutions and the parliaments at the national levels could also imply that parliamentarians will unlikely ignore or avoid parliamentary deliberations on issues concerning non-compliance with a judgment of the ECtHR.

Similarly, in the Austria context, as stated earlier, it is the constitutional service (Division V) of the Austria Chancellery that has the responsibility to pressure relevant agencies of the state to ‘implement individual and general measures’ in response to any decisions from the ECtHR against Austria. Its role is not limited to supervision of execution of the Court’s judgment but it reviews draft legislation from government agencies and may recommend legislative changes when the proposed draft legislation falls below the Convention standard. It has been further observed that the constitutional service may call on ‘political parties and interest groups to comment on the results of its review, which are in turn published on the website of the Austrian Parliament and have influence in the discussion for a new statutes’.¹³¹ The ‘constitutional court and the constitutional committee of the Austrian national assembly’ may be called to give opinion whenever a federal law is considered incompatible with the state’s Convention’s obligations and the ECtHR case laws.¹³² As a common practice in Austria, new bills are often subjected to critical

the committee on human rights and freedoms, Turkey – The human rights inquiry committee, Poland – ‘the justice and human rights committee and the foreign affairs committee of the Sejm (the lower house) jointly established a permanent sub-committee on the execution of judgments of the ECtHR’, Czech Republic – ‘The committee on constitutional and legal affairs in the chamber of deputies (lower house) of the Czech parliament has established a sub-committee for the execution of ECtHR judgments and legislative proposals from the Ombudsman’, Romania - the committee for legal matters, discipline and immunities (‘the legal committee’) in the chamber of deputies (the lower house) created a sub-committee to monitor the execution of ECtHR judgments; for further details on more lists of committees and sub – committees, see The role of parliament in implementing ECHR standards: overview of existing structures and mechanisms’ 2014 and 2016 available at <http://www.assembly.coe.int/CommitteeDocs/2014/E-PPSD14-22%20BackgroundECHRstandards.pdf> and <http://website-pace.net/documents/10643/695436/20142110-PPSDNotefondstandardsCEDH-EN.pdf/113ad45b-7ffd-4ee7-b176-7fb79ad32f93> (accessed 14 June 2019).

¹³¹ Anagnostou & Mungui – Pippidi (n 93 above) 222; D Thurnherr ‘The reception process in Austria and Switzerland’ in Keller & Stone Sweet (n 88 above) 44–45.

¹³² Anagnostou & Mungui – Pippidi (n 93 above) 222.

review and scrutiny (at the planning stage of the legislative process) to ensure that the proposed legislation is compatible with the Convention and Strasbourg case law before passage.¹³³

Another aspect most relevant to this discussion is the practice where parliamentarians demonstrate incentive to integrate the ECtHR case law into national legislation.¹³⁴ This is aimed at enhancing implementation of the ECtHR judgments through the engagement of national parliament within the European states under the CoE.¹³⁵ Given that most violations of the Convention require adoption of general measures relating to lack of domestic laws, inadequate domestic legislations and inconsistencies in existing legislation, parliament may then be expected to amend or pass new legislation to fill the gap in compliance with the case law for which a decision has been issued.¹³⁶ By so doing, interpretation of the Convention rights through the ECtHR case law finds a safe abode in the amended or new legislation passed by the state parliament. A practical example of this is the case of *Ravon & others v France* which concerns an alleged violation of art 6(1) of the Convention.¹³⁷ In compliance with the ECtHR decision, the national parliament introduced an amendment to the existing state's legislation - consequently, it is now possible to appeal to the President of the Court of Appeal against orders authorizing searches. Similarly, the UK Parliament in compliance with the ECtHR decision in *Dudgeon v UK*,¹³⁸ amended the provisions of the Homosexual Offences Order in Northern Ireland. So that homosexual acts involving two consenting adults will cease to be a criminal offence. In another sense, when the violation is caused by a national Court's interpretation of a legislative provisions which contradicts the Convention, as seen in *Aka v Turkey*,¹³⁹ measures must be taken by national parliament to modify

¹³³ H Tretter *et al* 'Supranational rights litigation, implementation and the domestic impact of Strasbourg Court jurisprudence: A case study of Austria', JURISTRAS project (2008), at 16, available at: www.echr.coe.int/LibraryDocs/JURISTRAS-2007-EN-Austria.pdf (accessed 4 June 2019).

¹³⁴ See high level conference on the future of the European Court of Human Rights, Brighton declaration, 20 April 2012, available at <http://www.coe.int/en/20120419-brighton-declaration> para (9) (d) (ii) (accessed 5 May 2019).

¹³⁵ Forst (n 81 above) 31.

¹³⁶ This is not to imply that all cases of violations fall into this narration, however, the following cases are referenced to explain this point a bit more clearer, see J Polakiewicz 'The execution of judgments of the European Court of Human Rights' in R Blackburn & J Polakiewicz (eds) *Fundamental rights in Europe: the European Convention on Human Rights and its member states* (1950 -2001) 56; see also the case of *Dudgeon v the UK* - application no. 7525/76 (for modification of an existing law); *Ravon and others v France* application no. 18497/03 (for the adoption of a new legislation).

¹³⁷ *Ravon and others v France* Application No 18497/03 (21 February 2008).

¹³⁸ *Dudgeon v the UK* Application No 7525/76 (22 October 1981).

¹³⁹ Turkey granted direct effect to the decision of the European Court by modifying the relevant domestic laws; see *Aka v Turkey* - Application No.19639/92, ECHR 1998 – VI; see also CoM resolution CM/ResDH (2001)70.

and realign the domestic jurisprudence of the violating state to suit the Convention for purposes of compliance.

In the scholarship, it is also asserted that parliament often adopts proactive approaches in avoiding anticipated future violations. Some of the approaches may require parliament (a) to be sensitive to adverse decision against other states (b) to take into account similar violations for which judgment has been issued in other states (c) to identify state's legislations that are incompatible with the Convention as interpreted by the Court which form the basis for decision against other states (d) to adopt measures for repeal or amendment of potential offensive laws or passage of new laws to meet the Convention standard as interpreted in the relevant case laws of the ECtHR.¹⁴⁰ These *erga omnes*¹⁴¹ effect where a third party (not involved in the case) draws inspiration from well-established ECtHR case law against another state to secure Convention's rights has been a common practice under the EHRS. I cite a few instances to explain this. In *Salduz v Turkey* the ECtHR stated that a suspect under police custody should be given access to a lawyer from the moment of interrogation except there are reasons that defeats this privilege. In this case, the Court extended the suspect's rights to a legal representative to start from the moment the suspect is taken into custody. Inspired by the above case, the French Constitutional Council's (in a domestic case) declared that the procedure for police custody is inconsistent with the French national constitution and requested an amendment by the legislative arm.¹⁴² This decision from the French national court is inspired by the ECtHR's decisions in *Salduz v Turkey*. As a result, in a subsequent case between *Brusco v France*, the ECtHR gave some guidelines or evaluative criteria for modification of the state's legislation.¹⁴³ Consequently, in 2011, a new legislation was then adopted to provide for the rights of the suspect in custody to have access to a lawyer in compliance with art 6 as interpreted by the Court's case laws.¹⁴⁴ In other instances, it will be expected that both the national

¹⁴⁰ The committee for legal affairs and human rights of the Parliamentary Assembly have consistently emphasized on the need for states to take into account the ECtHR relevant case laws when new legislations are being drafted and to be guided by decisions against other states on anticipated similar violations, for details, see Forst (n 81 above) 10; see also L Wildhaber 'A constitutional future for the European Court of Human Rights?' *Human Rights Law Journal* (2002) 162.

¹⁴¹ This can be deduced from art 1 which requires states to take into consideration the interpretation of the Convention by the Court in order to secure the Convention rights by giving an *erga omnes* (which means 'rights or obligations owed towards all') effect to the decisions of the Court.

¹⁴² See Forst (n 81 above) 10 -11 citing the case of Conseil Constitutionnel, M Daniel W et autres- decision No. 2010-14/22 QPC (30 July 2010), *Journal Officiel* 31 juillet 2010, p 14198.

¹⁴³ Application No. 1466/07.

¹⁴⁴ See Forst (n 81 above) 10 citing '*Loi No. 2011-392 du 14 avril 2011 relative à la garde à vue*', *Journal Officiel de la République Française* No. 0089 p 6610.

parliament and court would take into account the ECtHR case law as a guide for subsequent legislative drafting and adjudication of cases at the domestic level.

(c) Embedment under the EHRS through engagement of NHRIs and other related bodies

Similar to the oversight functions of the national parliament, the role of NHRIs are also critical in enhancing the execution and compliance with the ECtHR judgment in quite a number of ways. For instance, they often times collaborate with CoM by sending their opinions and suggestions to facilitate compliance with decisions especially when it requires a state to adopt general measures. Some notable NHRIs that have made input towards the execution of the ECtHR judgments are the ‘French National Consultative Commission for Human Rights’ (FNCCHR) and the ‘French Ombudsman’ (*Le Médiateur de la République*). To pressure for compliance, these bodies, sent an opinion to the CoM claiming that the general measures adopted by the French government to implement the ECtHR judgment in *Frérot v France*¹⁴⁵ ‘were not sufficient to comply with the judgment of the court’ and further proposed measures that should be adopted.¹⁴⁶

In the context of this discussion, the role of National Human Rights Commissions cannot be undermined. For instance, the Greece National Commission for Human Rights (GNCHR) also engages different mechanisms in the drive for rights protection and mobilization for state compliance. The GNCHR is a compliance partner that has similar mandate and often collaborate with NHRIs in pressuring states for compliance. It comprises of trade unions, human rights experts, and independent authorities, representative of NGOs and pro-rights political parties, academics, legal experts and Bar Associations.¹⁴⁷ Of importance is the role played by this body using adverse decisions from the ECtHR to advance rights movement. For instance, the GNCHR has been involved in ‘issuing resolutions on human rights topics, submitting recommendations on issues such as Greece’s ratification of ECHR’ Protocols, implementation and dissemination of ECtHR judgments, and publishing an annual report’.¹⁴⁸

In addition to the role of the GNCHR, the collaborative efforts of the Athens Bar Association in Greece was equally instrumental in ‘[distributing] to its members a compact guide on the

¹⁴⁵ Application No. 70204/01; Forst (n 81 above) 12

¹⁴⁶ Forst (n 81 above) 12.

¹⁴⁷ Haglund (n 57 above) 115.

¹⁴⁸ See generally IO Kaboglu & S-IG Koutnatzis ‘The reception process in Greece and Turkey’ in Keller & Stone Sweet (n 88 above) 504; Haglund (n 57 above) 115 -116.

protection of human rights in Europe, which provides an overview of the ECtHR case law'.¹⁴⁹ One lesson that can be drawn from this is the fact of domestic public access to decisions of the regional mechanisms through the efforts of NHRIs and related national bodies.

(d) Embedment under the EHRS through engagement of CS: Domestic electorates

Other than the role of domestic institutions, CS also contributes in enhancing execution of the ECtHR judgments. In the context of this discussion, the role of the electorates as one of the strands of CS is analysed below. To understand how engagement of domestic electorates increases the chances of better compliance and effectiveness in the European system, a brief background drawn from the scholarship is necessary. As asserted in the literature, during electioneering period, the stake for executive's retention of office is expectedly very high (mostly in democratic settings).¹⁵⁰ As a result, the executive does everything it could to pay attention to matters that may influence electorates' consideration of electoral choices.¹⁵¹ As Hillebrecht's findings reveal, domestic constituents see 'executives of their national states as duty-bearer of human rights.'¹⁵² This implies that failure on the part of executive or elected politicians to pay attention to matters of electoral concern could trigger negative reactions from those at home, particularly from eligible voters who may have been closely monitoring executive's disposition towards respect for human rights decisions. Although it acknowledged there could be many other voters and segments of the CS who may not be disposed in raising electoral costs for government's non-compliance with international judicial decisions for some potential reasons as discussed below.¹⁵³ From these scholars' analyses on the role of electorates, the question that maybe asked is how raising electoral

¹⁴⁹ Kaboglu & Koutnatzis (n 148 above); Keller & Stone Sweet (n 88 above) 515; Haglund (n 57 above) 116.

¹⁵⁰ For a comprehensive analysis of the correlation between effect of democratic institutions and provisions of public goods (which includes human rights protections) to citizens, see generally Bueno de Mesquita *et al* *The logic of political survival* (2003) 11 (arguing *inter alia* that 'every political leader faces the challenge of how to hold on to his or her job. The politics behind survival in office is, we believe, the essence of politics. The desire to survive motivates the selection of policies and the allocation of benefits'); Bueno de Mesquita *et al* 'Thinking inside the box: A closer look at democracy and human rights' (2005) 49 *International Studies Quarterly* 439-457; for a contrary response to the views and arguments in Bueno de Mesquita *et al* (2003), see KA Clarke & RW Stone 'Democracy and the logic of political survival' (2008) 102 *American Political Science Review* 387-395.

¹⁵¹ Haglund (n 57 above) 32-33; however, there are exceptional instances where states may prefer the option of non-compliance with certain rights decisions, see section 4.1.2 below for details of such cases.

¹⁵² Hillebrecht (2012) (n 49 above) 969.

¹⁵³ Hillebrecht (2012) (n 49 above) 969 (citing the IAHRs as a case study, he states: 'The regular coverage of the Inter-American human rights tribunals in local newspapers and the engagement of domestic civil society groups with the Commission and the Court suggest that audiences at home are paying attention to how their elected officials respond to the tribunals' rulings').

cost correlates with non-compliance with rights decisions from international judicial bodies. The aim of raising electoral cost is to threaten the political survival of an elected politician who is insensitive to issues of concern by the voting public and the potential effect may (or not) affect re-election of the political office holder. This becomes the basis for assuming that engagement with domestic electoral forces has the potential to influence compliance with regional rights obligations. In the above context, Hillebrecht notes that CS in member states can then lean on executive non-compliance with decisions and poor human rights practices as a basis to express their dissatisfactions over government's attitude towards rights and consequently raise electoral cost (with the aid of media) at the 'polling booth'.¹⁵⁴ To avoid any resulting consequences, the executive may succumb to such electoral domestic pressure if the benefits of compliance outweigh the cost of non-compliance.¹⁵⁵

Having laid the above foundation on how engagement of the electorates matter in improving compliance, It will now be necessary to explain how the potential role of domestic electorates has contributed in influencing government's policy in states under the European system. In realizing this, I will rely on two insightful narrations in the scholarship relating to the link between engagement of domestic electorates and compliance with a particular treaty Convention as well as decisions of the ECtHR and the IAHRs. In my analysis of these scholarship, the two narrations are branded as 'domestic incentive model' and 'political uncertainty model'. A point to note in the following analyses is that first, the 'domestic incentive model will be employed to only explain the relevance of engagement of electorates in fostering compliance under the EHRS and secondly, the 'political uncertainty model' will then be used to explain the link between a candidate's electoral uncertainty and compliance with decisions of both the IACtHR and ECtHR. However, in addition to this, other forms of engagement under the IAHRs are discussed in 4.4.2 below.

Thus, in explaining the 'consequences of electoral cost against politicians' quest for office survival' under the domestic incentive model, Dai adopted a model of domestic enforcement to test whether electorates retrospective voting gives elected officers' incentives to place voters' interest as a better alternative choice.¹⁵⁶ In doing this, she experimented how domestic

¹⁵⁴ As above.

¹⁵⁵ D Cingranelli & M Fillippov 'Electoral rules and incentives to protect human rights' (2010) 72 *The Journal of Politics* 243-257 (arguing that the 'mechanism that compels politicians to act is the threat of being voted out of office. This threat may very well come not from those who are starving, but from those who are not starving and are ready to vote').

¹⁵⁶ X Dai 'Why comply? The domestic constituency mechanism' (2005) 59 *International Organization* 363-398.

constituents' electoral leverages and their informational endowment influence member states' (21 European countries) compliance with the Long Range Transboundary Air Pollution Convention (LRTAP).

From her background analysis, 21 European states agreed in 1985 to reduce their extent of sulphur emission to at least 30% before 1993.¹⁵⁷ After the agreement by these states, the probable challenge was how each of them would comply with terms of their respective obligations under the LRTAP Convention. This concern is what Dai's work was set out to investigate. The major question was to know which domestic mechanism most appropriate to influence states parties' compliance with the LRTAP Convention. Can electoral leverages and domestic informational status of voters in member states of the LRTAP Convention incentivize states parties' compliance with the LRTAP Convention? These are the questions; the following analyses seek to answer. However, I am not unmindful of the variation between compliance with a treaty obligations and states parties' response to decisions emanating from institutions established by a particular treaty – for instance, compliance with general states' obligations under the ECHR as a treaty and compliance with decisions of the ECtHR as an institution established by the Convention. While there could be variation in terms of compliance in both instances, insights from the following analyses will help in understanding the dynamics in how electorates' concern could matter in a compliance pull.

First, Dai explains that in a democratic systems, the elected executive is often seen as the policy maker whose policy decision often affects the interest of her electorates at home (positive or negative). Depending on the effect of the state actors' policy on the domestic audience, the latter may decide whether to retain the policy maker in power or not.¹⁵⁸ In this regards, policy maker must choose between two alternatives: to forgo the opportunity cost of making policy(s) that favor domestic constituents in order to secure future re-election or to do otherwise and face attendant electoral cost.

Second, owing to the general assumption that the electorates determine to a large extent the political job security of policy makers (elected political office holders), the latter then increase his/her performance ratio as collateral for future re-election, by this, a sort of agency relationship exist between both players in the political game. In this context, the state actors become the agents

¹⁵⁷ Dai (n 156 above) 363-364.

¹⁵⁸ Dai (n 156 above) 366.

while the electorates stand as the principal.¹⁵⁹ In an elementary agency relationship, the agent's job security is determined by how much of the principal's assignment that has been carried out in good faith. When the principal feels, that her welfare is being jeopardized by the agent's exercise of power, the latter can be fired.

In the context of this thesis, state actors' compliance decision has serious domestic effects, therefore, the strands of CS with electoral value and capacity may influence state actors' compliance decision in a favorable terms. Due to the fact that political leaders always wish to remain in office, they tend to design their compliance policies to align with voters' preference all else equal, or otherwise face threat to office survival. But this is determined by the question of whether politicians do associate better human rights records with their political survival and the extent to which government's bad behavior over the rule of law (which includes compliance with rights decisions) can become a consideration by voters in taking electoral decisions

Third, while voters' electoral leverages matter in shaping state actors' compliance policy, the extent of voters' information symmetry *vis a vis* the policy maker is critical in the policy making transaction. This is due to the fact that voters' ability to influence policy change to align with societal issues of concern depends on how much knowledge they have about the state policy relative to the welfare they enjoy. According to Dai, 'the informational status or the monitoring ability of constituents should thus affect their ability to shape the policymaker's incentives in a way quite distinct from the political clout originating from the size of the constituencies'.¹⁶⁰ The implication of voters' informational deficit about accurate knowledge of policy content and effect defeat their use of electoral leverages in shaping policy impact. Thus, state actors' tend to be more influenced with electoral cost emanating from knowledgeable voters than averagely informed or uninformed voters.

Fourth, the assumption so far is that politicians value retention of office, thus, state policy are designed to maximize the quest to remain in office until the expiration of office term. Accordingly, voters' performance rating becomes a critical factor in the political calculus with respect to

¹⁵⁹ Dai (n 156 above) 364.

¹⁶⁰ Dai (n 156 above) 365. As it is common with agent-principal relationship, while it is expected that the agent's action affects the principal directly, the principal may not even directly observe the agent's action, for detail understanding, see the B Holmstrong 'Moral hazard and observability' (1979) 10 *Bell Journal of Economics* 74-91; SJ Grossman & OD Hart 'An analysis of the principal-agent problem' (1983) 51 *Econometrica* 7-45.

politician's quest for office survival versus issues that guide electorates' consideration in making electoral choices. However, two factors may defeat the accuracy of this assumption and perhaps the influence of electoral cost and the likely effects of voters' informational endowment: (a) if the incumbent shows apathy for re-election, in which case, he may pay less or no attention to voters' welfare and issues of electoral concern¹⁶¹ (b) if the policy maker places his chances of re-election on the believe that the electoral institutions and state security apparatus' will manipulate and facilitate electoral victory thereby dispersing the efforts and supports of the voting public. Other factors that could also affect the success of this model are discussed in section 4.4 below.

Arising from the above analyses, Dia's findings on the extent of compliance with the LRTAP Convention reveal as follows: (a) that of the 21 member states to the LRTAP Convention, the countries with the 'highest level of domestic environmental activism' recorded reduced sulphur emission by 75 % as at 1993 while the countries with low level of environmental activism and information asymmetry recorded reduction of sulphur emission by only 26% by 1993.¹⁶² (b) By country specific analysis, she observes that in Norway, there was an upsurge of environmental awareness amongst electoral domestic forces which then 'stimulated the greening political arena' to pressure government for compliance with the Convention¹⁶³ By 1981, opinion polls recorded that the number of domestic actors who considered the sulphur emission issue as an important electoral concern rose from 1.3% in 1981 to 18.8% in 1989, while those who consider the same issue as second most important electoral concern rose from 1% in 1985 to 11.6% in 1989.¹⁶⁴

Similarly, in West Germany, the increase of public concern over the sulphur reduction issue finds relevance in the state political survey. As at 1972, 43% of the domestic individuals considered state's compliance with the environmental pollution regulation Convention as an important electoral issue; by 1987, the number has increased to 69%. There was also an incremental increase in the level of awareness of this issue by different domestic regional and sub-regional groups across all measures. This account for the high numbers of voluntary groups: 130 supra-regional groups and more than 1,100 regional environmental groups as at 1980. These groups exerted domestic

¹⁶¹ Dai (n 156 above) 369.

¹⁶² Dai (n 156above) 378.

¹⁶³ Dai (n 156 above) 379.

¹⁶⁴ Dai (n 156 above) 379; for other related literature on this subject, see T Laugen 'The reluctant pusher: Norway and the Acid Rain Convention' in A Underdal & K Hanf (eds) *International environmental agreements and domestic policies: The case of acid rain* (2000) 109-138; G Wetstone & A Rosencranz *Acid rain in Europe and North America: National responses to an international problem* (1983) 65; M Reitan 'Norway: A case of splendid isolation' in MS Andersen and D Liefferink (eds) *European environmental policy: The pioneers* (1997) 287-331.

pressure and mobilization for government compliance with desulphurization policy at different levels. Their strategy includes raising electoral threat, wide media publicity and national debates as well as widespread campaign for compliance. As a result, by 1980, campaign for desulphurization has become a key electoral concern across the nation. The notable Green party also engaged the ‘Green media and bureaucracy’ to pressure government for compliance. The involvement of Green party on this issue did not only aid domestic mobilization but also contributed to compliance success recorded which in turn led to electoral victory for the Green party as well.¹⁶⁵ As earlier observed, countries with low level of domestic mobilization, apathy amongst the voting public and less media attention recorded low level of compliance with the LRTAP convention. France, Belgium, Italy and Czechoslovakia fall into this typology.¹⁶⁶

The political competition model examines the factors that propel member state’s compliance with rights decisions from the European and the Inter-American Human Rights systems (ECtHR and IACtHR). The major question this model seeks to ask is why would member states comply with adverse decisions when the benefit of compliance is low and anticipated cost of non-compliance is equally low. On this point, Stiansen argue that an elected politician who is uncertain of chances of political survival especially in a country with high political competition amongst competing political parties may choose to exercise incentive to comply with rights decisions as a tool to constrain the chances of an opponent’s victory.¹⁶⁷

Furthermore, Stiansen after an analysis of some data set collected from the ECtHR judgments and IACtHR remedial orders¹⁶⁸ concludes that there is ‘robust evidence for the expectation that

¹⁶⁵ See generally, Dai (n 156 above) 380-381; D Conradt & R Dalton ‘The Western German electorate and the party system: Continuity and change in the 1980s’ (1988) 50 *Review of Politics* 3-29; S Boehmer & J Skea *Acid politics: Environmental and energy policies in Britain and Germany* (1991) 85-92; G Frankland ‘Germany: The rise, fall and recovery of Die Grünen’ in D Richardson & C Rootes (eds) *The Green challenge: The development of Green parties in Europe* (1995) 23-44.

¹⁶⁶ Dai (n 156 above) 380-384.

¹⁶⁷ Ø Stiansen ‘Competition and compliance: Electoral uncertainty and implementation of judgments from the international human rights judiciary’ (2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116708 (accessed 26 October 2018) 1-2; for related literature, see Hillebrecht (2014a) (n 43 above); Hillebrecht (2014b) (n 43 above) 1100–1123; G Sharanbir & E Voeten ‘Are new democracies better human rights compliers?’ (2015) 69 *International Organization* 497–518; E Voeten ‘Domestic implementation of European Court of human rights judgments: Legal infrastructure and government effectiveness matter: A Reply to Dia Anagnostou and Alina Mungiu-Pippidi’ (2014) 25 *European Journal of International Law* 229–238.

¹⁶⁸ According to Stansen, the analysis is supported with evidence generated from the shared – frailty and stratified cox as well as the multilevel logistics regression models.

political competition promotes compliance with ECtHR and IACHR rulings'.¹⁶⁹ However, as reported, the success of this model depends (a) on when the elected politician is uncertain of future electoral victory in the face of high political competition amongst competing powerful parties (b) when the political timing in the state coincides with the time the Court's decision is issued.¹⁷⁰ This implies that politicians will be more willing to comply when the political uncertainty within an election period is high. This therefore means that the chances of compliance with decisions from these courts reduce when the elected incumbent's political party dominates the electoral domain in a respondent's state. As an example of places where electoral uncertainty has been tested as reason for compliance with decisions (even when the human rights issuing institution lacks relative public support) is the United Kingdom. For instance, as Duranti explains, that the British Conservative party's support of the establishment of the ECtHR was related to 'concerns for the policies that Labour government might pursue', thus, similar assumption also relates to the willingness of the UK government to accept adverse judgment issued by the ECtHR.¹⁷¹

In detail explanation to the overall argument, Wenander comprehensively reports as follow:

[The] Swedish social democrats during their period of electoral dominance were skeptical about the power of the ECtHR to overturn democratically enacted policies. Attitudes towards the ECtHR only became more positive during the late 1980s and early 1990s. During this period, the electoral dominance of the Social Democratic was somewhat reduced, while the Conservative party was strengthened. Similarly, the reduced dominance of the Partido Revolucionario Institucional in Mexico in the 1990s is reported to have increased the willingness to accept independent courts and in 1998 Mexico also accepted the Jurisdiction of the IACtHR¹⁷²

In contrast, elected politicians whose political party dominates other political structures may be less likely to exercise incentive to comply with adverse rights decisions. A good example of

¹⁶⁹ Stiansen (n 167 above) 1, 2, 11, 13 & 24; Bøyum, L Standal, D Naurin & Ø Stiansen 'Codebook for the judicial behavior and compliance in the IACtHR dataset' (2017).

¹⁷⁰ Stiansen (n 167 above) 1-28; Stephenson & C Matthew 'When the devil turns ...The political foundations of independent judicial review' (2003) 32 *The Journal of Legal Studies* 59-89.

¹⁷¹ Stiansen (n 167 above) 2, 9; M Duranti, 'Curbing labour's totalitarian temptation: European human rights law and British postwar politics' (2012) 3 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 361-383; M Duranti *The conservative human rights revolution: European identity, transnational politics, and the origins of the European Convention* (2017).

¹⁷² Stiansen (n 167 above) 8-9; H Wenander, 'Sweden: European Court of human rights endorsement with some reservations' In P Popelier, S Lambrecht, & K Lemmens (eds) *Criticism of the European Court of Human Rights: Shifting the convention system: Counter-dynamics at the national and EU Level* (2016) 239-265; J Finkel 'Judicial reform as insurance policy: Mexico in the 1990s' (2005) 47 *Latin American Politics and Society* 87-113.

countries in this mold includes Hungary and Poland - these countries have strong and dominated political structures.¹⁷³ Also on the list is the United Socialist party in Venezuela under the Inter-American system. This explains the reason for the attitude shown by Venezuela towards non-compliance with IACtHR rulings and her decision to withdraw their membership from the jurisdiction of the IACtHR¹⁷⁴

What do these analyses imply? How are they related to the focus of this thesis? Bearing in mind that the primary objective of this thesis to find a complementary domestic mechanism to improve compliance with decisions from rights institutions under the AHRS, these analyses present five salient questions: Is there already an existing bottom – up interaction between the African regional human rights system and domestic institutions and CS in member states? How much knowledge do voters within the African continent have about government compliance policies versus the public goods being provided by the incumbent? In the African context, are there not many countries where there is no real choice in voting? Do voters in Africa care about compliance with rights decisions relative to other pressing needs (say- security, health, education, infrastructure, government’s choice of appointments, etc)? How can the consciousness of CS in Africa be awakened to matters of human rights and to make the human rights conduct of politicians count in the electoral decisions of voters (CS)? The above analyses, from my perspective, demonstrates the point that in the West, democratic legitimacy at the domestic level is considered more important and valuable than external endorsement by other governments (what could be termed international pressure). Arguably, it seems state parties under these systems defer mostly to the power of the domestic constituencies - particularly, the electorates (CS) and domestic institutions acting as disaggregated units - rather than the approval of other governments (their peers) or external bodies. Thus, one of the major concerns of this thesis is to investigate how African states can get to this level where they realize that their source of power and legitimacy is in the hands of the electorate and human rights conduct becomes a critical consideration in the exercise of this power by the domestic electorates.

Therefore, the relevance of the above analyses to this thesis, is to help ponder on the question: whether in the African context, it is also possible to develop the kind of legitimate relationship that exist between the domestic forces and the European states in the manner as discussed by Dia. That

¹⁷³ Stiansen (n 167 above) 4-5.

¹⁷⁴ Stiansen (n 167 above) 8-9.

is, if an African model can be developed in order to build a relationship to enhance interaction between the AHRS and domestic forces which includes the electorates in matters of compliance. I will address this and other related matters in the next chapter.

4.4.2 Engagement of domestic institutions and CS under the IAHRs

I have, in the preceding section, discussed not just awareness but a deep-rooted engagement/interaction and participation of the domestic institutions and CS in the affairs of the EHRS. As could be inferred from the above discussions, there is a regular bottom-up conversational flow between the domestic settings and the regional institutions – in this context, the ECtHR under the EHRS. Having established this, I now turn to the IAHRs. Thus, the aim of this section is to find out if similar bottom-up conversation and interaction also takes place under the latter system. Therefore, under this section, the inter-relationship between the IAHRs and domestic institutions on the one hand and the IAHRs and CS on the other hand will be examined with a particular focus on the role of the following domestic actors (as disaggregated units different from the state unitary structure): national judiciary, parliament, NHRIs, individual actors, the media and the electorates. However, for a discussion on the engagement and potential role of the electorates in improving compliance, see preceding discussions in section 4.4.1 above.

(a) Engagement of domestic institutions and CS under the IAHRs: the interaction with national judiciary

Despite the lack of evidence of existing democratic culture for compliance under the IAHRs, the national judicial arm and judges exercise comparable incentives (like their European counterparts) to comply with tribunal's ruling on rights protection. This is possible because of the level of regular interaction between the IAHRs and domestic institutions. As Huneeus observes in the context of the IAHRs, 'a national judge must take action before there can be full compliance with the court's ruling'.¹⁷⁵ The kind of orders in which judicial compliance may be needed includes: investigative, prosecuting, re-opening of cases and sentencing or punishing violators of human rights.¹⁷⁶ As seen in the case of *Bulacio v Argentina*, the IACtHR ordered the latter to, among other things prosecute a police chief who had been exonerated of a crime by a national court. Despite the seeming breach on the civil rights of the defendant (right to be tried once on a particular crime - double jeopardy),

¹⁷⁵ Huneeus (n 54 above) 502.

¹⁷⁶ Haglund (n 57 above) 96.

threat on the legitimacy of the national court of first instance and procedural constraints associated with re-opening of a closed case within the domestic sphere, the Supreme Court in Argentina complied fully with IACtHR ruling without hesitation.¹⁷⁷ The national court's response in this case was not induced by external influence, rather, it is a function of internal domestic incentive and reverence for the IACtHR. Which then also signifies that compliance can equally be attracted under IAHRs when independent domestic institutions act as a disaggregated compliance constituents like their European counterparts.

Similarly, the IACtHR issued a ruling invalidating the long-standing amnesty laws (covering a wide array of crimes committed during the regime of Alberto Fujimori) which prohibit investigation and prosecution of officers involved in massive violation of human rights during the military regime.¹⁷⁸ This ruling, considering the impunity with which military officers' were engaged in massive violation leveraging on the amnesty laws, entails high costs and political considerations and intricacies for its implementation. As sensitive as this ruling, the Argentina Supreme Court leveraging on the regional court's ruling, exhibited an unusual clout by refusing earlier pardon granted six military leaders during the country's transition to civil rule.¹⁷⁹

In view of the above, it might be apt to ask why would domestic judges exhibit such kind of clout - for instance, to invalidate such highly politically sensitive legislative instruments (amnesty law) or exercise the incentive to comply with adverse decision not minding its costly implication on the executive. Can the incentive exhibited by the national courts in the above instances not demonstrated a flow of relationship between the national and regional system? Are these decisions not complied with out of respect and acceptance of the regional institution at the domestic level? Should not this kind of relationship be considered as a reflection of an enhanced internal legitimacy between the regional and national systems? Are there external factors (NGOs or regional/external communities) responsible for the swift compliance recorded in the above cases? From the literature, there are different views to these questions: first and foremost, domestic judges - in the context of the Inter-American Human Rights Systems (IAHRs) - value public support from domestic constituents; therefore they would consider compliance with rights protecting ruling to

¹⁷⁷ As above.

¹⁷⁸ For details, see *Barrios Altos v Peru, Merits*, Judgment, Inter-Am.Ct.H.R.(ser.C) No. 219 41-44 (14 March 2001); Hillebrecht (2012) (n 43 above) 975.

¹⁷⁹ Hillebrecht (2012) (n 49 above) 976.

bolster citizens' confidence and support.¹⁸⁰ Again, given that constituents at home value separation of power as a mechanism to check executive behavior,¹⁸¹ judicial compliance with rights decisions presents the opportunity to CS in member states under the IAHRs to pressure their government, hold elected executive and legislative officials accountable and raise domestic cost against government in the event of failure to give effect to decision having been complied with by the judiciary.

Second, tribunal rulings under the IAHRs provide a focal point for judicial activism. Judges consider it as a materially important source of law¹⁸² and basis for adjudication of rights and development of jurisprudence beyond national borders. Domestic judiciary demonstrate incentive to comply with rights decisions in order to project and sustain their independence, because it is assumed that a powerful judiciary capable of complying with decisions unfavorable to state, must maintain some level of autonomy and independence.¹⁸³ The likelihood that a national court can effectively enforce international human rights rulings at the national level, not minding the political consequences on the executive, will depend on the extent it has insulated itself from the political influence of the state unitary structure. That way, the court can enforce human rights rulings from regional tribunals and as well as being able to raise costs that can influence other state actors (executive and legislature) to also comply in like manner.¹⁸⁴ In this sense, the court does not respond to any external will or endorsement, it acts as an independent domestic pressure source for improving compliance. From the above analyses, there are some very important questions which may be pondered upon in the context of the AHRs: first, whether citizens in African

¹⁸⁰ Haglund (n 57 above) 102-103.

¹⁸¹ Haglund (n 57 above) 103.

¹⁸² Hillebrecht (2012) (n 49 above) 976.

¹⁸³ BA Simmons 'International law and state behavior: Commitment and compliance in international monetary affairs' (2000) 94 *The American Political Science Review* 819-835 (arguing on the significance of independence of judiciary in the protection of human rights, she notes that 'for courts to play an important enforcement role, they must be at least somewhat independent from political control. The government or one of its agencies, representatives or allies is likely to be the defendant in rights cases, and unless local courts have the necessary insulation from politics, they are unlikely to agree to hear and even less likely to rule against their political benefactors'); On the contrary Cavallaro & Brewer warn that 'total isolation is never possible and may be counterproductive to the extent that it leads the court to make incorrect factual assumption. See Cavallaro & Brewer (n 40 above) 777. However, what is important is that the court should ensure that its decisions are not swayed by external political forces otherwise it will be seen to have lost its bearing as a protector of rights.

¹⁸⁴ CJ Carruba 'Courts and compliance in international regulatory regimes' (2005) 67 *Journal of Politics* 669-689; G Vanberg *The politics of constitutional review in Germany* (2005) 46, 49; V Gauri & DM Brinks *Introduction: The elements of legalization and the triangular shape of social and economic rights in counting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 1-37; C Rodriguez-Garavito 'Latin American constitutionalism: Social and economic rights: Beyond the courtroom: The impact of judicial activism on socio-economic rights in Latin-America' (2011) 89 *Texas Law Review* 1669-1977.

countries can by-pass the government and go directly to the national courts to get national judgments that can further increase domestic pressure on the state to comply? Will the same victims subsequently proceed to any of the African human rights institutions (say for example, the Commission) for further remedies that can strengthen the basis for domestic political mobilization against national governments when a national court fail to grant remedy? Second, whether national courts in African states also have or can have similar clouts to be able to by-pass the state structure of government to reinforce the international decision, clothing it in the garb of a national decision that the state must comply with? How domestic judges in national courts can become enablers or disablers of domestic accountability of the state to the international human rights structure under the AHRS?

(b) Engagement of domestic institutions and CS under the IAHRs: the interaction with national parliament

When human rights tribunals charge states to address human rights violations against its citizens, they do not specify which specific state actors should give effect to the decisions. However, given the nature of the judgment, the executive may delegate such compliance responsibility to the appropriate state agents. Thus, when such decisions require a state to change a particular piece of legislation in order to conform to provisions of the ACHR, then the national parliament has the primary duty to act. Similar to the practice under the EHRS, legislators can significantly contribute to implementation of decisions of the IACtHR by providing the enabling legislative framework needed for rights reforms and consequential compliance. Owing to the understanding that upon election, the legislators owe their allegiance to the people - particularly the voting public -, the legislators can then act as enabler and source of pressure for compliance under the IAHRs. While the legislature exercises the needed incentives for compliance, it must be mentioned that the specialized roles of technical parliamentary committees (for example, house committee on human rights, public petitions or committee on external matters) are also critical in the finishing stage leading to compliance.¹⁸⁵

Recognizing the significance of the legislature under the systems, Haglund writes:

¹⁸⁵ Haglund (n 57 above) 73; for details on the impact parliamentary technical committees, see Inter-Parliamentary Union (IPU) committee on the human rights of parliamentarians: Overview available at <http://archive.ipu.org/hr-e/committee.htm> (accessed 26 September 2018); see also IPU support to parliamentary human rights committee[online] also available at <http://archive.ipu.org/hr-e/parliaments.htm> (accessed 26 September, 2018).

[That] regional court judges recognize the importance of state action related to the amendment, repeal, or adoption of domestic law because changes to domestic legislation often limit the number of similar cases brought before the court in the future, and therefore reduces the caseload before the regional court.¹⁸⁶

The case of *Loayza Tamayo v Peru* presents a good background or example of how pressures have been mounted or exerted through national parliament under the IAHRs. In this case, the IACtHR directed the Peru government to amend or repeal the decree laws on terrorism and treasonable offences operational in the state.¹⁸⁷ In complying with this ruling, the Peru constitutional court declared the affected decree unconstitutional and of no effect. As a result, the legislature passed a series of legislative decrees to bring the state legal system into conformity with international human rights standard as provided by the ACHR. The effect of these new laws led credence to several other reforms which gave impetus for imprisoned terrorists to now have access to prison benefits particularly with regards to reductions in sentence durations.¹⁸⁸ After the Court's decision against Peru, legislatures in other states under the IAHRs, consequentially embarked on reforms with the aim of bringing their national laws in conformity with the IACtHR decision against Peru. For instance, in 2003, the Argentine Congress commenced a legislative process to annul its amnesty laws and by 2008, the Congress 'followed through with a 2004 IACHR friendly settlement agreement and annulled the military code of justice once and for all'.¹⁸⁹ This is similar to the position in Chile. In the case of *Almonacid Arellano v Chile* where the victim requested the IACtHR to declare the Chilean's amnesty laws invalid relying on the Court's previous case law on amnesty as precedent. Despite the institutional challenges associated with legislative reforms, the Chilean president expressed the political will to comply with the decision and that resulted in change of Chilean laws.¹⁹⁰ Some questions may be asked: why would legislators be concerned

¹⁸⁶ Haglund (n 57 above) 73.

¹⁸⁷ *Loayza Tamayo v Peru* merits judgment, Inter-Am. Ct. H.R. (ser .C) No.33 (Sep 17 1997). In this case, the victim Maria Elena Loayza was arrested by agents of the national counter-terrorism bureau on an unverifiable allegation that the victim collaborated with a subversive group called 'Shining Path'. Loayza -Tamayo was kept in detention without having access to anybody. She was perpetually subjected to all sorts of inhuman treatment in a bid to make a confessional statement. In view of this, the IACtHR ordered the Peru government to amend its anti-terrorism and treason laws. For a similar situation, see the case of *Castillo Petruzzi and others v Peru* (Merits, 1999), operative para 14.

¹⁸⁸ In response to the court's ruling, the state legislature enacted law 27913 (January, 9 2003) which permits the executive to deliberate on matters of counter-terrorism; Haglund (n 57 above) 74.

¹⁸⁹ M Valente 'Argentina: Congress decriminalizes homosexuality', IPS (2008); Hillebrecht (2012) (n 43 above) 976

¹⁹⁰ *Almonacid Arellano v Chile*, Inter-Am. Ct.H.R. (ser. C) No. 154 (26 September 2006); Cavallaro & Brewer (n 37 above) 820.

about human rights matters especially when it requires compliance with adverse decision from regional rights institution? Do legislators in Africa consider human rights matters and compliance in their legislative debates? To what extent do national parliaments in Africa know about regional human rights practices?

First, in the Inter-American context, national parliament (just like the national judiciary) values and respect decisions from the Inter-American regional human rights institutions, such that legislators might want to leverage on a tribunal's ruling as a means to legitimate human rights policy and improve their legislative debates in order to meet international standards.¹⁹¹ Thus, Hillebrecht finds that:

[P]ro-human rights legislators might view the tribunals' ruling as a reason to advance human rights policy and believe that the international legal mandate embodied in the ruling will provide them protection from any political fallout that might result from making a politically divisive decision regarding human rights¹⁹²

In other words, there is a perception of deference on the decisions of the IACtHR which has the potential to enhance legislative incentive to directly or indirectly pressure for compliance. Given the fact that tribunal's rulings relating to the legislature often entails change of existing state laws, legislature's incentive to comply, as Simmons argues, constitute an important foundation for change of national agenda¹⁹³ which could attract political credit and relevance (from domestic audience) to members of legislature especially the sponsors and supporters of the new law.

Second and perhaps most fundamental is legislators' incentive born out of the need to retain political office.¹⁹⁴ Owing to the fact that citizens attach value to separation of powers as the basis

¹⁹¹ See similar argument by Hillebrecht (2012) (n 49 above) 971; see also Scribner and Slagter stating that tribunal's ruling enhances legislative debates, provides political cover for pro-rights legislators and most importantly to use compliance as a threat to political oppositions who may want to escalate domestic and international cost in the event of non-compliance; D Scribner & T Slagter 'Supranational human rights adjudication and national legislative politics' (2011) available at http://www.allacademic.com/meta/p499024_index.html (accessed 24 June 2018).

¹⁹² Hillebrecht (2012) (n 49 above) 970-971 (he further argues that 'International human rights law and the tribunals' rulings in particular can pierce through stasis or malaise in legislatures and force individual legislators to take action on human rights law...[therefore] tribunal rulings, can be an important and motivating source of law for legislators, inspiring them to push for compliance').

¹⁹³ see B Simmons *Mobilizing for human rights: International law in domestic politics* (2009); Simmons (n 183 above) 148-149

¹⁹⁴ See generally Bueno de Mesquita *et al The logic of political survival* (2003) 11 (arguing *inter alia* that 'every political leader faces the challenge of how to hold on to his or her job. The politics behind survival in office is, we believe, the essence of politics. The desire to survive motivates the selection of policies and the allocation of benefits'); Bueno de Mesquita *et al* 'Thinking inside the box: A closer look at democracy and human rights' (2005) 49 *International Studies Quarterly* 439-457; for a contrary response to the views and arguments in Bueno de Mesquita *et*

for checks and balances in government particularly on the executive,¹⁹⁵ legislatures may face high domestic costs of non-compliance by losing domestic support (in their bid for re-election) and legitimacy. While it might be admitted that legislators have incentive to respond to CS electoral concern to avoid loss of political support, it is however not clear how often CS considers non-compliance with rights decisions as the basis for raising political cost against legislators.

Besides the above observation, electoral institutional rules also play a major role in determining the correlation between voters' concern on matters of importance on the one hand and their elected law makers' disposition in paying attention to issues of electoral concern on the other hand.¹⁹⁶ Cingranelli and Filippov contend that the ability of voters to sway the mind of elected officials will be determined by the size of the electorate district because when the electorate district size becomes larger, the possibility that the electorates will conveniently check legislators' preference over human rights decisions becomes thinner.¹⁹⁷

In the above context, while voters can with ease monitor behavior of legislators with respect to issues relating to rule of law and other matters of electoral concern within a small electorate district, this possibility becomes unlikely in a large size electoral district. Thus, voters in a large electoral district may then be constrained to few choices of issues for which the attention of government may be drawn to. In consequence, it is unlikely (in a large size electoral district) if the bad behavior of government (including disregard for rule of law and human rights decisions) can be framed as an important electoral concern at the expense of other relatively more important societal needs in making electoral choices. Further details of this are set out in section 5.2.4 of chapter 5 below.

al (2003), see KA Clarke & RW Stone 'Democracy and the logic of political survival' (2008) 102 *American Political Science Review* 387-395; Haglund (n 57 above) 78.

¹⁹⁵ GA Almond & V Sidney *The civic culture: Political attitudes and democracy in five nations* (1963) (arguing that citizens in democratic government values delineation of government boundaries for all organs or state agents); B Weingast 'The political foundations of democracy and the rule of law' (1997) 91 *American Political Science Review* 245-263 (arguing that 'citizens value the concept of separation of powers and consider it as a tool to check excesses of the executive powers').

¹⁹⁶ Haglund (n 57 above) 78.

¹⁹⁷ Cingranelli & Filippov (n 155 above) 243-257.

(c) Engagement of CS under the IAHRs: the interaction with national human rights institutions (NHRIs)

National human rights institutions (NHRIs) are independent state institutions or bodies established to act as the link between international obligations and states' compliance with these obligations at the national level. As Cardenas notes:

NHRIs are charged most often with promoting and protecting international human rights norms domestically.....NHRIs – whether through independent activism, cooperation or collusion with the state, or seemingly innocuous promotive work – can alter the human rights landscape domestically. For good or ill, incrementally or dramatically, their incorporation into national human rights struggles cannot be ignored.¹⁹⁸

Although, there might be instances where the capacity and authority of a NHRI may not always motivate state's compliance, this does not affect the reality that they have the potential for a successful mobilization for compliance with human rights decisions.¹⁹⁹ They are established by the state yet they are not state agents, they could act either as compliance partners or an intermediary between international actors, the state agents and domestic actors. They are, in the context of this thesis considered and discussed as among the promoters or agents of compliance with the potential to provide necessary information that can trigger and strengthen domestic mobilization. Basically, NHRIs in collaboration with other strands of CS could help to monitor government attitude towards respect for rule of law, rights protection, which by extension includes compliance with rights judgment. Sometimes, NHRIs in ensuring state compliance engage in quasi-judicial functions by exercising the power to investigate violation and publish findings for the knowledge of the public with a view to holding state accountable.²⁰⁰ NHRIs also act as follow-up mechanisms in pressuring states to comply with respect to regional court's decisions. On this note, Reif maintains that the 'Inter-American human rights system [IAHRs] is accessible to domestic ombudsman and both the Inter-American Commission and Inter-American Court are increasingly relying on human rights reports and evidence provided by Ombudsman'.²⁰¹ The

¹⁹⁸ S Cardenas 'National human rights institutions and state compliance' in R Goodman and T Pegrum (eds) *Human rights, social compliance, and social change: Assessing national human rights institutions* (2012) 29.

¹⁹⁹ Haglund (n 57 above) 118-119.

²⁰⁰ A Smith 'The unique position of national human rights institutions: A mixed blessing?' (2006) 28 *Human Rights Quarterly* 914.

²⁰¹ L Reif *The ombudsman, good governance and the international human rights system* (2004) 213.

NHRIs act as conduit for dissemination of information about regional court's cases and decision outcomes to the voting public in order to instigate domestic mobilization. In view of Simmons' contention, there is need for some level of legal literacy,²⁰² which can aid the voting public to have access to the regional court or use the court's decision to galvanize domestic mobilization, NHRIs stand to fill this gap.²⁰³

As evidence of how engagement of NHRIs propels compliance, the case of *Ximenes Lopez v Brazil*²⁰⁴ concerning series of killings and poor health conditions in a psychiatric clinic is apposite. The IACtHR held that Brazil was in violation of the ACHR. The case was first deliberated upon by the IACmHR but prior to the time when the case was submitted to the IACmHR, it had become a subject of concern amongst different human rights organizations: Ceara legislature's human rights commission (a major Brazilian human rights commission), psychiatric specialist and professionals, individual groups, key human rights networks resident in Brazil, local and national health commissions, domestic human rights actors of different strata and the media. By the time the Court assumed jurisdiction, the state had been subjected to intense domestic pressures from CS. As a result, the earlier 'internment model of mental health care system' has been upgraded to outpatient care system as opposed to confinement, and increasing respect for patient rights.²⁰⁵ In this case, the role of NHRIs and other strands of CS were useful in prompting the Brazilian government towards a shift for a new Brazilian health policy. Drawing from this, it may therefore be necessary to ask whether and how the role of NHRIs could be relevant in fostering compliance in the African context. Writing on the role of domestic mechanisms in promoting implementation and compliance with findings of treaty bodies in Africa, Murray and Long identify NHRIs 'as important "partners" for the treaty bodies in monitoring follow-up of their findings'.²⁰⁶ To further establish the role of NHRIs in the African context, the AU Human Rights Strategy for Africa is quoted to have affirmed that 'NHRIs play an important role in popularization of human rights norms and mechanisms, monitoring state compliance with their obligations, and contribute to the implementation of the decisions of AU organs and institutions...'²⁰⁷

²⁰² For a comprehensive understanding of domestic mobilization see, Simmons (n 193 above) 132-155.

²⁰³ Haglund (n 57 above) 119.

²⁰⁴ *Ximense Lopez v Brazil*, Inter-Am. Ct. H.R (ser. C) No. 149 (July 4, 2006).

²⁰⁵ For details, see Cavallaro & Brewer (n 40 above) 790-791.

²⁰⁶ R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 104-108; for related literature, see Cardenas (n 198 above) 29 -51.

²⁰⁷ Cited by Murray & Long (n 206 above) 104-105.

The above underscores the fact that in the African context, NHRIs have been considered as one of the promoters of human rights and compliance with rights decisions from the supervisory mechanisms. However, as has been observed, the effectiveness of their role in promoting compliance maybe limited by certain factors: lack of awareness or familiarity with the decisions of the regional bodies, lack of funding, restricted scope of operation and lack of independence from government intrusion and so on. In the context of this thesis, notwithstanding these potential constraints facing NHRIs, it is expected that the role of NHRIs in Africa could be enhanced in putting pressure on states to comply especially by means of engaging, giving orientation and mobilising the domestic subsets within the local communities in African states to raise domestic costs against non-compliant states.

(d) Engagement of CS under the IAHRs: interaction with the media

In functional democracies where active CS participation is enhanced, the media as one of the strands of CS act as a source of pressure for compliance. As a takeoff point in explaining the role of the media, the case of *Loayza Tamayo v Peru* (earlier examined)²⁰⁸ demonstrated how the engagement of the media contributed in facilitating compliance with Loayza's decision issued by IACtHR. In this case, the IACtHR held the state of Peru under the IAHRs to be in violation of the ACHR for unlawful arrest, detention of the victim, denial of fair hearing by keeping her incommunicado, subjecting her to: inhuman torture, psychological abuse and further sentence by a 'kangaroo like tribunal'²⁰⁹ to twenty years imprisonment. This case attracted the attention of the public as there was wide and consistent media coverage which ran from the period of arrest up to when the state finally complied with the decision. As a result of the constant media reportage, and the efforts of other strands of CS, domestic pressure was mounted on the Peruvian state. Despite the initial resistance from the government, Loayza was finally released within a period of one month from the IACtHR judgment.²¹⁰

Under the Inter-American system, the role of the media has helped in attracting the attention of the public to certain human rights ills perpetuated by some governments within this region. This

²⁰⁸ See *Loayza Tamayo* (n 187 above).

²⁰⁹ A term adopted in describing the local faceless tribunal that sentenced Loayza to twenty years imprisonment.

²¹⁰ Cavallaro & Brewer (n 40 above) 789.

position is exemplified in the case of *Velasquez Rodriguez v Honduras*²¹¹ and the related case of *Godinez Cruz and Fairen Garbi v Honduras*.²¹² These cases are mostly related to complaints about (state sponsored) forced disappearance of political opposition members. The essence of referencing these cases is to highlight the role media and the wider CS play in exposing and bringing government's violations to the public glare. In the context of these cases, the media acted as pressure source against the Honduras government in bringing the attention of the domestic and global constituencies to the common practices of state influenced forced disappearances in the region and particularly in Honduras. The wide media coverage and publicity swayed the feelings of the public against the state and activated a positive climate needed to hold the state accountable for the crimes.²¹³ The role of media as a strand of CS in these cases suggests that a domestic environment with vibrant pro-rights advocates where freedom of expression and media reportage thrive, the possibility of successful domestic mobilisation increases.²¹⁴

One important avenue by which the media brings pressure and attention to bear is when adjudication process of the IACtHR is carried out by way of public hearing. The following cases demonstrate how the IACtHR use of public hearing enhances the role of the media as a pressure source for compliance. First, the case of *Urso Branco v Brazil*²¹⁵ concerning provisional measures granted by the IACtHR in favor of inmates over a massacre and acts of violence in a penal facility will be a useful example. In this case, the provisional measures granted in 2002 were not responded

²¹¹ *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct.H.R (ser.C) No.4 (July 29, 1988); Cavallaro & Brewer (n 40 above) 797,806,821; JE Mendez & JM Vivanco 'Disappearance and the Inter-American Court: Reflecting on a litigation experience (1990) 13 *Hamline Law Review* 507-558.

²¹² *Godinez Cruz and Fairen Garbi v Honduras* Inter-Am. Ct.H.R (ser. C) No. 2 (June 26 1987), summary of facts and details available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_06_ing.pdf (accessed 19 September 2018).

²¹³ Cavallaro & Brewer (n 40 above) 797-798.

²¹⁴ Haglund (n 57 above) 117; Cavallaro & Brewer (n 40 above) 789; see also example of similar cases where non-compliance and hostile reception from state actors was characterized by absence of media cost, *Castillo Petruzzi v Peru*, the victims (foreign nationals) were tried by a faceless tribunal and was consequently sentenced to life imprisonment for an alleged crime committed in Peru. As Cavallaro & Brewer note, the state refused to comply on grounds that the decision is an evasion into their sovereignty. In similar reaction, the state congress passed a resolution calling on the Peru government to denounce its recognition of the court's jurisdiction. This hostile reaction was perhaps due to the fact that the victim could not generate the same sympathetic media and public supports as in the Loayza's case. Also, in *Yean and Bosico v Dominican Republic*, the court considered the state's refusal to issue two children of Haitian descent with their birth certificate as discriminatory and contrary to the ACHR. The decision may have been fully complied with but for the difficult and hostile climate faced by domestic activism and media who could not mobilize widespread campaign and pressure; for details, see *Castillo Petruzzi*, Inter-Am Ct. H.R (ser.C) No.52, at 1,20-31, paras.1,86 (30 May 1999); *Yean Bosico v Dominican Republic*, Inter-Am. Ct. H.R (ser.C) No. 130 (8 September 2005).

²¹⁵ *Urso Branco v Brazil* provisional measures order, Int-Am. Ct. H.R. (18 June 2002).

to by the state, furthermore, the public had no knowledge of this until 2004 when the regional court resorted to conduct a public hearing which then generated wide publicity in Brazil.²¹⁶ The choice of conducting public hearing enabled the media to publicize the violation and refusal by the state to comply. This attracted serious pressure against the state.

Second, in a similar approach, the case of *Montero Aranguren v Venezuela* (also known as ‘the Reten de Cotia case’)²¹⁷ also presents a clear picture of how public hearing enhances media reports. In this case, a group of Venezuelan journalists were actively involved during the public hearing sessions. Beyond consistently reporting details of the public hearing to the general public, they independently embarked on a community investigation which then unveiled the entire historical details and background of the case. These efforts then triggered the awareness of the public and further ignited mobilization for compliance by the wider domestic CS. The above approaches help to bring the regional courts close to home-based pro-rights actors and also expose the regional court to the day-to-day reality of the people; above all, it aids media wide coverage for the benefit of domestic and international audiences. In addition to the relevance of public hearing, the engagement of live witnesses also enhances public visibility about ongoing trials. In a detailed analysis of how the use of live witnesses during public hearing improves the probability of increasing media reportage, Cavallaro and Brewer note that ‘the multiple hearing and compelling testimony that characterize [the cases presided during public hearings] offered focal points for media attention’.²¹⁸

(e) Engagement of CS under the IAHRs: interaction with human rights advocates and pro-compliance individuals within government employ

Closely connected to NHRIs is the role of human rights legal experts (cause lawyering) as well as exceptional efforts of pro-rights individual actor within government employ. Given that NHRIs and NGOs use campaign strategy to draw public concern to regional decisions against a target state which then trigger domestic cost from the voting public, pro-rights legal experts also (as discussed below) play a key role in ensuring implementation of adverse court’s ruling. In analyzing their role with respect to treaty ratification, Simmons notes that

²¹⁶ Cavallaro & Brewer (n 40 above) 802.

²¹⁷ *Montero Aranguren v Venezuela*, Inter-Am. Ct. H.R., (ser. C) No. 150 (5 July 2006).

²¹⁸ Cavallaro & Brewer (n 40 above) 797.

legal interest groups may take a new interest in the issues covered by the treaty, debating, publicizing, and interpreting its meaning within the local legal system ... additionally, legally trained individuals – strongly motivated by selective incentives – may decide to lend their professional expertise to the nascent rights movement, providing the legal, technical, and advocacy skills that many students of social movements have noted are critical to their success.²¹⁹

Legal experts -‘Cause lawyering’– as a strand of CS helps to tickle right consciousness of other domestic actors by (a) creating awareness for the need for supranational litigation; (b) increased participation and value of litigation; (c) altering state anti-rights policy in social and political context; (d) promoting effectiveness of supranational tribunals.²²⁰ For example, in the *Street Children* case, the IACtHR found Guatemala to be in violation of art 19 (with respect to protecting the rights of the child) and ordered the Republic of Guatemala to engage rights reforms to bring its laws to conform to rights standards as contained in the ACHR.²²¹ The difficulty in this order was that the court charged the state to consider the most appropriate measure that it deemed fit to reform its legal system on rights of the child. Therefore, in such case when it seems like the regional court has by its unclear judgment put all state actors in a deadlock, the ‘role of ‘cause lawyers’ are particularly important in bringing attention to state responses to adverse regional court decisions’.²²²

Supranational court rulings can also become a strategic tool for mobilization by pro-rights individuals within government employ. In one instance, the government of Costa Rica required all journalists in the state to mandatorily belong to an association prescribed by a state law for the practice of journalism. This became a subject for which the court’s advisory jurisdiction was sought.²²³ On the basis of this, the Court issued an advisory opinion holding that the Costa Rica law requiring all journalists to belong to a government prescribed association is incompatible with the Convention. Despite the Court’s opinion, the law remained operational until the former president of the IACtHR (Rodolfo Piza) assumed a new national office as the Constitutional

²¹⁹ Simmons (n 193 above) 146.

²²⁰ A Sarat and SA Scheingold ‘Cause lawyering and the reproduction of professional authority in cause lawyering: Political commitments and professional responsibility’ in A Sarat and SA Scheingold (eds) *Cause lawyering: Political commitments and professional responsibility* (1998) 3-28; Helfer & Slaughter (n 61 above) 312.

²²¹ Pasqualucci (n 36 above) 248.

²²² Haglund (n 57 above) 121.

²²³ See arts 13 and 29 of the ACHR) Advisory Opinion, Inter-Am. Ct. H.R (ser. A) No. 5 (1985).

Chamber of Costa Rica's Supreme Court. On assumption of office, the law was declared invalid and was immediately repealed.²²⁴ In a similar manner, the government of Honduras refused to comply with the monetary damages ordered by the court in the case of *Velasquez Rodriquez and Godinnez Cruz v Honduras*, until Carlos Roberto Reina (former court judge) became President of Honduras.²²⁵

The above cases seem to suggest that even if government's incentive to comply decreases, the influence of some pro-rights individuals acting as disaggregated actors within the government cabinet can increase the probability of success in mobilization thereby raising cost to propel executive expectation to comply.

From the above narrations, it can be arguably stated that the effectiveness of the IAHRs cannot be appraised without considering the role of domestic actors, so that without looking deep, domestic institutions acting as disaggregated components of the state in collaboration with CS can be considered as potential sources of domestic pressure for compliance. From a compliance based perspective, Torelly notes that the increasing bonding and interaction between domestic institutions or political arms of government have given rise to a sort of hybrid practices which have facilitated the embeddedness of the IAHRs procedures and norms into national states' bureaucracies. That is, in practice, other than the role of IACHR as one of the regional sources of pressure, domestic institutions are the often targets of domestic sources of pressure for compliance.²²⁶ In other words, the system relies so much on the cooperation of domestic institutions and public mobilization for improved compliance and effectiveness.²²⁷

Owing to the fact that the discussions in the preceding section concern the link between engagement of CS and domestic institutions and compliance, should not it be proper to ask if CS will be interested and therefore be engaged in all cases of violation? In the next section, I discuss certain peculiar potential factors that may inhibit CS activism in the EHRS, IAHRs and few references to the AHRS.

²²⁴ T Buergenthal 'New upload-remembering the early years of the Inter-American Court of Human Rights' (2005) 37 *New York University Journal of International Law and Politics* 268-269.

²²⁵ Buegenthal (n 224 above) 272; Cavallaro & Brewer (n 40 above) 791.

²²⁶ M Torelly 'From compliance to engagement: Assessing the impact of the Inter-American Court of Human Rights on constitutional law in Latin America in P Engstrom (ed) *The Inter-American human rights system: Impact beyond compliance* (2018).

²²⁷ See generally Engstrom (2018) (n 34 above).

4.5 Factors that may trigger CS disincentive to pressure for compliance

While the hypothesis (as discussed in section 4.1 above) predicts that CS engagement has the potential to increase the chances of compliance, there are instances (exception to the rule) where certain decisions from human rights tribunals could attract backlash from CS and thus, non-compliance becomes likely. One of such potential factors is when human rights institutions, while issuing judgments, fail to consider the day – to – day reality, the prevailing traditions and values that exist in the respondent’s state. From this, it is possible to assume that compliance is unlikely when there is a shift of acceptance (legitimacy) of a rights institution or refusal of its rulings by CS. I use few instances below to explain how the hypothesis may fail when there is a withdrawal or lack of acceptance of a tribunal judgment by CS. This discussion in this section ought to cover only the European and Inter-American systems, however, similar potential situations under the AHRS are also discussed for purposes of showing instances where the hypothesis may not pan out in the three regions.

First, under the EHRS, the UK refusal to comply with the decision of the ECtHR in *Hirst v UK*²²⁸ presents a picture of the potential consequences that arise when a rights decision contradicts existing beliefs and traditional realities peculiar within a violating state. In the above case, the ECtHR ruled on the application of Mr. John Hirst that the blanket ban on the rights of prisoners to vote violates the provisions of Protocol 1, art 3 of the ECHR and therefore, the UK government should engage legislative reform and proposals to comply with the decision as issued.

On the side of the government, the argument is that ‘the denial of prisoners to vote is to prevent crime, punish offenders, enhance civic responsibility, respect for the rule of law’ and maintain the old fundamental British traditional elements - parliamentary sovereignty and common law practices. While so much pressure to raise high financial cost (prisoners’ litigation and compensation cost) against the UK government has become a concern, results from opinion polls reveals that more than 60% of those examined disagreed with the option of government compliance with the ECtHR decision in *Hirsts’ case*. In further opinion sampling, the disagreed rate increased to 70% from voters of over 55 years of age.²²⁹

²²⁸ See *Hirst’s case* (n 64 above).

²²⁹ JL Hiebert ‘The human rights act: Ambiguity about parliamentary sovereignty’ (2013) 14 *German Law Journal* 2252-2274.

Other than the fact that the case lacks wide public supports, the government is also faced with two major concerns: first, the desire to respect the court's decision in order to enfranchise prisoners (most of whom are with records of heinous crimes which includes terrorism) to exercise their rights to vote either for or against the same government by whose agencies they were convicted. Could this not eventually attract political backlash against the government? Could the prisoners not leverage on these voting rights as bait in calling on government for release negotiations? Second, the UK government desire to respect the sacred state's parliamentary sovereignty which it considers as the bedrock of democracy.²³⁰ To avoid all these, the UK government and most part of the public seem unwilling to consider any kind of reform that will lift prisoners' voting ban to vote while in incarceration.

Taking into account the sensitive political and social implication in lifting the ban for prisoners to exercise their rights to vote, one commentator notes:

The case [*Hirst v UK*] which is still unresolved over a decade after the ECtHR first made the judgment in 2005 – has become, in the eyes of some MPs [member of parliaments], a battle to defend the uniquely British tradition of Parliamentary sovereignty from an over-zealous court. The ECtHR has been accused of infringing on the British Parliament's 'right to decide on matters which are fundamental to the British way of life.' In this instance, the reason for the Government's reluctance to obey the ECtHR's ruling is clear: if the centuries-old, democratic, sensible British Parliament decides that prisoners cannot vote, then a seemingly unaccountable, European (foreign) court should not be able to challenge it. This means that the UK is most likely to resist ECtHR rulings that appear to fundamentally challenge or threaten elements of the 'British approach'..... For now, the UK seems most likely to accept ECtHR judgments when they match, or at least don't contradict, British human rights traditions. But if a ruling challenges fundamental elements of the British tradition – like Parliamentary sovereignty – the UK and ECtHR will be much more likely to clash.²³¹

In view of the above, it can be argued that the expectation that CS may generate domestic pressure for compliance may be threatened when public reception and acceptance of a particular tribunal's decisions is low owing to certain factors: traditional or religious values and beliefs.

²³⁰ For general discussion, see ED Bates 'The continued failure to implement *Hirst v UK*'-EJIL Talk! (2015) available at <https://www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/> (accessed 19 September 2018).

²³¹ Z Jay 'The reluctant role model: Why Britain (usually) obey the European Court of Human Rights' (2017) available at <http://blogs.lse.ac.uk/politicsandpolicy/why-britain-usually-obey-the-ecthr/> (accessed 19 September 2018).

Second, under the IAHRs, the IACtHR ruling requesting *inter alia* the state of Peru to inscribe the names of death victims on an ancient monument popularly known as ‘The Eye That Cries’ attracted significant negative reaction and resistance from both political, societal and domestic audiences. In this case, there was a politically motivated attack on a group of prison inmate at *the Castro Castro penal facility* which led to the death of several numbers of inmates in custody. These inmates were members of a domestic movement associated with the Sendero Luminoso which in the view of the Peruvian government and a wider section of the public, were considered a terrorist group. Historically, this monument popularly known as ‘The Eye That Cries’ already bear names of dead people who died (for a just cause in opposition to Sendero Luminoso) during the internal clash in Peru from 1980 to 2000 (the list includes police, military personnel, civilian who were victims of political violence).

The crux of anger and dismay at the court’s ruling was that a monument which stands as a memorial and honor to victims of terrorism should not and ought not to reflect names of suspected and convicted terrorists. The families of those whose names were already inscribed on the monument considered the ruling of the court as an affront. The then Peruvian President, Alan Garcia leveraged on these ill feelings from citizens and majority of the public to condemn the ruling and described the court as a distant institution that lacks the moral and social impetus to issue such ruling without taking into cognizance, the traditional, moral and social factors operational in Peru.

In consequence, the monument was demolished in the following year.²³² The negative reaction in this case implies that relying on domestic CS to generate pressure holds the risk of backlash in the forms of mob justice, withdrawal of acceptance of the institutions and continuous resistance to similar decisions.

Third, the reaction of the Rwandan government towards the decision of the African Court exemplifies an instance where CS may be unwilling to pressure their government for compliance. For instance, in the case of *Rwanda v Victoire Ingabire*,²³³ the applicant was a leader of a political party – republican movement for democracy in Rwanda, for purposes of forming a coalition, her party later formed a merger with another opposition party called ‘Forces democratiques unifies

²³² For details see *Miguel Castro Castro Prison v Peru* Inter-Am. Ct. H.R (ser. C) No. 160, at 2, para 3 (2006); Cavallaro & Brewer (n 40 above) 824-825.

²³³ App. No.003/2014.

(FDU Inkingi). Prior to this time, the Rwanda government had aimed at resisting any conduct or act that is capable of inciting the public and re-igniting potential crisis or any action that will refresh and bring back the memories of the public to the 1994 Genocide. In view of this, the government perceived the applicant's political action as ill motivated most importantly because, she has been considered as one of the suspected perpetrators of the genocide for which she has evaded national trials. As a result, the applicant was subjected to series of trials and was consequently sentenced to 15 years imprisonment by the Rwanda Supreme Court for alleged offences of complicity in terrorism, breach of internal security, sectarianism and among others.

On her application to the African Court, the latter held that Rwanda was in violation of arts 7(1)(c) and 9(2) of the African Charter and further requested the respondent's state to take all necessary measures to restore the Applicant's rights who has been sentenced by the national court. In a twist, the government of Rwanda informed the African Court of their withdrawal of earlier declaration to allow access to individual and NGOs to bring action in accordance to art 5(3) of the Charter owing to the fact that the government and the wider CS perceived the Court's judgment as being insensitive, an aberration and affront to their moral and psychological feelings.

A similar circumstance of backlash could be expected in view of the recent decision of the African Court against Mali. The complainant in this case approached the Court alleging that there is need to order the government of Mali to reform its family code (which violates the rights of women and children) in order to meet international human rights standard as contained in following human rights instruments: the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol'), the African Charter on the Rights and Welfare of the Child ('ACRWC') and the Convention on the Elimination of all forms of Discrimination Against Women ('CEDAW').

The Court found Mali to have violated the relevant instruments with respect to protection of women and children under the AHRS and ordered the Malian government to amend the legislature complained of. As important as this decision in the promotion of a wide range of rights, the Muslim associations in Mali (in whose favour the family code stands) had issued statement condemning the Court's decision as an affront and disregards to Mali's religious and social values and of course, disrespect to Mali's Constitution. In a collective statement, the Muslim community implored all

citizens to ‘take action to save the country from this danger’.²³⁴ In view of the reaction from the Malian government and the cold reception towards the court’s decisions from the Muslim community within the state, it remains to be seen how the Mali government will exercise leverage to comply with this decision despite the interest of the minority CS within the state and the long term benefits associated with the decision. In this instance, it may then be difficult to expect domestic pressure to be generated based on the following grounds: those who brought the action may not necessarily have felt the pulse of the nation, or they are a minority who deliberately want the courts to perform its counter-majoritarian role. This would then be an exception to cases where the wider civil society can be expected to support the judicial institutions whether at home or abroad.

In addition, the recent order from the African Union (AU) Executive Council leading to final withdrawal of observer status of the Coalition of African Lesbian (CAL – also popularly known as LGBTI) could be a sort of backlash based on moral grounds. This is due to the fact that part of the reasons for the Executive Council’s insistence on the withdrawal of CAL’s observer status is based on the assumption that the latter’s ‘operations and practices may impose values and practices contrary to entrenched African aged traditional virtues and moral standing’.²³⁵ This then mean that if for instance, a human rights mechanism of the AHRS made a decision in favour of LGBTI, the fact that most Africans hold a bias against it could mean that CS cannot be expected to hold it against a government.

²³⁴ For details on the African Court decision against Mali, see T Davi ‘African Court on Human and Peoples’ Rights delivers landmark ruling on women’s rights and the rights of the child in Mali’ (2018) [online]-EJIL:Talk! available at <https://www.ejiltalk.org/african-court-on-human-and-peoples-rights-delivers-landmark-ruling-on-womens-rights-and-the-rights-of-the-child-in-mali/> (accessed 18 September, 2018); for facts and summary of the case, see 046/2016 *APDF and IHRDA v Republic of Mali* available at <http://en.african-court.org/index.php/56-pending-cases-details/942-app-no-046-2016-apdf-ihrda-v-republic-of-mali-details> (accessed on 18 September, 2018); <https://ijrcenter.org/2018/05/29/african-court-finds-malis-family-law-violates-human-rights-obligations/> (accessed 18 September, 2018); for more information on statement issued by Muslim Associations in Mali, see details at <http://malijet.com/actualite-politique-au-mali/flash-info/210933-cour-africaine-des-droits-de-l%E2%80%99homme-l%E2%80%99-apdf-obtient-la-r%C3%A9vision.html> (accessed 18 September, 2018); M Tomz ‘Domestic audience costs in international relations: An experimental approach’ (2007) 61 *International Organization* 821.

²³⁵ See Executive Council decision at the thirty – third ordinary session in June 2019 at Mauritania –Ex. CL/Dec.1015 (XXXIII) p 3, para 8 available at https://au.int/sites/default/files/decisions/34635-ex_cl_dec_1008_-1030_xxxiii_e.pdf (accessed on 30 October 2018); for details, see ‘African Commission bows to political pressure, withdraws NGOs observer status’ (2018) available at <https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/> (accessed 30 October 2018); for detail analysis of this, see J Biegon ‘The rise and rise of political backlash: African Union executive council’s decision to review the mandate and working methods of the African Commission’ (2018) available at <https://www.ejiltalk.org> (accessed on 1 December 2018).

All these cases demonstrate instances where my hypothesis may not unfurl as projected and thus qualify as an exception to the general assumption earlier proposed and the hypothesis as set out in chapter 1 above.

4.6 Compliance under the EHRS and IAHRs: an examination of legitimacy as a potential factor

The discussions under section 4.4 reveal the level of mutual interaction and conversation that exist between the regional systems and domestic actors at the national level. Drawing from this, the following questions may be necessary in the examination of the link between legitimacy and compliance. First, why should national judges be expected to consider the merits or otherwise of complaints on alleged breach of the provisions of the Convention at the domestic level? What explains the enduring democratic culture for compliance and mutual relationship between most European contracting states and the EHRS? Why has the UK for instance, not denounced membership to the ECHR despite series of threat of withdrawal by the Conservative party, politicians and the UK public? As discussed above, the national judiciaries and the parliaments ensure that the provisions of the Convention and ECtHR cases are considered during judicial and parliamentary proceedings. What could account for this level of deference exhibited by domestic institutions under the EHRS? Why would the domestic institutions cede to the authority and the jurisprudence of ECtHR instead of the authority and influence of the state? What is it about the ECtHR that has made it earn such level of respect from the CS and domestic institutions of states within the Council of Europe?

Second, owing to the fact that the states subject to the jurisdiction of the IACtHR emerged from a long reign of military dictatorship, what could explain the level of integration and interaction between the regional human rights systems and the national legal systems in member states? How come the domestic institutions were able to bypass the interest of the state, pro-violation constituencies and strong political elites to invalidate and repeal the long-standing controversial amnesty laws? The responses to these questions form the crux of my discussion in this section. One strong candidate as a compelling potential explanation for this kind of interlocking relationship between the domestic and regional system is legitimacy. Therefore, the claim is that the interface and conversation between domestic actors and the regional systems depict a picture of legitimacy. In this regard, I will draw from the analyses in the extant literature to explain how legitimacy features in the context of the relationship between the domestic systems and the

European and American systems on the one hand and the correlation between legitimacy and compliance on the other hand.

There are different shades of legitimacy and in a manner of writing, scholars have also discussed the concept of legitimacy using different labels (as would be seen below). Legitimacy could literally be understood to mean the peoples' acceptance or belief about an authority and other associated obligations. From a sociological point of view, Weber explains a version of legitimacy which excludes any forms of recourse to normative considerations.²³⁶ Accordingly, Weber notes that the legitimacy of a political regimes depends on the extent of faith or believes that its participants are able to demonstrate. That is: 'the basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige'.²³⁷ As is well known, Weber identifies three main sources of legitimacy which could generally be explained to mean acceptance and believe. For instance, people tend to accept and believe in a particular political system or social order because the system has existed for such a time, thus, it has become a culture to accept that system or its norms (tradition), because of the personality of the rulers (charisma), or because they 'trust its legality-specifically the rationality of the rule of law' (trust).²³⁸

On his part, Amos argues that 'a decision is more likely to be considered legitimate and stands a greater chance of acceptance in the following instances: 'those affected have had a say in it either directly or via their elected representatives (democratic legitimacy); the decision reflects the shared values of those affected; or the decision has been made by an expert and authoritative person or institutions'.²³⁹

Similarly, Hurd sees legitimacy from the perspective of an actor's believe or perception that an institution and its rules ought to be obeyed when the substance, procedure and source of the rule has been crystalized and internalized as part of the traditions and shared values by the actor. The perception that the rule is legitimate having been accepted then determines the behavior of the

²³⁶ W Mommsen *The political and social theory of Max Weber* (1989) 20.

²³⁷ M Weber AM Henderson & T Parsons *The theory of social and economic organization* (1947) 382.

²³⁸ M Weber 'Politics as a vocation' in H H Gerth and CW Mills (eds) *From Max Weber: Essays in sociology* (1918, 1946) 77-128.

²³⁹ M Amos 'The dialogue between United Kingdom courts and the European Court of Human Rights'(2012) 61 *International and Comparative Law Quarterly* 575-576.

actor towards obedience or compliance with any rule emanating from the institutions.²⁴⁰ On the effect of norm internalization on compliance, Koh's transnational legal theory present a similar insight as he argues that through a repeated process of transnational legal process, norms become internalized, at this stage, compliance becomes the concomitant result.²⁴¹

From a constructivism point of view, Franck argues:

[L]egitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.²⁴²

Against the above background, Franck uses 'legitimacy' as a yardstick to argue that the determinant for compliance with international law or norm is the norm's 'compliance pull', arising from a question whether the norm is perceived to be legitimate by the people to whom it applies.²⁴³ The central bearing for norm driven or legitimacy theory is that 'in a community organized around this rules, compliance is secured-to whatever degree it is at least in part by the perception of a rule as legitimate by those to whom it is addressed'.²⁴⁴ Franck recognized four sources of legitimacy: 'determinacy, symbolic validation, coherence, and adherence' – these variable or properties of a rule either in a single alternative or combined together culminate to compliance pull' which exert pressure on states to comply'.²⁴⁵

From the above discussions, legitimacy comes with acceptance and the chances of compliance are higher when there is a perception of legitimacy. In other words, legitimacy triggers compliance. On this note, it is possible to then establish that without looking more (prima facie) that compliance level is higher in the European and American systems because of higher resort to internal legitimacy. Put simply, the underlying argument is that compliance is higher in any systems where internal legitimacy is higher. Conversely, the chances of compliance may be reduced in regimes where deference for internal legitimacy is low or non-existent. If put in a logical flow, it will then read as follows: the chances of compliance is higher in all human rights

²⁴⁰ I Hurd 'Legitimacy and authority in international politics' (1999) 53 *International Organization* 381.

²⁴¹ H Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2602; H Koh 'Bringing international law home' (1998) 35 *Houston Law Review* 626-627; H Koh 'Transnational public law litigation' (1991) 100 *Yale Law Journal* 2348.

²⁴² Franck *The power of legitimacy among nations* (1990) 24.

²⁴³ M Burgstaller *Theories of compliance with international law* (2005) 101.

²⁴⁴ TM Franck 'Legitimacy in the international system' (1998) 82 *American Journal of International Law* 705.

²⁴⁵ Franck (n 244 above) 49; Burgstaller (n 243 above) 113-114.

regimes where there is high level of deference for internal legitimacy; the level of deference for internal legitimacy under the EHRs and IAHRS is high, therefore, compliance is higher in these regions. This position aligns with my hypothesis as stated above.

4.7 Conclusion

In concluding this chapter, the important question to ask is: what was this chapter intended to achieve or put simply, what gap in chapter three that this chapter aims to fill? To respond to this, a reflection of the hypothesis earlier mentioned will be necessary. The claim is that compliance level could be improved in human rights systems where there is an entrenched engagement and regular interaction with the wider CS in the activities of the systems. In other words, the probability of compliance increases when there is a perception of ownership of the system by domestic actors at the domestic level. This perception of ownership as discussed above may be induced by acceptance and believe on the system by the people to whom the system applies. As the feeling of acceptance grows (internalization), legitimacy of the system equally becomes higher and then, the probability of compliance becomes increasingly feasible.

In the context of the practices under the AHRs as discussed in chapter three of this thesis, the accuracy of this hypothesis could not be justified for the following reasons: (a) evidence of embedment of the regional system into domestic system as often characterized by engagement and interaction with domestic institutions and CS remains to be seen. (b) arguably, the commonest and regular forms of engagement is between the AHRs, NGOs and regional or international stakeholders (c) evidence of participation and engagement of domestic institutions and wider CS is limited (d) there is lack or limited awareness of the practices of the AHRs at the domestic level as national parliaments and judiciaries in member states do not crave to ensure that their practices align with the provisions of the Charter.²⁴⁶ Therefore, the unstated claim could then be that part of

²⁴⁶ For the literature arguing on lack of awareness of the AHRs by the people it concerns, see generally, R Murray & D Long *The implementation of findings of the African Commission on human and Peoples' rights* (2015) 75,79,81,85,94-95,97-98,102-109; Murray & Mottershaw (n 2 above) 360-362; M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: Introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 8; F Viljoen *International human rights law in Africa* (2012) 282; OC Okafor *The African human rights system, activist forces, and international institutions* (2007) 253.

the reasons why the AHRS has or experiences compliance problem is because the legitimacy of the system is external²⁴⁷ and does not suit my hypothesis.²⁴⁸

Owing to the understanding that this thesis is on a mission in search of a domestic mechanism that can improve compliance under the AHRS, I examined the workings of the EHRS and IAHR in the lens of the hypothesis to test its reality or otherwise. As could be deduced from the discussion in section 4.1, the operations and compliance regimes of the latter systems differ in many ways. For instance, while the IACtHR ruling orders states parties to comply with specific set of remedies, the ECtHR does not specify or decide on how contracting states should be implement its judgments.²⁴⁹ Under the EHRS, the role of supervision is done by the CoM, while under the IAHR, domestic accountability is achieved through mobilization of public opinion, raising awareness by the media, domestic litigation process, and engagement of live witnesses during public hearings and resilient efforts of pro – compliance national judges and parliamentarians.²⁵⁰

Also, owing to the fact that most states under the EHRS comprises of partially consolidated democracies in Western Europe and former communist states from Eastern Europe, compliance attitude from these states varies as states from Western Europe possess a democratic culture of compliance while states from the Eastern Europe have no such background from origin. In contrast, many state parties under the IAHR emerged from ‘right – wing militarist dictatorship’.²⁵¹ Therefore, compliance approach in these states under the IAHR is not as fine – grained as their European counterpart. However, despite these differences and as could be seen from the discussions in sections 4.4.1 and 4.4.2 above, there is one common trend that runs through the practices in the both systems – a collective efforts between the regional institutions, domestic institutions and wider CS towards embedment of the regional systems into the national legal

²⁴⁷ I employ this term to refer to the kind of legitimacy (acceptance) drawn from stakeholders that are not domestically suited, in the context of this discussion, I am referring to NGOs and regional or international stakeholders working to improve the AHRS.

²⁴⁸ This must be understood against the background that the advancement and impact of human rights depends on the extent it has become socially institutionalised and internalized in the peoples’ mindsets as has further become part of the day-to-day workings of domestic and social institutions: the judiciary, the legislature, the schooling, healthcare systems, the market, place of worship and the family, therefore, as Spano explains: [‘any human rights] system that by definition is not embedded politically and historically in a national constitutional framework, is from time to time confronted with the threat of losing its effectiveness at national level if a critical mass of distrust and a perceived lack of legitimacy pervades its work’. For detailed analysis on this, see Spano (n 13 above) 473-494; MR Madsen & G Verschraegen (eds) *Making human rights more intelligible: Towards a sociology of human rights* (2013).

²⁴⁹ Hawkins & Jacoby (n 32 above) 37.

²⁵⁰ Engstrom (2018) (n 38 above).

²⁵¹ Stiansen (n 167 above) 11.

systems. In other words, both systems depend on the domestic institutions and CS (internal legitimacy) in states parties as source of pressure for compliance and effectiveness. It may therefore be necessary to ask if there is a similar trend under the AHRS. It could then be argued that the practices under EHRs and IAHRS confirm my hypothesis as well as the theoretical framework for this thesis.²⁵²

Drawing from the above, there are reasons to conclude that the kind of relationship between the regional systems in Europe and American speaks to legitimacy as there is high level of deference by domestic institutions and CS over the decisions and operations of the rights institutions. In view of this, it is then possible to argue that a system where there is high level of deference for internal legitimacy,²⁵³ compliance tends to be higher, conversely, chances of higher compliance may be threatened when the deference for external legitimacy is high as the case under the AHRS. By these analyses, part of my findings is that the model of embeddedness through engagement of domestic institutions and CS in these regions is lacking under AHRS. And therefore, if this model or a related model (as discussed in chapter five) is borrowed and transposed into the AHRS, it will then serve as a domestic mechanism that will complement the existing mechanisms or compliance regime. When that happens, the gap found in chapter three of this thesis would have been filled and the aim of the thesis, as I should expect, would have been realized.

²⁵² See generally, A Moravcsik *Explaining international human rights regimes: Liberal theory and Western Europe* (n 63 above) 157-189.

²⁵³ Internal legitimacy in this context means authority or influence that is earned (and not by coercion or external inducement) which is often characterized by respect, acceptance and belief drawn from the people or domestic institutions acting as disaggregated units of the state. This is different from external legitimacy that is considered to have emanated from external forces (by means of force or external sanctions or coercion). In the context of this thesis, these forces may include: the human rights NGOs and international or regional stakeholders operating under the AHRS.

CHAPTER FIVE: TOWARDS IMPROVED COMPLIANCE IN THE AFRICAN HUMAN RIGHTS SYSTEM: ENHANCING THE ROLE OF CIVIL SOCIETY

5.1 Introduction

As discussed in the two preceding chapters, the major claim in this thesis is framed as a hypothesis that state compliance with regional human rights decisions is likely to improve if domestic societies in state parties under the AHRS are properly engaged to raise the domestic cost of non-compliance.¹ In proving the validity or otherwise of this hypothesis, I adopted a descriptive approach in the development of chapters 3 and 4 above. The aim was to describe, first and foremost, the current practices operational in the three regional human rights systems: the African Human Rights System (AHRS), European Human Rights System (EHRS) and Inter-American Human Rights System (IAHRS). And second, to show the variation in the pattern of engagement of domestic actors in the operations of these regions or systems.²

As discussed in sections 4.4.1 and 4.4.2 of chapter 4 above, the European and Inter-American human rights systems (EHRS/IAHRS) maintain a bottom-up structure where internal or domestic legitimacy is enhanced as between the regional systems and the domestic institutions as well as the wider domestic societies. Thus, this intertwining relationship could be considered as one of the major factors that may have accounted for improved compliance in these regions.³ In contrast, as discussed under sections 3.7 and 3.8 of chapter 3 above, the level of domestic or internal legitimacy as between the domestic front at the national level and the human rights institutions at the African regional level is almost inexistent, hence the assumption that the AHRS depends almost exclusively on external factors to pressure for compliance. This then gives the impression that low compliance level under the AHRS may be partly linked to the system's over-reliance on external legitimacy as sources of pressure.

¹ See discussion in sections 1.3, 3.7, 4.7 of chapter 3 and 4 respectively.

² As discussed in sections 3.8 and 4.7 of chapters 3 and 4 above, the assumption is that that part of the reasons why the AHRS suffers low compliance level could be as a result of lack of adequate engagement of wider domestic societies in the workings of the system. By a way of comparison, my investigation (in chapter 4) on the workings and operations of the European and Inter-American systems reveal that the latter systems depends *inter alia* on engagement of domestic civil societies for improved effectiveness and compliance.

³ See generally the discussions set out in sections 4.4.1, 4.4.2 and 4.7 of chapter 4 above.

In considering how domestic mechanisms can improve state compliance under the AHRS, some important questions beg for attention: is it possible to improve the domestic legitimacy of the sources of pressure for compliance? If so, what needs to be done and what are the potential mechanisms for building such domestic legitimacy? Or put in another way, in what ways can CS in African states be considered as one of the domestic sources of pressure to raise domestic cost in pressuring state actors for compliance? In view of this, two options may be considered: first - to adopt the model of CS engagement under the EHRS and IAHRs as discussed in chapter 4 above, second - to develop and recommend potential domestic models of CS engagement which may be more suitable and practicable within African states. However, owing to the fact that different dynamics operate in the three regions, the first option may not be (at least for now) plausible in the African context.⁴

In view of the above, this chapter adopted a normative approach in examining the possibility of how an enhanced engagement of CS can improve compliance under the AHRS. In other words, the chapter argues for a shift from the seeming exclusive - reliance on external factors for compliance in the AHRS to a complementary domestic route where engagement of the African people and wider domestic communities would be considered as one of the potential mechanisms

⁴ Besides several areas of similarities and differences that could be inferred from my discussions in chapter 3 and 4 on the basic workings of the three human rights systems (AHRS, EHRS AND IAHRs), there are other factors that may defeat the possibility of a wholesale adoption of the European and Inter-American practices into the AHRS. Whereas the AHRS share most similar features with the IAHRs, there are different dynamics operational in the EHRS and IAHRs that may not be suitable in the African context. For instance, firstly, under the EHRS, the democracy is deeper because it has existed for a longer time and by implication, the states institutions in the EHRS/IAHRs are arguably stronger and more independent than their African counterparts - therefore, the chances or incentive for voluntary compliance is higher when a decision requires a domestic institution to act in a particular manner. Secondly, the level of CS awareness about the notion of human rights practices is higher in the EHRS/IAHRs – so that the will of the people is considered a strong variable that influences change of behavior of state government towards compliance. However, in the African context, the system defers to the will of external stakeholders as sources of pressure for compliance. Thirdly, most states under the EHRS/IAHRs are richer; therefore, compliance with decisions on payment of damages or claims for ‘just satisfaction’ may be easily complied with. This may not be quite easy for some African states who would have complied with similar decisions from the African human rights institutions but for the cost implications. Fourthly, the electoral systems work better in the European and American systems and as such, the fear of attendant electoral consequences from the electorates increases the chances of swift compliance. For other differences or dynamics, see section 4.4.1, 4.4.2, 4.6 and 4.7 of chapter 4 above; see also AO Obi ‘The African regional human rights system: Comparing the African human rights law system and the European and Inter-American Human rights systems within a normative and institutional framework’ unpublished Master’s thesis, Eastern Mediterranean University Cyprus, 2012 70-90; for other related literature, see M Mutua, ‘The African human rights system in a comparative perspective’ (1993) 3 *Review of the African Commission on Human and Peoples’ Rights* 7; M Mutua *The African human rights system: A critical evaluation* (2005) 5; B Okere ‘The protection of human rights in Africa and the African Charter on Human and Peoples’ Rights: A comparative analysis with the European and American systems’ (1984) 6 *Human Rights Quarterly* 156.

for improving compliance.⁵ To achieve this, my preference is then based on the second option above – that is, enhancing domestic legitimacy through engagement of CS as a domestic source of pressure for compliance. For this purpose, I identify two models of CS engagement: indirect (through elections) and direct CS actions (protest, strike, boycott, dialogue and consultation, call for referendum, among others). However, my discussion in the following sections is limited to indirect engagement through elections and direct engagement through protest. The reasons for this preference are discussed in section 5.3 below.

A major claim in this chapter as it relates to the hypothesis is that compliance can be improved if the sources of government authority and legitimacy are engaged to raise domestic cost to punish state actors for their unbecoming behavior towards issues of societal concerns - which may possibly include human rights and compliance with judicial decisions. However, this chapter argues that the success of these models is likely when human rights and non-compliance are factored as: (a) part of the key electoral issues voters consider in deciding the choices of candidates to be voted for, or (b) when human rights and compliance have become part of the reasons or grounds for citizens' direct civil actions. These and more other potential signals/obstacles are addressed in sections 5.2.4 below.

In developing this chapter, the following questions will guide my discussion: Are there issues voters consider in taking electoral decisions on the choices of candidates to be voted in or out? In the African context, are human rights and non-compliance part of the issues voters consider in making such electoral choices? If no, what can be done for this to become a reality during electioneering processes in Africa? Again, do governments consider key electoral issues raised by CS when framing states' policies? Would citizens' direct action lead to government change of behavior towards human rights?

After this introduction, I use the remaining parts of this chapter to discuss the above questions *vis-à-vis* the proposed domestic models (direct and indirect CS engagement) as well as finding the conditions on which the above hypothesis can apply as a complementary domestic mechanism in improving compliance under the AHRS. In addition to this, the concluding section summarizes the main arguments in the chapter thereby laying foundation for recommendations and final conclusion of this thesis in the chapter next.

⁵ This is the roadmap envisaged in section 1.2 of chapter 1 above.

5.2 Domestic engagement of CS: two potential models for enhancing domestic legitimacy

Drawing from the above discussions, the argument in this section is that member state compliance level can be increased when the source of government's legitimacy and authority is engaged as a source of pressure in raising domestic cost to check excesses of government on issues that matter to the wider domestic communities. These issues may include disrespect for rule of law or non-compliance with rights decisions.⁶ This argument is based on the common knowledge that in a functional or substantive democracy,⁷ the people and their vote constitute the source of government political survival, therefore, there are possibilities that any sort of domestic resistance or backlash against elected politicians may threaten their chances of re-election or political office survival.⁸ In the following sub-sections, I discuss two ways or models by which CS in African states can be engaged: (a) indirect engagement of CS through elections and (b) direct CS actions by means of protest.

5.2.1 Indirect engagement of CS through electoral processes

As a starting point, the following questions might be asked: How can CS in African states explore this model in enhancing accountability of elected office holders to the people? What are the likely factors or obstacles that may determine the success or otherwise of this model? As discussed below, the likely effect of this model as a complementary domestic mechanism for improving compliance will depend on certain factors. However, before a discussion on these factors, it will be necessary to first of all understand how this model can become a valuable tool in increasing government's responsiveness and accountability in a democratic system - that gives opportunity for the voting public to participate in periodic elections. To this end, the following analyses will give deeper insights about the model. Again, it is also important to note that in presenting a brief

⁶ See similar arguments in section 4.6 of chapter 4 of this thesis.

⁷ There are liberal and illiberal democracies. There are even other political systems that claim to be democracies but are not, there could also be other instances where a country allows the electorates to vote, yet the features of substantive democracy may be lacking, for example in a formal democracy – even though, all the required features of democracy exist, they are not utilized and managed democratically. However, in the context of the discussions in this chapter, the term 'functional or substantive democracy' is used to imply a political system that allows citizens in making choices of political leaders through participation in credible elections and electoral processes. For further understanding on the different forms of democracy, see LR Jacobs & RY Shapiro 'Studying substantive democracy' (1994) 27 *Political Science & Politics* 9-17.

⁸ See generally the works of B Bueno de Mesquita *et al The logic of political survival* (2003) 10, 45-46; X Dai 'Why comply? The domestic constituency mechanism' (2005) 59 *International Organization* 366.

background about this model, my analysis will be guided by the work of Bueno de Mesquita *et al.*⁹

The first and most important aspect of this model is the fact that political office holders must return to the people for a renewal of mandate, which then means that credible elections could be considered as one of the most important signals of government legitimization and of course, a means of raising cost against government for any untoward behavior. Using elections as leverage raiser in raising domestic costs is a major concern to politicians and party loyalists as the quest for political office survival and retention of power is one of the greatest hallmarks of politics. Therefore, in the game of political competition, while an incumbent politician struggles to remain in office until expiration of office tenure, challengers from other parties compete to oust the incumbent to enable the challenger with the highest results from the polls to emerge as winner. On assumption of office, the elected officer (perhaps a one-time challenger) will then struggle to remain in office within the constitutional term limit. The round of the game continues as long as democratic electoral practices exist.

The second aspect to note about this model is that the desire of an elected politician to remain in office will determine the state preference or choices of policies, to whom the policies are directed, quantum of government allocation to be shared and who gets what. In fact, the totality of government's action is tailored towards a satisfaction of a politician's quest to retain power either for personal interest, for an assumed interest of the public, for the interest of political allies or the interest of the political party.¹⁰

While the gimmicks for retention of political office are endless all through the electoral cycle, a political leader may be confronted with a wide range of challenges which may include, impeachment or threat of being voted out of power by the voting public and political contenders. To surpass the latter threat, elected politicians may adopt several strategies to avert any attendant electoral consequences. In the context of this discussion, one of such strategies is discussed below.

⁹ Bueno de Mesquita *et al* (n 8 above) 11; B Bueno De Mesquita *et al* 'Thinking inside the box: A closer look at democracy and human rights' (2005) 49 *International Studies Quarterly* 439-457.

¹⁰ For related literature, see A Downs *An economic theory of democracy* (1957); D Black *The theory of committees and elections* (1958); R Wintrobe *The political economy of dictatorship* (1998); Bueno de Mesquita *et al* *The logic of political survival* (n 8 above) 31.

As Bueno de Mesquita *et al* argue, elected leaders may embark on intensive revenue generation through tax and other sources. Within the framework of a state's fiscal budgetary regulations, the total revenues and allocations generated may be spent to provide either: public goods - that can satisfy the wants of the general public or private goods - which go specifically to members of their winning coalition.¹¹ Although, the quantum of private goods to coalition members reduces when the coalition size gets bigger - in which case, leaders may then focus on allocating public goods that benefit the general public.¹²

The essence of the above sharing formula is to help elected politicians to protect the interest of loyal voters and to avoid any risk of defection of loyal members to challengers' camp or party. Without sustaining the support of 'members of the winning coalition', the probability of securing the votes and support of loyalists reduces and this could ultimately attract high electoral cost at the polls. It is assumed that as long as the interests of members of the winning coalition are satisfied, their loyalty to the incumbent increases and the probability of raising electoral cost reduces. That is, irrespective of the preference level of other contending groups, once an incumbent is able to satisfy the interest of members of the winning coalition, all things being equal, chances of being re-elected increases.¹³

Other than providing certain incentives to sustain the support of members of an incumbent's winning coalition in the manner discussed above, it must be noted that 'the chances of defection (of member of winning coalition) reduce with the uncertainty that even if the challenger wins, the probability that the defector (from incumbent's winning coalition) will be included in the

¹¹ Bueno de Mesquita *et al* (n 8 above) 122 (they listed examples of public goods to include: the rule of law, transparency and accountability, security, education, communication, transportation, infrastructure and other social amenities. While private goods may include those 'booty or rent' allocated to loyalists of the incumbent government. The list also includes: discounted or favorable tax, tariff and trade policies as well as enjoyment of subsidies on matters of special concern). They also define the term 'winning coalition' to mean 'the group of voters who elect the leader', they constitute the political strength of the incumbent, if the latter loses the loyalty of members of her winning coalition, an opponent, can oust her from office. For further details on the effect of provisions of public and private goods to sustain the loyalty of supporters, see M Olson *The logic of collective action* (1965); T Bergstrom & RP Goodman 'Private demands for public goods' (1973) 63 *American Economic Review* 280-296; R Cornes and T Sandler *The theory of externalities, public goods and club goods* (2001); R Wintrobe 'The tinpot and the totalitarian: An economic analysis of dictatorship' (1990) 84 *American Political Science Review* 849-872; DA Lake 'Powerful pacifists: Democratic states and war' (1992) 86 *American Political Science Review* 24-37; F McGillivray 'Party discipline as a determinant of the endogenous formation of tariffs' (1997) 41 *American Journal of Political Science* 584-607; F McGillivray *Targeting the marginal* (2003).

¹² Bueno de Mesquita *et al* (n 8 above) 10,147.

¹³ Bueno de Mesquita *et al* (n 8 above).

challenger's winning coalition so as to receive private goods is unclear'.¹⁴ However, in a system with large 'selectorates and large coalitions',¹⁵ the affinity between political leaders and their supporters reduces and thus, chances of defection also increase. In all, the incentive to provide private goods to loyal voters in the incumbent's winning coalition reduces the potential electoral cost against the incumbent. This is one of the strategies an incumbent may adopt to avert electoral cost. However, the success of this approach might also be subject to other factors discussed below. Accordingly, Bueno de Mesquita *et al* argue that in ideal democratic settings, government possesses certain incentives to sway voters from raising electoral cost which threatens politicians' survival in political office. In relating the above analyses in the context of this chapter, public goods may therefore include a broader understanding of government's responsiveness to key electoral issues often raised by the public through any of the following possible sources: town hall meetings, panel discussions, media channels, opinion polls and political campaigns. While private goods concern specific benefits that government provide to satisfy the political interest of members of her winning coalition or political party. Therefore, the probability that this model will be successful in improving state compliance will depend on whether the questions of human rights and non-compliance with judicial decisions are considered either as parts of the key electoral issues voters consider in deciding their choice of candidate or part of private goods politicians must provide for members of their winning coalition in order to sustain the quest for political office survival.¹⁶ Again, it may be asked if there is a likelihood that a person's right (who belongs to an influential political party) will be violated to warrant a judgment, the implementation of which will constitute private goods? In other words, is this feasible – at least in the African context? Drawing from the above discussions, the question of how issues can be framed for electoral purposes so as

¹⁴ Bueno de Mesquita *et al* (n 8 above) 11.

¹⁵ For general meaning of the terms 'Selectorate and large coalition', see Bueno de Mesquita *et al* (n 7 above) 13, 57, 64 (they define 'selectorate' as 'the set of people whose endowments include those qualities or characteristics institutionally required to choose the government's leadership and necessary for gaining access to private benefits doled out by the government's leadership' while the winning coalition constitute the group of voters with the political wherewithal and resources needed for political office survival of the incumbent. In a large district magnitude, the tendency for the winning coalition to grow larger is high, thus, it becomes a large coalition. Note, members of the winning coalition are often times, chosen from the pool of selectorate); see also S Shirk *The political logic of economic reform in China* (1993).

¹⁶ Bueno de Mesquita *et al* (n 8 above) 44-45 (stating that public goods include the 'rule of law, transparency and accountability, even-handed police services, general access to education, a level commercial playing field, anti-pollution legislation, parkland preservation, communication and transportation infrastructure' while private goods may also include the booty or rents, favorable tax policies, subsidies to trade and tariff' and the like).

to generate incentive for politicians to provide private goods in relevant context is discussed in section 5.2.2 below.

All these analyses could inspire the argument that because of politicians' quest to remain in office and also to retain power for their choice successor, mobilization of electoral leverages may become effective to stimulate government responsiveness and accountability to issues of societal concerns which may include human rights and compliance with rights decisions in Africa. Therefore, to enhance political office holders' accountability during the pre and post electoral cycles, two possible assumptions may be considered in this chapter. The first assumption is that CS takes advantage of certain electioneering events to frame issues which are not usually in the minds of people to become important issues for election purposes. And one of the potential consequences is that candidates and political parties would be persuaded to address, make promises and policy statements regarding such issues in the build-up to elections. The second assumption is that subject to certain factors discussed below, there are possibilities that CS – opposition political party members, political actors, domestic institutions and stakeholders - may amplify and make these issues to become issues of public concerns, which the electorates may (or not) consider in making electoral choices. I attempt to discuss the feasibility or otherwise of these assumptions in sub-sections 5.2.2 and 5.2.3 below.

However, in the African context, it may be necessary to ask: Are there often issues of concern framed by CS during the pre – election seasons? Do these issues become subject of interest to politicians? Are human rights and non-compliance part of the issues often framed by CS? If no, what can be done for human rights and issues of non- compliance to become part of other societal issues that politicians are persuaded to respond to? Is it not possible to employ the same mechanism or processes to frame human rights and compliance as part of the matters of importance that politicians must consider in providing private goods? If so, what needs to be done? Drawing on the above assumptions, these questions are addressed in the next sub-sections.

5.2.2 The role of CS in framing societal issues to enhance political accountability: Elections and electioneering events as potential mediums

Building on Bueno de Mesquita's conceptualization on the link between elections and the quest for political office survival, this sub-section discusses how CS in African states explore different electoral processes to generate incentives for candidates (whether incumbent or not) and political parties to pay attention to issues which would have remained under the political radar. The

argument is that if there exist a practice where CS takes advantage of certain political events - panel discussions, political debates, town hall and consultation meetings, opinion polls and political campaigns - to frame issues and make them matters of political considerations, then, the expectation is that human rights and questions of non-compliance can also be brought to the front burner during these pre-election events. Therefore, in understanding how elections can be explored as means by which societal issues are highlighted as matters of important political considerations, the two assumptions mentioned in sub-section 5.2.1 above are discussed in more detail.

First and most importantly, is to understand the link between elections and government accountability to the people. Second, is to explain how electorates in African democratic states leverage on electioneering processes to raise issues of societal needs which may (or not) form the basis for taking electoral decisions. The discussions below will serve as relevant building blocks in explaining the possibility or otherwise of how human rights and compliance can be considered as important as other issues of societal concerns.

Drawing from the above, elections can arguably be considered as one of the essential properties of democracy, which serves as one of the independent variables for determining the emergence of political office holders.¹⁷ One of the features of democratic electoral processes is the opportunity for citizens to express their will on the choices of political leaders and the consequential benefits of politicians' accountability to the people during and after elections. As clearly explained by Richards:

Elections allow citizens to affect government respect for human rights by providing a framework in which citizens are treated as political equals and whereby they can elect to office those representatives or governments that they feel will represent their preferred policy positions-either improving human rights conditions or maintaining good conditions-and whereby they can also remove from office those representatives or governments that they feel have been abusive. The threat of being removed from power by voters provides a motive for accountable behavior by governments and their officials.¹⁸

¹⁷ C Wlezien 'Pattern of representation: Dynamics of public preferences and policy' (2004) 66 *The Journal of Politics* 2 (arguing that one way in which democratic representation occurs is through elections, where the will of the people for their choice of political representative is being expressed. As a feedback, the people expect that their wants will be commensurably delivered through policy making process. Also, in an ideal democratic setting, elected politicians are expected to place high priority to voters' preference in fear of probable electoral cost for doing otherwise.

¹⁸ DL Richards 'Perilous proxy: Human rights and the presence of national elections' (1999) 80 *Social Science Quarterly* 651; In another sense, he finds in his work in 2007 that national legislative elections has more impact on

The general assumption is that elections foster citizens' political participation which present the opportunity for the electorates to exchange their votes for anticipated government response towards their welfare.¹⁹ On this note, it can be argued that the need for expression of citizens' political input denotes legitimacy of the political system and evidence that the people will matter in the determination of government's authority and legitimacy. To emphasize this more clearly, Dalton notes:

Democracy requires citizen control over the political process. . . . Citizen control over political elites is routinized through periodic, competitive elections to select these leaders. Elections are intended to ensure that elites remain responsive and accountable to the public.²⁰

One notable advantage of political participation through election is the delineation of the limit of government's actions and predictions over policy making decisions. This unique feature distinguishes elections from any other forms of participation and representation. This is because, the extent of political participation is clearly defined within a particular legal framework as part of the rights conferred on citizens which cannot be easily busted by government individuals. In this context, Ginsberg and Stone note as follows:

human rights protection in the year following elections than presidential elections, DL Richards & RD Gelleny 'Good things to those who wait? National elections and government respect for human rights' (2007) 44 *Journal of Peace Research* 506; C Davenport 'The dynamics of state repression: A cross-national time series examination of domestic politics processes' an unpublished PhD dissertation, University of New York, Binghamton 15 (arguing that '...governments with a restrictive political structure, one in which involvement with and over policy decisions is severely limited, will take a very repressive stance with regard to its population').

¹⁹ A body of scholarship confirms that elected politicians are more disposed to the preferences of active median voters because of their relevance on elections day, see for instance, C Wlezien & SN Soroka 'The relationship between public opinion and policy' in RJ Dalton & HD Klingemann (eds) *Oxford handbook of political behavior* (2009) 18 (arguing that voters are the people who matter on election day, they are the ones that determines the political job security of an elected political leader especially the type seeking for re-election); JD Griffin & B Newman 'Are voters better represented?' (2005) 67 *Journal of Politics* 1206-1227 (arguing that politicians express more preferential treatment to voters' preference than non-voters); LM Bartels 'Economic inequality and political representation' paper presented at the annual meeting of the American political science association, Boston 2002 but revised in August 2005 available at <https://www.russellsage.org/sites/all/files/u4/Bartels%20EIPR.pdf> (accessed 26 August 2019); M Gilens 'Inequality and democratic responsiveness' (2005) 69 *Public Opinion Quarterly* 778-796 (suggesting *inter alia* that politicians in the US pay more attention to opinion preferences of high-income voters than others). However, Wlezien & Soroka suggest that without an environment with certain level of practical political competition and mass media engagement, politicians will be attuned to pay less attention to public opinion. Without these elements, voters may find it difficult to gather information about policies decisions and its effects and therefore, holding politicians accountable for their misdeeds may be unlikely. For details on this argument, see Wlezien & Soroka (n 14 above).

²⁰ RJ Dalton *Citizens politics in western democracy* (1988) 205; some scholars argue that the most important features of elections is that it helps to improve the legitimacy of the political system at home and abroad. For this, see N Palmer *Elections and political development: The South Asian experience* (1975); J Linz *The breakdown of democratic regimes: Crisis breakdown, and re-equilibrium* (1978); GO'Donell *et al Transitions from authoritarian rule: Prospects for democracy* (1986); L Diamond *et al Democracy in developing countries* (1988); D Kowalewski 'Ballots and bullets: Elections riot in the periphery, 1874-1985' (1993) 29 *Journal of Development Studies* 518-540.

Elections help to equalize citizens' capacities to influence rulers' conduct.....The capacity to influence officials' actions will therefore vary-with wealth [or] social position.....Elections, by introducing a formal, public means of influencing official conduct, can compensate for private inequalities in political resources.²¹

On his part, Lijphart notes that a functional democracy must exhibit four essential features: representativeness, accountability, equality and participation.²² What other medium brings all these to bear if not through elections? In addition to all these, Dahl opines that whatever general good that befits the society, (in the context of this thesis, human rights and compliance with rights decisions) is to give an equilibrium platform for citizens to 'express a choice among the alternatives [say, by casting votes]'.²³

Drawing from these analyses, one of the major arguments in this chapter is that accountability of political leaders may be influenced by the extent to which issues of societal concerns are made matters of public debates and regular political conversations during the pre-election events. Therefore, having given the above background about how elections may influence accountability, it is now important to understand how CS (mostly, the electorates) frame key societal issues of concern and make those issues get identified by politicians as matters of importance during elections. In explaining this, the 2015 and 2019 Nigerian presidential elections will serve as useful examples for this discourse.

Nigeria practices a presidential system of government in which elections to executive and legislative offices take place every four years. In 2015, the presidential elections witnessed a tight contest between two major candidates: the then incumbent president - Goodluck Ebele Jonathan of the Peoples' Democratic Party (PDP) and General Muhammadu Buhari (now the incumbent president) who contested under the platform of the All Progressive Congress (APC).²⁴ As the poll results reveal, the then incumbent president Goodluck Jonathan was defeated by opposition

²¹ B Ginsberg & A Stone *Do elections matter?* (1996) 5.

²² A Lijphart 'Constitutional choices for new democracies' in L Diamond & MF Plattner (eds) *The global resurgence of democracy* (1993) 146-158; S Ashworth 'Electoral accountability: recent theoretical and empirical work' (2012) 15 *Annual Review of Political Science* 184 (arguing *inter alia* that 'competitive elections create a relationship of formal accountability between policy makers and citizens-electoral rewards and punishments can be handed out on election-day. Ideally, this formal accountability leads to better governance').

²³ R Dahl *Democracy and its critics* (1989) 31.

²⁴ O Owen & Z Usman 'Why Goodluck Jonathan lost the Nigerian presidential election of 2015' (2015) 114 *African Affairs* 455 -471.

candidate Buhari by a whooping margin of more than 2.5 million votes.²⁵ Prior to 2015 elections, the PDP had consistently ruled Nigeria for a period of 16 years (1999 – 2015). The question is how the 2015 elections made such history: first, to buck the consistent incumbency trend and, second – to end the one party dominating factor. The answer could be found around certain unaddressed issues of public concern that the electorates have raised prior and during the 2015 elections. These include failure to respect agreements for power rotation or zoning, economy/subsidy, corruption and security.²⁶ I briefly explain how these issues were framed and later became matters of public and political deliberations.

First, within the 16 years of the PDP rule upon Nigeria's return to civilian rule, there was a mutual understanding of an internal PDP arrangement for power rotation amongst the different major regions in the country – the North, South West and South – South which includes the Eastern regions.²⁷ The system of power rotation is not only designed to ensure equitable share of power among the regions but to also avoid potential socio-political, tribal or religious crisis/conflicts in the country. However, upon the untimely death of President Umaru Musa Yar'adua (president from 2007-2010) representing the northern region, the then Vice -President Goodluck (from the Southern region) did not only step in to complete the term of office in accordance with the Nigerian constitution but later contested and won elections as president from 2011-2015. From this time, the PDP could not restore the rotation formula to status quo as President Jonathan further indicated interest for a second term re-election bid. The PDP's choice of Jonathan as a candidate for the 2015 elections became a major concern to a section of the voting public most especially the electorates from the North. Therefore, majority of the voters especially from the northern part of the country consider this issue as one of the major factors in deciding which presidential candidate to be vote for. And this concern (refusal to stick to the zoning arrangement) was framed by political actors

²⁵ For general details, see AF Ayinde & AO Idowu 'Nigeria's 2015 Elections: Permanent voter's cards, smart card readers and security challenges' (2016) 15 *Journal of African Elections* 50 - 66; O Nkwachukwu 'The 2015 Nigerian general elections' (2015) 50 *African Spectrum* 73-85. Also available via, <https://foreignpolicy.com/2015/03/31/fourth-time-the-charm-buhari-ousts-goodluck-jonathan-nigerian-election/> (accessed 30 July 2018).

²⁶ Owen & Usman (n 24 above) 456.

²⁷ In line with the PDP tradition of power rotation, President Olusegun Obasanjo (from the Western region) ruled from 1999 -2007 and was succeeded by late Yar'Adua (from Northern region). Upon the death of Yar'Adua, Goodluck (from the Southern region) took over and not only completed Yar'Adua's tenure but was voted as President from 2011-2015.

as one of the key election issues during the campaigns and other political events in the build-up to the 2015 elections.²⁸

Second, 'governance lapses' was another issue of concern that heralded the 2015 elections.²⁹ This covers a wide range of issues relating to the economy, corruption and security. For instance, in the 16 - year reign of the PDP led - government (which included the 6 years of Jonathan's leadership), there were persistent concerns about the government's lack of transparency in some areas of the Nigerian economy.³⁰ For instance, in the oil sector, there were allegations that a subsidy policy which was designed to cushion the effect of international market prices of imported refining oil products for the benefit of local consumers was disproportionately diverted to the benefit of a 'powerful cartel' who were suspected to be allies of the PDP led regime.³¹ Consequently, as some political analysts note, the failure of the Jonathan's government to address this sensitive economy issue in the oil sector as well as other issues of public concerns further served to sway the minds of the electorates against his administration.³²

Another notable example of the government's lack of transparency was when the Jonathan's government ordered the removal of the former Governor of the Central Bank of Nigeria (CBN) - Governor Sanusi Lamido Sanusi as the latter raised several concerns about series of financial misappropriations within the oil sector -which made the general public to be aware that the Ministry of petroleum resources and state oil corporation had failed to remit US\$ 20 billion crude oil earnings to government coffers.³³

Beyond the issues of economy and corruption, security concerns also took a center stage in the different public debates, town hall meetings and social media campaigns which preceded the 2015 elections.³⁴ For instance, the government inability to effectively manage security challenges

²⁸ C Nyuykonge & JS Omotola 'Nigeria's 2015 general elections: Challenges and opportunities' available at <https://www.accord.org.za/publication/nigeria-2015-general-elections/> (accessed 21 August 2019).

²⁹ See report titled '5 key issues in Nigeria's elections' (2015) available at <https://www.news24.com/Africa/News/5-key-issues-in-Nigerias-elections-20150324> (accessed on 9 July 2019).

³⁰ See World Bank report on Nigeria economy (African Region, World Bank – Washington DC July 2014); Nigerian national bureau of statistics '2011 Annual socio-economic report' (Nigerian national bureau of statistics, Abuja 2011).

³¹ Owen & Usman (n 24 above) 456 -471; See SL Sanusi 'Memorandum submitted to the Senate Committee on finance on the non-remittance of oil revenue to the federation account' (CBN report dated 3 February 2014).

³² Owen & Usman (n 24 above) 'Briefing: Why Goodluck Jonathan lost the Nigerian presidential elections of 2015' (2015) 114 *African Affairs* 455-471; see also D Zane 'Nigeria's Goodluck Jonathan: 5 reasons why he lost' (20015) available at <https://www.bbc.com/news/world-africa-32136295> (accessed 21 August 2019).

³³ Owen & Usman (n 24 above).

³⁴ See the analysis by M Amaza 'Nigeria elections 2015: A different kinds of politics' (2015) available at <https://africanarguments.org/2015/03/20/nigeria-elections-2015-a-different-kind-of-politics-by-mark-amaza/>

especially the Boko Haram insurgency in the North-East, and the incidence of abduction of the 279 Chibok school girls in 2014 by the Boko Haram sect further eroded the trust and confidence of the people.³⁵

From the above analyses, it may be assumed that these issues may not only have influenced the outcome of the 2015 elections, but they also form the basis to argue that issues which are not ordinarily supposed to be matters of contention can be framed by voters in a manner which may (or may not) determine political survival of an incumbent, for instance – the Nigerian example discussed above. This then places an obligation on the government or subsequent regime to pay attention to similarly situated issues of electoral concerns whenever they arise.

In the recent 2019 Nigerian elections, the issues discussed above (and many others) also resurfaced as matters of societal concern framed in the political debates, town hall meetings, opinion polls, media outlets and of course, the campaigns leading to the elections. One of the notable events that presented the opportunity for CS to ask questions and frame certain key electoral issues was the town hall meeting titled: ‘The candidates’. At the different sections of the debates anchored by Kadaria Ahmed (one of the moderators of ‘The candidates’), several societal issues were framed as subject of electoral discourse for which the vice and presidential candidates of major political parties were not only confronted with but they were swayed to address those issues.

For instance, the PDP presidential candidate – Alhaji Atiku Abubakar (in response to issue of whether (or not) amnesty should be granted to corrupt leaders) promised a roadmap of how corruption would be nipped in the bud if the electorate would give him the mandate to rule. According to Abubakar:

I will consider granting amnesty to corrupt persons willing to surrender their loots. I will consider drawing a line during which corrupt former public officials would be allowed to return their loot without prosecution. After then, strong policies would be put in place to prevent and fight corruption. It will be more prudent to allow looters return their assets to Nigeria tax free and invest

(accessed 21 August 2019). It needs to be pointed out that the social media campaign on ‘bring back our girls’ also brought the abduction of 276 Chibok school girls to the front burner. Details available at <https://www.theguardian.com/world/2015/apr/14/nigeria-bringbackourgirls-campaign-one-year-on> (accessed 21 August 2019).

³⁵ Owen & Usman (n 24 above) 456 -471.

them in order to boost the country's economy. Whether it is moral rectitude that you want to achieve or you want to see a fast development of your country?³⁶

Other issues ranging from economy, security, health, education, removal of subsidy on petroleum products, job creation and poverty, among others were equally framed by CS and consequently addressed by the presidential candidates (mostly the PDP candidate) and their running mates.³⁷

These issues constitute among other societal needs that different segments of the domestic society have complained about prior to the 2019 general elections - though in different context. For instance – the poor and the downtrodden raised concern about poverty and hunger ³⁸ The elites and the middle class complained about the rise in exchange rate, refusal of government to continue fuel subsidy policy, security challenges, poor electricity incessant power outage, uneven spread of political appointment and selective prosecution under the guise of fighting corruption.³⁹ The youths have expressed concern about unemployment and inflation.⁴⁰ Religious institutions

³⁶ M Shehu 'Nigeria: A tales of two debates' available at <https://allafrica.com/stories/201902040610.html> (accessed 21 August 2019).

³⁷ See M Caruso – Cabrera 'Nigeria's economy prospects: A conversation with Vice President Yemi Osinbajo' (2019) available at <https://www.cfr.org/event/nigerias-economic-prospects-conversation-vice-president-yemi-osinbajo> (accessed 21 August 2019); A Johnson 'Osinbajo, Peter Obi & others tackle economic problem in vice presidential debate' available at <https://www.pulse.ng/news/politics/osinbajo-peter-obi-and-others-tackle-economic-problem-in-vice-presidential-debate/k4qmtgn> (accessed 21 August 2019).

³⁸ M Omilusi 'Electoral behavior and politics of stomach infrastructure in Ekiti State (Nigeria)' (2019) available at <https://ideas.repec.org/h/ito/pchaps/160488.html> (accessed on 8 July 2019) (citing the Ekiti 2014 governorship elections as an example of how most of the voters consider hunger and poverty as parameter for deciding their choice of candidate. As Omilusi argues, 'Ekiti result is owed largely to people's preference for 'stomach infrastructure' to long-term overall development of the state, then there is danger in the land and all right thinking people must recognize this and get armed to confront the virus before it assumes epidemic proportion').

³⁹ See generally, RM Bone 'Three key issues dominating Nigeria's elections' (2019) available at <https://www.atlanticcouncil.org/blogs/africasource/three-key-issues-dominating-nigeria-s-election> (accessed 9 July 2019); L Unah 'The key issues shaping Nigeria's presidential elections' (2019) (stating that the issues that matter most in the Nigerian forthcoming elections range from endemic corruption to increasing unemployment, security, economy and electricity) available at <https://www.trtworld.com/magazine/the-key-issues-shaping-nigeria-s-presidential-elections-23995> (accessed 9 July 2019); H Idayat 'Nigeria 2019: The issues and electoral maths that will decide the race' (2018) (listing corruption, economy, security as parts of the concern that will sway voters' votes) available at <https://africanarguments.org/2018/11/01/nigeria-2019-elections-issues-electoral-maths/> (accessed on 9 July 2019); A Jideofor 'what to expect from the 2019 presidential elections in Nigeria' (2019) available at <https://www.brookings.edu/blog/africa-in-focus/2019/01/22/what-to-expect-from-the-2019-presidential-election-in-nigeria/> (identifying the following issues as matters of importance that may shape voters electoral decisions: security, restructuring, spread of appointment and power rotation) (accessed on 9 July 2019); C Ryan 'Security, violence could impact outcome of Nigeria's elections' (2019) available at <https://theglobalobservatory.org/2019/02/security-violence-impact-outcome-nigeria-election/> (accessed 9 July 2019); J NDA-Isaiah 'Nigeria: issues that will define the 2019 presidential race' (2018) available at <https://allafrica.com/stories/201801160043.html> (accessed 9 July 2019).

⁴⁰ See O Stephen & C Allengheny 'Nigeria's president Buhari failed to fix Nigeria's economy, but still has the edge over this election' (2019) (stating that the Nigerian economy is not beneficial to most Nigerians as unemployment amongst the Nigerian youth has been widespread) available at <https://www.news24.com/Africa/News/buhari-failed-to-fix-nigerias-economy-but-he-may-still-have-the-edge-20190128> (accessed on 8 July 2019); See Aljazeera report '

(especially the Christians from the South - South and South West regions) were and are still worried about the fear that the Nigerian state will be Islamized,⁴¹ owing to the perception that the incumbent president is an assumed religious fanatic.⁴²

The legal community raised concerns over government infraction to the rule of law and preference for state security over the rule of law. To this extent, the human rights records of president Buhari's first term in government was also an issue in the recent 2019 elections.⁴³ The labour bodies which include the professional associations, academic unions and civil servants were all concerned about increase in minimum wages and other welfare benefits.⁴⁴

While these issues are considered by some section of the society as factors that may potentially determine the choice of voting out the incumbent, other groups and individuals leverage on these issues as the basis for endorsement of the incumbent president as a preferred presidential candidate. This underscores the reality that this model (indirect engagement of CS through electoral processes) is not to be understood to argue that the issues often raised by the public must always result in voting out the incumbent who is seeking re-election - it goes both ways.

Young and unemployed in Nigeria' (2019) available at <https://www.aljazeera.com/programmes/countingthecost/2019/02/young-unemployed-nigeria-190216073358024.html> (accessed on 8 July 2019).

⁴¹ T Ayomide 'Who is the Nigerian church supporting in the 2019 presidential elections' (2018) available at <https://www.pulse.ng/news/politics/who-is-the-nigerian-church-supporting-in-the-2019-presidential-election/rzxdqj> (accessed on 9 July 2019); CO Ele 'Islamization of Nigeria: implication for sustainable peace' (2018) 2 *International Journal of social science and English Literature* 13-19; A Adelokun 'Fighting Islamisation of Nigeria' (2017) available at <https://punchng.com/fighting-islamisation-of-nigeria/> (accessed 9 July 2019).

⁴² See 5 key issues in Nigeria's elections (n 29 above).

⁴³ Lawyers expressed their concern through their professional body -The Nigerian Bar Association (NBA) over the government's brazen disobedience to due process and disregard for rule of law and selective compliance with human rights decisions. In one occasion, the NBA reacted to government's continued disregard to court's orders and judgments by threatening that it would 'mobilize its members across the federation to get their permanent voters cards (PVCs) ready, and not only participate in the 2019 general elections, but also ensure that the will of the electorate prevailed', for details on this, see N Clifford, N Ikechukwu & Y Dirisu 'NBA tackles Buhari over rule of law abuse' (2019) available at <https://www.vanguardngr.com/2019/01/nba-tackles-buhari-over-rule-of-law-abuse/> (accessed 8 July 2019); N Ikechukwu 'NBA attacks Buhari, insist rule of law central to democracy' (2018) available at <https://www.vanguardngr.com/2018/08/nba-attacks-buhari-insists-rule-of-law-central-to-democracy/> (accessed on 8 July, 2019); another issue that was of utmost concern to some members of the NBA was the suspension, trial and removal of former Justice of the Nigerian Supreme Court – Justice Walter Onnoghen, for details, see as reported by E Okakwu 'Stop Onnoghen's trial now, follow due process, NBA tells Buhari' (2019) available at <https://www.premiumtimesng.com/news/headlines/307011-stop-onnoghens-trial-now-follow-due-process-nba-tells-buhari.html> (accessed 8 July 2019).

⁴⁴ H Camilla 'The struggle for a minimum wage in Nigeria' (2018) available at <https://africasacountry.com/2018/12/the-struggle-for-a-minimum-wage-in-nigeria> (accessed 9 July 2019); see as reported in the Punch newspaper 'Don't disrupt 2019 elections over minimum wage issue, Lai Mohammed warns Labour' dated 21 December 2018 available at <https://punchng.com/dont-disrupt-2019-elections-over-minimum-wage-issue-lai-mohammed-warns-labour/> (accessed 9 July 2019).

However, in the African context, the likely effect is that if these issues of societal concerns become subject of discourse during elections, politicians will have to think carefully before they decide on the choices of government policies, bearing in mind that there could be political costs for paying less attention to public yearnings especially on societal issues raised during and after elections.

Based on this, it will then be immaterial whether the elections were freely conducted or rigged, and whether vote buying or under age voting were prevalent in the electoral processes or whether (or not) the results of elections were determined before-hand. This is because while the fairness (or otherwise) of the electoral processes and the entire conduct of the elections may be considered in assessing the credibility of the elections, the expectation for accountability of government to issues raised by the electorates in the build-up of the elections remains. So that the incumbent's failure to be accountable to issues of basic societal needs raised during past elections reduces the prospect of future re-election.

As could be gleaned from the Nigerian scenario, there is a possibility that voters in African states take into account the lack of government accountability towards certain key electoral issues in making electoral choices in future elections. At this juncture, it must be pointed out that these issues discussed above (from the Nigerian elections) are reflection of similar issues often raised by voters in the pre-election activities in most African states⁴⁵ and even beyond – for instance, the

⁴⁵ See similar issues raised during elections in the following African countries: (1) South – Africa – issues concerning unemployment rate of young people, state of education systems, calls for land reform, lack of trust in the integrity of national leaders', rising crimes, corruption, lack of accountability, poor infrastructure and service delivery and other socio-economy were highlighted as issues of concerns. For details, see L Tracey-Temba 'Do you want my vote? Understanding the factors that influence voting among young South – Africans' (2016) Institute for security studies (ISS) available at <https://issafrica.s3.amazonaws.com/site/uploads/Mono193-1.pdf> (accessed 10 July 2019); see Al Jazeera news by C Clark 'South Africa elections: What are the main issues' dated 7 May 2019 available at <https://www.aljazeera.com/news/2019/05/south-africa-elections-main-issues-190507134749751.html> (accessed on 10 July 2019) (2) In Uganda, Cheeseman *et al* identify the following issues as matters of importance raised during elections: Job creation, improves services, reduction of debts, trust, militias attacks, need to manage federalist demands, for this, see N Cheeseman, G Lynch and J Willis 'Uganda 2016: Six key issues for the next government' (2016) available at <https://www.newsweek.com/uganda-2016-six-key-issues-next-government-408279> (accessed on 10 July 2019); (3) Kenya – key electoral issues includes: Land disputes, state of health care facilities, hate and defamatory news, vote rigging and post elections violence, regionalism and security, for details, see M Carotenuto 'Kenya elections: Key issues past and present' (2017) available at https://www.huffpost.com/entry/kenya-elections-key-issues-past-and-present_b_5988ba67e4b030f0e267c694 (accessed on 10 July 2019); H Elszasa 'Key issues to watch in the Kenyan Election' (2017) available at <https://www.diplomaticourier.com/posts/key-issues-watch-kenyan-election> (accessed on 10 July 2019); Z Flood 'Land holds key to Kenyan rivalries' (2013) available at <https://www.aljazeera.com/indepth/features/2013/03/201334132716223258.html> (accessed on 10 July 2019); for issues raised in other countries, see generally J Siegle 'an overview of Africa's 2019 elections' (2019) African center for strategic studies impact through insight 1999-2019 available at <https://africacenter.org/spotlight/an-overview-of-africas-2019-elections/> (accessed on 10 July 2019).

United States (US).⁴⁶ It would therefore be unnecessary to have a recounted tale of the same process in all the African countries where elections are periodically held.

In view of the above analyses, it is then possible to argue that voters can leverage on key issues of societal needs to decide the choice of candidates during elections. And they may further decide to raise cost against government for any disobedience or refusal to respond to issues of public interest. This argument aligns with the findings in a recent literature, for instance, in discussing the impact of vertical accountability (which aligns with the indirect CS engagement model), Ham and Chappell note:

Vertical accountability refers to the accountability of public officials generated through elections, via which citizens hold public officials to account. Popular decisionmaking in representative democracies generates a ‘vertical’ division of power between citizens and the representatives that they select at elections to make public decisions on their behalf. This creates an actor–delegate relationship, as citizens delegate their power to decide on public matters to their representatives, and can subsequently hold their representatives to account for their actions at the next elections..... Vertical accountability is thus generated by the fact that citizens can replace the government at elections if they are not satisfied with its performance. The expectation is that the presence of electoral sanctions will generate incentives for governments to be responsive to what citizens want⁴⁷

However, in the African context, the lessons to be drawn from the above examples are: (1) CS utilized avenues of electoral leverages to highlight issues of societal concern, specifically to enhance elected leaders’ accountability. This also create an avenue for assessment of political

⁴⁶ As for the US last elections, as the Pew research center’s report indicates, ‘the economy and terrorism are the top two issues for voters ... Overall 84% of registered voters say that the issue of the economy will be very important to them in making their decision about who to vote for in the 2016 presidential election; slightly fewer (80%) say the issue of terrorism will be very important to their vote. [Similarly], in 2008, far more said the economy would be very important to their vote (87%) than the issue of terrorism (68%)’. For details, see analyses from Pew research center ‘2016 campaign: Strong interest, widespread dissatisfaction’ (2016) available at <https://www.people-press.org/2016/07/07/2016-campaign-strong-interest-widespread-dissatisfaction/> (accessed on 10 July 2019); in addition, arising from Gallup’s midterm election benchmark poll dated 15-28 October 2018, Newport identifies the following key issues: Healthcare, economy and immigration ‘top a list of issues that voters consider important to their vote for congress this year. Other issues that at least seven in 10 voters rate as ‘extremely’ or ‘very’ important include the treatment of women in U.S. society, gun policy and taxes...’ for this, see F Newport ‘Top issues for voters: Healthcare, economy, immigration’ (2018) <https://news.gallup.com/poll/244367/top-issues-voters-healthcare-economy-immigration.aspx> (accessed on 10 July 2019).

⁴⁷ C van Ham & L Chappell ‘Democracy and human rights: a tripartite conceptual framework’ (2017) 23 *Australian Journal of Human Rights* 148-149; for other related literature, see PC Schmitter ‘The ambiguous virtues of accountability’ (2004) 15 *Journal of Democracy* 4, 46–59; AC Przeworski *et al Democracy, accountability, and representation* (1999); G O’Donnell 1998. ‘Horizontal accountability in new democracies’ (1998) 9 *Journal of Democracy* 111–26.

parties and politicians past credentials with respect to the extent of accountability in the past tenure; (2) CS takes advantage of the electoral events not only to attract the attention of politicians to the need of their constituents but to get politicians commitment to these needs. Again, this sends a strong signal that any acts of disobedience or government's recalcitrance to these needs increases the likelihood that those elected officers or their political parties could be visited with electoral costs in future elections.

Thus, the electoral processes present a viable platform for these issues (matter of public importance) to be given political consideration. For instance, as it may be asked: arising from the Nigerian scenario discussed above, would the human rights records of the government be a subject matter that concerns the general public other than the direct beneficiaries of the judgment? Would among other things, security, subsidy removal, corruption, economy and poverty be given such a public and political attention through any other mediums other than elections? As a result, it is argued that elections provide the opportunity for political stakeholders (CS) to increase awareness which attract the public and political community to matters which would not ordinarily or easily be brought to limelight.

Again, one important question that nags is whether and under what conditions, African electorates would make the human rights compliance records of a government as one of the factors they consider in making electoral choices? This can be framed differently, for instance, how can the voting public in African states consider human rights and compliance with international rights decisions in relative equilibrium with other societal needs, say for example - alleviation of poverty, literacy education, security and welfare and other social amenities, etcetera? Can the same process or mechanism used in bringing other issues of societal needs to the table of politicians be explored to make human rights and compliance matters of political consideration during and after elections? While it is conceded that human rights are not issues electorates in African states often take into consideration in making electoral choices, this thesis however argues that the same parameters and mediums discussed above (from the Nigerian example) can equally be explored for issues of human rights and compliance to be framed as part of other societal issues raised during pre-election events. So that human rights and compliance can get the same attention from politicians as other issues of societal needs during elections. That way, CS indirect engagement during elections can become a useful tool in raising electoral cost which may (or not) threaten political survival of

elected politicians in Africa. This position to some extent finds credence in the arguments presented by Ham and Chappell as follows:

[v]ertical accountability can be effective in promoting human rights, as it provides electoral checks on the incumbent government: if it does not respect human rights, it can be replaced in the next elections, providing an incentive for incumbents to respect human rights.⁴⁸

However compelling the above arguments may sound, the justification of the indirect engagement model will depend on the extent of voters' awareness (as discussed below) and the value placed on the particular decision for which voters are expected to raise cost for compliance (see section 4.5 of chapter 4 for broader discussion on similar potential obstacles). To this extent, voters civic education becomes necessary, so that NGOs/CSOs and other stakeholders aiming to advance compliance under the AHRS can then factor this approach into their advocacy/orientation programs and act as one of the conduit pipes or channels in providing the electorates and domestic institutions with all necessary information about the AHRS, for example - the need to improve state compliance with rights decisions as well as the importance of framing human rights and compliance as key issues of political discourse together with other issues of societal concern. I discuss this in a more detail in the next sub-section and in chapter 6 below.

5.2.3 Framing human rights and compliance as key electoral issues: The need to increase awareness of the voting public (information endowment)

As discussed above, engaging the voting public to consider societal issues in taking electoral decision about the choice of candidate is different from framing human rights and compliance as an important issue for political consideration. However, the two assumptions form the crux of my arguments in this chapter. For emphasis, it needs to be stated that one of the main objectives of this chapter is to investigate whether it is possible for CS to explore pre-election circumstances to frame human rights and issues of government compliance with international decisions as among other important electoral issues in order to gain political consideration. In this context, drawing from the literature, the chapter argues that raising the awareness of voters (especially those from the majority voting districts) to see human rights and compliance as important as other electoral or societal issues increases the possibility that human rights and compliance could be framed alongside other societal issues and thus, would get the same political attention as other issues of

⁴⁸ van & Chappell (n 47 above) 149.

concern. Writing on the importance of raising CS awareness in enhancing government accountability, Dia notes, ‘interest groups who care about compliance decisions compete to get the government to devote relatively more time and effort to their interest...’⁴⁹ especially when there is high knowledge about the subject matter for which government’s attention is needed.

Accordingly, Dia further notes that ‘the informational status or the monitory ability of constituents should thus affect their ability to shape the policymaker’s incentives in a way quite distinct from the political clout originating from the size of the constituencies’.⁵⁰ The implication of voters’ informational deficit about policy content and effect defeats their use of electoral leverage in shaping policy impact. Thus, state actors tend to be more influenced with electoral cost emanating from knowledgeable voters than an averagely or uninformed voters.⁵¹

In addition to Dia’s argument on the effect of voters’ awareness in the context of this discussion, the following example is provided for further clarity. Thus, it maybe assumed that CS - as representing the section of society that is not government – do engage in their normal activities which include voting, refraining from voting, expression of public opinion and call for referendum. And in these normal activities, consequences can arise against government’s untoward behaviour especially from the electorates who are not just informed but knowledgeable about government policies. Therefore, if politicians are aware that citizens (CS) are not just literate but are aware and responsive to events such that the electorates can ‘punish’ bad behaviour with electoral consequences, not necessarily specific to human rights and compliance, the chances are that those politicians will be aware that politically incorrect behavior, including disregarding court judgments (especially international court judgments) can result in electoral consequences.

The above implies that an incumbent can be punished for conducts tantamount to undermining the needs of domestic constituents. However, it is only possible when the awareness and informational level of CS about government welfare policies and governance behavior are high, say for example (a) when citizens are abreast about human rights infraction and non-compliance;⁵² (b) if voters can

⁴⁹ Dai (n 8 above) 365.

⁵⁰ Dai (n 8 above) 365 (as it is common with agent-principal relationship, while it is expected that the agent’s action affect the principal directly, the principal may not even directly observe the agent’s action, for detail understanding), see the following literature, B Holmstrong ‘Moral hazard and observability’ (1979) 10 *Bell Journal of Economics* 74-91; SJ Grossman & OD Hart ‘An analysis of the principal-agent problem’ (1983) 51 *Econometrica* 7-45.

⁵¹ Dai (n 8 above) 365.

⁵² Ham & Chappell (n 47 above) 148-149.

care about human rights and compliance even when no direct or personal breach is suffered; (c) if significant numbers of majority citizens' are concerned about human rights and compliance in relative proportion (or even more) with other societal needs or matters of general concerns;⁵³ (d) when human rights and compliance become a salient political subject of discourse during electioneering processes; (e) when human rights violations and non-compliance directly affect the interest of the wider CS – for instance, a decision questioning government action on restraint of freedom of the press, freedom of citizens' association and assembly and other related laws which concern socio – economic and political rights of individuals and group of indigenous people.⁵⁴

In addition to all these factors, the model may become more effective, when voters from regions or districts with highest numbers of voting capacity demonstrate the needed incentive to use their votes to attract electoral cost against an incumbent. Conversely, it may be doubtful if human rights and compliance can be framed as important issues of concern when majority of the citizens with high electoral value are not affected by the probable consequences of a state's non-compliance with rights decisions.

Again, looking at this from the perspective of my first assumption discussed in sub-section 5.2.1 above, the question would be: if the essence of CS engagement is not to have electoral costs but just to ensure that those issues feature in the pre-election discourse for purposes of getting politicians to know what affects the generality of the society (as part of my projection), will the result of this model be affected if the majority of the voters decided to cast their votes despites concerns about a state's poor human rights records? The answer would be on the negative. This then means that the application of this model will generate a different result when it is explored for purposes of bringing politicians' consciousness to issues that matter to the society so they can be properly guided in the scale of preference government policy, however, at the same time, there might be some level of political cost when government becomes habitually insensitive to the peoples' needs. That said, I discuss below certain factors that may limit successful application of this model and the conditions under which these factors may occur.

⁵³As above. The general assumption is that the chances of raising electoral costs is higher when a majority of the citizens are able to consider human rights and compliance as important as other issues that influence their choice of candidate. However, the caveat to this assumption is that there could be a possibility that a relatively small numbers of voters can effectively raise costs to punish an erring politician if these group of voters are registered voters from a districts with marginal seats.

⁵⁴ Van Ham & Chappell (n 47 above) 149.

5.2.4 Potential obstacles that may limit the success of indirect CS engagement

As stated earlier, the entire arguments in this chapter revolve around the two major assumptions discussed in sub-section 5.2.1 above. For sake of emphasis, the assumptions are rephrased as follows: first, the possibility is that CS explores elections opportunities to simply flag issues of societal concerns in order to convey and attract politicians to the kinds of issues that generally matter to the electorate. Second, there are possibilities that when issues are properly framed by CS during elections, individual voters might be swayed in taking electoral decisions which might (or not) affect future re-election of an incumbent. Therefore, it needs to be stated upfront that the effect of the following potential obstacles may only arise with the second assumption.

While the discussion in section 5.2.3 above may enhance the chances of increasing the success of this model, there are instances where the model and of course, the hypothesis will not play out if certain measures are not considered. For instance, it will be unlikely for human rights and compliance to become part of the issues voters consider in taking electoral decision especially when awareness about the human rights decision for which compliance is expected is limited – this then implies that the hypothesis may not pan out if CS knowledge about a particular societal issues is limited. Again, I further discuss below other potential obstacles (by no means exhaustive of all possible factors) that may render it difficult or unlikely for voters to exercise their voting leverages (in line with the second assumption) to raise electoral cost against politicians who fail to pay attention to issues that matter to the public – which may include respect for rule of law and by extension, compliance with rights decisions.

(a) Type of electoral systems: whether majoritarian or proportional representation systems

This discussion is to show how types of electoral systems and electoral regulatory frameworks may limit the success or the probable results of an indirect engagement of CS in raising electoral costs. There are various types of electoral systems in practice. However, for purposes of this discussion, the plurality/majoritarian (P/M) and proportional representation electoral systems (PR) shall be my focus.⁵⁵ Under P/M system, only one seat is allocated to a particular political district.

⁵⁵ I have deliberately restricted my discussion on this subject to the P/M and PR electoral systems, because in my opinion thus far, they align more with the indirect CS engagement model which has been discussed in section 5.2.1 above. For more information about these electoral systems, see A Reynolds *et al Electoral system design: The new International IDEA handbook* (2005) 27-90 also available via https://ifes.org/sites/default/files/esd_english_0.pdf (accessed 3 July 2018); DL Horowitz 'Electoral systems: A primer for decision makers' (2003) 14 *Journal of Democracy* 115-127; G Cox *Making votes count: Strategic coordination in the world's electoral systems* (1997).

This implies that if the district magnitude is small, only one candidate will emerge from a particular district. To be further broken down, plurality electoral system is slightly different from majoritarian electoral system in the sense that under the former, a candidate can emerge winner upon winning most of the votes without necessarily winning over 50% of the total vote counts. And in the latter, the winner emerges upon a win of over 50% (absolute majority) vote counts.

Under the PR electoral systems, the total vote counts won by a party determine the parliamentary seats it gets. For instance, if a party wins 30% of the total votes, it gets equivalent of 30% of the seats. Other parties with 60% and 10% will be expected to get seats proportionate to the percentage of votes won.⁵⁶ Under this typology, the party's extent of power allocation and representation in the parliament is determined by the share or portion of votes from the total votes count. In this context, under PR, the party determines the political fate of the parliamentarians as the case in South Africa. PR operates through party lists of candidates, this list can either be done through an open process where voters are allowed to list candidates in order of preference or closed process which implies that the party regulates and determines the list and choices of candidates. The peculiarity and dynamics in each electoral system determine the impact of leaders' accountability to voters. For example, under the closed party list process in PR, the likelihood of legislators' accountability to their party leadership (instead of voters) increases owing to the fact that the party leadership determines the order of candidates' names on the list.

On the contrary, owing to the fact that the P/M electoral system allows voters to make choice of candidates vying for any elected political offices, the possibility of elected politicians' accountability to voters is higher.⁵⁷ This sense of accountability implies that the security of leaders' political jobs lie in the hands of the voters and not the party structure.⁵⁸ In view of this, it may therefore be asked: which electoral system enhances the chances of politicians' accountability to key electoral issues raised by the voting public? Or put differently, which electoral system enhances the possibility that voters can successfully frame and consider issues of societal concern as the basis in determining the choice of candidate? From the literature, the answer to these

⁵⁶ AR Menocal 'Why electoral system matter: an analysis of their incentives and effects on key areas of governance' Available via <https://pdfs.semanticscholar.org/3193/42480d539900d9b248283a58e3e53a8cec8e.pdf> (accessed 3 July 2018) 3, Reynolds *et al* (n 55 above) 27-90.

⁵⁷ Menocal (n 56 above) 2-5.

⁵⁸ Menocal (n 56 above) 2-5.

questions are neither here nor there. For instance, taking South African PR electoral system as example, as reported:

In South Africa, at both national and provincial level, we only vote for a political party, never for an individual. The political parties decide which candidates appear at what positions on their electoral lists and political parties therefore in effect decide who will represent us voters in the various legislatures. (Voters merely decide how many representatives from each party list will eventually go to the various legislatures.)... Ordinary voters have almost no say in who would represent them in Parliament... This means that members of Parliament are not beholden to voters at all and have no independent power base and they have no incentive to listen to and respond to the wishes of the electorate in their informally allocated “constituencies”. Instead they are wholly beholden to the party bosses who can give them instructions on how to behave in the legislature, which Bills to vote for, and how vigorously to hold members of the executive to account.⁵⁹

From the above South African account, the chances that this model will be effective in enhancing government’s accountability to the electorates in states where PR electoral system operates is unlikely.

Furthermore, Blaise and Bodet identify two inconsistencies associated with PR electoral system which defeat any argument about the expectation that PR foster better congruence between voters and politicians. This is further explained as follows:

On the one hand, PR leads to more parties and more choice of voters: but these parties are less centrist, and this increases the overall distance between voters and parties. On the other hand, PR increases the likelihood of coalition governments; this pulls the government towards the center of the policy spectrum and reduces the distance between the government and the voters. These two contradictory effects of PR wash out, and the net overall impact of PR on congruence is nil.⁶⁰

On their part, Soroka and Wlezien argue that P/M seems to provide a better representation and congruence to opinion change for two primary reasons: first, owing to the fact that high coordination cost is associated with PR multi-party coalition; it is not likely that a better government response will be guaranteed in PR as much as in P/M. This is because, coalition agreements poses high constraint on government executive which limits government flexibility to

⁵⁹ For details on this, see ‘How can we solve problems with our electoral system? (2012) available at <https://constitutionallyspeaking.co.za/how-can-we-solve-problems-with-our-electoral-system/> (accessed on 10 July 2019).

⁶⁰ A Blais & MA Bodet ‘Does proportional representation foster closer congruence between citizens and policy makers? (2006) 39 *Comparative Political Studies* 1243-1262.

maneuver policy change, thereby reduces the possibility of better government accountability in - between elections. In essence, they claim that ‘coalitions introduce ‘friction’ into policy making process’ which render accountability somewhat unlikely.⁶¹ For this reason, they argue that P/M has more features of single-party governments which place more responsibility on the hands of voters to determine the fate of the candidates. Thus, voters can therefore apply the ‘stick’ and the ‘carrot’ as a reward for better accountability or punishment for wrongdoing while in office under P/M electoral system. Second, beyond accountability, they further contend that P/M has more potential to swing government’s policy to suit public interest all through the electoral cycle due to the fact that it focuses on individual candidate and not on the party structure.⁶² In short, their argument is summarized as follows:

Majoritarian governments have more of an incentive to respond to opinion change owing to the larger seats-to-votes ratios in those systems. Since a shift in electoral sentiment has bigger consequences on Election Day in majoritarian systems, governments ... are likely to pay especially close attention to the ebb and flow of opinion.⁶³

Similarly, the above view amplifies Rogowski and Kayser’s argument about government’s sensitivity to consumers’ (electorates) wants on the demand side and supply of produces by the elected politicians in P/M electoral system more than in PR electoral system.⁶⁴

On the other hand, Powell and others seem to be more concerned on the effect of PR in fostering a better congruence or politicians’ accountability to issues that matter to voters and the larger domestic societies.⁶⁵ In explaining the basis for Powell’s contention, Wlezien and Soroka state that

⁶¹ B Jones *et al* ‘A general empirical law of public budgets: A comparative analysis’ (2009) 53 *American Journal of Political Science* 855-873; G Tsebili *Veto players: How political institutions work* (2002).

⁶²Wlezien & Soroka (n 19 above) 16; SN Soroka & C Wlezien ‘The majoritarian and proportional visions and democratic responsiveness’ (2015) 40 *Electoral Studies* 540; for literature on the effect of coalitions transactions and bargaining, see W Muller & K Strom ‘Coalition agreements and cabinet government’ in K Strom et al (eds) *Cabinet and coalitions bargaining* (2010).

⁶³ Wlezien & Soroka (n 19 above) 16; C Wlezien & SN Soroka ‘Electoral systems and opinion representation’ (2015) 51 *Journal of Representative Democracy* 273-285; SN Soroka & C Wlezien (n 63 above) 540; see also RG Niemi & P Fett ‘The swing ratio: An explanation and an assessment’ (1986) 11 *Legislative Studies Quarterly* 75-90; G King ‘Electoral responsiveness and partisan bias in multiparty democracies’ (1990) 15 *Legislative Studies Quarterly* 159-181.

⁶⁴ R Rogowski & M Kayser ‘Majoritarian electoral systems and consumer power: price level-evidence from the OECD countries’ (2004) 49 *American Journal of Political Science* 526-539.

⁶⁵ GB Powell *Elections as instruments of democracy: majoritarian and proportional views* (2000) (arguing that PR encourages greater and direct participation of constituencies and as a result, elected parliamentarians are more accountable to voters specifically in the open list pattern of voting under PR); see also GB Powell ‘Party polarization and the ideological congruence of government’ in Dalton *et al* (eds) *Citizens, context, and choice* (2011) (the author

Powell's work to some extent reveals that one of the major features of PR electoral system is party coalition. And by implication, 'coalition governments tend to include ideological centrist parties, which brings the average orientation of coalition parties closer to that of the median voter' hence the argument that PR foster better congruence.⁶⁶

Finally, viewing all the arguments from the literature on how electoral system may increase or limit the likelihood that government will take into account issues that matter to the public in framing state policies, the P/M electoral system present a better credential in enhancing politicians' accountability to domestic issues of importance during elections.⁶⁷ Although, PR has a better explanation in fostering congruence between policy making and public preference or demands at the wake of elections, P/M electoral system seems to be more salient in voters' control of government policy during the entire election cycle.⁶⁸ In other words, PR electoral system may limit the chances of optimal success of this model as the candidates seeking for voters support are expected to be more accountable and responsive to their political parties rather than the voters. Therefore, the PM electoral system is 'friendlier' to this model than the PR electoral system. Despite my observation, what appears to be a general assumption is that the both systems may work to ensure responsiveness and accountability but in different ways and with different results.⁶⁹

also demonstrates little difference between electoral systems); M Golder and J Stramski 'Ideological congruence and electoral institutions' (2010) 54 *American Journal of Political Science* 90 -106 (arguing that PR electoral system produces parliament that offer more supply in terms of better representation to voters' demand than in P/M).

⁶⁶ See Wlezien & Soroka (n 63 above) 540.

⁶⁷ Similarly, Wlezien and Soroka in their 2010 and 2012 works find that PR dampens representation of politician to voters wants in between elections, a position that contrast Powell results in 2000. In a twist, Wlezien and Soroka in 2015 begin to test exactly how PR matter and why it dampens representation. In their latter work, they assume that coalition government reduces the incentive for better representation. However, they later admit that: 'our analysis are mixed... we do not have positive strong evidence that any particular mechanism is at work....[therefore, how] Precisely PR dampen representation between elections remains unsettled'.

⁶⁸ C Wlezien & SN Soroka (2015) (n 63 above) 273-285 (asking whether proportional system dampens representation, if so, what is responsible: is it the friction associated with party coalitions in PR and /or the related weaker electoral incentives from PR. Though the findings are mixed and not highly reliable but they seem to strongly support the former as the reason but on their final note, they conceive that PR matter at the wake of elections while P/M works better all through the duration of the term of office); Blais & Bodet (n 60 above) 20, (arguing that no electoral system is clearly superior on that front); Wlezien & Soroka (n 19 above) 16-18; A Lijphart *Democracies: Pattern of majoritarian and consensus government in twenty-one countries* (1984); see also A Lijphart *Pattern of democracy* (1999) 62-89, 143-170.

⁶⁹ See E Moberg 'Comment on elections as instrument of democracy' available via www.mobergpublications.se/positions/comment2p.pdf (accessed 3 July 2018) (arguing that despite his objections to Powell's claim, both systems work relatively well depends on the constitution in force) 4; what seems perhaps more important is the relevance of voters to politicians on election day and beyond in respective of the electoral system in place. There is a body of scholarship arguing that politicians pay more attention to the opinion of voters and perhaps high – income or influential voters. For details, see Wlezien & Soroka (n 19 above) 18; LM Bartels 'Economic inequality and political representation' paper presented at the annual meeting of the American political science

(b) Entry barriers posed by electoral rules

One other potential obstacle that may inhibit CS engagement in making issues of concern a subject of political debates is electoral rules. Electoral rules in this context, are closely related to the electoral systems earlier discussed. However, the present emphasis relates to the aspect concerning the effect of entry barriers posed by the voting pattern in place.⁷⁰ The assumption is that when the entry barriers are lowest, politicians' accountability and representation increases and *vice versa*. In a similar but detailed explanation of this argument, Cingranelli and Filippov find that:

[The] voters' ability to hold incumbents accountable is better where the barriers to entry in the electoral system are lower. Thus, single-member districts create great hurdles for new entry, and the limited menu of candidates (parties) forces the voters to choose on the basis of a few select 'important' issues and put aside less important concerns.....as long as human rights are a concern for most voters but a lesser concern than some other issue such as terrorism or immigration, politicians elected in single-member districts would be expected to do less to protect human rights than politicians elected under proportional representation.⁷¹

An aspect of PR that comes with party dominance in the selection of candidates also constitutes barriers on the chances of politicians' accountability and representation. As an extension of the rule posing entry barriers, representation and accountability diminishes when the party's role and dominance in selecting candidates increases. Also, size of the district determines politicians' concern over voters' needs in different ways: (a) when the district magnitude increases, voters' affinity with incumbent becomes weaker, thus, chances of representation and accountability to the needs of the public reduces (b) although when the district size gets smaller, on the one hand, infrequent issues of concern - say human rights are easily monitored by voters. Consequently, when it drops to a single member district, on the other hand, priority and emphasis on human rights and compliance over other more demanding issues of societal concerns may be unlikely.⁷² Again, this may be owing to the fact that human rights and compliance are the concerns of the specific

association, Boston (2002); M Gilens 'Inequality and democratic responsiveness' (2005) 69 *Public Opinion Quarterly* 778-796.

⁷⁰ D Cingranelli & M Filippov 'Electoral rules and incentives to protect rights' (2010) 72 *The Journal of Politics* 243, 246 (arguing that certain electoral rules are likely to provide better electoral incentive for elected legislators to provide policies that will enhance respect for rights of citizens in a democracies, thus, legislators elected through a 'low magnitude proportional representation districts' and electoral system that allows voters to cast their votes for individual candidates have less entry barriers and therefore, protection of rights and legislators' accountability is expected to be high).

⁷¹ Cingranelli & Filippov (n 70 above) 246.

⁷² See generally Cingranelli & Filippov (n 70 above) 246-247.

voting district and not of the entire country. Therefore, there might be a different result where for instance, the entire country is brought to a consciousness that the human rights conduct of the government matters, and such issue became a subject of frequent debate in the national news, panel discussions and in other forms of media. In this scenario, will it still matter whether a particular electoral district is big or small? Because, if the the essence of CS engagement is just to raise awareness of the public to issues of government's non-compliance with rights decision and amplify it to a level when it begins to gain political attention, then the expectation that the size of a voting district will affect the success of this model becomes irrelevant, see subsection 5.2.1 for the first assumption in this chapter.

However, it seems that despite the challenges associated with entry barriers, any electoral rules where voters are allowed to choose their candidates especially by means of open list voting or panachage voting procedure under PR electoral system or by other voting patterns practicable under P/M electoral system may improve incumbent individuals versus voters' demand and supply relationship.⁷³

(c) When human rights decision contradicts certain societal values and traditions

My predictions about the potential effect of this model should not be understood to mean that CS will be disposed to raise electoral cost in every case of human rights violation or non-compliance with rights decisions. For instance, it may be unlikely that CS will be engaged in human rights cases or decisions which, in the perception of the public, fail to take into account certain societal values or traditional and moral beliefs peculiar in a particular community or state. For instance, recently, the High Court in Botswana ruled that provisions in the state's criminal code that criminalise homosexual relationships were unconstitutional.⁷⁴ Assuming the government (the executive and perhaps – legislature) fails to comply with this decision, the important question would be whether (or not) the voters will be interested in framing this as an electoral issue for purposes of getting the government to comply. To ask in another way, would the electorates be swayed against the government if it fails to respect that decision of the high court. This question

⁷³ The term panachage means a pattern of voting used in PR which allows voters to cast multiple votes or allocates votes to candidates from different parties, by this method, electorates decide the choice of candidate to be voted for. For details on how this voting pattern enhances the chances of politicians' accountability, see Cingranelli & Filippov (n 70 above) 247; JM Carey & MS Shugart *Incentives to cultivate a personal vote: A rank ordering of electoral formulas* (1995) 417- 439 (arguing on the need for politician to cultivate voters' vote on the basis of personal reputation under various electoral laws).

⁷⁴ *Letsweletse Motshidiemang v AG & other* (Mahgb – 000591-16).

should be considered in the light of the assumption that most Africans hold a bias against homosexual and other related practices. Thus, the model may not pan out when explored in related cases – for example, the Botswana case above

The argument here is that relying on domestic CS to generate incentives through indirect engagement (electoral processes) could sometimes hold the risk of potential backlash so that it might be difficult to expect positive results in applying the hypothesis to all cases. See details about how these factors may limit CS incentive in raising cost as set out in section 4.5 of chapter 4 above.

(d) Indirect engagement of CS: Lack of legislative framework as potential obstacle

First of all, the chances of successful application of this model is likely when there is a national legal framework that provides and endorses the human right issue for which government compliance is expected. As elementary principles of rule of law and separation of powers hold out, no state institution is subservient to another, every institutions is expected to act as a watch-dog and hold to account another institution that lags in its responsibility to the people. Therefore, even when provisions of legal framework is lacking, the effect of CS engagement could still be possible when the national parliament exercises incentive to give effect to the yearnings of the people and matters of public concerns. However, whether this is possible in the African context is another puzzle.

This is because, drawing on the lessons from the Ghana supreme court's refusal to comply with the African Human Rights Court's order for provisional measures on the basis that the parliament of Ghana had not enacted law to accept the African Court's contentious jurisdiction,⁷⁵ would CS indirect engagement in pressuring government for compliance not be hamstrung on the basis of lack of existing legislature? However, the dynamism of this model is that even when legislative framework is lacking or limited, such human rights concern can be framed as matter of public importance so that government's non-compliance may attract the risk of future political consequences.

⁷⁵ *Alfred Agbesi Woyoma v Republic of Ghana* Application 0011/2017.

(e) The role of a national court as a counter-majoritarian institution

While so much is often thought about how voters in democratic states can leverage on their electoral powers to determine the fate of politicians seeking for elected offices,⁷⁶ little is written or thought about how the national courts, particularly the courts at the apex level can, in exercise of their counter-majoritarian role, issue decisions which could undermine the will of the electorates.⁷⁷

As an elementary understanding of the role of voters during electioneering process,⁷⁸ politicians and their political parties solicit the support of voters in order to be voted into political offices. Depending on the factors that may sway the minds of the majority voters, all else equal, a candidate with majority votes wins the polls. However, there are two sides to this assumption. First, the expression of the will of the electorates as the above assumption already bears out. Second, the role of the national court or special election tribunal to adjudicate over pre and post - election cases. As stated earlier, the type of electoral systems and rules/guidelines operational in a state can become potential barriers to the role of the electorate as ‘power giver’ to politicians. In the context of this discussion, a decision of the national court or election tribunal can equally become a barrier

⁷⁶ For related literature recognizing a correlation between elections and voter participation in democracy, see for instance, Dalton (n 20 above) 205. Some scholars argue that the most important features of elections is the fact it helps to improve the legitimacy of the political system at home and abroad. For this, see Palmer (n 20 above); Linz (n 20 above); O’Donell (n 20 above); Diamond (n 20 above); D Kowalewski (n 20 above) 518-540; GB Powell Jr *Contemporary democracies* (1982) 8 (the basis for his argument on the relationship between elections and democracy could in summary, implies that elections foster citizens’ political participation which give the latter the opportunity to exchange votes for anticipated government response towards their welfare); Ginsberg & Stone (n 21 above) 5; Lijphart (n 22 above) 146-158; R Dahl *Democracy and its critics* (1989) 31; Bueno de Mesquita *et al* (n 8 above) 23, 24, 35, 37, 43-47, 49, 51-52; C Wlezien (n 17 above) 2.

⁷⁷ The recent decisions of the Nigerian Supreme Court over the intra-party disputes amongst the All Progressive Party (APC) in Zamfara and Rivers states of Nigeria bear this out. For details, see *APC, Inuwa Abdulkadir & others v Senator Kibir Garba Marafa & 180 others*, SC/344/209 available at <https://www.pressreader.com/> (accessed 11 July 2019); *Senator Kibir Garba Marafa & others v Sanusi Liman Dan Alhaji & ors*, CA/S/32/19 available at <https://www.lawpavilionplus.com/summary/judgments/?suitno=CA%2FS%2F32%2F19> (accessed 11 July 2019); I Sagay ‘The judiciary as an alternative electorates’ (2019) *The Nation* newspaper dated 4 June 2019 available at <https://thenationonline.ng/the-judiciary-as-alternative-electorate/>; <https://www.independent.ng/zamfara-the-judiciary-as-alternative-electorate/> (accessed 11 July 2019); H Abiola ‘Zamfara - The judiciary as an alternative electorates: A rejoinder by Chief Awolomo SAN’ (2019) available at <http://loyalnigerianlawyer.com/zamfara-the-judiciary-as-alternative-electorate-a-rejoinder-by-chief-awomolo-san/> (accessed 11 July 2019); See as reported in the Punch newspaper dated May 2019 ‘Supreme Court delivers judgment on Zamfara APC dispute May 24’ available at <https://punchng.com/scourt-delivers-judgment-on-zamfara-apc-dispute-may-24/> (accessed 11 July 2019) E Okakwu ‘Why Supreme Court ruled against APC in Zamfara State’ (2019) available at <https://www.premiumtimesng.com/news/headlines/331517-why-supreme-court-ruled-against-apc-in-zamfara.html> (accessed 11 July 2019).

⁷⁸ As often seen in a state where the P/M electoral system operates which gives room for individual voters’ participation in the choice of candidates.

when (in its wisdom), it chooses 'to throw away' the will of the electorates – by overruling the candidature or validity of the candidate who won the majority votes - and orders victory for a candidate who got less or no votes from the electorate. For this, I briefly borrow examples from the recent decisions of the Nigerian Supreme Court decided against the All Progressive Congress party (APC) in Zamfara and Rivers states over pre – election disputes.⁷⁹

As part of the preparation for the 2019 Nigerian general elections, the Independent Electoral Commission (INEC) published a timetable containing detailed schedule of the events covering the entire electoral process. One of the activities and as also required by section 87 of the Electoral Act, 2010 is that all political parties should conduct their primaries and forward to INEC names of all their candidates for the general elections, the submission deadline is open from 18 August to end in 7 October 2018. However, owing to internal crisis within the Zamfara APC party, this requirement of section 87 of the Electoral Act was not appropriately complied with as the final primaries were conducted before 12.00 midnight of 7 October 2018 and names were forwarded to INEC.

Worried that INEC may not publish the names of their candidates for the general election, the APC Zamfara state approached a trial court praying for order to *inter alia* compel INEC to publish names of her candidates for the general election, the order was granted as prayed and INEC proceeded with the general elections fielding all APC candidates from Zamfara – for the Governorship, National Assembly and State Assembly elections.⁸⁰

Dissatisfied with the judgment of the trial court, the respondents approached the Court of Appeal and got reversal of the trial court's judgment. Afterward, both parties landed at the domain of the Supreme Court (SC) and as at this time, the elections had been concluded and results declared. From the results announced by INEC, APC candidates scored over 500,000 votes and PDP candidates scored just over 100,000 votes. The APC won all the National and State's Assembly seats.⁸¹

Despite the landslide victory for the APC in Zamfara state, the SC ruled *inter alia* that in the eyes of the law, APC had no candidates in the general elections and a party that has no candidate in an election cannot be declared the winner of the election. Therefore, the votes credited to the alleged

⁷⁹ See Nigerian Supreme court decision over pre-election issues in Rivers and Zamfara states (n 77 above).

⁸⁰ See as narrated by Itse Sagay (SAN) (n 77 above).

⁸¹ See Sagay and Awolomo's narrations on this (n 77 above).

APC candidate in the 2019 general elections in Nigeria should be considered as wasted votes and as mandate placed on nothing. In consequence, the candidates from other political parties other than APC with the highest number of votes and required spread stand elected into the various political offices.⁸²

Similar scenario manifested in Rivers state. However, in the latter case, the court refuses all APC candidates from participating in the general elections, which then made it possible for all PDP candidates to emerge as winners unopposed thereby denying the electorate their rights to vote their choice of candidates into different political offices.⁸³ The important questions to ask from these narratives are: whose will has brought the emergence of the current elected political office holders in Zamfara and Rivers states? Is it the will of the majority of the electorate or the will of the judiciary? Is the judiciary not playing an alternative role in determining emergence of political office holders? Is the judiciary not becoming the final determinant in successful expression of the will of the electorate?

This chapter does not intend to interrogate the fairness or otherwise of the two decisions of the SC but the point of its relevance to this discussion is to explain instances where my assumption could fail. For instance, as I argued earlier, CS can be indirectly engaged to explore electoral process to raise cost against politicians who pursue political office survival during and after elections. Arising from the Zamfara and Rivers states experiences discussed above, it will be unlikely how the above argument will become a reality when faced with a similar potential obstacle - when a court performs a counter-majoritarian role to undermine the will of the voters.

In the next section, I discuss the second model on how direct engagement of CS can be explored to raise domestic cost against government. In doing this, examples from the 1990-1991 Kenya and 2018-2019 Sudan's protests will be useful.

⁸² APC loses Zamfara as Supreme Court voids victory for all seats available at <https://www.pulse.ng/news/politics/apc-loses-zamfara-as-supreme-court-voids-victory-for-all-seats/8hmr4g> (accessed 11 July 2019).

⁸³ K Ogundele 'Supreme Court upholds judgment barring Rivers APC from polls' (2019) available at <https://punchng.com/supreme-court-upholds-judgment-barring-rivers-apc-from-polls/> (accessed on 11 July 2019); Breaking: Supreme Court upholds judgment nullifying Rivers APC Primaries' (2019) Sahara reporters available at <http://saharareporters.com/2019/02/08/breaking-supreme-court-upholds-judgment-nullifying-rivers-apc-primaries> (accessed on 11 July 2019); Breaking: Supreme Court throws out appeals of Tonye Cole, APC against exclusion from Rivers elections' (2019) Sahara reporters available at <http://saharareporters.com/2019/04/11/breaking-supreme-court-throws-out-appeals-tonye-cole-apc-against-exclusion-rivers> (accessed on 11 July 2019).

5.3 Direct citizens' action: engagement of CS through protest

As stated above, a greater engagement of wider CS can be achieved through a number of processes or approaches. In the preceding section, I discussed one of such processes which concerns CS indirect engagement (through elections) as a potential complementary mechanism for improving compliance in the AHRS. Thus, in this section, my focus is on the second process or model which examines how CS can be directly engaged in raising domestic cost to check government excesses – which includes specifically disrespect for, and non-compliance with human rights decisions. The expectation is that citizens' direct action ought to generate incentives for state actors to be responsive to public concerns or broader societal needs which may include respect for the rule of law (which covers human rights and issues of member states' compliance), and if government fails to be responsive, at least they should feel obligated to give account to CS for their unexpected actions.

The ultimate aim for these models is to enhance legitimacy of the domestic source of pressure or mechanism for improving compliance in the AHRS. The assumption, therefore, is that if states (or more precisely, state actors) feel they have no obligation to the international or regional communities as far as compliance with human rights obligations are concerned, then straightening the link between domestic publics and demand for human rights as a public good will improve legitimacy of those claims and therefore, make the consequences of ignoring judgments more at a level closer to their political interest.

The following examples (from Kenya and Sudan) aim to show how the direct civic engagement model has been explored to raise cost against governments' untoward behaviour in some African states. However, at the end of the discussion, it will be clear whether the instances given below have similar peculiarities to justify further generalization to other African states of similar context. It must be noted that the intensity of citizens' direct action in the context of the following discussion were mostly spontaneous, although in few occasions, it was planned.

5.3.1 CS peaceful resistance: the Kenya experience

One of the instances that demonstrate the effective role of CS in raising domestic cost to influence change in government behaviour and enhance accountability could be seen from the resilient peaceful protest engaged by wider CS in Kenya starting from July 1990 to late 1991. The basis for

CS mobilization in the Kenyan context concerns the refusal of President Moi (president 1978-2002) to establish multi-party electoral system and occurrence of series of human rights violations in the state. These reasons and many more triggered CS protest which started in a spontaneous manner (not planned) but later escalated owing to the government continued violations on the rights of the citizenry and series of repressive policies aimed at constraining citizens' civil actions. This peaceful protest became a product of an institutionalized resistant culture developed by CS in pressuring the President Moi's led government for change of behavior towards human rights protection and democratic practices - for instance, a demand for creation of multi-party system in order to widen the space for wider political participation. Owing to the government's refusal to heed to CS demands, different domestic measures were then adopted, including a resilient culture for regular demonstrations and protest seeking for 'political space for effective resistance' of government's repressive policies and re-occurring human rights violations. As a result, while some segments of the CS engaged different lobbying and advocacy tools in their mobilization drive, other groups and individuals engaged a confrontational approach such as organizing mass rallies in strategic locations in the Kenya capital city - Nairobi.⁸⁴

While all these arrangements were underway, President Moi adopted several policies to constrain NGOs operations and activism with the aim to weaken and silence domestic forces' mobilization. The President's action was vehemently resisted by the wider CS community; as a result, the government later retreated.⁸⁵ In pressuring the government for change, the wider CS engaged in massive and momentous rallies which at different times were scheduled to be held at the *saba saba* and *Kamakunji* historic rally grounds in 1990 and 1991 respectively. According to Robert Press, CS efforts within few weeks, 'effectively transformed the long-repressed underground movement for multi-party democracy into a mass movement which for the first time threatened government's control and authority.'⁸⁶ In a genuine expression of the agenda of the people, Shikuku, one of the opposition leaders, stated as follows: 'we were determined; we were ready to die...'⁸⁷

In addition to this, the mothers of those arrested and kept in prison without trial also embarked on a 'sit-down' pattern of protest in the 'down town park' in Nairobi calling on the government for

⁸⁴ MR Press *Peaceful resistance: Advancing human rights and democratic freedoms* (2006) 115-173.

⁸⁵ Press (n 84 above) 115.

⁸⁶ Press (n 84 above) 116.

⁸⁷ Press (n 84 above) 118.

release of their detained children, this action which was framed as ‘mothers’ strike’ further attracted the concern of other strands of CS: clergy, human rights activists and individuals from opposing factions and as a result, four detainees were released.⁸⁸ As Robert Press further notes, the turning point in Moi’s government was prompted by ‘domestic unrest, angry and the discontent public and not the just because of the aid freezing by international community’.⁸⁹

In these efforts, the role of different strands of CS - which includes some national judges, the catholic church community, lawyers, other religious institutions, former political leaders, business men and women, the ‘angry and unorganized public’, contributed in raising high level of domestic cost against president Moi led regime. These efforts finally forced the government not only to adopt multi-party electoral system but ordered the release of prisoners and opposition individuals, and improve the state of human rights protection in the country.⁹⁰ In relation to the focus of this thesis, this kind of direct engagement of CS has the potential to drive compliance especially on cases relating to government unwillingness to release political prisoners and refusal to create political space for more competitive elections. In this context, this approach could be a promising potential domestic tool in pressuring states under the AHRS to comply with decisions requiring political change (for example, *Mtikila & others v Tanzania*)⁹¹ or release of political prisoners (*Zegveld & others v Eritrea*)⁹²

5.3.2 CS protest in Sudan

In 2011, South Sudan ceded from Sudan, as a result, the new country got about 75% of the oilfields.⁹³ Accordingly, Morgan notes that the number of oilfields ceded to the new country –

⁸⁸ Press (n 84 above) 122.

⁸⁹ Press (n 84 above) 119.

⁹⁰ Press (n 84 above) 121.

⁹¹ *Mtikila & others v Tanzania* Application 011/2011 -The case was decided by the African Court. The complainant alleges a breach of his rights under the Charter to contest as an independent candidate in national elections in Tanzania. This complaint is based on the Tanzanian national legislation that bans independent candidate from contesting election to any political office; the law requires any interested candidate to register under a political party.

⁹² *Zegveld & others v Eritrea* Communication 250/2002, the complainants were former government officials who as at the time of arrest had become members of an opposition political party. Threatened by their political strength and experiences, they were arrested and detained at the instance of the Government of Eritrea. Upon arrest, they were denied access to food, medical care, legal representation and family members. On the basis of this, the Commission held that the Eritrea state is in violation of arts 2, 6, 7(1) & 9(2) of the Charter and order the immediate release of the 11 former political officials under custody.

⁹³ H Morgan ‘Not afraid of the government’: One month of protests in Sudan’ Aljazeera report dated 19 January 2019 available at <https://www.aljazeera.com/news/2019/01/afraid-government-month-protests-sudan-190119111337527.html> (accessed 10 July 2019).

South Sudan - ‘accounted for more than half of the former Sudan’s gross domestic product’.⁹⁴ This development nosedived Sudan’s economy since the former Sudan depends heavily on oil exportation for its economic sustenance and mainstay. As part of the attendant consequences, inflation on prices of consumable items became high to the extent that a majority of its population were not able to afford basic societal needs. The straw that further broke the camel’s back was when the Sudan’s economy started facing additional strains such as shortage of fuel, shortage of cash in banks ATM leaving people to queue for hours, rapid depreciation of the Sudanese pound and scarcity of essential commodities – particularly bread. In addition, the prices of some imported items (medications) skyrocketed while most consumable items became scarce.⁹⁵

While these concerns were being expressed by the people, the government of Sudan led by Omar al-Bashir continue to feign ignorance. This situation got to a boiling point when there was shortage of bread in the whole city as was further confirmed by the announcement made by the local authorities informing the public that there was no flour in the whole city at the time of information. This and other accumulated concerns about economic hardship became the focal point for what started as a small demonstration in the north-eastern city of Atbara in 19 December 2018. This demonstration was then followed by residents of neighboring town of Berber who took to the streets in calling on the government to address issues of economic hardship ravaging their livelihood. This is how the protest became a nationwide civil action by all segments of CS in the country.⁹⁶

At the beginning stage, rather than taking measures to address the peoples’ concern, the government accused the US government of being responsible for the states’ economic downfall owing to several sanctions imposed against the state from 1997 till late 2017.⁹⁷ As Morgan notes: ‘the Sudan government accused protestors of being influenced by some sort of foreign powers who

⁹⁴ As above.

⁹⁵ See ‘Sudan: Economy and military in the fall of Bashir’ (2019) available at <https://www.bic-rhr.com/research/sudan-economy-and-military-fall-bashir> (accessed 10 July 2019); AE Tchie ‘How Sudan’s Protesters upped the ante, and forced al-Bashir from power (2019) available at <https://theconversation.com/how-sudans-protesters-upped-the-ante-and-forced-al-bashir-from-power-115306> (accessed 10 July 2019); Morgan (n 82 above) 1; M Taylor ‘Sudan protests: Why it’s in the government’s interests to respond with restraint’ (2016) available at <https://africanarguments.org/2016/11/30/sudan-protests-why-its-in-the-governments-interests-to-respond-with-restraint/> (accessed on 10 July 2019).

⁹⁶ See generally, Morgan (n 93 above); A Atta–Asamoah ‘Will Sudan latest protest bring down Bashir? (2019) available at <https://issafrica.org/iss-today/will-sudans-latest-protests-bring-down-bashir> (accessed 10 July 2019).

⁹⁷ See generally, Morgan (n 93 above); Tchie (n 95 above).

aimed to perpetually destabilise the country's economy'.⁹⁸ Owing to this perception, the government declared a state of emergency and imposition of curfews to constrain further protest in some cities where protestors had already taken to the streets. The government further declared closure of all schools and access to public use of internet and all social media. In addition, freedom of the press and association or assembly by any individuals or group of associations were highly restricted and constrained.⁹⁹ Omar al-Bashir also dissolved both federal and state government structures and substituted his former cabinet members with army officers. Deliberations over a proposed constitutional amendment aimed to pave way or determine whether or not the president will contest for an extra constitutional term in the next elections were also stalled.¹⁰⁰

In the heat of the continuing protest, the people started calling for reform, freedom, peace, justice and most importantly - the resignation of the President. This call was supported by about 23 different opposition political parties. Beyond the economy concerns which form the bedrock of the protest, most citizens of Sudan (particularly the women) have been negatively affected by Bashir's 'Islamisation and Arabisation' policies. This perhaps explains why the protest witnessed a significant numbers of young women most of whom are professionals. Prior to the December 2018 protest, Al Bashir's 30-year old regime had often been criticized for a number of reasons: autocratic practices, austerity measures and anti-people policies, nepotism, incessant human rights violations, corruption, violent conflict and so on.¹⁰¹

While the protests continued to gain more momentum, the government resorted to address protestors' concern with series of violations, unlawful arrest and detention (including journalists and activists) and random killing of people by the security agencies of the state. As observed, anti-graft street protest is not a new phenomenon in Sudan but this protest could be said to be quite significant because of the nature of the leadership forces behind it, 'the underlying economic and political drivers' and the people's resilience in calling for the end of Omar al-Bashir's three decade rule. Ironically, the protestors are mostly young professionals – most of whom were born and raised during Omar al-Bashir's leadership.¹⁰² When the president noticed that the protestors could

⁹⁸ Morgan (n 93 above).

⁹⁹ As above.

¹⁰⁰ Tchie (n 95 above); Morgan (n 93 above).

¹⁰¹ Tchie (n 95 above); for similar reports, see H Mohammed 'Sudan female protesters leading the pro-democracy movement' (2019) available at <https://www.aljazeera.com/news/2019/04/sudan-women-protesters-leading-pro-democracy-movement-190423134521604.html> (accessed 10 July 2019).

¹⁰² Tchie (n 84 above); Morgan (n 93 above).

not be clamped down, he called for a broad-based dialogue with the people but it was already too late.

As the fruits of months of protests (at least from December 2018 – April 2019) and the enduring approach of sit-in outside the military headquarters in Khartoum, president Omar al-Bashir finally bowed to the protestors pressure as he was placed under house arrest in 11 April 2019 while the military established a transitional government.¹⁰³

The Sudan CS does not only leverage the domestic tool of direct engagement (protest) in the removal of an autocratic leader but their resilient efforts have forced the transitional military council (TMC) into signing a power sharing agreement which aims at paving way for conduct of general elections and eventual emergence of civilian rule. As mutually agreed by both the CS and TMC, the duration for the power-sharing will last for only 39 months and within this period, the following developments are predicted: conduct of general elections, establishment of a sovereign council (SC) – cabinet and legislative body, the SC will be headed by a General for a period of 21 months while the civilians will take over the affairs of the country for the remaining 18 months, the SC will be comprised of a total number of 11 members, 5 each from both the civilian and military and 1 as a consensus candidate, the cabinet will be headed by a prime minister nominated by the CS, defence and interior minister will be nominated by the military and CS will nominate other appointees into the remaining political offices.¹⁰⁴

While the impact of the citizens' civil actions in Kenya and Sudan influenced significant changes and removal of the incumbent president in Sudan, this must not be understood to mean that all civil action must result in change of government behavior. My argument is that engagement of CS - whether through direct or indirect civil actions - enhances the possibility of improving government accountability to the people on issues of societal needs which would not have been considered but for CS role in voicing and amplifying these issues as matters of public discourse.

¹⁰³ Tchic (n 84 above); O Oyenkunle 'Breaking news: Sudan's coup leader bows to pressure and steps down' (2019) available at <https://www.africanexponent.com/post/10043-sudans-coup-leader-steps-down>; <https://www.telesurenglish.net/news/Sudans-Al-Bashir-Bows-to-Pressure-Will-Release-Reporters-20190207-0013.html> (accessed 10 July 2019).

¹⁰⁴ See BBC news 'Sudan crisis: what you need to know' (2019) available at <https://www.bbc.com/news/world-africa-48511226> <https://www.bbc.com/news/world-africa-48511226> (accessed on 22 August 2019); D Kode 'What other African protesters can learn from Sudan' (2019) available at <https://mg.co.za/article/2019-08-16-what-other-african-protesters-can-learn-from-sudan> (accessed 22 August 2019); Aljazeera news: Sudan opposition names five civilian members of Sovereign Council' available at <https://www.aljazeera.com/amp/news/2019/08/sudan-opposition-names-civilian-members-sovereign-council-190818151248859.html> (accessed on 21 August 2019).

As set out in section 5.1 above, there are a number of ways by which CS can be engaged. This chapter has only discussed engagement through electoral processes and protest. Other forms of direct engagement may include strike, boycott, dialogue, consultation and call for referendum. However, this chapter is confined to a discussion on CS engagement through elections and protest as already done. Two reasons may explain this choice: first, I observed that the objectives and tools or mechanisms often applied in most citizens' civil actions are similar, therefore, to avoid the risk of repetition, the two models discussed above can be understood in similar context with other possible forms of CS engagement. Secondly, a broader discussion on potential CS engagement in the African context can be an open field for further research. In similar manner as discussed above, several factors may also enhance or limit the potency of direct engagement CS, for details – see discussion in sections 5. 2. 4 above.

5.4 Conclusion

This chapter is a product of the confluence of my discussions in chapters 3 and 4 of this thesis. In chapter 3, the validity of my hypothesis was first put to test to examine whether there is currently an entrenched engagement of CS in the regional human rights practices under the AHRS. The findings from chapter 3 do not support or justify the hypothesis as set out in chapter 1. For this purpose, in chapter 4, the practices under the EHRS and IAHR were examined with the aim of finding a safe landing ground for my hypothesis. At the end of the chapter, I find that there is a high level of connection and participation of the wider domestic society (which includes domestic institutions within these regions) in the affairs of the regional human rights institutions. Which then suggest that reliance on the role of CS and domestic institutions in the embedment of the regional human rights practices into national legal systems could have contributed to improved effectiveness and compliance in the latter regions.

With the aim of finding a balanced mechanism to improved compliance in the AHRS, this chapter investigated how the legitimacy of domestic source of pressure can be improved and how CS can be engaged as one of the potential domestic drivers of compliance in the AHRS. In doing this, two models have been suggested and examined: direct and indirect CS engagement. In all, the chapter concludes as follows: (a) currently, electorates in African states take advantage of pre-election events in framing issues of societal concern to get political attention – as a result of this, issues which would not ordinarily be on the political radars of politicians and political parties get identified as matters of importance during elections. (b) In the African context, voters' and public

concern on issues relating to the need for government to uphold the rule of law and by extension – human rights and compliance with international rights decisions are not given the same importance as other issues of public concern such as economy, security, corruption, choice of appointments, hunger/poverty, unemployment, human rights violations, human and capital development. Therefore, the possibility that African politicians will consider human rights and compliance as key electoral issues that matter to their constituents is unlikely – at least for now.

(c) Notwithstanding the above, this chapter concludes that rule of law and its components - such as human rights violations and compliance with rights decisions - can also become part of the issues of contention that attract the attention of politicians same way as other matters of societal needs. However, this might be possible, if the awareness and consciousness of the majority of registered voters (mostly from politicians' political strongholds) is raised to a level where human rights and compliance is framed as important as other issues of societal concern during elections (see section 5.2.3 above). This is where intensive orientation of voters through voters' civic education is needed in member states under the AHRS.

In addition to the above, the chapter further argues that other than elections, direct citizens' actions, for instance, protest can equally be explored as potential domestic process or mechanism for making government to pay attention to issues of concern which would not ordinarily become matters of consideration in government policies. All things being equal, citizens' civil unrest has the potential to swing government attention to issues of societal importance which state actors cannot feign ignorance of - the above discussions on the effect of direct civic action by CS in Kenya and Sudan are good examples to justify this assertion.

However, this does not imply that CS direct or indirect actions must always yield compliance from government because, the summary of my entire arguments in this chapter is that: if these issues of societal needs are presented as part of public outcry and yearnings either during elections or citizens direct actions (for example, protest or other forms of civil unrest), politicians will have to tread with caution during the pre and post elections periods because failure to address these issues raised by the public can attract immediate or future political costs.

CHAPTER SIX: SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

The African human rights system (AHRS) has existed for over three decades now.¹ Despite the relatively long years of existence, there are still concerns about lack of effectiveness and member states' poor attitude towards compliance with human rights decisions from the system's supervisory mechanisms.² These concerns relate more specifically to challenges of state parties' non-compliance and lack of effectiveness of the system as measured by the extent of how and whether human rights decisions have been able to influence desired changes in respondent states under the AHRS. Identifying these challenges and finding a complementary domestic mechanism that can improve compliance and by extension, effectiveness of the system was the primary motivation for this thesis.

As a result, this thesis in section 1.3 of chapter 1 sought among others to investigate whether state compliance levels in the AHRS can be raised by improving the internal legitimacy of the domestic sources of pressure for compliance. It further sought to know which domestic mechanisms can improve compliance and enhance effectiveness of the AHRS. These research questions were based

¹ The AHRS has from inception existed under the aegis of the former OAU and now AU. As discussed in section 1.1 of chapter 1 above, the primary constitutive instrument that regulates the affairs of the AHRS is the African Charter on Human and Peoples' Rights which was adopted in 1981 and later became operational in 1986.

² F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human & Peoples' Rights 1994-2004' (2007) 101 *The American Journal of International Law*, 8-12; D Abebe 'Does international human rights law in African courts make a difference?' (2016) 56 *Virginia Journal of International Law* 564; O Olukayode 'Enforcement and implementation mechanisms of the African Human Rights Charter: A critical analysis' (2015) 40 *Journal of Law, Policy and Globalization*, 47,50-53; See also R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 350-353; V Ayeni 'The impact of the African Charter and the Maputo Protocol in selected African states' (2016); V Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five selected African states' unpublished LLD thesis, University of Pretoria, 2017, 132-166,393; 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* 466-467; F Kabata 'Impact of International human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria (2015) 379-386 (arguing that the level of implementation of the findings of the African monitoring human rights mechanisms in the Kenya context is low), for related argument with regards to impact of the resolutions of the African Commission, see JK Biegon 'The impact of the resolutions of the African Commission on human and peoples' rights' unpublished LLD thesis, University of Pretoria (2016) 79-221.

on the hypothesis that state compliance with regional human rights decisions is likely to improve if domestic civil society (CS) in state parties under the AHRS are properly engaged to raise the domestic cost of non-compliance against non-compliant states.³ For purposes of emphasis, as stated in section 1.4 of chapter 1 above, CS in the context of this thesis should be understood to mean the wider domestic communities in states parties under the AHRS, this does not include the state (or agencies of state) acting as a unitary entity and the human rights NGOs/CSOs working closely with the supervisory mechanisms.

In justifying or rebutting the above assumption, the thesis firstly sought to understand whether there is a link between raising international cost of non-compliance and actual improvement in the rate of compliance under the AHRS. Secondly, to determine whether or not the effect of raising international cost has not become wane or inadequate to improve compliance. And if so, should there not be need to increase domestic influence or internal legitimacy of domestic forces in raising domestic costs to improve compliance? Thirdly, the thesis proceeds to investigate possible ways of increasing engagement of CS as part of the mechanisms that drive compliance under the AHRS. In this regard, the study in the preceding chapters investigated how domestic mechanisms such as national electoral processes and wider domestic mobilization by means of protest can contribute to increasing domestic cost of non-compliance. In other words, the thesis examined the role and engagement of CS as potential domestic source of pressure in improving compliance under the AHRS.⁴ The ultimate objective was to find whether (or not) an entrenched engagement of CS in the affairs of the AHRS could improve compliance with human rights decisions issued by the supervisory mechanisms under the AHRS.

³ See discussion in sections 3.7, 3.8 and 4.6 and 4.7 of chapter 3 and 4 respectively.

⁴ Drawing inspiration from the EHRS and IAHRs, chapter 5 of this thesis investigated the possibility of how engagement of CS in African states can be enhanced with the aim of improving compliance under the AHRS. This is because, my findings in chapter 3 reveal that the operations of AHRS present little or no evidence of deference to CS and domestic institutions as sources of pressure for compliance owing to the assumption that compliance is mostly being driven by NGOs/CSOs and their international or regional allies. For the literature on limited engagement of CS and domestic institutions, see R Murray and D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 87-118; for scholarship on the general role of NGOs/CSO in the AHRS, see R Murray 'The Role of NGOs and civil society in advancing human security in Africa in A Abass (ed) *Protecting human security in Africa*' (2010); A Motala 'Non-governmental organizations in the African system' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2004) 246-279; BS Baek 'RHIS, NHRIs and human rights NGOs' (2012) 24 *Florida Journal of International Law* 236; in addition, see generally, F Viljoen *International human rights law in Africa* (2012) 340, 383-388, 405-406 (he observes that 'apart from being formally accountable to the AU, in practice the Commission is held accountable more consistently by NGOs'); DH Moore 'Agency cost in international human rights (2004) 42 *Columbia Journal of Transnational Law* 498 (arguing that NGOs 'promote and monitor human rights compliance').

In addition, the thesis further assessed the conditions on which an entrenched engagement of CS may (or not) improve state compliance level in the AHRS.⁵ To this end, this thesis argues that the chances of improving compliance in the AHRS is likely when the awareness and consciousness of CS is raised to a level where human rights and compliance are framed together with other issues of societal needs either during elections or direct citizens' actions.⁶

Against the above background, this chapter, in the next section, presents a brief summary of all discussions in the preceding chapters and further set out the findings in relation to all the research questions for this thesis. The second and final sections will conclude this chapter by identifying and discussing a number of targeted recommendations and proposals which could then serve as my contribution to existing knowledge and of course, a basis for future research.

6.2 Summary of findings

Owing to the fact that this thesis is primarily concerned about the role of CS in enhancing effectiveness and improving member state compliance with rights decisions under the AHRS, this study focused on examination of how wider domestic community can raise domestic cost to induce compliance as a complement to international cost.

In the above context, four research questions were formulated for this survey; these questions form the basis for several arguments and analyses in the preceding five chapters, specifically chapters 3, 4 and 5. At the beginning of this thesis, several assumptions/projections were raised in chapter 1 to lay the foundation for in-depth discussions in subsequent chapters. One of such important projections discussed in chapter 1 was that compliance could be improved when the internal legitimacy of domestic sources of pressure is raised to a level that matter to state actors at the national level. The expectation is that state actors under the AHRS can equally respond to domestic stimuli (domestic cost) as much or even more than in response to international stimuli (international cost) especially when the chances of re-election might be threatened by domestic actors.

Chapter 2 discussed related theories on compliance. The aim was to find which theory has the potential to explain certain domestic factors that can also motivate state actors to comply. In the context of this thesis, the aim was to find a theory that assumes a disaggregation of a state's entity in order to allow the collective interest of the domestic constituents embedded in the state to

⁵ See section 5.1. & 5.2 of chapter 5 above.

⁶ See general discussions in sections 5.2.1 - 5.2.3 of chapter 5 above.

determine the interest of the state. So that it can be argued that CS – understood as part of states’ domestic structure - can be engaged to increase domestic cost of non-compliance and become drivers of state compliance with decisions of the African human rights supervisory mechanisms.⁷ At the conclusion of chapter two, the thesis finds the liberal theory to be more suitable in explaining the potential effect of CS engagement in raising domestic cost of non-compliance against violating states.⁸ The reasons for adopting the liberal theory as a theoretic framework for this thesis are discussed in section 2.4 of chapter 2 above. Having laid this foundation, I now turn to discuss the summary of my major findings in relation to the overall objectives of this thesis.

6.2.1 Summary of major findings from chapter three

First and foremost, chapter 3 aimed at finding: (a) the current status of compliance with rights decisions in the AHRS; and (b) where the balance of pressure for compliance currently lies as between internal and external arenas. This study makes several findings in this regard.

First, the analysis on the current status of compliance as discussed in section 3.4 of chapter 3 reveals that when human rights decisions are issued by the supervisory mechanisms under the AHRS, state parties’ compliance level has been relatively low or inadequate. Arising from this, it is argued that in the African context, there exist a sort of apathetic attitude and disincentive by state parties towards compliance with adverse decisions issued by the supervisory mechanisms under the AHRS. These findings were not only drawn from the existing scholarship but also from clear statements made by the supervisory mechanisms – particularly the Commission and the Court as contained in their recent activity reports.⁹ In view of this, it then became necessary to examine the possible reasons for this lingering challenge of low compliance with a view to finding a potential remedy that could possibly improve the status of compliance. In doing this, the chapter identified NGOs/CSOs and the supervisory mechanisms (particularly the Commission) as part of the major actors who directly or indirectly follow-up on decisions or orders with the aim of enhancing the prospect of compliance.

Second, as a result of the above findings, chapter 3 further examined the strategies or tools being applied by these stakeholders or compliance actors in their follow-up on decisions. As discussed in section 3.5.1 of chapter 3 above, the Commission has been involved in follow-up on decisions

⁷ For a comprehensive discussion on the liberal theory, see section 2.3.2 of chapter 2 above.

⁸ For a wider discussion on the liberal theory application to this thesis, see details in section 2.3.2 of chapter two above.

⁹ See section 3.4 of chapter 3 above.

by exploring different tools: Communication procedure, reporting procedure, mission visits, issuance of Country-specific resolutions, referral of communication to the African Court and appointment of special rapporteurs. The thesis finds that the Commission takes advantage of these strategies to: open up dialogue with state actors over a wide range of issues, to foster a closer relationship between states and the Commission and to also encourage and pressure for compliance. This approach explains a situation where the Commission explores independent mediums within its powers at the regional level rather than relying on CS at the domestic levels to pressure states into compliance.

On the other hand, one of the most important assumptions discussed in chapter 1 of this thesis is that NGOs rely almost exclusively on international pressure to push states to comply. And in proving this, the thesis identified the strategy of ‘naming and shaming’ (through issuance of public statements, call on international community and mass media publicity) as one of the major strategies NGOs often applied in follow-up on decision.¹⁰ This strategy is expected to be more effective when it is able to attract the concern of the public, global community and foreign funders who may then raise costs against the ‘named and shamed’ state.¹¹ The users of this strategy – particularly NGOs/CSOs defer mostly to the authority of external forces to raise international costs to induce state compliance.¹² This then suggest that the pattern in which compliance is being driven in the AHRS seem to be one sided. For instance, when a state refuses to comply with an adverse decision, different options could be explored: (1) the AU Assembly or Executive Council may sanction the non-compliant state. (2) As discussed above, the supervisory mechanisms may, through several mediums, encourage and pressure states to comply. (3) NGOs may explore its naming and shaming strategy to put the target state on a negative spotlight which may result to other attendant consequences (mostly, international costs).

All these analyses give the impression that the AHRS defers to external rather than internal legitimacy as sources of pressure for compliance. As discussed in sections 3.7 and 3.8 of chapter 3 above, evidence of an entrenched or deeply rooted engagement of wider domestic civil societies

¹⁰ For a comprehensive discussion on this, see sections 3.6.2 – 3.6.4 of chapter 3 above.

¹¹ See discussion on positive and negative effects of naming and shaming in section 3.6.3 of chapter 3 above. While it is argued that the use of naming and shaming mostly attracts the attention of western community and international bodies who may raise international costs against the target state, it must be further understood that the strategy can also be used domestically.

¹² It needs to be pointed out that naming and shaming strategy is not only used to attract the attention of the global public, it can also be used at the national level.

in the affairs of the African regional system is lacking. Therefore, this could then justify the claim that part of the reasons for the lingering challenges of non-compliance under the AHRS (despite the use of the above strategies by relevant stakeholders') is because the legitimacy of the sources of pressure for compliance is external, as against the underlying assumption that chances of higher compliance are likely in regimes where the deference for internal legitimacy of sources of pressure is higher (as discussed in section 4.6 and 4.7 of chapter 4 above).

In this above context, this thesis does not delegitimize the current practice (where the pattern of follow-up or pressuring for compliance is often built around external authorities and factors) or mechanisms often employed for driving compliance. However, in view of the discussions in section 3.6.4 of chapter 3 above, the frequent use of international pressure to raise international cost as a tool for compliance does not seem to have improved compliance.¹³ As a result, even if western donors or international community are swayed by the effect of NGOs 'naming and shaming' to initiate sanctions (aid reduction, security, economic or other forms of embargoes) against a target state, this has not taken compliance level to where it should, hence, compliance level under the AHRS has persistently remained low.

In view of the above discussions, this thesis argues that the need for a homegrown domestic mechanism (CS) that can raise domestic cost to complement the effect of international cost has become more pertinent than ever. Accordingly, Brysk describes such combination as pressure from 'above and below' which in the context of this study, could be more effective in improving compliance than the seeming exclusive reliance on external factors for compliance under the AHRS.¹⁴

¹³ For the literature providing both positive and negative effect of international pressure, see Biegon (n 1 above) 160-163 (Biegon observes that 'empirical evidence demonstrates that human rights criticism occasionally results in unexpected and unfavorable outcomes. The target state may, for example, intensify torture of detainees, close media outlets, or increase clandestine executions'); S Brown & R Raddatz 'Dire consequences or empty threats? Western pressure for peace, justice and democracy in Kenya' (2014) 8 *Journal of Eastern African Studies* 44-57; EM Hafner-Burton 'Sticks and stones: Naming and shaming the human rights enforcement problem' (2008) 62 *International Organization* 689, 693 (arguing that global publicity from NGOs, the news media, or the UN could have the accidental side effect of providing incentives for groups to orchestrate acts of violence large enough to attract the spotlight. Governments react to these security challenges by repressing human rights even further, setting spirals of violence in motion'); A Brysk, 'From above and below: Social movements, the international system, and human rights in Argentina' (1993) 26 *Comparative Political Studies* 259.

¹⁴ Brysk (n 13 above) 259.

6.2.2 Summary of major finding in chapter 4

Chapter 4 of this thesis examined whether or not an enhanced internal legitimacy of domestic sources of pressure has the potential to improve compliance. This is ultimately aimed to respond to the main research question which sought to determine whether state compliance levels in the AHRS can be raised by improving the legitimacy of the source of pressure for compliance. To this extent, chapter 4 discussed the role of CS and domestic institutions in raising domestic cost in promoting compliance with decisions of the European and the Inter-American human rights systems.¹⁵ At the end, the following key findings were reached.

First, as discussed in section 4.3 of chapter 4 above, there is an entrenched democratic culture of compliance which exist in most western European states under the European system. As a result of this, compliance has become a common trend within those states. Arising from this, the thesis argues that this inherent democratic culture of compliance is characterized by sense of ownership, acceptance and legitimacy of the system.¹⁶

Second, there is generally a bottom-up relationship between the domestic constituents and the regional system in both systems, which then shift the burden of compliance to the wider domestic societies and domestic institutions in these regions. For instances, as discussed in section 4.4.1 of chapter 4 above, domestic institutions under the European system often consider the provisions of the European Convention and ECtHR case law to guide their operations at the national level and as further set out in section 4.4.2 of chapter 4, similar practices also exist in the IAHRs as CS and domestic institutions voluntarily crave to see that their practices at the national level align with the regional human rights standard. These kinds of practices do not only reveal an intermingling relationship between the regional institutions and domestic constituencies but it further reveals a

¹⁵ For an analysis of the potential impact of CS across different rights jurisdictions: EHRS, IAHR and AHRS, see 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* 959-985; 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* 768-784; OC Okafor 'The African human rights system, activist forces, and international institutions' (2007); JE Haglund 'Domestic implementation of supranational court decisions: The role of domestic politics in respect for human rights' unpublished PhD thesis, Florida State University, (2014)37-38, 71-72, 93-94,109-110,112-150; X Dai 'Why comply? The domestic constituency mechanism' (2005) 59 *International Organization* 363-398; D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and International Relation* 52-83.

¹⁶ See discussions as set out in section 4.7 of chapter 4 above.

zest and voluntariness on the part of the domestic stakeholders to ensure compliance and effectiveness of the both systems.

Third, under the IAHRs, the thesis finds that state accountability is achieved through a number of domestic mechanisms: mobilization of public opinion, raising awareness by the media, the domestic litigation process, and engagement of live witnesses during public hearings and resilient efforts of pro-compliance national judges and parliamentarians.¹⁷ In all, compliance under the both regions is determined to a large extent, by the deep-rooted engagement and participation of CS on the one hand and the level of deference for internal legitimacy of wider CS and domestic institutions as sources of pressure for compliance on the other hand.¹⁸ This then triggered the argument that the higher the deference for internal legitimacy of CS as source of pressure, the higher the chances of better compliance.

Fourth, under the both systems, the state unitary structure is disaggregated so that compliance is not considered as a task strictly meant for the executive arm of government. As a result of this, the thesis finds relevance in the role of other state actors: legislature and the judiciary in leveraging on regional courts' decisions to reform existing national laws in order to conform to international human rights instruments and case law thereby raising expectation for executive adherence with regional rights decisions to avoid any attendant domestic costs for non-compliance. Beyond the efforts of these coalition domestic actors (national legislature and judiciary) who pressure for compliance in these regions, the role of different strands of CS, for instance: media, individuals in government employ, provincial and national parliaments, NHRIs, national judges, individual human rights activists and legal experts have significantly contributed in facilitating compliance in the both regions.

As the broader discussions in section 4.4.1 & 4.4.2 of chapter 4 indicate, member states under these regions tend to comply with rights decisions either for fear of anticipated domestic backlashes from CS or due to vested or voluntary commitment towards promotion of human rights and compliance with rights decisions. Whereas engagement and participation of CS could be generally considered as an important indicator for better compliance under the IAHRs and EHRS, the resilient efforts and engagement of disaggregated domestic institutions are more visible in the

¹⁷ See generally P Engstrom (ed) 'Rethinking the impact of the Inter-American human rights system' (2018) available at https://www.researchgate.net/publication/323168283_Rethinking_the_Impact_of_the_Inter-American_Human_Rights_System (accessed 13 March 2019).

¹⁸ Haglund (n 15 above) 147-148; see discussion in section 4.7 – 4.8 of chapter 4 above.

embeddedness of the European system into national legal domains. Drawing inspiration from these jurisdictions, this thesis suggests that engagement and reliance on domestic institutions and CS to raise domestic cost could be as effective (if not more) as international cost – an insight that may appear useful in improving compliance under the AHRS.

6.2.3 Summary of major findings from chapter 5

Inspired by the findings in chapter 4, chapter 5 examined the possibility of how an enhanced engagement of CS can improve compliance under the AHRS. Owing to this objective, one of the major findings in chapter 5 was that: first, CS in African democratic states often frame different issues of public concern in deciding the choice of candidate during elections and to enhance government accountability to the needs of domestic constituents. Second, while these issues may (or may not) determine the outcome of elections, they help in pulling the attention of politicians to public worries and concerns. Therefore, as discussed under section 5.2.2 of chapter 5, this process or approach can equally be explored in improving compliance if the awareness of voters (strands of CS) can be raised to a level, where rule of law – which entails human rights and compliance – can be framed as part of other important issues often raised by CS during elections. In view of this, two models were identified as potential domestic mechanisms for improving compliance. The models are direct engagement of CS through protest and indirect engagement of CS during elections.

All these issues discussed in chapter 5 points to the fourth research question which sought to answer the following questions: In what ways can domestic cost of non-compliance be raised? Can domestic political arena emerge as a potential locus for raising domestic cost of non-compliance? In response, the thesis argues that voters can exercise electoral leverages to stimulate compliance from state actors on a wide range of issues which may include - rule of law and compliance with rights decisions, however, this may be subject to certain potential factors.¹⁹ For instance, as may be applicable in the African context, the possible effect of electoral cost is contingent on the following factors: (i) Improved awareness of voters' about human rights decisions as well as engagement of CS in the operations of the African human rights institutions under the AHRS (ii) majority of voters' preference for human rights protection and compliance with judicial decisions (iii) voters' equal value/preference on demand for respect for rule of law (which includes all other components, say human rights protection and compliance) with other domestic pressing issues-say

¹⁹ See sections 5.2.2 and 5.2.3 – 5.2.4 of chapter 5.

security, poverty, education, infrastructure and other social amenities. This is important because, in a scale of preference, the chances that elected leaders will give more attention to voters' demands for rights protections alone as against other more seemingly competing governance issues may be unlikely. However, elected leaders may be more disposed to comply with voters' demand for respect for rule of law when the latter is framed alongside other societal issues mentioned above (iv) when there is a demand for respect for rule of law by member(s) of the elected leader's winning coalition. As discussed in section 5.2.1 of chapter five above, winning coalition consist of group of voters to whom an incumbent seeking re-election rely on for electoral victory. Therefore, the risk of being ousted out of office becomes higher when the demands from members of the winning coalition are ignored. However, the chances of electoral victory increase if and when an incumbent is able to influence state compliance policy to suit voters' preference.²⁰ In addition to all these factors, the thesis also finds citizens' direct action through protest as one potential domestic mechanism for improving compliance.²¹

6.3 Recommendations

In view of the findings discussed in section 6.2.2 above, a number of recommendations have been suggested in the section below, these recommendations could be explored in raising the internal legitimacy of the domestic sources of pressure in improving state compliance level in the AHRS. It needs to be pointed out that while some of the recommendations are influenced by the practices under the European and American human rights systems as discussed in chapter 4 of the thesis, others are prompted by the findings in chapters 3 and 5 of the thesis.

6.3.1 Engagement of CS as domestic mechanism for compliance

The question here is: by whose effort do state comply with rights decisions? What mechanism triggers state actors' incentive to comply? In her study on the likely impact of international human rights treaties on domestic politics, Simmons argues that international law does impact domestic actors and subsequently aids state human rights change in different manner: by altering the state agenda, aiding supranational litigation, providing a source of law and facilitate mobilization of

²⁰ For general discussion on domestic effect of threat to political survival, see Bueno de Mesquita, Bruce, A Smith, RM Siverson & JD Morrow *The logic of political survival* (2003) 10,122; In explaining the political relevance of members of winning coalition, Bueno de Mesquita *et al* argue that 'switching coalition membership away from core supporters [could amounts to] political suicide', for this, see Bueno de Mesquita *et al* 144.

²¹ See section 5.3 of section 5 above.

domestic actors for rights change.²² This implies that the role of domestic actors could be relevant in stimulating the state actors' incentive to comply with their international treaty obligations. In identifying the relevant domestic actors for domestic rights mobilization, Hillebrecht states²³ that a combined effort of coalition of domestic actors which includes the executive, judiciary, legislature and CS increases the likelihood of state compliance with rights decisions.²⁴

Admittedly, as reiterated in section 6.2.2 of this chapter, the role of these domestic actors contributed towards improving compliance and effectiveness in the EHRS and IAHRs. Notwithstanding the fact that the dynamics operational in these regions are different from the African system, the level at which these domestic institutions crave to ensure that compliance level and effectiveness are enhanced in the European and American systems could be considered as a model worth emulating in the African system. Therefore, in adopting Hillebrecht's typology of domestic actors, this thesis explains how the role of domestic institutions would matter in promoting compliance under the AHRS.

In this section, bearing in mind the underlying assumptions of the liberal theory as discussed in section 2.3.2 of chapter 2 above, the state is not recognized as a unitary entity but a deconstructed structure with segregated units – the executive, the legislature, judiciary and wider CS. And since the state is considered as inanimate and does not have its own will, it is the collective interest of the disaggregated components that directs states' policy which may include compliance cost-benefit assessments. Therefore, the role of the following domestic institutions should be understood as disaggregated institutions of the state rather than the state as an entity.

(a) The role of the executive

First, the role of the executive seems to be the major concern. The reason is quite obvious. The executive is the arm of government that represents the state and often saddled with the responsibility of conducting and managing foreign policy and relations on behalf of the government.²⁵ They represent the state at the global level and as it concern regional litigations;

²² B Simmons *Mobilizing for human rights: International law in domestic politics* (2009).

²³ See section 4.4.1 and 4.4.2 of chapter 4 above.

²⁴ C Hillebrecht 'The power of human rights tribunals: Compliance with the European Court of Human Rights and democratic policy change' (2014) 20 *European Journal of International Relations* 1100-1110; K Alter *The new terrain of international law: Courts, politics and rights* (2013).

²⁵ Hillebrecht (n 15 above) 961; Haglund (n 15 above) 27-38; A Huneeus 'Courts resisting Courts: Lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 493-533.

they are recognized and charged as the state interlocutor throughout the litigation period.²⁶ As a result of this, the executive is usually expected to exercise certain level of willingness and incentives towards compliance with rights decisions. While it seems that the responsibility to comply falls on the executive, the role of CS is also critical in pressuring elected executive political office holders towards compliance.

One of the major incentives that ‘pushes’ elected political office holders towards compliance with adverse regional decisions is when CS (particularly the voters), raises electoral costs which threatens executive political office survival.²⁷ In order to avoid either the electoral cost of being ousted out of political office or face other kinds of domestic costs (through citizens’ direction actions),²⁸ the violating state (as often represented by the executive) may consider compliance as a better payoff. Therefore, the option of non-compliance will be jettisoned by elected executive politicians. In view of this analysis, this thesis recommends that NGOs/CSOs and other stakeholders working to improve state compliance with rights decisions issued by the supervisory mechanisms under the AHRS should explore (as part of their follow-up strategies) these potential incentives to trigger compliance from those elected into executive arms of government in state parties to the AHRS. This can possibly be done by educating the voting public (through voters’ and civic education) on the need to consider respect for rule of law (which includes human rights and compliance with rights decisions) as one of the factors in determining the choice of candidate to be voted for or against. This orientation should be regularly carried out at the grass-root level by way of seminars, communities’ campaigns, town-hall meetings during and after election periods. Such sensitization programs could also be infused into the day-to-day advocacy programs of human rights NGOs who work under the AHRS. The expectation is that when elected politicians know that voters are informed and knowledgeable enough to raise cost for their unbecoming behavior towards societal needs, bearing in mind the potential electoral backlashes, there are possibility that those elected into executive arms of government will be wary of being insensitive to matters of public importance (which may include human rights and non-compliance with courts decisions).²⁹

²⁶ As above; see section 5.2.1 of chapter 5 above.

²⁷ Haglund (n 15 above) 31-38; see discussion in chapter 5 particularly section 5.1.2.

²⁸ See sections 5.2.1 and 5.3 of chapter 5 above.

²⁹ See sections 5.2.1, 5.2.3 and 5.3 of chapter 5 above.

(b) The role of the national judiciary

Second, owing to the fact that there are no central mechanisms for enforcement of international human rights decisions at the national level, domestic courts have often been considered as one of the mediums by which international human rights decisions are given effect at the domestic level.³⁰

The national judiciary plays a critical role in not just improving compliance but sets a stage for public expectation of a corresponding compliance response from the executive and legislature.³¹

In the context of the Inter-American Court on Human Rights (IACtHR), Huneeus contends that the national court has significantly contributed in promoting compliance under the IAHR regime.³²

In similar manner, Hillebrecht observes that one of the most important allies suspected to have contributed in improving compliance with European Court on Human Rights (ECtHR) case laws is the national judiciary'.³³

Other scholars whose works focus on factors that influence compliance similarly contend that the independence of the judiciary is one of the most important predictors of member states' compliance with the ECtHR decisions.³⁴ Hillebrecht further notes that 'courts, both in the aggregate and individual judges, use the ECtHR's jurisprudence to inform their work, and many use the court's rulings as a yardstick against which they measure their country's own human rights laws'.³⁵ These arguments find similar credence with respect to the role of some national courts in Nigeria (particularly during the military era) towards compliance with the Commission's decisions

³⁰ See sections 4.4.1 and 4.4.2 of chapter 5 for discussions on the role of national judiciaries in improving compliance and effectiveness under the EHRS and IAHRs.

³¹ Haglund (n 15 above) 96-105, 144, Huneeus (n 25 above) 502; for other related literature on the importance of domestic judicial power and independence in promoting compliance, see EJ Powell and JK Staton 'Domestic judicial institutions and human rights treaty violation' (2009) 53 *International Studies Quarterly* 149-174; LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273-391; OA Harthaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935-2042; Simmons (n 22 above).

³² Huneeus (n 25 above) 502

³³ Hillebrecht (n 24 above) 1107-1108.

³⁴ For the literature in this context, see S Besson 'The reception process in Ireland and the United Kingdom' in H Keller & A Stone Sweet (eds) *A Europe of Rights: The impact of the ECHR on national legal systems* (2008) 32-106; IO Kaboglu and SI Kountnatzis 'The reception process in Greece and Turkey' in H Keller & A Stone Sweet (eds) *A European of rights: The impact of the ECHR on National Legal systems* (2008) 451-522; Powell & Staton (n 31 above); H Keller & A Stone Sweet 'The reception of the ECHR in national legal orders' in H Keller and A Stone Sweet (eds) *A Europe of rights: The impact of the ECHR on national legal system* 3-26.

³⁵ Hillebrecht (n 24 above) 1107-1108.

under the AHRS.³⁶ While commenting on the role of the Nigerian judiciary in giving effect to the Commission's interim-measure in *Lekwot's* case, Okafor states as follows:

'the Court....granted the application and dismissed the government's objections that the Court had no jurisdiction to hear the matter, it held that it was necessary to grant the injunction in order to preserve the subject matter of the communication before the Commission; that is, the lives of the convicted persons. Without this injunction, the Court reasoned, the government could go ahead and execute them, thereby rendering the anticipated decision of the Commission nugatory'³⁷

Drawing from the above, it may therefore be asked, why domestic national courts are important domestic actors in fostering compliance with adverse rights decisions. As discussed in sections 4.4.1 and 4.4.2 of chapter four above, the national courts under the European and Inter-American systems possess certain incentives to comply with rights decisions which requires investigation, prosecution, re-opening of cases and sentencing or punishing violators of human rights as may be directed by the judgments of regional human rights tribunals. Several reasons may trigger judicial incentive or behavior to comply with rights decisions. These include: (a) to boost the legitimacy and reputation of the national court and the judiciary at large, to exhibit independence of the judges and the entire judicial system, to gain the confidence of the public so as to be seen as beacon of hope for the 'common man'; (b) to foster a good relationship with the regional court, to improve information symmetry about the human rights happenings at the regional level, to strengthen and expand their jurisprudence, to provide more sources of law and enhance top-down supranational litigation; (c) consistent application and domestic enforcement of regional court decisions enhances the effectiveness and legitimacy of the supranational courts; (d) a signal of acceptance and voluntary commitment to embed the practices of regional human rights systems into national legal systems.

As Huneeus notes, the IACtHR remedial orders can 'demonstrate the benefits of partaking in transnational judicial dialogue by deferring to, citing and otherwise promoting national jurisprudence that embeds the court and its rulings in national settings'.³⁸ Similarly, Haglund states that powerful judicial system plays an important role in determining the effectiveness of the

³⁶ Okafor (n 6 above) 96-99.

³⁷ See Comm 87/93, *The registered trustees of the constitutional rights project (in respect of Zamani Lekwot and six others) v Nigeria*; Okafor (n 15 above) 98-99.

³⁸ Haglund (n 6 above) 144-145; Huneeus (n 25 above) 502-533.

supranational rights institutions because the mere act of integrating regional decisions into national domestic judicial jurisprudence suffice effectiveness and legitimacy of the regional court at the domestic level.³⁹

In view of the above, it is suggested that an understanding of how to explore the potential role of the national judicial courts and judges to act as an independent domestic source of pressure by raising domestic cost against executive policy makers' could promote compliance under the AHRS. In other words, the chances of better compliance is likely if stakeholders can defer to and focus on the possibility of raising internal legitimacy of domestic sources of pressure for compliance under the AHRS. Therefore, the thesis recommends that NGOs/CSOs and other stakeholders working to improve compliance under the AHRS may have to take up the task of initiating a forum that enables periodic interactions between national judges of apex courts in member states (especially in non-compliant or violating states) and regional courts judges or appointed Commissioners (of regional rights institutions under the AHRS). Such forum or fora will present opportunities for dialogue on range of issues which could also include discussions on challenges of non-compliance and ways to improve member states' compliance.

Some of the possible advantages of these recommendations are: that the knowledge about the activities of the regional human rights institutions would be improved, chances of more participation and engagement of domestic institutions and wider CS in the affairs of the regional system could become feasible and therefore, embedment of the regional human rights practices into national legal systems could become more likely. To further improve on the proposed synergy between the regional judges and their national courts' counterparts, this thesis further recommends the involvement of some key domestic actors – judicial service commissions and National bar associations. The latter can, through national conferences and other related fora, engage regional and national judges to discuss, share views and interact on human rights discourse particularly in relation to the importance of giving domestic effect to regional human rights decisions and improve on state parties' compliance.

(c) The role of the national parliament

Thirdly, the national parliament or legislature also play a key role in the implementation of human rights decisions from the regional human rights tribunals.⁴⁰ Often times, decisions from regional

³⁹ Haglund (n 15 above) 144 -145.

⁴⁰ Haglund (n 15 above) 73-80; see discussion in section 5.3 of chapter 5.

monitoring bodies may require national legislatures to amend, repeal or domesticate rights related decisions. The regional tribunal may even order a respondent state to reform an aspect of its national legal system to conform to provisions of international human rights treaties or case law.⁴¹ This kind of order requires the legislative input of members of parliament. The question that nags from the above scenario is what motivates members of parliament to facilitate compliance with such injunctive orders or decisions? There are different factors that motivate members of national parliaments to undertake measures towards compliance. For instance, as argued in chapter 4 and 5 of the thesis, legislators are elected as members of the legislative arm of government, therefore, in the same manner with the executive, they also possess some sort of electoral incentives to comply and be accountable to matters of public importance which may have been raised by voters during and after elections.⁴² This is to avoid electoral consequences that could arise from electoral or the ballot polls.⁴³ However, given that voters's need and the policy preferences of elected policy maker are not always perfectly aligned, it is uncertain how legislators' accountability to the peoples' needs will be guaranteed. As a result, there might be need to first, identify and understand the different types of electoral systems operational – whether plurality/majoritarian or proportional representation - and second, the democratic electoral rules which give the elected officer the incentive to consider and be more responsive to societal issues that voters consider very important (which may include respect for decisions issued by international courts).⁴⁴

Viewing from the above, the question that comes to mind is: by which way will legislators in national parliaments consider decisions of the regional monitoring bodies as an important item in their legislative businesses? Some factors could explain this, for instance, Scriber and Slagter argue that one of the direct ways by which the subject of compliance may become a subject of legislative consideration and debate is by 'abstract constitutional review'.⁴⁵ For instance, when a decision requiring a change of legislation is issued, to ensure that a proposed legislation conforms to the decision of the rights tribunal, the process of resorting to abstract constitutional review might become necessary. First, the minority legislators could refer a particular proposed legislation to a

⁴¹ As above.

⁴² See section 4.4.1 and 4.4.2 of chapter 4 and section 5.2.1 of chapter 5 above.

⁴³ As above.

⁴⁴ See section 5.2.4 of chapter 5 above; D Cingranelli & M Filippov 'Electoral rules and incentives to protect human rights' (2010) 72 *The Journal of Politics* 243.

⁴⁵ D Scriber & TH Slagter '*Domestic institutions & supranational human rights adjudication: The ECtHR and the IACtHR compared*' (2016) 6.

state's constitutional court before its passage especially when it is perceived that the proposed legislation will not satisfy the requirements of the regional court's judgment. Second, the expectation is that if the national or constitutional court finds the entire legislation or any part therein unconstitutional and not in conformity with international human rights standard, the majority members of parliament may be required to alter the bill in order to conform with the regional court's order which the minority legislators and the entire domestic public may have clamored for. However, owing to the different parliamentary rules applicable and peculiar in different parliaments, this procedure may not be carried out in all states except the rules of parliament in that state's legislature provide for it.

Despite the above observation, the option to send a bill to the national court for review (in states where it could be applicable) poses domestic threat to the majority legislators and the executive arm of government especially when the proposed legislation is forwarded to the parliament by the executive (often called 'executive bill').⁴⁶ While this approach may differ from the conventional legislative procedure of bill passage in most national parliaments in Africa, it may however be relevant in domestic politics where its applicability is feasible. This procedure could be adopted in national parliaments particularly within African states in order to strengthen minority or opposition legislators' ability to demand for legislative framework which aids compliance with rights decisions. Again, it may be asked: by which means can this approach be achieved and thus, recommended?

The starting point is to amend the rules of parliament (in states where it is not provided for) to empower the minority legislators to exercise such kind of leverage. Again, it is unlikely how minority legislators will lobby the majority to support such an amendment when the end result will be unfavorable to the latter. However, in states where this could be possible, a referral of legislative bill to a national or constitutional court for a review may have the potentials to render government non-compliance unlikely as this may present the public the opportunity to watch the actions of the executive and the majority legislators closely. In this case, the minority legislators act as human rights policy 'watchdogs' and conduit pipes that could trigger domestic public mobilization against the majority members for non-compliance or any kind of infraction.⁴⁷ In addition, Scriber and Slagter further contend that:

⁴⁶ Scriber & Slagter (n 45 above) 6-7.

⁴⁷ Scriber & Slagter (n 45 above) 9.

Even without the direct threat of referral, the possibility exists that other societal actors (e.g, groups that may exert significant political pressure on parties through the media and/ or the ballot box) can utilize the supranational court to advance their political objectives⁴⁸

While the thesis argues that national parliament can exercise domestic incentive and then shift the compliance baton to the executive for corresponding response, this possibility is limited in specific context. For instance, in the African context, one major limitation that may wane the effective role of legislators in influencing compliance at the national level is the lack of awareness of human rights violations and decisions issued by the supervisory mechanism at the regional level.⁴⁹ When there is deficit of knowledge about human rights issues and government intending compliance policy at the domestic level, it is unlikely how legislators (particularly, the pro-human rights compliance minority) will consider compliance decision policy in their legislative drafting and debates. Murray and Long contend that ‘there is often little knowledge of human rights among parliamentarians resulting in limited capacity to undertake any meaningful discussion on findings of the African commission...overall, therefore, there are few occasions on which African Commission findings are debated in domestic legislature’.⁵⁰

Despite the above challenges, it is hereby recommended that NGOs, CSOs and other human rights actors operating under the AHRS should fine-tune their advocacy strategies to include regular presentation of updates about human rights decisions and reports of non-compliance to national parliaments in respondent’s state, this can be done through the various parliamentary committees on: public petitions, human rights, rules, business, judicial matters, foreign policy and other related matters. This is important owing to the fact that the human rights bodies from where the decisions emanate cannot enforce their decision at the domestic level. On the other hand, legislators who could possibly set out measures for compliance may be constrained if they do not have the requisite knowledge and of course, the capacity to follow-up decisions from the point of litigation to compliance. Therefore, it is traditionally expected that the human rights actors (NGOs and CSOs)

⁴⁸ Scriber & Slagter (n 45 above) 7.

⁴⁹ Murray & Long (n 4 above) 104.

⁵⁰ Murray and Long (n 4 above) 103-104; on how awareness and knowledge of human rights violations and compliance can enhance and also limit legislative incentive for compliance, see Scriber & Slagter (n 45 above) 29-30 (arguing that while legislators under the IAHRs possess more knowledge and incentive to use ‘the IACtHR to legitimize a position or stake out well-defined turf around a particular human rights issue, including new rights issues such as gender equality and indigenous rights’, their counterparts in Germany exhibited less incentive towards compliance because human rights discourse in Germany is not ‘contentious as the case in Chile but is being constantly fine-tuned’).

who often times litigate human rights cases on behalf of victims, may further consider the saliency of presenting human rights issues requiring compliance to get legislative attention and considerations. For this concern, it is further recommended that national parliaments in member state under the AHRs should set up parliamentary committees (where none exist) to oversee and advise on measures to be taken in enhancing compliance through engagement of national parliaments. It is further suggested that parliamentary committees of this sort should perhaps be composed of lawyers or human rights activists and if possible, be headed by pro-human rights legislators.

In the African context, legislators should be advised to indulge in human rights trainings and capacity building as regularly as possible. In their oversight functions, they should consider human rights as important as other issues of regular concern, and legislators should consider human rights and respect for international court's decisions as part of the public or private goods that should be delivered to their constituents. To surpass the financial cost and difficulty in complying with certain kinds of rights decisions (for example, payment of compensation to victims and family), it is recommended that while preparing state budget, legislators should create sub-heads for human rights expenses in every budgetary fiscal year. Without which, compliance may be challenged when the financial wherewithal needed to comply is limited or not available.

(d) The role of CS

Fourthly, in this sub-section, the unique roles played by CS will be discussed. As widely discussed in chapter 4 and 5, domestic mobilization for rights protection may include the option of raising electoral or other domestic costs against state actors when they fail to comply. CS, in the context of this discussion may include: the voting public, the individuals and the media, bar associations, labor leaders, social movement groups and pro-human rights individuals.⁵¹ In addition, for purposes of this thesis, the role of national human rights institutions (NHRIs) is considered and discussed as one of the promoters of compliance in collaboration with CS.

It follows from the analyses in the two preceding chapters that the role of CS serves as 'informational conduit', watchdogs and checks and balances to the role of other domestic institutions.⁵² In this way, transparency in the compliance process is guaranteed as no one domestic

⁵¹ See section 1.4.1 of chapter 1 above on definition of terms.

⁵² Scriber & Slagter (n 45 above) 7.

institution can shirk or frustrate the process of compliance owing to the fear that the wider CS is watching and could raise domestic cost for non-compliance.⁵³ This informs the argument that chances of compliance with rights decisions are likely to be higher when there is a presence of a strong, robust and active CS in a state. As a result, this thesis posits, that the existence of CS activism over a particular rights decision could facilitates chances of better compliance especially when domestic pressure and above all, mobilization is at work. To maximize the effect of other domestic actors' political incentive for compliance, the role of CS is needed so as to blow the 'whistle' on account of any infraction on rights protection from any of the domestic institutions discussed above.

As discussed in sections 5.2 and 5.2.1 of chapter 5 above, CS' direct or indirect engagement has the potential to influence compliance from state actors. For instance, when a state actor fails to adhere to rights decisions and respect for rule of law, the voting public and citizenry can resort to raising either electoral or other domestic costs against the non-compliant actor. To avoid such consequences, the non-compliant actor may tend to comply with right decisions. Putting this in clear terms, in the context of the IAHRs, Hillebrecht states:

While the executive have an incentive to signal the legitimacy of their human rights plans and policies to international audiences, they have a similar incentive to signal such commitment to human rights to domestic constituents...the regular coverage of the Inter-American human rights tribunals in local newspapers and the engagement of domestic civil society groups with the commission and court suggest that audiences at home are paying attention to how their elected officials respond to the tribunal's ruling. Constituents expect that political elites will uphold basic human rights, and they are willing to express their expectations in the media and in the voting booth.⁵⁴

However, in the African context, for CS mobilization to improve compliance, this thesis recommends that there should be an unfettered engagement and participation for CS in the general affairs of the AHRS particularly as it concern the operations of the supervisory mechanisms. While the role of the electorates, media, individual activists and other strands of CS may seem to be salient in generating domestic cost, impact of NHRIs may also be considered very important. NHRIs are independent statutory bodies charged with the responsibility to among others publicize

⁵³ Hillebrecht (n 24 above) 1100-1108.

⁵⁴ Hillebrecht (n 15 above) 969.

human rights decisions, monitor state infraction and extent of compliance as well as follow-up of litigation updates till compliance is realized.⁵⁵ Murray and Long's analysis reveals that NHRIs:

[h]ave a broad mandate to protect human rights and are, in theory, well placed to play a central role in the follow-up activities of the treaty bodies and the African commission and to facilitate the process of implementation of findings at the national level.⁵⁶

In order for NHRIs and other strands of CS to function effectively in the African context, it is recommended that the level of awareness and familiarity about the human rights happenings at the regional level has to be raised. So that the existing cordial relationship between NGOs and the supervisory mechanisms (especially the African Commission under the AHRS) should be extended to other strands of CS.

6.3.2 Re-shaping the contours of human rights NGOs and CSOs working under the AHRS

Owing to the fact that non-compliance with rights decisions has a domestic distributional effect and given that the human rights supervisory mechanisms under the AHRS have no enforcement and oversight mechanisms that drive compliance, it may therefore be asked: How has compliance been driven since inception of the AHRS? Who are the primary compliance actors in the AHRS? This thesis extensively examined these questions in chapter 3 of this thesis, and finds that there is an overwhelming influence and engagement of human rights NGOs and CSOs in the workings of the African human rights monitoring bodies under the AHRS.⁵⁷ The thesis further finds that NGOs/CSOs play significant roles in litigation and follow-up on decision with the aim of eliciting state compliance with right decisions. One of the notable strategies often applied by NGOs/CSOs is by piling international pressure by way of 'naming and shaming' the violating state. In consequence, the target state may face various forms of sanctions or international costs from western community and foreign donors. The analyses in chapter 3 reveal limited resort to domestic cost for compliance and inconsistent results in the use of international pressure for compliance. Therefore, in order to address the current challenge of non-compliance, this thesis fills the gaps in the literature by suggesting that relevant NGOs/CSOs working on improving human rights compliance in Africa should defer and improve on internal legitimacy of domestic sources of

⁵⁵ Murray & Long (n 4 above) 104; A Muller & F Seidensticker *The role of national human rights institutions in the United Nations treaty body process* (2007); R Carver 'A new answer to an old question: National human rights institutions and the domestication of international law' (2010) 10 *Human Rights Law Review* 1-32.

⁵⁶ Murray & Long (n 4 above) 105.

⁵⁷ For extensive discussions on the role of NGOs/CSOs under the AHRS, see discussion in section 3.5.2 of chapter three above.

pressure and be more concerned in raising domestic costs than international cost. As Cavallaro and Brewer note in the context of the IAHRs, that primary actors for compliance are the members of the public and social groups which includes the media, pro-human rights actors at the domestic level, pro-human rights activist under the state employ and others members of the domestic constituency having passion to undertake long-term advocacy campaigns.⁵⁸

6.3.3 Effectiveness of the AHRS: The need to improve legitimacy and ownership of the system

As espoused by some scholars, the challenge of ineffectiveness of the AHRS is partly as a result of lack of legitimacy and ownership by the people to whom the system is established to protect.⁵⁹ Therefore, it may be necessary to inquire to know the factor(s) that can improve legitimacy of the system? This thesis recommends that the following factors could enhance legitimacy and ownership of the supervisory mechanisms in Africa and by extension, effectiveness of the AHRS: first, a broader engagement of CS is needed, for instance (a) engagement of the wider domestic society in the works of the African human rights institutions; (b) reliance on the wider CS community to raise domestic cost to drive compliance; (c) and channelling rights decisions to empower domestic mobilization for compliance; (d) engagement of national judges and national legislators in joint court sittings or parliamentary sessions and conferencing. This will help to stimulate and exchange ideas and also reduce the current challenge of lack of awareness.

Second, in addition to the factors listed above, it is further recommended that international human rights law should be made a compulsory study in law faculties and in the scheme of teaching, focus should be on the operations of the AHRS, its progress, challenges and the way forward. Again, lawyers in African states under the AHRS should inculcate the culture of regular referencing to the regional rights decisions as precedents and this should be done as often as possible. During advanced legal trainings, the bar associations and council of legal education (or their equivalent bodies) in member states should pay serious attention towards advancing knowledge about the human rights practices in Africa. That way, regional human rights discourse could become part of other topical issues often discussed. Above all, human rights NGOs/CSOs could also design

⁵⁸ Cavallaro & Brewer (n 15 above) 770.

⁵⁹ C Odinkalu 'Why more Africans don't use human rights language' (2000) 2 *Human Rights Dialogue* 4; BK Murungi 'To whom, for what, and about what? The legitimacy of human rights NGOs in Kenya' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 37-48.

training programs and talk shows in conjunction with other domestic agencies and institutions with the aim of increasing awareness of human rights at the domestic level.

The implementation of these recommendations will contribute towards improving the legitimacy and ownership of the rights institutions and by extension, effectiveness of the system. In similar context, writing on effect of regional rights litigation under the IAHRs, Cavallaro and Brewer argue that ‘human rights tribunals should understand that international rights courts are most effective when their work contributes to efforts deployed by domestic activists as part of their broader human rights campaigns’.⁶⁰ This implies that legitimacy of rights tribunals is partly measured to the extent in which the latter procedures and jurisprudence are considered relevant to the long –term mobilization efforts of domestic actors.⁶¹ In the African context, Okafor’s analyses seem to indicate that the role displayed by the Commission in *Lekwot’s* case was because its jurisprudence, procedure and decisions gave impetus to the mobilization efforts of the Nigerian domestic forces which attracted an unusual domestic pressure on the Nigerian military government.⁶²

All these suggestions are consistent with the tenets and assumptions of the liberal theory.⁶³ As earlier mentioned in section 6.2 above, going by the liberal theory, the state’s physical outlook should be disaggregated so that the disaggregated units can determine the policy direction of the state and claim ownership of the state affairs. Therefore, in the context of this thesis, engagement of CS in the manner as suggested above will shift the system from its current practice of focusing on NGOs and external factors to drive compliance to a domestic oriented pattern of driving compliance. A focus on domestic mobilization approach will entail paying more attention to the potential role of CS in raising domestic cost to improve compliance.

6.4 Conclusions and future research

In view of the above findings and insights drawn from the general analyses in the literature as discussed in the preceding chapter 1 to 5, four major conclusions can be inferred: (a) In the context of the AHRs, NGOs are one of the major drivers of compliance and they rely almost exclusively on international pressure to push states to comply, yet compliance levels have remained low; (b) The effect of the mechanism of international pressure and other external tools often applied by

⁶⁰ Cavallaro & Brewer (n 15 above) 775.

⁶¹ Cavallaro & Brewer (n 15 above) 770.

⁶² Okafor (n 15 above) 96-99.

⁶³ For details on the liberal theory, see discussion in section 2.3.2 of chapter two above.

NGOs are either becoming wane or inadequate to compel compliance from member states under the AHRS; (c) In the African system, instances of entrenched engagement and participation of domestic institutions and wider CS in pressuring states for compliance is limited, and therefore, the legitimacy of the existing sources of pressure for compliance is external; (d) state compliance levels in the AHRS can be raised by engaging the wider CS to become enablers of compliance so as to encourage deference on internal legitimacy of domestic sources of pressure in the African system; (e) CS can raise domestic costs against non-compliant state by exploring either or both the following tools: direct citizens' actions – by means of protest, and indirect CS engagement - through elections. These are all exclusively (but not exhaustive) potential domestic mechanisms that could drive compliance. In addition, the awareness of the African public about the happenings of the human rights practices at the regional level is relatively low and this need to be stirred up. It is important to note that these conclusions were inspired by the different descriptive analyses in the literature which demonstrated the extent in which CS activism and mobilization in raising domestic costs contributed to improving state parties' compliance under the European and Inter-American systems. The whole analyses in this thesis are guided by the liberal theory (section 2.4 of chapter 2 above) and the hypothesis set out in section 1.2 of chapter 1 above. While the lessons from these regions provided some key insights in the development of this thesis, the direct and indirect CS engagement models discussed in chapter 5 above form the basis in justifying the validity of the overall focus of this thesis. The framework and focus of this thesis are not limited to specific countries or case studies, therefore, with little variations, the above findings and recommendations are assumed to be generally applicable to all member states under the AHRS – especially the states with a clear or at least, a resemblance of democratic systems of government. In an endeavour of this sort, it is almost impossible to assume that all areas of research concerning the role of CS as a complemeatry domestic mechanism in improving compliance have been covered. As promised in section 1.8 of chapter 1 above, future research would be needed in certain areas for which this study is limited. For instance, while this thesis has addressed issues of effectiveness and compliance with rights decisions under the AHRS with particular focus on the role of CS in exploring electoral processes and protests as potential domestic tools for improving compliance, other potential domestic tools were also identified but not discussed in this study. These includes: strike, boycott, lobby, impeachment, recalling and referendum. All these tools could also be explored as possible domestic tools for influencing state compliance. Further

research may explore the use of these tools as domestic mechanisms to punish or threaten states' disobedience or non-compliance with court orders especially international courts.

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