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**Compliance With Judgments Of The African Court On Human And Peoples' Rights:
A Case Study Of Tanzania And Rwanda With Lessons From The Inter-American And
European System.**

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Declaration

I **KELVIN TINASHE KABAYA**, hereby declare that this thesis is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, or is being, submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

Signed: _____

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CONTENTS

CHAPTER 1-BACKGROUND AND INTRODUCTION	3
PROBLEM STATEMENT	5
RESEARCH QUESTIONS	5
METHODOLOGY	5
LITERATURE REVIEW	6
CHAPTER SYNOPSIS	8
INTRODUCTION	9
The African Court on Human and Peoples' Rights: Historical origins and legal framework for compliance.	9
Compliance Legal Framework	11
Mapping resistance against the African Court	13
Defining compliance	14
Categories of Compliance	14
Theories of compliance with international law	16
Disaggregating factors influencing compliance with judgments of Human Rights Tribunal	24
CHAPTER CONCLUSION	28
CHAPTER 3: WHAT IS THE STATUS OF COMPLIANCE WITH JUDGMENTS OF THE AFRICAN COURT IN TANZANIA & RWANDA?	29
INTRODUCTION	29
The case of Tanzania: Compliance with judgments of the African Court on Human and Peoples' Rights	29
The case of Rwanda: Compliance with judgments of the African Court on Human and Peoples' Rights	35
Zimbabwe's compliance conundrum with International tribunals	39
CHAPTER CONCLUSION	40
CHAPTER 4: LESSONS FROM THE EUROPEAN AND INTER-AMERICAN HUMAN RIGHTS SYSTEMS	42
Introduction	42
The European Court of Human Rights: Historical Origins	42
Compliance Legal Framework of judgments of the European Court of Human Rights	45

Trends, Challenges and Opportunities: Compliance with judgments of the European Court of Human Rights	48
The Inter-American Court of Human Rights: Historical origins	50
Compliance Legal Framework	51
Trends, Challenges and Opportunities in compliance with judgments of the IACtHR	53
CHAPTER CONCLUSION	60
CHAPTER 5: SUMMARY OF FINDINGS, RECOMMENDATIONS & CONCLUSION	61
Introduction	61
Summary of Major findings Chapter 2	62
Summary of Major findings in Chapter 3	63
Summary of Major Findings in Chapter 4	63
RECOMMENDATIONS	64
CONCLUSION	68
BIBLIOGRAPHY	68

CHAPTER 1-BACKGROUND AND INTRODUCTION

Effective judicial remedies lie at the very heart of the International Human rights system. An effective judicial remedy is one that offers a victim redress for violations of his rights. Legally-binding judgments of international human rights tribunals play this critical role. They contribute to setting standards by providing authoritative interpretation of rights and obligations in international human rights instruments.¹

However, unlike domestic legal systems which have coercive mechanisms for enforcement of domestic judgments, International tribunals depend on compliance by states of their judgments. International Human rights courts cannot seize assets of non-complying states or order the arrest of non-complying states for contempt.² Thus notes that, “The practical consequences of International Human Rights Courts rulings thus depend on actions taken within the political and legal systems of respondent states and prompt implementation cannot be taken for granted.”³

For purposes of this thesis, it is pertinent to note that the African Court on Human and Peoples’ Rights (hereinafter referred to as “The African Court”) faces a similar predicament on compliance with its judgments. As this study will illustrate, several factors account for the non-compliance with judgments of the Court.

The Court was established through the Protocol to the African Charter on Human and Peoples’ Rights adopted on 10 June 1998 (The African Court Protocol). The Court was established several years after the formation of the Organisation for African Unity and the adoption of the African Charter on Human and Peoples’ Rights in 1981. The Court’s decisions are legally binding between parties *inter se*.⁴ The Court’s relationship with the African Commission on Human and Peoples’ Rights (The Commission) is one of complementarity.⁵ The Court was established as response to claims that the

¹ T Mutangi, An Update on Compliance BY Zimbabwe with decisions and judgments of International Human Rights Judicial and Quasi-Judicial Bodies, University of Zimbabwe Law Journal, 2018.

² AT Guzman, ‘International tribunals: A rational choice analysis’ (2008) 157 University of Pennsylvania Law Review 171, 179

³ O Stiansen, ‘The Politics of Compliance with International Human Rights Court Judgments’ (published DPhil thesis, University of Oslo, 2019)

⁴Rule 61 (5) of the Rules of the African Court on Human and Peoples’ Rights as read with Article 30 of the Protocol.

⁵Article 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.

effectiveness of the African Human Rights system was limited by the absence of a judicial institution with capacity to issue binding judgments.⁶

In enforcing human rights in the African system, the Court's work is complemented by other institutions such as the Commission, the Africa Union, The African Committee of Experts on the Rights and Welfare of the Child.

Despite the existence of these legal and institutional frameworks under the African human rights system, there remains a wide gap between judgments and recommendations, and compliance with same. Several scholars have attempted to answer the broad question of non-compliance with judgments of international tribunals giving rise to two broad conceptual frameworks, namely, constructivism and rational choice theories.

The context of resistance against judgments of the African Court can also be analysed within the framework of the above mentioned conceptual frameworks. It is pertinent to note however, that the Court operates in a continent where a variety of governance systems exist. The continent is home to authoritarian states as well as well-established democracies. Serious governance challenges permeate the African landscape, from internal armed conflicts, unconstitutional changes in government and weak state institutions. These generally intersect to create very little will to comply with judgments of the Court.

The lack of compliance with judgments of the Court is however, unsurprising. The Commission, which was in existence prior to the Court, faced and continues to face serious levels of non-compliance with its recommendations. The Court was therefore established against the backdrop of a lack of commitment by States to comply with the recommendations of the Commission.

The question that may also arise is the meaning and scope of the concept of compliance. What factors are indicative of compliance? What factors influence compliance/non-compliance with judgments of the Court? This thesis endeavoured via the aid of compliance theories, to explain the several factors which influence compliance with the Court's judgments.

Specifically, the thesis assessed Tanzania and Rwanda's state of compliance with judgments of the Court. Whilst Tanzania initially appeared to comply with judgments of the Court, it later on engaged in a series of non-compliance which culminated in its withdrawal of its declaration under Article 34 (6) of the Protocol to the Court. As at the time of writing of this thesis, Tanzania has the highest number of reports of

⁶ A. Etuvoata 'The Role of Civil Society in improving Compliance with the decisions of the African Human Rights Supervisory Mechanisms (published thesis, University of Pretoria, 2019)

non-compliance with judgments of the Court.⁷ This is notwithstanding the fact that Tanzania is the host state for the Court. The judgments of the Court touched on Tanzania's electoral and criminal justice system. It would appear that the basis for Tanzania's resistance was the fact that the judgments struck right at the heart of Tanzania's constitutional order and public policy.

Similarly, Rwanda's lack of compliance with judgments of the Court is well documented. The context of this resistance appears to be the Court's judgments which have struck at highly sensitive areas of Rwanda's past-The Rwandan Genocide of 1994. Some have argued however, that Rwanda's open defiance of the Court's judgments mirrors the closure of civic space at the domestic level.⁸

PROBLEM STATEMENT

Since its establishment, the Court has delivered several judgments. The judgments have been in different forms, from those sounding in money to orders of law review. The problem has been that African states and by illustration, Tanzania and Rwanda have not complied with many judgments of the Court. As this thesis demonstrated, quantitatively the percentage of the total number of judgments complied with as a fraction of the total number of judgments handed down by the Court remains low. Several factors may explain the context of resistance to the Court's decisions.

RESEARCH QUESTIONS

The major question this study sought to answer was, **what is the status of compliance with judgments of the African Court by Tanzania and Rwanda and what factors influence the extent of compliance?** In answering the main question above, several sub-questions were addressed below:

- a. What is meaning of the concept of compliance?
- b. What factors influence State compliance with judgments of the Court?
- c. What is the status of compliance with judgments of the Court in Tanzania and Rwanda?
- d. What recommendations can be made to strengthen compliance with judgments of the African Court on Human and Peoples' Rights?

⁷Activity Report of the African Court on Human and Peoples' Rights 1 January-31 December 2021.

⁸Etuvoata (n6 above)

METHODOLOGY

Desk research: The research utilised desk research as the main methodology primarily because of the research questions asked which require an analysis of scholarly work.

Quantitative and Qualitative research: The study also made use of the quantitative and qualitative research method mainly because it involved aggregating and disaggregating data to assess the state of compliance with judgments of the Court. The use of tables and or charts will illustrate compliance with judgments across states and human rights systems.

Comparative research method: The thesis also adopted the comparative research methodology. Comparisons were drawn with the Inter-American and European human rights Systems. The value of the comparator lies in the relatively high level of state compliance in the two systems from which the African system can draw lessons. The Inter-American system in particular, is similar in many respects to the African system and also faced compliance issues in its formative years. Great value was thus drawn from the Inter-American and European systems on how to improve compliance with judgments.

LITERATURE REVIEW

There is a plethora of scholarly work on theories of compliance with international law generally. As already highlighted above, the thesis sought to answer several research questions on the state of compliance with judgments of the Court. The Literature review which follows here is based to some extent on the research questions above.

The concept of compliance has been defined by several scholars. Liwanga posits that despite varying definitions of this concept, compliance can be classified into three broad categories namely, non-compliance, partial compliance and full compliance.⁹ However, this classification still does not define with precision what the concept means. Mutangi holds that in simple terms, compliance refers to the process and action taken by a state in order to remedy the state of affairs found inconsistent by a tribunal or court, with that state's international obligations.¹⁰

⁹ RC Liwanga, From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies, Brooklyn Journal of International Law, Volume 41, Issue 1, 2015.

¹⁰Mutangi (n1 above)

With regard to the state of compliance, it has been argued that measuring the rate of compliance is a complicated process due to the fact that it depends on the number of cases analysed and number of compliance reports used, among other factors.¹¹ Compliance rates are not always static for a Court.

There has been dedicated scholarly research on the factors influencing compliance with international law spanning decades. Two broad conceptual frameworks have emerged which are used as analytical tools to deduce factors influencing state compliance with international law. These are the constructivist theory and the rational choice theory.

Constructivist theorists contend that what influences compliance 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.¹² They further contend that, state compliance is not influenced by the convergence of state interest and international law or human rights law, or some political or economic calculation.¹³

Some scholars under the constructivist model thus posit that the legitimacy of a rule of international law attracts greater compliance by states.¹⁴ When states perceive the rule of international law as legitimate and the institution from which the rule is developed as legitimate, compliance is generally greater. By necessary deduction, States will comply with judgments of the African Court if they perceive the judgment as legitimate and if they view the Court itself as a legitimate institution.

Rational choice theorists on the other hand posit that state compliance is a matter of choice, coercion and external powers.¹⁵ Under this theory are several other proponents namely, the Liberal theorists, institutionalist and realists. Liberal theorists contend that the driving force behind state compliance with international law are domestic forces which include Civil Society Organisations, individuals and other groups among others.¹⁶ These groups apply pressure on the State to comply with international obligations.

¹¹ V.O Ayeni, 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five African states' (published LLD thesis, University of Pretoria, 2018).

¹² Etuvoata (n6 above)

¹³ Etuvoata (n6 above)

¹⁴ Etuvoata (n6 above)

¹⁵ Ayeni (n11 above)

¹⁶ Ayeni (n11 above)

An interesting theory proposed by Stiansen, suggests that compliance with judgments of International Human Rights Tribunals is based on politics of the respondent state and some aspects of the judgments that influence their reception by domestic political actors.¹⁷ He contends that three types of judgment characteristics affect compliance. He further argues that, judgments which order legislative reform are more difficult to comply with, mostly because legislative changes take time due to various factors such as lack of consensus by domestic actors.¹⁸ It would appear that this argument holds true in the African context where several judgments striking at the heart of the constitutional order of states have faced serious resistance.¹⁹

CHAPTER SYNOPSIS

Chapter 1: Background and Introduction

This chapter sets the scene for the research problem under study. It identified the research questions that are the subject of the study and placed the research in context and gave a background to the research problem.

Chapter 2: The concept of Compliance with judgments

This chapter discussed in depth the concept of compliance. It further presented a theoretical discussion on factors influencing compliance and carried out literature survey whilst highlighting the limitations of the theories of compliance.

Chapter 3: What is the Status of compliance with judgments of the Court in Tanzania and Rwanda?

Chapter 3 assessed the State of compliance with judgments of the Court in Rwanda and Tanzania using both qualitative and quantitative techniques. This also involved aggregating and disaggregating data to analyse the state of compliance. The chapter provided a theoretical analysis of various factors that influenced Tanzania and Rwanda to comply or not to comply with judgments of the Court. To localise the thesis, the Chapter also briefly compared Tanzania and Rwanda's non-compliance with Zimbabwe's non-compliance with decisions of the SADC Tribunal and select cases before the Commission.

¹⁷Stiansen (n3 above)

¹⁸Stiansen (n3 above) at 6

¹⁹ See the case of Mtikila v Tanzania ACHPR App No. 001/2008

Chapter 4: Lessons from the Inter-American and European System.

This chapter explored the approach of the Inter-American and European system with regards to compliance of judgments of their respective tribunals and factors which influence compliance generally with a view to drawing lessons for the African system.

Chapter 5: Conclusion and Recommendations

Chapter 5 concluded the thesis by making conclusions on the state of compliance with the Court's judgments in Tanzania and Rwanda as well as presenting the factors which influenced compliance or non-compliance with judgments. The Chapter also makes some recommendations to improve compliance based on comparative analysis in Chapter 4.

CHAPTER 2: THE CONCEPT OF COMPLIANCE WITH JUDGMENTS

INTRODUCTION

This Chapter introduces the African Court on Human and Peoples' Rights, its historical origins and context in which it operates. This background is important to the extent that it lays a foundation for understanding the resistance that the Court has faced from its inception and thus indicative of compliance. The compliance legal framework of the African Court is also further analysed in this Chapter. The chapter also seeks to define the concept of compliance as understood in international law. The primary sub-question sought to be answered is, what is the meaning of the concept of compliance? The Chapter further highlights the lack of universality on meaning of the concept of compliance and how difficult it is to measure compliance with judgments. Invariably, the Chapter will analyse factors that influence compliance with judgments through two major theoretical lenses, that is, constructivist and rational choice theories.

The African Court on Human and Peoples' Rights: Historical origins and legal framework for compliance.

The African Court was established through Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights on 10 June 1998, at least seventeen years after African states adopted the first

African Human rights Charter. In its preamble, the African Court Protocol clearly states that the purpose of the African Court is to *complement* and to *reinforce* the functions of the African Commission on Human and Peoples' Rights. This may imply that there are some limitations with the African Commission in terms of its effectiveness. Be that as it may, the African Court was established against the backdrop of *inter alia*, human rights catastrophes of extreme proportions, poverty, colonialism, unconstitutional changes in government, genocide and civil wars amongst other in Africa.²⁰ Some of these ills continue to plague the African continent.

The African Charter on Human and Peoples' Rights marked a transition from this dark past into a period of respect for fundamental human rights. The adoption of the African Charter was, however, not without its fair share of challenges. There was an initial failure by African States to consent to the very idea of a regional legal instrument containing fundamental freedoms.²¹ The Practical Guide to the African Guide explains this resistance as follows,

*“The delay in establishing the African system corresponds mainly with the political and social environment of the 1970s and 1980s, a period marked by the fact that some heads of state were more concerned with wielding the principle of national sovereignty to hide violations of human rights committed in their country, than building a supra-national system of protection of human rights”*²²

Over time, however, consensus began to grow on the need to establish such a regional legal instrument. A committee of experts was established to work on a draft regional legal instrument on human rights. The then OAU Chairman, President Senghor of Senegal implored the experts to draw inspiration from African values and tradition and to also focus on the real needs of Africans such as the right to development and duties of individuals.²³ This committee of experts came up with a draft African Charter which however faced resistance from African States.

The African Charter was only adopted in 1981 in Banjul, Gambia. Of importance to note however, is that the Charter does not contain provisions establishing the African Court. Perhaps this is a manifestation of how African States were loath to the idea of subjecting themselves to an adjudicative tribunal with power to issue binding decisions.

²⁰M. Killander 'Celebrating the African Charter at 30: A Guide to the African Human Rights System, Pretoria University Law Press (2011).

²¹Killander (n20 above)

²² Practical Guide: The African Court On Human And Peoples' Rights: Towards The African Court Of Justice And Human Rights, International Federation for Human Rights

²³Killander (n20 above).

Furthermore, that the President Senghor implored the committee that drafted the Charter to draw on African values, is also arguably a manifestation of this resistance to being subjected to an adjudicative authority as African values generally prefer other methods of dispute resolution such as mediation and conciliation as opposed to the traditional Court route.

It became clear however, that the African Commission faced serious limitations in its mandate as its findings are merely recommendatory. To complement and reinforce the work of the Commission, the African Court was therefore established. However, the African Court only delivered its first ruling on 15 December 2009.

It was only in 1995 in Cape Town that a draft Protocol drafted by the OAU was discussed and several consultations followed. The Protocol to the African Court was finally adopted in Ougadougou, Burkina Faso in 1998 with 30 member states signing the Protocol.²⁴

Compliance Legal Framework

The African Court has power to issue binding judgments between parties *inter se*. Such judgments must be rendered within ninety (90) days following arguments and must be made public.²⁵

In addition, it is a requirement under the African Court Protocol that the judgment must be well reasoned and is final in nature.²⁶ Article 62 of the Interim Rules of Procedure of the Court provides for details which must be included in a judgment. These include, but are not limited to, date of judgment, parties involved, names of representatives, summary of proceedings and the operative part of the judgment.

If the Court makes a finding that a right under the African Charter has been violated, it can order appropriate measures to remedy the violation. What constitutes appropriate measures is wide. Generally however, a remedy has certain features. Mutangi quotes the celebrated case before the International Court of Justice in the *Chorzow Factory Case (Germany v Poland)*, where the Court held that,

“Reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is

²⁴Practical Guide (n22 above).

²⁵ Article 28 (1) of the African Court Protocol

²⁶ Article 28 (6) and 28 (3) of the African Court Protocol

not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”²⁷

The above approach has been the African Court’s approach to the issue of remedies. In *Mohamed Abubakari v the United Republic of Tanzania*, the African Court held that,

“The Court also restates that, the purpose of restitution being restitution in integrum it, “...must as far as possible, erase all consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed.”²⁸

The African Court may also make rulings on provisional measures to prevent irreparable harm occurring to any person.²⁹ The Court has issued several of these measures and they shall form part of the analysis of this thesis.

With respect to execution of judgments, State parties undertake to comply with judgments of the African Court.³⁰ It is important to note however, that unlike most domestic courts, the African Court does not have a coercive institution under it to execute judgments where States have not complied with its judgments. In essence, the African Court depends on the commitment by States under Article 30 of the African Court Protocol.

However, the Court can publish its decisions and notifies the parties to the case, the Commission, the Assembly, the African Union Commission and the Executive Council.³¹ This can serve as an important tool for applying pressure on non-compliant States to comply with judgments. As will be noted later, although the Court has utilised these provisions, Tanzania and Rwanda have still failed to comply with the Court’s judgments.

²⁷*Germany v Poland 1928 PCIJ, Ser A. No. 17 cited by Mutangi in An Update on Compliance BY Zimbabwe with decisions and judgments of International Human Rights Judicial and Quasi-Judicial Bodies, University of Zimbabwe Law Journal, 2018.*

²⁸ *Mohamed Abubakari v The United Republic of Tanzania App 007/2013*

²⁹ Article 27 (2) of the African Court Protocol as read with Rule 51 of the Court’s Rules of Procedure.

³⁰ Article 30 of the African Court Protocol

³¹ Article 64 of the African Court Interim Rules of Procedure

The Africa Union's Executive Council monitors the compliance of judgments of the African Court.³² The Executive Council is made up of Ministers of Foreign Affairs of African Countries. This arrangement may create challenges for execution of the Court's judgments. It has been argued that,

*"This creates the paradox situation whereby it is up to the ministers of those countries which have not ratified the Protocol and those ministers whose countries have been condemned by the Court to monitor the execution of the judgments of the regional judiciary."*³³

Furthermore, there is ambiguity with respect to the sanctions that may be imposed by the Executive Council where a State has failed to comply with a judgment of the Court. Perhaps these structural weaknesses contribute largely to the non-compliance with judgments of the Court.

The African Court is also mandated to report annually to the General Assembly of the Heads of State of the AU on its activities which include judgments which would not have been complied with.³⁴

Mapping resistance against the African Court

Before discussing the Tanzania and Rwanda's compliance status with African Court judgments, it is perhaps imperative to briefly map the patterns of resistance that the Court has faced since it began its work.

Scholars on the African Court have identified at least two patterns of resistance that the Court faces in its work, namely the 'pushback' and 'backlash'. Pushback relates to resistance within the established rules of the game (ordinary critique), with the aim of reverting developments in the jurisprudence of an International Court in specific areas of law.³⁵ Pushback is usually meant to influence the future direction of a Court or to influence future decisions of the Court on certain issues.

³² Article 29 (2) of the African Court Protocol

³³ Practical Guide (n22 above)

³⁴ Article 31 of the African Court Protocol

³⁵ Tom Gerald Daly and MichaWiebusch 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court' Forthcoming in International Journal of Law in Context 14(2) (2018)

On the contrary, backlash refers to resistance that is not based on acceptance of the rules of the game (extra-ordinary critique), challenges the authority and institutional set-up of an IC, and tends to involve collective action by member states.³⁶

Whilst these concepts are beyond the scope of this thesis, as will be demonstrated below, these patterns of resistance are usually indicative of whether a state will comply with a judgment or ruling of an International Court.

Defining compliance

The term compliance with judgments is one that is subject to several definitions. Kingsbury correctly notes that discussions on compliance often proceed as if there is a shared understanding of what compliance means.³⁷ Compliance can be defined as the measures taken by States to redress a violation of right as ordered by a Court or tribunal. In other words, compliance entails a process and the action taken by a State in order to remedy a state of affairs found to be inconsistent with that State's obligations by a Court or tribunal.³⁸ As Mutangi argues, compliance invariably implies the evident possibility of non-compliance.³⁹

Thus, Stiansen defines compliance as the full execution of the action or complete avoidance of the action called for or prohibited by the ruling.⁴⁰ Liwanga on the other hand in his article refers to Article 94 (2) of the UN Charter which defines non-compliance as the failure by a State party to perform the obligations incumbent upon it under a judgment by the International Court of Justice.⁴¹

The concept of compliance thus has to be understood as also encompassing other variations including but not limited to non-compliance itself.

³⁶ Mikael Rask Madsen, PolaCebulak and MichaWiebusch 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts Forthcoming (2018) International Journal of Law in Context 14(2) iCourts Working Paper Series, No. 118, 2018.

³⁷ B. Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, Michigan Journal of International Law, Vol 19

³⁸ Mutangi (n1 above)

³⁹ Mutangi (n1 above)

⁴⁰ Stiansen (n3 above) at Page 13

⁴¹ RC Liwanga, From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies, Brooklyn Journal of International Law, Volume 41, Issue 1, 2015

Categories of Compliance

Viljoen and Louw on the concept of compliance argue that compliance has several categories namely, non-compliance, partial compliance, substantial compliance and full compliance.⁴² This implies that when defining compliance, one invariably has to use a sliding scale as it is difficult to measure compliance in absolute terms.

Liwanga proposes the following categories of compliance, non-compliance, partial compliance and full compliance.⁴³

Thus in answering whether a State has complied with a judgment of an International tribunal, and in particular, with a judgment of a Human Rights Tribunal, the question that arises is, To what extent did the State comply-fully, partially or not at all?⁴⁴

Liwanga in his article illustrates the categories of compliance as follows: Where a State has been found to be in violation of human rights and ordered to pay reparations to victims, to prosecute offenders and to reform its legislation, there is non-compliance if a State does not fulfil any of the above orders. Viljoen and Louew define 'non-compliance' as failure by a state to implement all the remedial orders contained in a judgment and where the state concerned has not made any public commitment to comply.⁴⁵ The State would be partially compliant if it for instance, pays reparations and prosecutes perpetrators. Lastly, the State would be fully compliant if it complies with all three remedial orders above.⁴⁶

Ayeni posits that there are many ways of categorising state compliance with judgments but however emphasises that the two main ways are categorisation according to the degree or extent of implementation and categorisation according to the pace of implementation.⁴⁷ Thus with regards to categorisation according to the pace of implementation, phrases such as 'situational compliance', 'in progress' and 'application for review' are often used.⁴⁸

⁴²Viljoen and Louw State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights: 1994-2004

⁴³Liwanga (n41 above)

⁴⁴Viljoen and Louw (n42 above)

⁴⁵Viljoe and Louw (n42 above)

⁴⁶Liwanga (n 41 above)

⁴⁷V.O Ayeni, 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five African states' (published LLD thesis, University of Pretoria, 2018)

⁴⁸Ayeni (n11 above)

This thesis however, focuses on the categorisation based on degree or extent of implementation, which categorisation leads to whether a state has not complied, partially complied or fully complied with a judgment of a Human Rights Tribunal.

According to Ayeni, a state is considered to have fully complied with a judgment if, it has complied with every element of the judgment of the Human Rights tribunal.⁴⁹ Regarding partial compliance, a state would fall into this category if it has complied with at least one of the remedial orders imposed by the human rights tribunal but fails to take other measures or to implement other remedial orders. Hillebrecht describes this as 'a la carte' compliance which loosely translates to a menu that lists items separately.⁵⁰

Lastly, a state would be non-compliant if it fails to comply with any element of the judgment of a Human Rights Tribunal.

Whilst this categorisation seemingly makes measuring compliance a simple process, this is not the case. Mutangi asserts, correctly in my view, that there is controversy on measuring compliance regarding the tools, instruments, formula or indicators for such measurement.⁵¹ Many factors explain this difficulty. One factor which makes measuring compliance a difficult task is the fact that, it is by no means easy to demonstrate that compliance with the judgment came about as a result of the judgment itself rather than because of some other factor-the so called complexity of state conduct.⁵² In other words, measuring compliance is made difficult by the fact that states are generally unwilling to open up on the reasons behind their compliance or non-compliance with certain decisions.⁵³

Posner and Yoo propose a simple tool of measuring compliance being the number of judgments complied as a percentage of the total number of judgments given against the Respondent state.⁵⁴

A discussion on the concept of compliance invariably leads to a discussion on what factors influence states to comply or not to comply with judgments of human rights tribunals.

⁴⁹Ayeni (n 11 above)

⁵⁰ C Hillebrecht Domestic politics and international human rights tribunals: The problem of compliance (2014).

⁵¹Mutangi (n1 above)

⁵²Viljoen and Louw (n 42 above)

⁵³Mutangi (n1 above)

⁵⁴Mutangi (n1 above)

Theories of compliance with international law

A great deal of doctrinal attention has been devoted to identifying factors which influence compliance with international law generally. Several theories have thus emerged to explain factors which influence state compliance with international law and in particular judgments of international tribunals. As has been noted above, states generally do not disclose reasons for complying or their failure to comply with judgments of international tribunals. In some cases, States do not report to the tribunals from which remedial orders were handed down, on implementation. Due to the fact that research around compliance with judgments relies on Activity reports of the Court concerned, these reports may be of very limited utility to researchers, policy makers and observers as some States may have failed to submit reports on implementation. As such, research may necessarily have to look study local media reports, Civil Society Organisations reports and government websites of the countries concerned. On activity reports of human rights tribunals on state of compliance with judgments, Courtney notes that, these are ‘impenetrable’ and few practitioners will have time and or inclination to drudge through each annual report.⁵⁵

By way of illustration, activity reports of the African Court on Human and Peoples’ Rights will only show whether a State has complied with the Court’s judgment if the Respondent state has filed a report of implementation. To buttress this point, in its 2021 Activity report, the Court had this to say,

“It is important to indicate here that for the moment the Court does not have an independent mechanism to verify the extent of implementation on the ground. It relies almost exclusively from the Report of the Government and reaction of Applicant thereto. The Court can collect information from other sources, but has to ascertain the integrity, independence and neutrality of those sources.”⁵⁶

Theories of compliance are divided into two broad categories namely, constructivist and rational choice theories.⁵⁷ The body of work on these theories is interdisciplinary, straddling international relations, political science and international law.

⁵⁵ A. Etuvoata ‘The Role of Civil Society in improving Compliance with the decisions of the African Human Rights Supervisory Mechanisms (published thesis, University of Pretoria, 2019)

⁵⁶ Activity Report of the African Court on Human and peoples’ Rights EX.CL/1258(XXXVIII) at Page 13

⁵⁷Ayeni (n 11 above)

Constructivist theory

One of the earliest proponents of the concept of constructivism is Jean Piaget who argued that human beings create knowledge through the interaction between their experiences and ideas. His area of specialisation was however, in cognitive development. This theory of constructivism has thus been adapted to several other fields such as international Law and International Relations. Professor Ackermann in his book, 'Reconstructing American Law' was one of the first scholars to coin the term, "legal constructivism."⁵⁸ Thus in the context of International law, constructivist theories broadly explain compliance with international law as a by-product of repeated interactions, argumentation and exposure to norms.⁵⁹ In other words, it is the influence and significance of ideas of international law and the persuasive powers of legitimate legal obligations which influences states to comply with international law.⁶⁰ Under this theory, several specific sub-theorists include, the *spiral model*,⁶¹ *rule legitimacy*, *Chayeses' managerial theory*⁶² and *transnational legal process*.

Legitimacy theory

Proponents of the rule legitimacy theory posit that a norm of international law attracts greater compliance when the rule is perceived by domestic state actors to be legitimate and possess features of legitimacy from a legitimate institution. By necessary deduction, states are likely to comply with a judgment of the Court if the remedial order is considered to be legitimate by the State concerned and the Court itself is considered to be a legitimate institution.

Thus Franck argues that the major influence of state compliance is the potential norm's 'compliance pull' which arises from whether the norm is considered legitimate by the people to whom it applies.⁶³ Perhaps this theory explains in part why the African Court still faces resistance from African States in terms of compliance with its judgments. According to Franck, African states do not always comply because they

⁵⁸ Gregory S. Alexander, *Interpreting Legal Constructivism*, 71 CORNELL L. REV. 249 (1985)

⁵⁹ E.S Bates *Sophisticated Constructivism in Human Rights Compliance Theory*, The European Journal of International Law Vol 25 no. 4, 2015

⁶⁰ OA Hathaway 'Do human rights treaties make any difference?' (2002) 111 The Yale Law Journal 1955.

⁶¹ T. Risse, S.C. Ropp, and K. Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999).

⁶² Chayes, Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*.

⁶³ M Burgstaller 'Amenities and pitfalls of a reputational theory of compliance with international law' (2007) 76 Nordic Journal of International Law

perceive the rights institutions and their outputs to be illegitimate, this owing to claims that most decisions are overwhelmingly influenced by western powers.⁶⁴ Thus in measuring legitimacy, Franck observes that four factors must be taken into account namely, whether the rule/ norm is determinate, symbolic validation, coherence and adherence.⁶⁵

Inherent in these factors is the influence of perceptions of legal quality of the judgment sought to be complied with. Stiansen thus posits that, in the European system, Respondent states are more likely to comply with judgments of the European Court on Human Rights when these are rendered by a higher proportion of career judges.⁶⁶ This speaks to both the quality of the judgment and the legitimacy that attaches to the judgment thus attracting higher chances of compliance.

As a corollary to the influence of the quality of the judgment, it has also been argued that judicial dissent may increase non-compliance as dissenting opinions/ judgments may be used by opponents of implementation to suggest that there might be other legitimate views concerning what the 'law' requires.⁶⁷ Whilst on the contrary, consensus or unanimous decisions preserve the legitimacy of judgments and communicate legal certainty by demonstrating the ability of judges to persuade their audience that their rulings are unbiased interpretations of the law rather than reflections of the judges' own policy preferences.⁶⁸

Transnational legal process

Another theory under constructivism is the transnational legal process. According to this theory, states comply with international norms where there has been a process of repeated interaction between domestic and international actors which leads to internalisation of these norms.⁶⁹ Key proponents of this theory include Harold Koh. In other words, states are compelled to comply with International norms as a result of interactions with transnational actors that constitute a state's interests and identity.⁷⁰ Transnational actors include non-state actors such as civil society organisations. By way of illustration, through their interactions with international law, tribunals and

⁶⁴Etuvoata (n6 above)

⁶⁵TM Franck 'Legitimacy in the international system' (1988) 82 American Journal of International Law.

⁶⁶Stiansen (n3 above)

⁶⁷Stiansen (n3 above)

⁶⁸Stiansen (n3 above)

⁶⁹ HH Koh, 'How is International Human Rights Law Enforced?' (1999) 74 Indiana Law Journal.

⁷⁰Ayeni (n11 above)

players, domestic actors such as national judges and civil society organisations internalise international norms and over time, these norms become part of the national law. To that end, States which would have internalised these international norms are likely to comply with judgments of international tribunals. This theory has however, has evident weaknesses as it fails to explain why even those states which would have internalised these international norms sometimes fail to comply with decisions of international tribunals. Could it be that States comply with judgments if it is in their self-interest or if the judgment does not impose a burdensome responsibility on the State concerned?

Chayeses' managerial theory

The managerial theory on the other hand suggests that States will comply with international judgments except those with certain defects, those embedded with inherent pitfalls which could dissuade states from complying.⁷¹ States will also not comply with judgments if there is lack of proper interpretation of the rules, if the judgment is ambiguous or if the treaty obligations are couched in indeterminate language and also due to budgetary constraints.⁷² In other words, States will likely comply with judgments of international tribunals if for instance they receive technical and budgetary support from stronger nations.

The spiral model of human rights change

Another strand of the constructivist theories is the spiral model of human rights change as developed by Risse, Ropp and Sikkink.⁷³ This model explains the transition of states from authoritarianism to 'rule-consistent behaviour'.⁷⁴ The five-phased process includes, *repression, denial, tactical concessions, prescriptive status and rule consistent behaviour*.⁷⁵ According to this model, repressive states begin by denying existence of human rights violations. However due to international advocacy and pressure, they end up making tactical concessions such as releasing political prisoners and allowing protests.⁷⁶ These concessions then incentivise domestic actors such as civil society to demand more concessions such legislative reform.⁷⁷

⁷¹Chayeses(n62 above)

⁷²Etuvoata (n6 above)

⁷³Risse, Ropp&Sikkink (n61 above)

⁷⁴Risse, Ropp&Sikkink (n61 above)

⁷⁵ Bates (n59above) Page 1171

⁷⁶Ayeni (n11 above)

⁷⁷Ayeni (n11 above)

At the prescriptive stage, human rights norms are not disputed but the state continues to violate the human rights.⁷⁸ At this stage, states also ratify international human rights treaties and domesticate treaties and set up national human rights institutions.⁷⁹ Finally, at 'rule-consistent behaviour' stage, the state begins to exhibit consistent respect for human rights and internalise human rights norms.⁸⁰ Indicators of this final stage include behavioural change and sustained obedience. To contextualise this theory, states are likely to comply with judgments of international tribunals if they reach the final stage of spiral model, namely, the 'rule-consistent behaviour' stage characterised by internalisation of human rights norms.

Some have argued however, that the spiral model presents a sophisticated constructivism which has elements of the rational choice theories in it.⁸¹

Rational choice theory

Rational choice theorists differ materially from constructivist theorists in that according realists, compliance with judgments of international tribunals is not dependent on the legitimacy or authority of international norms. Generally, realists argue that compliance with judgments is essentially based on material incentives that accrue to states, sanctions and the convergence of state interest with legal rules. It has been argued that some realist scholars construe the international environment as characterised by anarchy, thus rejecting the role of international institutions in bringing about compliance with international law.⁸² There are several strands under the rational theory and these are discussed below.

Liberal theory

Liberal theorists argue that the key drivers of compliance with international law include the pressure from domestic actors and not the state's self-interest. Leading Liberal theorists include Moravesik⁸³ and Slaughter⁸⁴. Although Liberalists agree that the State is an international actor, they however consider that the State is inanimate

⁷⁸Ayeni (n11 above)

⁷⁹Ayeni (n11 above)

⁸⁰Ayeni (n11 above)

⁸¹ Bates (n59 above)

⁸²Ayeni (n11 above)

⁸³ A-M Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations' (1994) 4 Transnational Law and Contemporary Problems pp.397 - 400.

⁸⁴ A-M Slaughter, 'International Law in a World of Liberal States' (1995) 6 European Journal of International Law p.503.

and can be disaggregated into several domestic constituents.⁸⁵ These domestic constituents include politicians, civil society, Judiciary, transnational forces and the Executive amongst other players. These actors are the major drivers of compliance with international law. The State being inanimate therefore, follows the direction of these domestic forces.

According to this theory, if the domestic pressure is such that States have to comply with international law, it follows that the State will comply as the State is a mere representative institution of these domestic forces. In other words, compliance depends on domestic politics and not on the State's self-interest or the relative pull or legitimacy of the international norm or judgment.

These theorists further argue that the distinction between liberal and non-liberal states could be a primary predictor of how states behave in international law. Simply put, liberal states tend to comply with international norms whilst non-liberal states tend not to comply with international law. Thus it can be argued that, Tanzania's lack of compliance with judgments of the African Court could be consistent with the democratic regression that occurred under President Magufuli's tenure. It would appear that under his Presidency, Tanzania began to openly defy judgments of the Court. Domestically, the period was also marked by a closure of the civic space, attacks on the civil society, legal profession and legitimate opposition.

Similarly, the lack of compliance with judgments of the African Court by Rwanda is unsurprising, at least according to liberal theory. Rwanda is a de facto one party state where all forms of dissent are ruthlessly crushed. The civic space is very constricted, whilst all critics of the government are allegedly persecuted, abducted and even assassinated.⁸⁶

In this context, Zimbabwe is also another example of a State which faces serious non-compliance challenges. Zimbabwe has a hundred-percent record of non-compliance with decisions of the African Commission on Human and peoples' Rights and the SADC Tribunal.⁸⁷ Like Rwanda, Zimbabwe has a military dictatorship which is characterised by constant attacks on the civic space and capture of State institutions. Perhaps, its failure to comply with international obligations under the African Commission is due to its system of governance which is arguably not liberal.

⁸⁵Etuvoata (n6 above) Page 55

⁸⁶ Rwandan opposition figure, SeifBamporiki was allegedly assassinated by Rwandan Government mercenaries in Cape Town, South Africa in 2021.

⁸⁷Mutangi (n1 above)

However, it can be argued this theory has weaknesses of its own. Compliance records of a state do not necessarily translate the identity of that state from non-liberal to a liberal state. A typical example is the United States of America which is considered a liberal state. However, it has not always necessarily complied with some of its obligations under international law particularly with regards to the use of force-*ius ad bellum*.⁸⁸ The USA has also been accused for its failure to comply with judgments of international tribunals most notably a series of ICJ decisions relating to the rights of foreign nationals under the Vienna Convention on Consular Relations⁸⁹ and World Trade Organisation rulings condemning the US for the illegality of its “zeroing” methodology for calculating anti-dumping duties.⁹⁰ It is therefore arguable that, the distinction between liberal and non-liberal states as a primary predictor of compliance is to some extent inaccurate.

Realist theory

According to this theory, compliance is a question of state choice, coercion and influence of external powers.⁹¹ Furthermore, this choice that the state exercises is influenced by its own self-interest or by the influence of a more powerful state.⁹² In other words, the key drivers of compliance under this theory are the convergence of the state’s interest with international norms. Realists argue that State compliance is not dependent on the authoritativeness or legitimacy of international law itself as argued by constructivist theorists.

Thus Etuvoata argues that,

*“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.”*⁹³

From the above, one assumption is that, States will comply with international law or judgments if they anticipate some economic benefit. The economic benefits could

⁸⁸ Invasion of Iraq in 2003

⁸⁹ M.A Pollack, Who supports International law, and why?: The United States, the European Union, and the international legal order, International Journal of Constitutional Law, Volume 13, Issue 4, October 2015, Pages 873-900

⁹⁰ Pollack (n89 above)

⁹¹ HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1948); Hans J. Morgenthau, *Positivism, Functionalism, And International Law*, 34 AMER. J. INT’L L. 260 (1940)

⁹² Etuvoata (n6 above) Page 50

⁹³ Etuvoata (n6 above) Page 50

include foreign aid, trade or other benefits attached to being a member of a particular treaty.⁹⁴

Goldsmith and Posner are apposite in their analysis and 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’.⁹⁵

Ayeni posits that realism has developed along two strands, namely, classical realism and structural realism.⁹⁶ According to classical realism, international law exists because powerful states benefit from its existence.⁹⁷ Less powerful states thus comply with international law because they are required to do so by the powerful states.

Structural realism on the other hand argues that states comply with international law when it is in their interests to do so.

Institutionalism

Proponents of this theory place value in International institutions. According to this theory, States consciously come together to establish institutions, norms and principles within a particular legal framework where actors’ interests converge.⁹⁸ Like realists, institutionalists argue that state compliance is based on self-interest.⁹⁹ They however proceed to argue that, compliance is also a function international co-operation, reputation, coercion and reciprocity.

Ayeni convincingly posits that,

“Certain outcomes, such as securing development assistance, negotiating trade relations with other countries, addressing climate change, promoting environmental protectionism, and other transnational issue areas, may be achieved only through cooperation with other states. According to institutionalist theorists, the desire to realise these outcomes may provide

⁹⁴ OA Hathaway ‘Why do countries commit to human rights treaties?’ (2007) 51 Journal of Conflict Resolution 588-621.

⁹⁵ JL Goldsmith & E Posner The limits of international law (2005) 23-224

⁹⁶ Ayeni (n11 above) Page 137

⁹⁷ Ayeni (n11 above) Page 137

⁹⁸ J Goldsmith, ‘Sovereignty, International Relations Theory, and International Law’ (2000) 52 Stanford Law Review.

⁹⁹ RO Keohane After hegemony, cooperation and discord in the world political economy (1984) 65 - 84.

necessary incentives for states not only to pursue international cooperation but also to comply with international law."¹⁰⁰

Additionally, it is also important to note the influence of reputational concerns as a driver of state compliance with international law under this theory. According to this view, states are perceived to have a 'single, unitary and fixed reputation.'¹⁰¹ It can be said that under this rubric, states comply with international law to protect their reputation.

To conclude on these theories, the preferred theory of compliance for purposes of this thesis shall be the rational choice theory. As will become clear in the next chapter, compliance with judgments of the Court by Tanzania and Rwanda has largely been a matter of choice exercised carefully by these States. It will also become apparent that Tanzania and Rwanda have not complied with judgments of the African Court largely because these judgments have not coincided with their state interests.

Disaggregating factors influencing compliance with judgments of Human Rights Tribunal

In the preceding paragraphs, this thesis has described theories of compliance with international law in a broad sense. It is clear that these theories straddle across several disciplines, *inter alia*, international law, international relations and political science. To contextualise this discussion, this thesis will now proceed to identify some factors that influence compliance with human rights judgments in international law.

In their journal, Helfer and Slaughter propose a checklist of factors which influence compliance with judgments.¹⁰² The factors are divided into three categories namely, Factors within the control of States Party to an agreement establishing a supranational tribunal, factors within the control of the judiciary and factors beyond the control of states or judges.¹⁰³

According to this methodology, factors which influence compliance which are within the control of states parties to an agreement establishing a supranational tribunal include; Composition of the tribunal, caseload of functional capacity of the Court,

¹⁰⁰Ayeni (n11above) Page 138-139

¹⁰¹Ayeni (n11above) Page 140

¹⁰²L.Helfer& A Slaughter, Toward a Theory of Effective Suprenational Adjudication, The Yale Law Journal, Volume 107

¹⁰³Helfer& Slaughter (n102 above)

Independent fact finding capacity and Formal authority of the law that the tribunal is charged with applying.¹⁰⁴

The composition of the tribunal will have implications on the legitimacy of its judgments and invariably influence compliance by states. In essence, an international tribunal will wield greater authority if its members are recognised and well known by national judges.¹⁰⁵

Another factor which may influence compliance is the caseload or functional capacity of the Court. In simple terms, a court that is rarely used or not accessible cannot hope to make much of an impact. Perhaps this could explain why the African Court faces serious resistance and lack of compliance with its judgments. Since its inception just over a decade ago, it has handled relatively few cases. This is not made any easier due to the restrictive direct access provisions of the protocol establishing the Court.¹⁰⁶ Because the Court is scarcely used and is difficult to access for individuals from member states, its impact is perhaps limited.

Furthermore, on factors within the control of states parties, the formal authority of the law that the tribunal is charged with applying may also influence compliance. Helfer and Slaughter posit that, the instrument that the tribunal is charged with interpreting and whether the tribunal's decisions themselves are regarded as binding and hence accorded formal status as law also influences effectiveness of a tribunal and thus compliance with its decisions.¹⁰⁷ To demonstrate this point, the jurisdiction of the African Court extends to all cases concerning the interpretation and application of the African Charter and any other relevant Human Rights instrument ratified by the States concerned.¹⁰⁸ That the African Court can use as its interpretation method, *any other relevant Human Rights* instrument may create challenges for the compliance of its judgments. The African Court has in some cases relied on these relevant Human Rights instruments in its decisions such the International Covenant on Civil and Political Rights.¹⁰⁹ Unsurprisingly, there has not been compliance in those cases.¹¹⁰ As already alluded to above, some African states do not always comply with decisions of the African Court because they perceive the rights institutions and their outputs to be

¹⁰⁴Helfer & Slaughter (n102 above) Page 300-307

¹⁰⁵Helfer & Slaughter (n102 above) Page 300, Ayeni (n11 above)

¹⁰⁶ Article 34 (6) of the African Court Protocol

¹⁰⁷Helfer and Slaughter (n 102 above) Page 304

¹⁰⁸ Article 3(1) of the African Court Protocol

¹⁰⁹Lazaro v United Republic of Tanzania App No.003/2016

¹¹⁰ See 2021 African Court activity report of non-compliance with the judgment relating to the death penalty in the Lazaro case

illegitimate, this owing to claims that most decisions are overwhelmingly influenced by western powers.¹¹¹

Another factor which may influence compliance with judgments of ICs and in particular the African Court is the relative importance with which human rights issues dominated discussions at the AU level. According to the study by Viljoen and Louw, human rights issues are not prominent at the political level of the AU and as such this has negatively affected state compliance with international human rights.¹¹²

It also appears that compliance may be determined by whether a State has enacted legal framework for implementation of judgments of the International Court. As the next Chapter demonstrates, the absence of specific legislation on implementation of judgments of the African Court has also contributed to non-compliance in several ways. One of the ways is that it gives the Respondent leeway to avoid implementation on the basis of a lack of specific legislation on implementation of judgments of international Courts.

Lastly, on factors within state parties' control, is the independent fact finding capacity of the human rights tribunal. This relates to but is not limited to the tribunal's ability to elicit factual information on which it can base its decisions. It is important to note that, in the context of compliance, the African Court faces a predicament in this respect. As already noted, its Activity reports rely on the information availed to it by the Applicant or by a report from the Respondent state on measures of implementation. Without such, the Court has no independent mechanism to verify and assess measures of implementation by Respondent States.¹¹³

The second category of factors, as already indicated relates to those factors which are within the power of the Human Rights Court. These factors relate to those matters within the Court's power that influence compliance with its judgments. These include, an awareness of audience, neutrality and demonstrated autonomy from political interests, incrementalism, quality of legal reasoning, judicial cross-fertilisation and dialogue and form of opinions.¹¹⁴

Perhaps of interest within this second category is the concept of incrementalism. Helfer and Slaughter posit that, 'Bold demonstrations of judicial autonomy by judgments against state interests and appeals to constituencies of individuals must be

¹¹¹ Franck (n27 above)

¹¹² Viljoen & Louw (n23 above).

¹¹³ Activity Report of the African Court (n.20 above)

¹¹⁴ Helfer and Slaughter (n102 above)

tempered by incrementalism and awareness of political boundaries.¹¹⁵ In essence, judgments have to be sensitive to the interests and context of state parties whilst fulfilling their duty to protect human rights. Perhaps this also explains why Rwanda has openly defied judgments of the African Court whose judgments have struck at the heart of Rwanda's highly sensitive 1994 Genocide.

In addition, the lack of an effective follow up mechanism to monitor compliance could also influence state compliance with decisions of an International Court. As Louw argues, the existence of a follow-up mechanism may lead to increased compliance.¹¹⁶ This conclusion was arrived at through an empirical study on compliance with recommendations of the African Commission on Human and Peoples' Rights carried out by Viljoen and Louw in 2005.¹¹⁷

The third category of factors influencing compliance with judgments are those factors which are beyond the control of states or judges. These include the nature of violations and autonomous domestic institutions committed to the rule of law and responsive to citizen interests.¹¹⁸

The nature of violations influences compliance in the sense that some violations are minor and unintentional.¹¹⁹ Such violations, according to Helfer and Slaughter require few concessions from the offending state. Examples of such violations include cases of maladministration or conflicts of interest prevalent in a complex society.¹²⁰

Lastly, another factor which may influence compliance is the existence of the international tribunal within an environment of liberal states. These liberal states have strong institutions which have internalised human rights norms and thus have strong commitments to human rights and the rule of law.

Related to the above is the role of the Civil Society in monitoring compliance with judgments of the International Courts. CSOs play a critical role in monitoring and reporting on compliance thus putting significant pressure on States to comply as they do not want negative publicity. However, where the CSOs operate in an authoritarian

¹¹⁵Helfer and Slaughter (n102 above) Page 314

¹¹⁶LiretteLouw, Member States' Compliance with Recommendations of the African Commission on Human and Peoples' Rights In: Compliance with International Human Rights Law in Africa: Edited by AderomolaAdeola, Oxford University Press.

¹¹⁷Viljoen and Louw (n42 above)

¹¹⁸Helfer and Slaughter (n102 above)

¹¹⁹Helfer and Salughter (n102 above) Page 329

¹²⁰Helfer and Slaughter (n102 above) Page 329

state, the operating space for CSOs may become very limited thus hindering monitoring and reporting of compliance. Conversely, where the CSOs operate in an open environment, they may execute their monitoring role freely thus applying pressure on States to comply with judgments.¹²¹

CHAPTER CONCLUSION

The main thrust of this chapter was to set the scene for a discussion on the status of compliance with judgments of the African Court in Tanzania and Rwanda that follows in the next Chapter. The historical origins of the African Court provide early indications of the compliance challenges that have bedevilled the Court. In particular, the fact that the Court exists in an environment that is dominated largely by illiberal or authoritarian states to some extent explains why African states have failed to comply with judgments of the African Court. In concluding this chapter, it is pertinent to reiterate that it is difficult to state authoritatively what factor(s) influence states to comply with a particular decision. However, this chapter has attempted to define the concept of compliance although there is no universally accepted definition of the term. What is clear from this Chapter is that compliance is not an all or nothing concept but is a matter of scale. Thus the Chapter makes a finding that compliance entails the very possibility of non-compliance. It was also demonstrated that compliance has various categories. For purposes of this thesis, the preferred categories included measuring compliance on the basis of 'full compliance', 'partial compliance' and 'non-compliance'. The Chapter further introduced various factors that affect compliance with judgments using two theoretical lenses, namely, constructivism and rational choice theories. The Chapter also adopted the rational choice theory as the theory that explains the status of compliance with judgments of the African Court by Tanzania and Rwanda. This is so because the failure of compliance by these two states has largely been an exercise of their own choice influenced by their interests and a lack of incentive to comply. This chapter concluded by identifying individual factors that influence compliance with judgments with international tribunals.

¹²¹LiretteLouw(n116 above).

CHAPTER 3: WHAT IS THE STATUS OF COMPLIANCE WITH JUDGMENTS OF THE AFRICAN COURT IN TANZANIA & RWANDA?

INTRODUCTION

In this Chapter, an analysis is made of the rate of compliance with judgments of the African Court in Tanzania and Rwanda. This thesis will aggregate and disaggregate data extracted from Activity reports of the African Court. Based on this data, the Chapter measures compliance according to whether the States have fully complied, partially complied or not complied at all with a judgment of the African Court. The Chapter also measures compliance with both judgments on merits and rulings on provisional measures. Although not expressly, the Chapter identifies that compliance with judgments of the African Court by Tanzania and Rwanda has been largely influenced by rational choice theory where the two states have clearly exercised a choice of not complying because the judgments do not align with their own state interests.

The case of Tanzania: Compliance with judgments of the African Court on Human and Peoples' Rights

Tanzania ratified the African Court Protocol on the 7th of February 2006.¹²² It further made a declaration on the 9th of March 2010 pursuant to Article 34 (6) of the African Court Protocol to allow individuals and Non-Governmental Organisations to bring matters before the African Court.¹²³ Tanzania deposited its instrument in terms of Article 34 (6) to the African Court Protocol on the 10th of February 2006.¹²⁴ Tanzania is also the host state of the African Court with the Court's premises being located in Arusha.

¹²² Activity Report of the African Court on Human and Peoples' Rights 1 January-31 December 2021

¹²³ Activity Report (n122 above)

¹²⁴ Activity Report (n122 above)

TABLE 1: JUDGMENTS ON MERITS & REPARATIONS OF THE AFRICAN COURT AGAINST TANZANIA AND COMPLIANCE RATES¹²⁵

Number of Judgments	Judgments complied with	Judgments partially complied with	Judgments not complied with
33	Nil	1	32
Total as a percentage of total number of judgments	0%	3%	97%

TABLE 2: RULINGS ON PROVISIONAL MEASURES BY THE AFRICAN COURT AGAINST TANZANIA AND COMPLIANCE RATES¹²⁶

Number of Rulings on Provisional measures	Rulings complied with	Rulings partially complied with	Rulings not complied with
24	Nil	Nil	24
Total as a percentage of total number of rulings	0%	0%	100%

As at the time of writing of this thesis, the African Court has been seized with a total number of three hundred and thirty-nine (339) applications since its inception.¹²⁷ Of these Applications, one hundred and fifty-six have been brought against Tanzania accounting for at least 46% of the Applications that have come before the African Court.¹²⁸ It is also pertinent to note that Tanzania has the highest number of judgments on merits and reparations against it by the African Court.

The compliance conundrum facing the African Court can be illustrated by reference to the 2020 calendar year of the Court. In November 2021 at a Conference on the Implementation and Impact of decisions of the African Court on Human and Peoples'

¹²⁵ Statistics have been compiled from <https://www.african-court.org/cpmt/statistic> and 2021 Activity Report of the African Court.

¹²⁶ Statistics have been compiled from <https://www.african-court.org/cpmt/statistic> and 2021 Activity Report of the African Court.

¹²⁷ <https://www.african-court.org/cpmt/statistic>

¹²⁸ <https://www.african-court.org/cpmt/statistic>

Rights, it was noted that, in 2020 alone, “the level of full compliance with the Court’s judgments stood at only 7%. In 18% of the Applications there was partial compliance with the Court’s judgments and in 75% of the Applications there was non-compliance with the Court’s judgments. Furthermore, there has been 10% compliance with the Court’s rulings on provisional measures.”¹²⁹

In light of these findings by the Dar es Salaam Conference, Table 1 is illustrative. As shown in table 1 above, a total of thirty-three judgments on the merits and reparations have been delivered against Tanzania since the establishment of the African Court. Of these, only one judgment has been partially complied with. The question that inevitably arises is what factors have influenced Tanzania not to comply fully with judgments and provisional measures issued by the African Court?

Some guidance can be drawn from 2021 Activity Report of the African Court. One can argue that, the nature of cases that have come before the African Court have contributed a great deal to non-compliance of judgments by Tanzania. These cases have struck at the heart of Tanzania’s constitutional order and have been considered by Tanzania to be political questions. To illustrate this point, one need not look further than the *Mtikila case*. In that case, Mtikila and Others approached the African Court challenging Tanzania’s 1992 Constitutional amendments which had barred independent candidates from participating in elections.¹³⁰ The Government of Tanzania strongly opposed the Application raising the “social needs” argument. According to Tanzania, barring independent candidates was necessary to avoid anarchy and disorder and was also necessary for good governance and unity.¹³¹ It was also necessary for social needs and reliance was placed upon the case of *CastañedaGutman v Mexico*¹³² in the Inter-American Human Rights System, where it was argued that, the introduction of independent candidates depended on the social needs of a state and its historical reality. In essence, Tanzania’s argument was that the introduction of independent candidates was a question for Tanzania’s political system to decide and not for the Courts. This argument had also carried the day in Tanzania’s Appellate Court which had found against Mtikila ruling that the banning of independent candidates was a political question.

¹²⁹ The Dar Es Salaam Communique, Africa Union Conference on the Implementation and Impact of decisions of the African Court on Human and Peoples’ Rights, 3 November 2021, Dar Es Salaam, Tanzania.

¹³⁰ *Mtikila & Others v Tanzania* App No. 011/2011

¹³¹ O Windridge ‘A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples’ Rights’ (2015) 15 African Human Rights Law Journal 299-328

¹³² *CastañedaGutman v Mexico* IACHR (6 August 2008) Ser C/Doc 184, paras 192 & 193

So strongly was the Tanzanian government against the African Court's judgment on the merits that, it openly criticised the judgment as wrong in the reparations application brought by Mtikila. The African Court went to the extent of concluding that,

“The Court notes that in its Reply to the Applicant's submissions on reparations, the Respondent maintains that the Court's Judgment of 14 June 2013 was wrong since the law in the Respondent State prohibits independent candidature for election to the Presidency, to Parliament and to Local Government. This was despite the Court's judicial finding that this prohibition is not in conformity with the Charter. This stance by the Respondent State is of concern to the Court and more so since the Respondent has never reported to the Court on the measures it is taking to adopt the constitutional, legislative and all other measures necessary to bring its law on candidature for elections to the Presidency, Parliament and to Local Government in conformity with the Charter. In this regard therefore, the Court grants the Applicant's prayer but orders the Respondent State to report to the Court, within six months from date of this ruling, on the Implementation of the Court's judgment of 14 June 2013.”¹³³

The conduct of the Tanzanian government in the Mtikila reparations Application is illustrative of the compliance challenges that lay ahead. Perhaps what is pertinent to note is that, where a judgment attacks the political system of a particular state and thus its constitutional order, the risk of non-compliance is high. Furthermore, a State is not likely to comply with a judgment which it considers to be wrong as was the case in the *Mtikila* case. This became clear as Tanzania has completely failed to comply with any of the judgments or orders that have been issued by the Court in the Mtikila Applications.¹³⁴

Several judgments against Tanzania which included payment of reparations have also suffered the same fate of non-compliance.¹³⁵ It may not be far-fetched to conclude that judgments sounding in money may face a high risk of non-compliance as they impose a burden on the national fiscus.

In a notice dated the 14th of November 2019, the United Republic of Tanzania withdrew its declaration pursuant to Article 34 (6) of the African Court protocol stating that the Declaration has been implemented contrary to the reservations

¹³³ Mtikila v The United Republic of Tanzania Application No. 011 of 2011

¹³⁴ Activity Report 2021 (n122 above)

¹³⁵ See Application 005/2013 – Alex Thomas v. United Republic of Tanzania, Application 006/2013 Wilfred Onyango Nganyani & 9 Others v United Republic of Tanzania

submitted by the United Republic of Tanzania when making its declaration.¹³⁶ In 2021, conversations about withdrawing from the Court itself by Tanzania dominated local and regional media with criticism being levelled at Tanzania. Perhaps giving an insight into why Tanzania had failed to comply with the Court's judgments, BoniphanceLuhende, Tanzania's Deputy Solicitor-General had this to say,

*"The withdrawal did not affect the pending cases. Tanzania remains allied to the spirit and mandate of the African Court...There are no specified procedures providing for the enforcement of the judgements in Tanzania...There are also some court orders that are unclear and ambiguous and hence cannot be implemented...The concern of the state is, 'What message is this sending to the society?'"*¹³⁷

What may be gleaned from the above sentiments is that Tanzania has viewed some of the judgments of the Court as vague and ambiguous and therefore impossible to comply with. These sentiments may also be a form of pushback against the Court so as to influence its future direction. That there are no specified procedures for enforcement of the Court's judgments in Tanzania is also testament to the weakness of the African Court's structure, that is, it lacks a coercive mechanism for enforcement. It also further demonstrates the lack of incentive on the part of States to comply with judgments of the Court.

With respect to rulings on provisional measures, Tanzania has failed to comply with any of those provisional measures by the African Court. Table 2 above shows that the Court has issued 24 rulings on provisional measures against Tanzania and of these 24, none have been complied with. Again, the reason for this failure is clear from the 2021 Activity Report of the African Court. In the case of *John Lazaro v The United Republic of Tanzania*¹³⁸, in its report to the Court on status of implementation, the government of Tanzania stated that, it could not implement the Court's decision as it sought to overturn the judgment of the Court of Appeal of Tanzania.¹³⁹ This implies that the Government of Tanzania considers the domestic Courts as perhaps more authoritative than the African Court. Tanzania further stated that it could not comply with the provisional measures of the African Court as the death penalty is provided

¹³⁶<https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania-E.pdf>

¹³⁷<https://www.theeastafrican.co.ke/tea/news/east-africa/tanzania-withdrawal-from-arusha-based-human-rights-court-3609834#:~:text=Tanzania%20has%20come%20under%20continental,directly%20access%20the%20African%20Court.>

¹³⁸ John Lazaro v The United Republic of Tanzania App No. 003/2016

¹³⁹ African Court Activity Report 2021 (n122 above) Page 18

for by Tanzanian statute and has been deemed to be constitutional.¹⁴⁰ It also further stated that, the death penalty was provided for in international law particularly, the ICCPR.¹⁴¹ Lastly, Tanzania argued that the decision on provisional measures was delivered *proprio motu* without affording it (Tanzania) the right to be heard.¹⁴²

Interestingly, the Tanzanian government refused to comply with subsequent rulings on provisional measures in subsequent cases basing on the same reasons in the Lazaro case above. These cases also involved the death penalty in Tanzania. Some of the cases include the cases of, *Habiyalimana Augustino & Others v The United Republic of Tanzania*¹⁴³ App No. 015/2016, *Deogratius Nicholas v The United Republic of Tanzania*¹⁴⁴, *Joseph Mukwano v The United Republic of Tanzania*¹⁴⁵, *Domick Damian v The United Republic of Tanzania*¹⁴⁶ and *Crosperry Gabriel v The United Republic of Tanzania*¹⁴⁷ among others.¹⁴⁸

The rulings of the African Court on provisional measures against Tanzania should be viewed in the context of Tanzania's own views on the death penalty. The death penalty in Tanzania has its roots in colonial legislation. It may be imposed on those who would have been convicted of murder. It is carried out by hanging the offender. According to Gaitan, the justification for the death penalty in Tanzania has been linked to the political and social culture of Tanzania expressed through the maxim, *jinokwajin* which means, 'a tooth for a tooth' and loosely translates to, 'he who kills a man must be put to death'.¹⁴⁹ In essence, the *jinokwajin* maxim is the moral basis for the death penalty in Tanzania. The death penalty in Tanzania is an established and justified form of punishment dating back to time immemorial, when it was applied to solve murder cases that were 'committed' by the use of witchcraft.¹⁵⁰

From this brief contextual analysis, it is clear therefore that the rulings on provisional measures in the death penalty cases against Tanzania were doomed and at a high risk of non-compliance. It is patently clear that the death penalty is part and parcel of the socio-political fabric of Tanzania. It can be argued therefore, that judgments which

¹⁴⁰ Activity Report 2021 (n122 above) Page 18

¹⁴¹ Ibid

¹⁴² Ibid

¹⁴³ *Habiyalimana Augustino & Others v The United Republic of Tanzania* App No. 015/2016

¹⁴⁴ *Deogratius Nicholas v The United Republic of Tanzania* App No. 017/2016

¹⁴⁵ *Joseph Mukwano v The United Republic of Tanzania* App No. 021/2016

¹⁴⁶ *Domick Damian v The United Republic of Tanzania* App No. 048/2016

¹⁴⁷ *Crosperry Gabriel v The United Republic of Tanzania* App No. 050/2016

¹⁴⁸ Activity Report 2021 (n122 above) Page 19-20

¹⁴⁹ A. Gaitan 'Tanzania's death penalty debate: An epilogue on *Republic v Mbushuu*' (2009) 9 African Human Rights Law Journal Page 459-481

¹⁵⁰ Gaitan (149 above) Page 464

strike at the heart of a State's social and political fabric face a high risk of non-compliance. These judgments are not in the interests of Tanzania.

However, it should be noted that in general, rulings on provisional measures have faced difficulties with compliance in many Regional Human Rights systems. It has however been argued that, one of the reasons why States have failed to comply with orders for provisional measures is because of the inconsistency of the African Court in the use of the provisional measures. Pascale puts it as follows,

“To be more precise, since the African Court generally abstains from assessing the international responsibility of States that have not implemented provisional measures, it somehow supports the situation of enduring disrespect for such measures and the resulting loss of their practical “usefulness”. This would therefore also mean that the African Court, namely the organ that should and could mainly contribute to improve the functioning of the “fragile” African Human Rights System, is indeed one of the causes of a further weakening of this System.”¹⁵¹

This appears to be a very serious weakness of the African Court itself which contributes to non-compliance with provisional measures of the Court.

That Tanzania has withdrawn its declaration allowing individuals and NGOs to approach the Court directly does not bode well for the future of the Court and the execution and implementation of its judgments. It can be argued that the withdrawal is a form of backlash against the African Court which threatens the existence of the Court itself. It is also indicative of the Tanzania's lack of compliance with judgments of the African Court.

The case of Rwanda: Compliance with judgments of the African Court on Human and Peoples' Rights

Rwanda emerged from the 1994 Genocide against the Tutsi a largely divided nation. The Government of President Paul Kagame that took power in 1994 after the Genocide has generally treated with ruthlessness, attempts to downplay or deny the 1994 Genocide. Many people have been prosecuted for their role during the Genocide, whilst others have been prosecuted for denying or downplaying the Genocide. Invariably, the civic space in Rwanda, according to CIVICUS, a leading civil society

¹⁵¹G.Pascale Andrea 'Provisional Measures Under the African Human Rights System', F. M. Palombino et al. (eds.), Provisional Measures Issued by International Courts and Tribunals, https://doi.org/10.1007/978-94-6265-411-2_12

organisation, is considered to be repressed.¹⁵² According to these ratings, a repressed civic space is the second worst rating after ‘closed’. The country faces challenges with fair trial rights and these matters have been brought before the African Court for adjudication.

Rwanda signed the Protocol to the establishment of the African Court on the 9th of June 1998.¹⁵³ It was one of the first countries to sign the Protocol. Perhaps this was influenced by the hope to have perpetrators of the Rwandan Genocide to face justice. Rwanda deposited the declaration pursuant to Article 34 (6) of the Protocol allowing individuals and NGOs direct access to the Court on 22 January 2013.¹⁵⁴

TABLE 3: JUDGMENTS ON MERITS & REPARATIONS OF THE AFRICAN COURT AGAINST RWANDA AND COMPLIANCE RATES¹⁵⁵

Number of Judgments	Judgments complied with	Judgments partially complied with	Judgments not complied with
3	Nil	Nil	Nil
Total as a percentage of total number of judgments	Nil	Nil	100%

TABLE 4: RULINGS ON PROVISIONAL MEASURES BY THE AFRICAN COURT AGAINST RWANDA AND COMPLIANCE RATES¹⁵⁶

Number of Rulings on Provisional measures	Rulings complied with	Rulings partially complied with	Rulings not complied with
2	Nil	Nil	2

¹⁵² CIVICUS Monitor (2022) National Civic Space Ratings, Available at: www.monitor.civicus.org (Accessed: 2022-06-21).

¹⁵³ Activity Report 2021 (n122 above)

¹⁵⁴ Umuhoza v Rwanda App. No. 003/2014 .

¹⁵⁵ Statistics have been compiled from <https://www.african-court.org/cpmt/statistic> and 2021 Activity Report of the African Court (n122 above).

¹⁵⁶ Ibid

Total as a percentage of total number of rulings	Nil	Nil	100%
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As shown in Table 3 and 4 above, the African Court has however not had the opportunity to deal with many cases involving Rwanda as the Rwandan government withdrew its Article 34 (6) declaration within three years after making the declaration. The turn of events following the declaration in 2013 perhaps explains why the Rwandan government has openly defied the judgments of the African Court. The case of *Umuhoza v Rwanda*¹⁵⁷ is key to this discussion on compliance.

In that matter, Ingabire Victoire Umuhoza, an opposition leader in Rwanda was alleged to have made some speeches between 2003 and 2010 whose effect was to minimise the Rwandan genocide or to downplay or deny it.¹⁵⁸ She was prosecuted in the High Court of Rwanda and sentenced to eight years imprisonment with hard labour.¹⁵⁹ She appealed to the Rwanda Supreme Court which reclassified the offences she was facing and sentenced her to fifteen (15) years imprisonment.¹⁶⁰ Umuhoza then approached the African Court arguing that her fair trial rights and right to freedom of expression had been violated.

The Court became seized with the Application. Initially, Rwanda co-operated with the Court in terms of submissions of responses and correspondences. However, four days before the hearing of the Application, Rwanda notified the African Union Commission of its intention to withdraw its declaration under Article 34 (6).¹⁶¹ In the *note*, Rwanda in apparent reference to the Umuhoza case stated that,

“CONSIDERING that a Genocide convict who is a fugitive from justice has, pursuant to the above-mentioned Declaration, secured a right to be heard by the Honourable Court, ultimately [sic] gaining a platform for re-invention and sanitization, in the guise of defending the human rights of the Rwandan citizens; CONSIDERING that the Republic of Rwanda, in making the 22nd January 2013 Declaration never envisaged that the kind of person described above would ever seek and be granted a platform on the basis of the said Declaration;

¹⁵⁷ *Umuhoza v Rwanda App. No. 003/2014*

¹⁵⁸ *Umuhoza (supra)*

¹⁵⁹ *Umuhoza (supra)* Judgment on merits

¹⁶⁰ *Umuhoza (supra)* judgment on merits

¹⁶¹ O Windridge ‘Assessing Rwexit: the impact and implications of Rwanda’s withdrawal of its article 34(6) declaration before the African Court on Human and Peoples’ Rights’ (2018) 2 African Human Rights Yearbook 243-258.

CONSIDERING that Rwanda has set up strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues;

NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court on Human and Peoples' Rights to receive cases under article 5(3) of the Protocol and shall make it afresh after a comprehensive review.”¹⁶²

This Notice of Withdrawal sums up the reason behind Rwanda's failure to comply with judgments of the Court that followed the notice. Rwandan Justice Minister justified its withdrawal of its declaration under Article 34 (6) because the Court's powers were being abused by genocide convicts and fugitives and therefore the country could not participate in the proceedings.¹⁶³

Rwanda's Ambassador to the African Union, Hope Tumukunde, also stated that, 'We quickly realised that [the African Court] is being abused by the judges on absence of a clear position of the court vis-à-vis genocide convicts and fugitives, and that is why we withdrew'.¹⁶⁴ This negative public discourse against the Court and its judges by Rwanda is a clear manifestation of a backlash against the Court and indicative of Rwanda's attitude towards compliance with judgments of the African Court.

In *Kennedy Gihana v Rwanda*¹⁶⁵, Rwanda advised the Court that it would not participate in the proceedings of the Court. This form of backlash against the Court would be indicative of non-compliance by Rwanda. Flowing from the refusal to participate in the proceedings of the Court, Rwanda has still not complied with the reparations order of the Court in the Gihana case.¹⁶⁶

Similarly, in the Umhuza case, the Rwandan Government has informed the Court that it will no longer co-operate with it.¹⁶⁷

¹⁶²<https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Rwanda.pdf>

¹⁶³<https://www.theeastafrican.co.ke/tea/news/east-africa/tanzania-withdrawal-from-arusha-based-human-rights-court-3609834#:~:text=Tanzania%20has%20come%20under%20continental,directly%20access%20the%20African%20Court>

¹⁶⁴<https://www.thecitizen.co.tz/tanzania/news/national/rwanda-rejects-calls-to-endorse-african-rights-court-2561186>

¹⁶⁵*Kennedy Gihana v Rwanda App. No.017/2015*

¹⁶⁶ 2021 Activity Report of the African Court on Human and Peoples' Rights (n122 above).

¹⁶⁷ 2021 Activity Report of the African Court on Human and peoples' Rights (n122 above).

With respect to orders for provisional measures, table 4 illustrates that there is a 100% non-compliance rate by Rwanda. Again, it would appear that the rulings that have been issued by the African Court so far have touched on the sensitive 1994 Genocide. To demonstrate this point further, the case of *Leon Mugesera v Rwanda*¹⁶⁸ is illuminating. Leon Mugesera is now a convicted person who was prosecuted for making inflammatory sentiments during the Genocide against the Tutsi in 1994 in Rwanda. In that case, Mugesera had approached the African Court requesting the Court to issue provisional measures against the Rwandan government to allow him to meet his lawyer and family. In an unprecedented move, during the initial procedural stage of the case, Rwanda sent a letter to the Registrar of the Court that it would not comply with any measure requested by the Court.¹⁶⁹ It would appear that this position by Rwanda was influenced by purely political reasons. Rwanda had notified the Court of its intention to withdraw its declaration allowing individuals and NGOs direct access to the Court in 2016 during the Umuhoza case before its conclusion. Rwanda had hoped to oust the jurisdiction of the Court in that matter and all other cases pending before the Court. The Court had acknowledged the validity of Rwanda's withdrawal but pursuant to the international law principle of *perpetuatio jurisdictionis*¹⁷⁰, the Court held that it would still determine all matters that were pending and that Rwanda would still be obliged to comply with decisions therefrom.¹⁷¹ This position by the Court led to Rwanda openly defying the judgments of the Court.

In conclusion, it would appear that Rwanda has failed to comply with judgments of the African Court mainly because the judgments touch on the Rwanda Genocide of 1994. It is also not far-fetched to conclude that, the failure to comply with judgments is also due to a restricted civic space in Rwanda characterised by fair trial violations and targeting of legitimate opposition.

Zimbabwe's compliance conundrum with International tribunals

Lessons can be learnt from Zimbabwe to solidify the understanding of the factors that have influenced Tanzania and Rwanda not to comply with judgments of the African Court. Zimbabwe continues to face serious challenges with respect to implementing decisions of International Tribunals.

The Southern African Development Community Tribunal is a key example. Before it was dissolved, largely at the instigation of Zimbabwe, several cases had been brought before the Tribunal against Zimbabwe. The SADC Tribunal was the judicial body of the SADC region established to interpret the community law.

¹⁶⁸*Leon Mugesera v Rwanda App. No 012/2017*

¹⁶⁹Mugesera (Supra)

¹⁷⁰ A procedure starting before a court or tribunal pursuant to the law in force at the time of the application shall continue until its conclusion. See Pascale (n151 above)

¹⁷¹Umuhoza (supra)

The leading case of *Mike Campbell (Pty) Limited v Zimbabwe SADC-001/2008* illustrates how judgments which touch at the heart of a State's constitutional order and alter a State's political-social fabric are at high risk of non-compliance. In that case, Mike Campbell challenged Zimbabwe's land reform programme alleging that it was unlawful to the extent that it was racially grounded with no prospects of compensation.¹⁷² As is common cause, the Government of Zimbabwe embarked on the land reform programme to address historical and colonial imbalances which gave fertile land to the white minority at the expense of the black majority. The Government of Zimbabwe strongly opposed Campbell's Application. The SADC Tribunal however found in favour of Campbell.

Unsurprisingly, the Government of Zimbabwe refused to comply with the Tribunal's ruling. After a series of events, the SADC Tribunal was actually suspended whilst the contracts of the judges of the tribunal were terminated. The harsh backlash by the Zimbabwean government had led to the suspension of the Tribunal itself. By way of comparison, it can be argued that similar to Tanzania and Rwanda, judgments of international tribunals which seek to interfere with sensitive aspects of a State's history and politics are highly likely not to be complied with.

CHAPTER CONCLUSION

This chapter constituted the main subject of this thesis, namely analysing the status of compliance with judgments in Tanzania and Rwanda. The chapter began by highlighting the position of Tanzania as the host state of the African Court and most importantly, that it gave individuals and NGOs direct access to the Court. The Chapter also analysed statistics of compliance as extracted from the Activity report of the African Court and the African Court website. Based on these statistics, the chapter makes a finding that currently, Tanzania has not complied with 97% of the Court's judgments on merits and reparations. A further finding is made that Tanzania has only partially complied with 1 judgment constituting 3% whilst it has never fully complied with any judgment. With respect to rulings on provisional measures, this Chapter makes a finding that Tanzania has not complied with any of the rulings. What is clear from these findings is that, the judgments and rulings have elicited an adverse reaction from Tanzania's government.

The Chapter makes a finding that these judgments and rulings have touched on sensitive aspects of Tanzania's socio-political fabric and hence the non-compliance.

¹⁷²Mutangi (n1) above

Simply put, Tanzania has exercised a rational choice not to comply because the judgments are inconsistent with Tanzania's own interests.

Additionally, one can also argue that the backlash against the Court by Tanzania has also been consistent with the democratic regression and closure of the civic space in Tanzania. Furthermore, it remains highly controversial for a supranational judicial body to supersede domestic judicial authority. This is clear from the death penalty provisional measures that have not been complied with by Tanzania.

The absence of a special domestic framework to ensure compliance with judgments of the African Court could also be a factor accounting for non-compliance with the Court's judgments. The sentiments of Tanzania's Solicitor-General alluded to earlier in this Chapter are apposite.¹⁷³

The case study of Rwanda commences from its history with genocide. The chapter also establishes that Rwanda was one of the major supporters of the African Court as it viewed it as a mechanism through which human rights could be promoted on the continent. Rwanda also gave individuals and NGOs the right of direct access to the Court. However, immediately following Rwanda's accession to Article 34 (6), the case of Umuhoza engendered feelings of hostility towards the Court leading to open defiance with its judgments. This was largely due to the fact that the judgment touched on Rwanda's sensitive history with genocide. The Chapter also finds that based on the statistics extracted from the Court's Activity report and website, Rwanda has not complied with any of the Court's judgments on merits and reparations and also rulings on provisional measures. The Court has thus faced severe backlash by Rwanda. The finding from this Chapter is that Rwanda has failed to comply with judgments of the Court because they are not in the interests of Rwanda.

In addition, the failure to comply may also be consistent with a closed civic space at the domestic level characterised by persecution of all dissent by the Government of Rwanda.

In the next chapter, the thesis will attempt to draw lessons from the European and Inter-American system of human rights by analysing the trends in those systems. The value that is going to be drawn from the two systems relates to ways of strengthening compliance within the African human rights system.

¹⁷³<https://www.theeastafrican.co.ke/tea/news/east-africa/tanzania-withdrawal-from-arusha-based-human-rights-court-3609834#:~:text=Tanzania%20has%20come%20under%20continental,directly%20access%20the%20African%20Court>

CHAPTER 4: LESSONS FROM THE EUROPEAN AND INTER-AMERICAN HUMAN RIGHTS SYSTEMS

Introduction

This Chapter analyses the European Court of Human Rights (The European Court/ ECtHR) and the Inter-American Court on Human Rights (The Inter-American Court/ ICtHR) with a view to establishing the status of compliance with judgments. Invariably, the Chapter looks at the compliance legal framework in both systems and

refers to select cases to demonstrate some factors which influence states to comply with judgments of these Courts. The Chapter also analyses some challenges facing these Courts with respect to compliance.

The European Court of Human Rights: Historical Origins

The European Court currently operates in an environment where the vast majority of States are liberal democracies and respect civil liberties. Due to this context, it has been able to exert influence on domestic actors in European states to integrate human rights. As this Chapter will demonstrate, the Court has also successfully managed to influence Constitutional, legislative and institutional changes in States through its judgments.

It is however remiss, to explain the origins of the ECtHR without briefly explaining the origins of the European Human Rights System itself. The system was established following the World War 2 which had been marred by gross human rights violations and violations of the laws of war. World War 2 led to massive loss of lives, destruction of property, internal displacement and migration crisis in Europe. The system was thus set up to prevent any future violations of human rights of the scale that was experienced during the 2nd World War.

The Council of Europe (not to be confused with the European Union) was formed in 1949 as an international organisation for European States.¹⁷⁴ Its mandate is to protect human rights, rule of law and promote democracy in member states to the Council.¹⁷⁵ It currently consists of forty-six (46) members. Russia is the latest country to cease to be a member of the Council following its invasion of Ukraine in March 2022.

The Council of Europe drafted the European Convention on Human Rights to secure basic human rights for individuals from member states of the Council. This shift to giving individuals rights in International law was consistent with a similar shift that occurred with the United Nations and the 1948 Universal Declaration of Human Rights.

The European Convention was signed in Rome in 1950 and came into force in 1953.¹⁷⁶ The European Convention made provision for several individual rights in accordance with the Universal Declaration of Human Rights.

¹⁷⁴<https://www.coe.int/en/web/about-us/who-we-are>

¹⁷⁵<https://www.equalityhumanrights.com/en/what-european-convention-human-rights>

¹⁷⁶<https://www.equalityhumanrights.com/en/what-european-convention-human-rights>

At the inception of the European system, three key institutions were responsible for protection of human rights namely, the European Commission of Human Rights, the European Court and the Committee of Ministers of the Council of Europe.¹⁷⁷ Under this original system, all applications filed in terms of the European Convention would first of all be handled by the European Commission which assessed the Application for admissibility.¹⁷⁸ If the application was found to be admissible, the Commission would draw up the facts and express a non-binding decision to the parties involved. The Commission or the Respondent State could then refer the matter to the European Court for a binding decision. If this option was not exercised, the Committee of Ministers could decide on the matter. This approach would in future prove to be a major structural weakness of the human rights system in Europe. One of the evident weaknesses of this system was the lack of a right to direct access to the Court for individuals.

However, the idea of a European Commission is one that was strongly supported by European States as far back as 1949. As the Explanatory report to Protocol 11 states, a Human Rights Commission, in addition to a Court, was necessary to “counter the criticism that the latter would be inundated with frivolous litigation and its facilities exploited for political ends.”¹⁷⁹ Some States however, still viewed the court as the only important institution that could effectively deal with human rights violations. The creation of the three institutions was therefore a compromise to pacify competing interests in the Council.

In 1998, through Protocol 11 to the European Convention, the Council of Europe restructured the human rights system. Protocol 11 effectively abolished the European Commission on Human Rights. The preamble provisions of Protocol 11 in explaining this restructuring provides that,

“Considering the urgent need to restructure the control machinery established by the Convention in order to maintain and improve the efficiency of its protection of human rights and fundamental freedoms, mainly in view of the

¹⁷⁷<https://echr.coe.int/Pages/home.aspx?p=basictexts&c=>

¹⁷⁸<https://echr.coe.int/Pages/home.aspx?p=basictexts&c=>

¹⁷⁹ Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.

*increase in the number of applications and the growing membership of the Council of Europe...*¹⁸⁰

This growth in the number of members of the Council of Europe was occasioned by the collapse of the Soviet Union and formation of several States in Eastern Europe. Several cases from these formerly Soviet Union States were filed under the Convention. Anagnostou also states that partly because of Russia and Turkey with deficient democratic standards, the European Commission was abolished and a single Court was created and rendered mandatory, the individual right to petition the Court directly.¹⁸¹ The Court has thus carried out this adjudicatory role in the European human rights system with distinction. Its workload in comparison with the African Court is massive. As Figure 1 below illustrates, as of 31 May 2022, a total of 72,100 cases were pending before the Court.

Compliance Legal Framework of judgments of the European Court of Human Rights

The obligation to comply with judgments of the European Court is one that is guarded almost jealously in the European system. In terms of Article 46(1) of the European Convention,

*“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”*¹⁸²

This provision is similarly worded with Article 30 of the African Court Protocol. This obligation to comply with judgments of the Court is three-fold. Firstly, it involves termination of the continuing violation, secondly, *restitution in integrum* and lastly just satisfaction.¹⁸³ In the case of *Vermeire v Belgium*, the Court held that the obligation to implement the judgment is immediate and not transitory.¹⁸⁴ However, in some instances, the nature of a judgment may mean that obligations cannot be complied with immediately but within a reasonable time.

It is also pertinent to note that, under the European system, Respondent States are given considerable latitude to device means and methods of complying with judgments of the European Court.

¹⁸⁰ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.

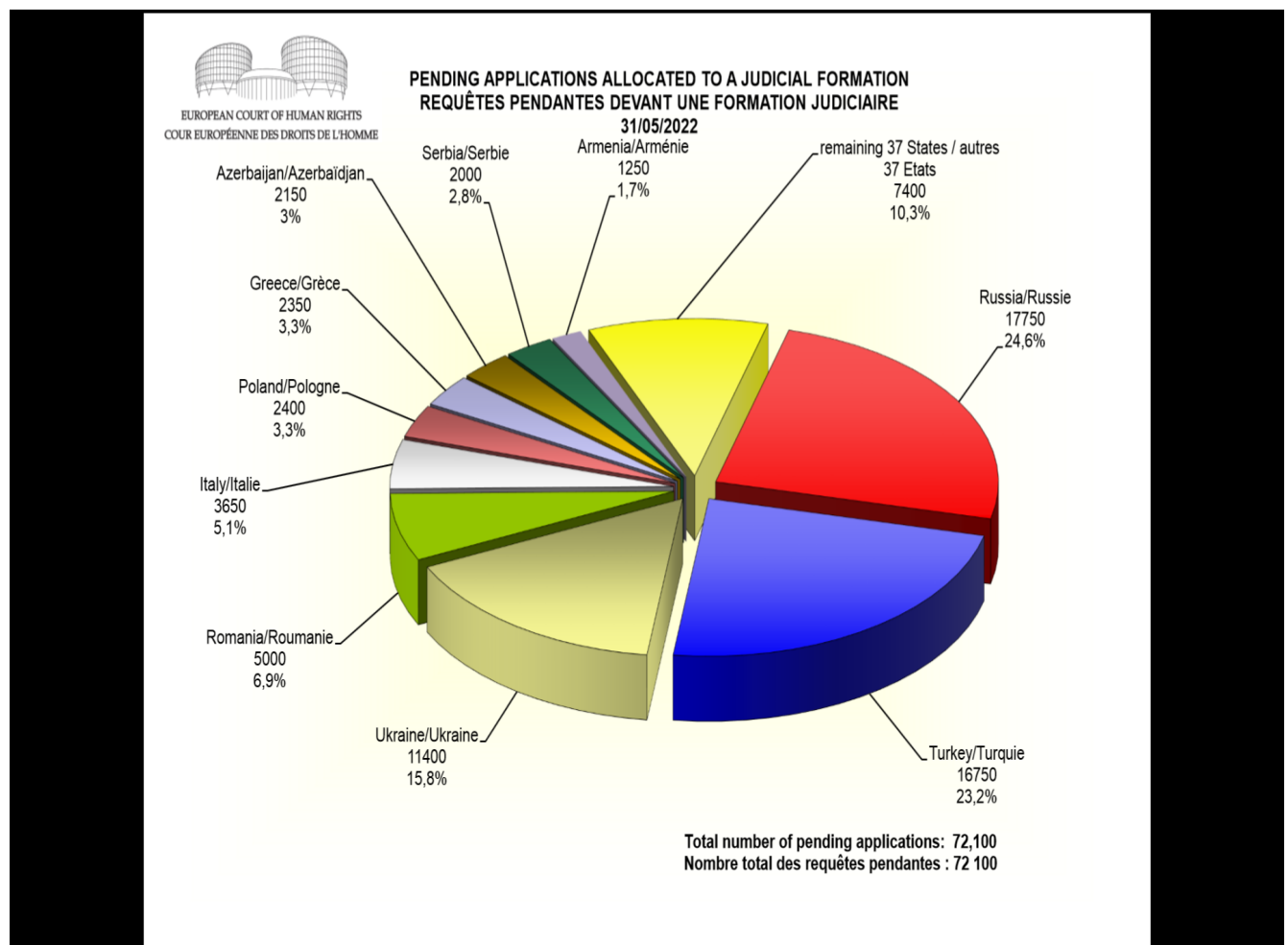
¹⁸¹ D. Anagnostou ‘THE EUROPEAN COURT OF HUMAN RIGHTS Implementing Strasbourg’s Judgments on Domestic Policy’ Edinburgh University Press, 2013

¹⁸² Article 46 (1) of the European Convention on Human Rights

¹⁸³ D. Forst ‘The Execution of Judgments of the European Court of Human Rights: Limits and Ways Ahead’ (Published LLM Thesis) Katholieke Universiteit Leuven

¹⁸⁴ *Veremire v Belgium* Application No. 12849/87

Figure 1: Pending cases before the European Court of Human Rights (source: https://echr.coe.int/Documents/Stats_pending_month_2022_BIL.PDF)



A key cog of the European system's compliance legal framework is the work of the Committee of Ministers. In terms of Article 46 (2) of the European Convention, the Committee of Ministers is tasked with supervising the execution of judgments of the European Court.

In performing its supervisory role, the Committee of Ministers interacts with the competent national authorities and reviews the adequacy of both individual and general measures that they undertake in response to adverse judgments.¹⁸⁵ Quite clearly, the CoM has more expansive and elaborate powers of monitoring execution of judgments than the Executive Council under the African human rights system. This is so if one were to compare the powers of the CoM under Article 46 of the European Convention and the powers of the Executive Council under Article 29 (2) of the African Court Protocol.

Anagnostou argues that, “state compliance with Strasbourg Court rulings that find a state to have infringed Convention provisions is actually remarkably high, and it has been described as ‘as effective as those of any domestic court.’”¹⁸⁶ New rules that came into force in 2010 have further strengthened the capacity of the CoM to monitor the execution of judgments of the Court. These changes came about as a result of an increase in the Court’s workload in the early 2000s. In the Explanatory Report to Protocol 14 which brought about these changes, it was stated that,

*“Measures must also be taken to prevent violations at national level and improve domestic remedies, and also to enhance and expedite execution of the Court’s judgments”*¹⁸⁷

In essence, the CoM has now been empowered with very wide powers to ensure that judgments of the European Court are complied with. This is achieved through the interactions between the CoM and domestic actors. This transnational legal process could be one of the factors that accounts for a high compliance rate under the European system.

Furthermore, it is also important to note that the CoM may refer to the Court for a determination on whether a state has refused to comply with a judgment in accordance with Article 46 (1) of the Convention.¹⁸⁸ Conversely, where the Court finds that there is no violation, it refers the case to the CoM which shall close the examination of the case.¹⁸⁹

Although it does not have a coercive mechanism to enforce compliance with its judgments, the European Court has through the innovative ‘pilot judgments’

¹⁸⁵ Anagnostou (n181 above)

¹⁸⁶ Anagnostou (n181 above) Page 1-2.

¹⁸⁷ Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention Strasbourg, 13.V.2004.

¹⁸⁸ Article 46 (4) of the European Convention (as amended)

¹⁸⁹ Article 46 (5) of the European Convention

procedure contributed to state compliance. According to this procedure, the Court suspends the examination of all repetitive cases during the supervision of the pilot judgment by the Committee of Ministers, whose supervision is given priority under the “enhanced procedure”.¹⁹⁰ In simple terms, the Court identifies causes of systematic problems or human rights violations and orders the Respondent State to implement some general measures. This is the pilot judgment. Should the State fail to comply with these general measures under the pilot judgment, the Court may re-open those cases which it would have frozen. The African human rights system in 2020 introduced new Rules which will see a version of the pilot judgments being introduced. Pilot judgments are key in that they may lead to legislative and policy changes and decrease cases of similar nature and consequently lessen the Court’s workload.

Trends, Challenges and Opportunities: Compliance with judgments of the European Court of Human Rights

As already highlighted above, compliance with judgments of the European Court is considered to be very high and to some extent, as high as compliance with judgments of domestic courts. However, it has been highlighted that measuring compliance with judgments under the European human rights system is extremely difficult.¹⁹¹ One of the challenges is the sheer amount of cases that have been decided by the Court which is very high. It should also be noted that several challenges remain in so far as compliance with judgments is concerned.

Judgments of the Court which order comprehensive legislative or Constitutional changes continue to face resistance. This is because they are viewed as challenging democratic ideals concerning majority rule and parliamentary supremacy. The Court’s judgments in the cases of *Hirst v U.K* and *Greens & M.T v U.K* faced this challenge.

Furthermore, judgments calling for legislative reform largely rely on the ability of legislative actors to contain the executive branch.¹⁹² A pliant legislature may not always be successful in implementing measures and thus complying with judgments of the Court.

Stiansen in his thesis quotes de Londras and Dzehtsiarou who posit that, some cases of non-compliance are a result of the Respondent states refusing

“to execute [an ECtHR judgment] because of a deep-seated disagreement not only with the outcome but, perhaps more significantly, with the principle of an

¹⁹⁰Forst (n183 above)

¹⁹¹Stiansen (n3 above)

¹⁹²Forst (n183 above)

international court's decision 'overturning' a domestic, democratically arrived at position in respect of a particular matter."¹⁹³

As a corollary to the risk of non-compliance with judgments on legislative reform is the rise of populism in Europe. Populism appears to be on the rise in most European States with extremist views on racism and migration threatening the essence of Europe as a liberal democracy. In his article, Petrov argues that, "supranational judicial review (European Court) is at odds with populist ideology."¹⁹⁴ He further argues that populism tends to include international courts such as the European Courts in the populist 'narrative of blame', which explains who is responsible for the current problems of the ordinary people and how to resolve them.¹⁹⁵ The point here being that, the rise of populism may be indicative of compliance challenges that lie ahead for the Court.

This populism has also manifested itself through criticism of the Court. For instance, Viktor Orban, President of Hungary criticised the European Court for finding that the removal of Hungary Supreme Court President as a violation of the Convention. He also criticised the Court after it had made findings against Hungary's immigration policies and treatment of migrants. He went on to state that the European Court was in need of reform as it had become a threat to the security of the EU people.¹⁹⁶

It can also be noted that judgments of the Court which interfere with counter-terrorism measures receive a lot of backlash from Respondent States and are prone to resistance. For instance, a judgment of the Court in favour suspected Islamic terrorist, Abu Qatada against the UK barring his extradition without assurances from the Jordan government that he would be tortured, received criticism from the British government. Then Home Secretary, Theresa May even suggested that the UK should withdraw from the Court.¹⁹⁷

It is pertinent to note however that in some instances, compliance is not necessarily non-existent but may be delayed due to several domestic factors. This is particularly so with respect to judgments that require legislative reform. Legislative reform by its very nature may be slow and cumbersome. This is in part due to the procedures themselves or due to opposition within the domestic politics. As Martinico points out with respect to Italy, that Italy has never refused to comply with a judgment of the

¹⁹³Stiansen (n3 above)

¹⁹⁴J.Petrov 'The Populist Challenge to the European Court of Human Rights' The Jean Monnet Working Paper Series, New York University School of Law, 2018.

¹⁹⁵Petrov (n194 above)

¹⁹⁶Petrov (n194 above)

¹⁹⁷Stiansen (n3 above)

European Court but compliance has been delayed due to a cumbersome legislative process.¹⁹⁸

Another factor which influences compliance with judgments of the Court is the nature of the judgment itself. Where the Respondent state is unclear as to what the judgment requires, the risk of non-compliance is high. As Staton and Vanberg argue, “By indicating remedies, courts can make the implementation process more transparent and in this way increase the political costs associated with non-compliance.”¹⁹⁹ However, this has its own challenges as the Court may be accused of overreaching or violating the subsidiarity principle that is central to implementation of judgments in the European Court.

The cessation of Russia from membership of the CoE may likely impact the compliance rates with the judgments of the Court. As shown in Figure 1 above, there are 17,750 cases pending before the European Court of Human Rights against Russia accounting for 24,6% of the Court’s caseload. Should all these cases be disposed by the Court, will Russia comply with the judgments? Yet the Court cannot simply remove the cases from its roll of cases.

Finally, it can be argued that compliance rates in the European system are high because of the context in which it operates, in particular, the high number of democratic states. The political cost of non-compliance also remains very high thus forcing states to comply with judgments.

¹⁹⁸G.Martinico ‘Italy: Between Constitutional Openness and Resistance In Criticism of the European Court of Human Rights. Shifting the Dynamics of the Convention System: Counter-Dynamics at the National and EU level, ed. Patricia Popelier, Sarah Lambrecht and KoenLemmens. Cambridge, Antwerp, and Portland: Intersentia 2016.

¹⁹⁹Staton and Vanberg ‘The value of vagueness: delegation, defiance, and judicial opinions’ American Journal of Political Science 52(3

The Inter-American Court of Human Rights: Historical origins

The Inter American Court of Human Rights (IACtHR) is one two principal organs of the Organisation of American States that is part of the Inter American Human Rights System. Together with the Inter American Commission of Human Rights, the IACtHR is responsible for the protection of human rights in the American region (both North and South America). To date, twenty American states recognised the Court's competence to deal with contentious matters.²⁰⁰ Founded in 1979, through the Statute of the Inter American Court of Human Rights, the Court is headquartered in Costa Rica.²⁰¹

It is important to note that human rights in the American system were introduced as far back as 1948 with the adoption of the American Declaration on the Rights and Duties of Man which contains individual human rights. This was followed by the American Convention on Human Rights adopted in 1969 and entered into force in 1978. The Convention establishes the IACtHR²⁰² and the IACHR²⁰³ as the competent organs for the protection of human rights in the American region. The IACtHR is regulated by the Statute of the Court which was adopted in 1979 and exists to interpret the rights provided for under the American Convention.²⁰⁴

It is pertinent to note that, although the Inter American human rights system is one of the oldest regional human rights system, it was formed against the background of military dictatorships, civil wars, absence of the rule of law and impunity. Invariably, domestic institutions in most of the American states were very weak and unable to deal decisively with impunity. As this study will show, compliance with international human rights obligations in this region continues to face serious challenges. Bailliet comments that the Court was created during the epoch of dirty wars and enforced disappearances.²⁰⁵ Quite clearly, the Court was created in an environment where democratic ideals were still alien.

²⁰⁰https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

²⁰¹https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

²⁰²Article 51 of the American Convention on Human Rights.

²⁰³Article 34 of the American Convention.

²⁰⁴Article 1 of the Statute of the Inter American Court of Human Rights.

²⁰⁵C. Bailliet 'Measuring Compliance with the Inter- American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America' Nordic Journal of Human Rights Vol. 31 No. 4. ISSN 1891-8131.

Unlike the European Court, the IACtHR was oriented towards democracy building rather than notions of deferring and giving states a margin of appreciation.²⁰⁶ This context is important in understanding the level of compliance with judgments of the IACtHR.

Compliance Legal Framework

Unlike the European and African systems, the primary role of monitoring compliance with judgments is done by the IACtHR itself. It is one of the elements that make up its jurisdictional function.

Similar to the other regional human rights systems, a violation of a human right under the American Convention must be remedied by the awarding of a remedy. As the IACtHR in the *Velasquez case* stated, “it is a principle of international law that any violation of an international obligation that results in harm entails the responsibility to make adequate reparation.”²⁰⁷

The Court has powers to order wide measures of repair for violations of the American Convention in terms of Article 63(1) of the American Convention. Upon ordering such measures of repair, the State responsible for internationally wrongful act has an obligation to implement provisions of the Court’s judgment in good faith and in a prompt and complete manner.²⁰⁸ This obligation is similar to the obligation of States in the European and African human rights systems. The failure to comply with a judgment under the American system will lead to the State being declared to have committed an internationally wrongful act. Furthermore, failure to comply with a judgment is considered to be a violation of the fundamental right of access to international justice.²⁰⁹

The Court monitors the execution of its judgments in a variety of ways which include the written process, hearings, visits and notes of the Secretariat.²¹⁰ One of the most important ways of monitoring compliance by the Court has been requesting

²⁰⁶Bailliet (n205 above)

²⁰⁷ *Velasquez Rodriguez v Honduras* IACtHR Series C 7 (1989) cited by Gonzalez-Salzberg, D.A. (2014) Do States comply with the compulsory judgments of the Inter-American Court of Human Rights? An empirical study of the compliance with 330 measures of reparation. *Revista do Instituto Brasileiro de Direitos Humanos*

²⁰⁸Article 68 of the American Convention.

²⁰⁹https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

²¹⁰https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

information from “other sources”²¹¹ The procedure of monitoring judgments is specifically provided for under Article 69 of the Rules of Procedure of the Court. The Court is empowered under these provisions to request information from the Respondent state on the activities it would have carried out to comply with a judgment of the Court.²¹² The Court also considers observations that are made by the Commission and representations made by the victims of violations or their representatives.²¹³

Under its monitoring mandate, the Court also employs joint monitoring of compliance with its judgments. This entails monitoring of measures of reparation orders in several cases against the same State.²¹⁴ Joint monitoring is meant to address structural challenges that inhibit compliance. To increase efficiency in monitoring compliance with judgments, the Unit for Monitoring Compliance with Judgments was established in 2015.²¹⁵ The joint monitoring approach is not found in the African human rights system.

Similar to the European and African human rights systems, the IACtHR reports annually to the OAS on its activities, including cases in which a State has not complied with the Court’s judgment, making any pertinent recommendations.²¹⁶

The Court may also summon the Respondent state and representatives of the victims of human rights violations to a hearing to monitor compliance with a judgment.²¹⁷ The IACHR is also involved in the hearing and may submit its findings.²¹⁸

Cases being monitored for compliance with judgments are closed when full compliance has been declared by the Court. As this study demonstrates, such cases remain very few compared to the number of measures that would have been ordered by the Court.

The conventionality control doctrine is also critical in the compliance legal framework under the American human rights system. According to this doctrine, by ratifying the American Convention, a State’s organs, including its judiciary and organs linked to the administration of justice at all levels are also subject to the Convention.²¹⁹ In essence,

²¹¹ Article 69(2) of the Rules of Procedure of the Inter American Court of Human Rights

²¹² Article 69 (1) of the Rules of Procedure of the Inter American Court of Human Rights

²¹³ Article 69 (1) *Ibid*

²¹⁴ Inter- American Court of Human Rights Annual Report 2021.

²¹⁵ Inter- American Court of Human Rights Annual Report 2021.

²¹⁶ Article 65 of the American Convention.

²¹⁷ Article 69 (3) of the Rules of Procedure *Ibid*

²¹⁸ Article 69 (3) of the Rules of Procedure *Ibid*

²¹⁹ Annual Report (n41 above)

this doctrine underscores the supremacy of the American Convention over domestic laws and institutions. It further ensures that the effects of the provisions of the Convention and indeed judgments rendered by the Court are not diminished through application of norms contrary to Convention's object and purpose.²²⁰ In summary, a State may not invoke its domestic laws, norms or institutional framework to refuse to comply with the American Convention and in particular, judgments of the IACtHR.

Trends, Challenges and Opportunities in compliance with judgments of the IACtHR

Figure 2: Total cases under supervision by the ICtHR²²¹

²²⁰ Annual Report (n41 above)

²²¹ https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

TOTAL CASES UNDER SUPERVISION AND ON FILE, BY STATE

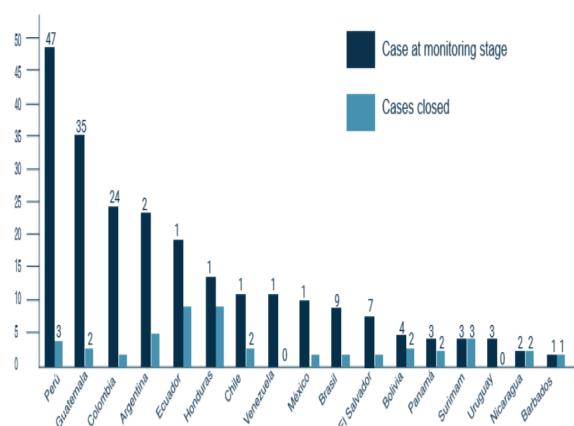
At the end of 2021, the following were in the monitoring stage

258 STAGES OF SUPERVISION
involving 1373 Reparation Measures



In 2021, a total of

47 ORDERS of Monitoring Compliance with Judgment



*Note: The information presented in this table is based on statements in the orders issued by the Court. Consequently, there could be other information provided by the parties in the files that has not yet been evaluated by the Court.

Figure 3: Compliance rates according to Patricia Cruz Marin²²³

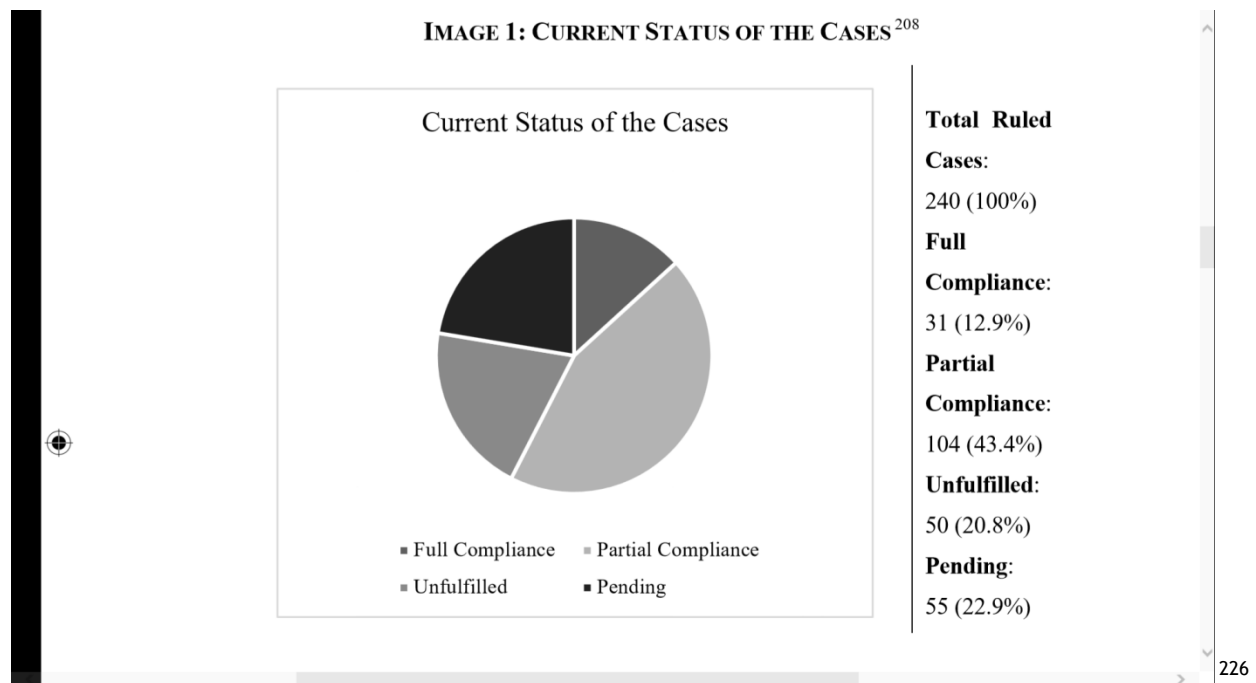
Table 1. Compliance levels by type of remedy awarded

Remedy	Compliance level
All remedies	38.87%
Restitution	38.89%
Rehabilitation	18.73%
Satisfaction	53.05%
Guarantees of non-repetition	28.01%
Compensatory measures	52.33%
Obligation to investigate, prosecute, and sanction	8.46%
Costs and expenses	61.41%

²²³ P.C Marin ‘Compliance of the Judgments of the Inter-American Court of Human Rights’ presented for the class Public Order and the World Community with Professor Michael Reisman on Fall 2019.

²²⁴https://www.researchgate.net/publication/342763914_Compliance_of_Judgments_of_the_Inter-American_Court_of_Human_Rights?enrichId=rgreq-1f179474833318198856ecb7c1760b52-XXX&enrichSource=Y292ZXJQYWdlOzMOMjc2MzZkxNDtBUzoxMDEzMDEyMDYwMzQ5MjI3MDA5QDE2MTg1NDM4MTc2OTQ%3D&el=1_x_3&_esc=publicationCoverPdf

Figure 4: Compliance rates according to Max Silva Abbott²²⁵



As has already been explained in the preceding Chapters, measuring compliance with judgments is by no means a simple task. The IACtHR operates in an environment that has a history of serious violations of human rights committed mainly by those who have the task of implementing the decisions of the Court. There has however been a move towards democratisation in American States, particularly in Latin America.

However, it has been observed by some scholars that, these democratic transitions have been marked by formal or informal elite pacts which have limited the possibility of national justice systems to pursue accountability of military and security individuals who were involved in enforced disappearances, extra-judicial killings and sexual violence.²²⁷ To that end, judgments of the Court that order States to investigate and punish military and security sectors involved in torture, enforced disappearances and extra-judicial killings have faced challenges with compliance. It should be noted that most these human rights violations occurred before these

²²⁵ M.S Abbott 'A Radiographic Analysis Of Compliance With The Decisions Of The Inter-American Court Of Human Rights' ILSA Journal of International and Comparative Law [Vol. 26.3

²²⁶ Abbott(n225 above)

²²⁷ Bailliet (n205 above).

democratic transitions and that most of the perpetrators continue to be in government. A few cases brought before the Court for determination on compliance illustrates this point. In the case of *Caballero Delgado & Santana v Colombia*, the Court found that Colombia had failed to comply with its judgment to investigate and punish those involved in the enforced disappearance and death of victims.²²⁸ The Monitoring Compliance judgments of *Juan Humberto Sanchez v Honduras* and *Garibaldi v Brazil* also demonstrate the difficulties of non-compliance with judgments of the Court when the reparation measures include investigation and prosecution of military personnel.

According to Antkowiak, out of fifty-four (54) judgments that have been issued by the IACtHR calling for investigation and prosecution of these military personnel, only one (1) has been deemed to have been fully complied with by the Court.²²⁹ This matter concerned the case of *Castillo-Paez v Peru*²³⁰ who had been enforcedly disappeared and never to be seen again by the police.

Furthermore, it has been observed by compliance scholars that judgments which require actions by public ministries and the legislature are at risk of non-compliance.²³¹ These include judgments calling for legislative and institutional reform. This is usually because such measures require the consensus of all competing domestic actors.

Scholars tend to differ on the exact rates of compliance/ non-compliance. Figure 2 above demonstrates that according to Court's 2021 Annual Report, Forty-seven orders were issued under monitoring for compliance with judgments. However, the number of cases which have been closed that is, deemed to have been fully complied with remain low compared to those under monitoring. This is perhaps an indicator that compliance is relatively low. 258 cases are under supervision for compliance with the Court's judgments.

Patricia Cruz Marin in her findings shown in Figure 3 above show that as at the time of her article, only 38.87% of remedies have been complied with. Figure 3 also demonstrates that judgments which impose an obligation to investigate and prosecute experience very low levels of compliance which she calculated at 8,46%. Furthermore, Figure 3 shows that judgments which order payment of compensation and orders of satisfaction have comparatively high rates of compliance.

²²⁸ *Caballero Delgado & Santana v Colombia* (Monitoring Compliance with Judgment).

²²⁹ Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 *Stanford J. Int'l L*

²³⁰ *Castillo-Paez v Peru* (Monitoring Compliance with Judgment).

²³¹ Bailliet (n205 above)

Figure 4 on the other hand illustrates that judgments which have been fully complied with are very low standing at only 12,9%. Staton and Romero also explain that compensatory and satisfactory remedies have higher levels of compliance in comparison to other remedies such as those requiring transformation of institutions, obligation to investigate, prosecute and sanction.²³²

To further illustrate the challenges of compliance facing the ICtHR, according to the Court's 2021 Annual Report, only two cases were closed following full compliance with judgments. These are the cases of *Baena Ricardo et al v Panama*²³³ & *Perrone & Preckel v Argentina*.²³⁴ To put this figure into perspective, one needs to compare the two judgments fully complied with versus the total judgments issued by the Court. According to the ICtHR's 2021 Annual Report, only a total of forty (40) cases have been closed following full compliance with the judgments of the Court.²³⁵

It can also be argued that compliance under the American human rights system is a matter of political will. Since the Court does not have a coercive mechanism to enforce its judgments, compliance becomes a matter of domestic implementation. As Hillebrecht correctly argues,

*"..governments only comply with these resolutions when it coincides with their internal agendas or when it helps them increase their legitimacy before their constituents..."*²³⁶

In essence, compliance is result of political will.

The nature of a judgment also influences the level of compliance with judgments of the ICtHR. It has been argued that the more vague the judgment, the lesser its chances of being complied with. As Staton and Romero state,

*"governments should be more likely to comply with judicial decisions as (1) the clarity of the order increases and (2) as the public costs of defiance increase, yet they should be less likely to comply as (3) their policy differences with the court grow more pronounced"*²³⁷

²³² J. Staton & A. Romero 'Clarity and Compliance in the Inter-American Human Rights System' 2011.

²³³ *Baena Ricardo et al v Panama* (Monitoring Compliance with Judgment).

²³⁴ *Perrone & Preckel v Argentina* (Monitoring Compliance with Judgment).

²³⁵ Annual Report (n214 above) Page 92-93.

²³⁶ Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals The Problem of Compliance*, Cambridge University Press.

²³⁷ Staton & Romero (n232 above) Page 6.

Yet Staton and Romero also argue that vagueness is a natural manifestation of judges' efforts to address core tensions of judicial policy making.²³⁸ The value of vagueness would lie in giving the Respondent State leeway to devise its own means to implement the Court's judgment without the accusation of judicial overreach.

Another factor which may influence compliance with judgments of the Court is the reluctance by the Court itself to utilising Article 65 of the American Convention.

*"I have strongly recommended the Court to apply Article 65 again, so as to bring states that do not comply back to their duties of compliance with the judgments of the Court, but the Court's majority has preferred to take a pragmatic approach. I am against pragmatism in this domain of protection. I think that protection is a matter of principle and there is no room under the American Convention for pragmatism."*²³⁹

Trindade, a former Judge of the Court has often come out in strong opposition to giving States, a margin of appreciation including in so far as implementing decisions of the Court. He argues that,

*"How could we apply [the margin of appreciation doctrine] in the context of a regional human rights system where many countries' judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity? ... We have no alternative but to strengthen the international mechanisms for protection ... Fortunately, such doctrine has not been developed within the inter-American human rights system."*²⁴⁰

His two comments above illustrate the challenges of compliance that the system now faces when it defers matters of compliance to the States, especially where the Court operates in an environment that is to some extent still facing governance issues and impunity.

²³⁸Staton & Romero (n232 above).

²³⁹Lauri R. Tanner Interview with Judge Antônio A. Cançado Trindade, Inter-American Court of Human Rights, Human Rights Quarterly [Vol. 31, No. 4 \(Nov., 2009\)](#), pp. 985-1005 Published By: The Johns Hopkins University Press.

²⁴⁰ Par Engstrom 'Reconceptualising the Impact of the Inter-American Human Rights System'

It should be noted and reiterated however, that compliance is a matter of spectrum and not an absolute measurement. That compliance are low does not in itself mean that States are indifferent to the judgments of the Court under this system.

The IACtHR has also faced serious criticism over some of its judgments, which is indicative of the compliance challenge the Court faces. The case of *Loayza Tamayo v Peru* is illustrative of this point. In that case, the Court had found some violations of rights of a University Professor and ordered several reparative measures. This judgment received severe backlash from the Peruvian government. The Criminal Chamber of the Military Jurisdiction's Supreme Council of Peru declared the Inter-American Court's judgment to be "non-executable."²⁴¹ Furthermore, then Peruvian Dictator, Fujimori criticised the Court's judgment and led the Peruvian Congress to withdraw from the Court's jurisdiction, although this was later found to be of no force or effect. Several other cases have led to open hostility against the Court but the *Tamayo* case stands out.

Some scholars have also argued that the IACtHR risks facing non-compliance with its decisions owing to its monitoring of compliance role. They argue that, there is no clear legal basis providing for the powers of monitoring that the Court currently exercises.²⁴² Furthermore, that the Court may convene hearings on monitoring compliance, make orders for compliance and still have those orders ignored or resisted by the States may affect its legitimacy.²⁴³ Consequently, the Court's judgments may lose their significance over time.

CHAPTER CONCLUSION

This Chapter has drawn lessons from the European and American Human Rights Systems with respect to compliance of judgments. The Chapter has also demonstrated that compliance with judgments remains a challenge for both systems. Despite the European Court operating in a relatively liberal environment, it still faces challenges with compliance with its judgments. The rise of populism in Europe also poses a risk to compliance as populism itself tends to collide with the very notion of an international adjudicatory body superseding domestic institutions. The Inter-American system on the other hand faces challenges with compliance of its judgments particularly with respect to those calling for investigation and prosecution of military and security sectors who were involved human rights violations. Due to democratic

²⁴¹Jorge Contesse 'Resisting the Inter American Human Rights System' Yale Journal of International Law [Vol. 44: 2

²⁴²Contesse (n241above).

²⁴³Contesse (n241above).

transitions that are backed by elite pacts, it remains extremely difficult for these judgments to be complied with.

The question that invariably arises is the value of this chapter to the thesis. Perhaps the answer to this question arises from the research questions in particular, what recommendations can be made to improve compliance within the African human rights system. This Chapter demonstrates that a strong compliance legal framework and transnational legal process accounts for the relatively high compliance rates in the European system. This chapter makes a finding that, under the European system, the Committee of Ministers has expansive powers to monitor compliance with judgments of the Strasbourg Court. These powers enable the CoM to engage widely with domestic institutions including domestic judiciaries. This transnational process has led to internalisation and entrenchment of rights under the European Convention. This has been evidenced by the reliance that is placed on judgments of the Strasbourg Court in domestic Courts. Furthermore, many European States have domesticated the provisions of the European Convention. This transnational process has perhaps led to high compliance rates in the European system. Innovative initiatives such as the pilot judgment procedure has also been utilised under the European system to deal with the structural causes of human rights violations. This procedure if properly implemented in the African system could lead to better compliance rates.

Although the Inter-American system faces challenges with compliance, the Inter-American Court has taken a leading role in monitoring of judgments through its convening of monitoring compliance with judgments hearings. These hearings put a spotlight on errant states and attract reputational risks for States. Perhaps the African Court could convene such as part of its monitoring role as a means of raising the cost for non-compliance with its judgments.

A clear finding from this Chapter is that transnational legal processes under the African system are clearly inadequate yet they are important for compliance. The Executive Council does not have expansive powers of monitoring under the African Court Protocol. Very few interactions occur between the Executive Council and domestic institutions to enable internalisation of human rights norms and increase the legitimacy of the Court.

The next Chapter will conclude the thesis by summarising the major findings of this study as well as proffering recommendations to strengthen compliance with judgments of the African Court.

CHAPTER 5: SUMMARY OF FINDINGS, RECOMMENDATIONS & CONCLUSION

Introduction

This chapter summarised the main findings of this study on the compliance conundrum facing the African Court with respect to Tanzania and Rwanda. It also made a conclusion on factors that have influenced compliance with judgments of the African Court by Tanzania and Rwanda. The summary also drew lessons from the European and Inter-American Human Rights Systems with respect to compliance, in particular it draws on trends, challenges and opportunities within these systems whilst making comparisons with the African system. Lastly, the chapter made some recommendations to strengthen compliance with judgments of the African Court drawing from previous scholarly work on the subject and from lessons learnt in other regional mechanisms.

Summary of Major findings Chapter 2

This Chapter initiated the discussion on the research questions as captured in Chapter 1 of the thesis. Chapter 2 commenced the study by explaining the origins of the Court and its compliance legal framework. The study establishes that the Court has faced resistance from the onset. The chapter proceeded by providing working definitions for the concept of compliance with judgments. It can be deduced from the discussion on this concept, that, compliance is not a 'all or nothing' concept but it is a matter of spectrum. As such, the thesis provided several definitions that have been put forward

by various scholars such as Viljoen and Louw who posit that compliance can be categorised into various forms, from Full compliance, partial compliance as well as non-compliance. It was highlighted from the onset that, the concept of compliance itself invariably recognises the possibility of non-compliance. Thus, compliance has to be understood as encompassing these variations, namely non-compliance, substantial compliance and partial compliance.

The thesis also makes a finding that there are other methods of categorising compliance. Compliance may also be categorised according to the pace of implementation. Thus, compliance may be categorised as being 'in progress' or in 'situational compliance.' Be that as it may, this study proceeded on the basis of categorisation of compliance according to degree/ extent of compliance which invariably led to such phrases as 'non-compliance', 'partial compliance' and 'full compliance' being used.

The Chapter also introduced the theoretical premise which guided the study. Two major theoretical premises were discussed in detail namely, constructivism and rational choice theories. These are commonly known as theories of compliance. The theories attempt, in very general terms, to explain the factors that influence states to comply with judgments of International Human rights tribunals.

The chapter concluded by disaggregating factors influencing compliance.

Summary of Major findings in Chapter 3

This Chapter analyses the status of compliance with judgments of the African Court by Tanzania and Rwanda. It is the main focus of the thesis. It highlighted that Tanzania is the host state of the Court and that it gave individuals and NGOs the right of direct access to the Court. However, this access was withdrawn by the Tanzanian Government as a backlash to adverse judgments from the Court.

The Chapter proceeded to make a finding that with respect to judgments on the merits and reparation orders, Tanzania has only partially complied with 1 judgment. It further finds that Tanzania has not complied with 97% of the judgments of the Court. With respect to rulings on provisional measures, Tanzania has a 100% non-compliance rate.

An analysis follows of what factors could have influenced such poor levels of compliance with judgments and rulings from the Court. The Chapter finds that the judgments were inconsistent with the interests of the Government of Tanzania. Some of the judgments touched on sensitive aspects of Tanzania's social and political fabric whilst some of the judgments have been considered as political questions which only

the people of Tanzania can decide on. Perhaps not explicit, the failure to comply with judgments by Tanzania could be a tacit accusation of judicial overreach by the Court.

Chapter 3 also analysed the status of compliance with judgments of the African Court by Rwanda. Rwanda also gave individuals and NGOs the right to direct access to the African Court in 2013. However, the turn of events following this declaration led to a severe backlash against the Court by the Rwanda Government. According to statistics extracted from the Activity Report of the Court and its website, Rwanda has a 100% non-compliance rate with both judgments on the merit and reparation and rulings on provisional measures.

The Chapter made a finding that the major factor that has influenced this poor compliance rate has been that the judgments of the Court have touched on Rwanda's sensitive Genocide past. The Court has been accused for giving audience to alleged perpetrators of the genocide. The Rwandan government has taken great exception to this and has openly told the Court that it would not co-operate with it.

The Chapter concludes by finding that the poor rate of compliance with judgments by both countries has been a function of an exercise of a rational choice by both countries where the judgments have not been in the interests of both states.

Summary of Major Findings in Chapter 4

In Chapter 4, the study takes the thesis to the Inter-American and European systems of human rights. In particular, the study analyses compliance with judgments of the European Court of Human Rights and the Inter-American Court of Human Rights. Through the aid of tables and graphs, the Chapter analyses compliance trends under the European System. The Chapter also briefly analyses the historical origins of the Strasbourg Court and its compliance legal framework. The European System is unique for its very high caseload which is as a result of individuals and NGOs having the right to access the court directly.

Scholars under this system have explained the difficulty of measuring compliance under the European system but however agree to a large extent that compliance is generally high. The Chapter makes a finding that compliance is generally high due to the leading role played by the Committee of Ministers in monitoring compliance with judgments. The CoM has expansive powers of monitoring compliance and engages extensively with domestic institutions. This process has contributed to the internalisation of human rights norms within European states. The Chapter also finds that there remain challenges with compliance in some of the states which have weak democracies. It would appear therefore that compliance rates under this system are

high due to the largely liberal nature of European states. In those states with weak democracies, compliance is still a major challenge. These countries include Russia and Turkey.

The pilot judgment procedure under the European system has also contributed to compliance in that systemic causes of human violations are addressed through the Court dealing with similar cases and also through transnational processes led by the CoM.

The Inter-American system on the other hand still faces challenges with compliance of the Inter-American Court's judgments. However, the Court's monitoring role has led to an improvement on compliance by raising reputational costs for non-compliance. This is done through the hearings on monitoring compliance with judgments.

The importance of this Chapter was to draw lessons that can be leveraged to improve compliance with judgments of the African Court.

RECOMMENDATIONS

Based on the findings made in the preceding chapters, the thesis proceeds to make some recommendations to improve compliance with judgments of the African Court below.

The African Human Rights System

The African system perhaps requires some changes to strengthen its compliance legal framework. This could involve amending the Protocol of the Court to make provision for expansive powers to the Executive Council which is the body tasked with monitoring compliance with judgments of the Court. As is clear from Chapter 2, the powers of the Executive Council are not elaborate. The Executive Council could like the Committee of Ministers under the European System, be more involved in transnational legal processes with the aim of ensuring domestic internalisation of human rights as well as increasing the legitimacy of the African Court.

Increasing the legitimacy of the Court is critical to ensure compliance as some scholars argue that the ineffectiveness of the African system is due in part to a legitimacy deficit.²⁴⁴

²⁴⁴ C Odinkalu 'Why more Africans don't use human rights language' (2000) 2 Human Rights Dialogue 4

One of the accusations that has been levelled against the Court is the vagueness of its judgments. Again, the sentiments of Tanzania's Solicitor General in Chapter 3 are pertinent. He accuses the African Court's judgments as being vague and thus incapable of compliance. As already explained in this thesis, compliance with judgments which lack specificity and clarity, contributes largely to non-compliance. Ayeni posits that vague judgments negatively impact implementation of human rights in one or more of the following ways, government officials are left confused as to what to do to comply with a decision; victims themselves are left uncertain on what to expect after the decision and pro-compliance actors may not have appropriate yardsticks to measure compliance.²⁴⁵

To address this problem, the judgments of the Court should be sufficiently clear to both victims and those tasked with implementing the orders. Furthermore, judgments should be specific on measures to enable government to know what to do, inform victims of what to expect and to allow effective monitoring of the judgment. It is important to note however, that, there is need to strike a balance between specificity of orders and subsidiarity. As Mutangi notes, "states are best positioned to work out how exactly treaty provisions-and the judgments of international courts interpreting these treaties should be given effect in domestic law."²⁴⁶ At any rate, Article 1 of the African Charter on Human and Peoples' Rights obligates all states to recognise all rights under the Charter and to take legislative and other measures to give effect to them.

With respect to its jurisprudential role, the Court has been accused of overreaching or descending into political matters. This is so when one looks at Rwanda's reaction to the *Umuhoza case* and the *Mtikila case* against Tanzania. This accusation perhaps points to a Court that has not yet achieved full legitimacy. It has been suggested that the Court ought to balance its role of promoting human rights with the need to engage in a deliberate form of 'incrementalism.' As Helfer and Slaughter argue, 'Bold demonstrations of judicial autonomy by judgments against state interests and appeals to constituencies of individuals must be tempered by incrementalism and awareness of political boundaries.'²⁴⁷ As demonstrated in Chapter 3 of this thesis, the idea of a supranational judicial authority superseding domestic institutions is highly controversial. The case study of Tanzania's refusal to comply with judgments of the African Court on the basis that they sought to overturn a judgment of the Apex Court of Tanzania illustrates this point. The Court is relatively 'young' compared to other

²⁴⁵Ayeni (n11 above)

²⁴⁶T.Mutangi 'Enforcing Compliance with the Judgments of the African Court on Human and Peoples' Rights In: Compliance with International Human Rights Law in Africa. Edited by: Aderomola Adeola, Oxford University Press.

²⁴⁷Helfer and Slaughter (n102 above).

regional human rights courts. As such, it may be wise for it to entrench its legitimacy by managing this delicate balance between human rights protection and incrementalism.

There is also need to increase the cost of non-compliance through applying political pressure on non-compliant states. What is demonstrably clear from this study is that, due to low cost of non-compliance, Rwanda and Tanzania have failed to comply with judgments of the Court. Much criticism has been levelled against the Executive Council for failing to ensure compliance with judgments of the Court. One of the reasons for this failure has been because the Council is made up of Foreign Ministers of African States thus making it difficult to monitor compliance with judgments against a State whose Minister is part of this Council. Notwithstanding this point, it is necessary for the Executive Council to apply political pressure on the non-compliant State to comply with a judgment. This could be done through adoption of resolutions, decisions and press releases. The Executive Council could also engage in a Universal Periodic Review Style, 'peer review mechanism' where constructive dialogue is convened to discuss impediments to compliance and sharing of good practices. This would not only contribute to improved compliance but may also increase the legitimacy of the Court. As a last resort, the Executive Council could adopt sanctions against non-compliant States.

One of the findings of this study is that the Court relies on Reports from States on status of compliance and also from victims themselves. However, this is inadequate. Due to the lack of an effective follow up on compliance and implementation under the African system, there have also been calls for the establishment of a Special Mandate on follow up with compliance and implementation. Such a mandate would come with reports on monitoring compliance including reports on on-going compliance, and providing technical support to states on compliance.

Member States

Member states of the Court could contribute to compliance through enacting domestic legislation for compliance with judgments of the African Court. With respect to Tanzania, the absence of a domestic legal framework to facilitate compliance has been described as one of the reasons for non-compliance. In the European system, countries such as Turkey and Italy have enacted such legal framework. This framework generally includes provisions for registration of the judgment of the African Court as a domestic one thus allowing execution. This is also important since the African Court has no coercive mechanism to execute its own judgments. However, such framework would only be successful where the domestic judiciary is independent for purposes of registration of such judgments. One of the challenges that such legal framework may encounter is the definition that is attached to the judgment of the African Court, that

is, whether it is a ‘foreign judgment’ or ‘international judgment’.²⁴⁸ Most States generally provide for registration of ‘foreign judgments’, which are usually defined as a judgment of another state.²⁴⁹ Whether a judgment of the African Court is a ‘foreign judgment’ will likely raise controversy. However, with a proactive national judiciary, the interpretation of a ‘foreign judgment’ may include the judgment of the African Court for purposes of registration and enforcement.

In addition, it is recommended that at the domestic level, member states ought to establish an administrative body tasked with implementation of judgments of the African Court. Such administrative body would review judgments of the African Court for purposes of implementation.

Another recommendation at the domestic level is to allow re-opening of cases that would have been decided definitively on the basis of findings of violations by the African Court. Although it has its own challenges, particularly the *res judicata* principle, the exception to the principle could be taken and justified on the basis that the domestic Court would have arrived at a different conclusion had it known that its decision would be inconsistent with the State’s international obligations under the African Charter.²⁵⁰ The re-opening of cases is also applied in the European system to good effect.

One of the findings of this thesis is that closure of civic space and democratic regression may have contributed to non-compliance with judgments of the Court. Member states ought to open civic spaces and increase democratisation in their states. This is necessary to allow internalisation of human rights norms and consequently compliance with judgments.

With respect to the legislature, it is important for it to domesticate relevant international human rights treaties as a way of internalising human rights norms. In particular, there is need to domesticate the provisions on the content of human rights under the African Charter as a means of norm internalisation.

With respect to National Human Rights Institutions, it is important for them to monitor compliance with judgments at the domestic level and to provide information to the Court and to the Executive Council of the AU on the status of compliance together with impediments to implementation.

²⁴⁸Mutangi (n246 above) Page 205

²⁴⁹ An example of such legislation is Zimbabwe’s Civil Matters (Mutual Assistance) Act (Chapter 8:02).

²⁵⁰Mutangi (n246 above) Page 211.

CONCLUSION

This thesis contributes the growing discussion on compliance with International Human Rights Law in Africa by looking at the compliance with judgments of the African Court on Human and Peoples' Rights by Tanzania and Rwanda. The thesis seeks to identify factors that have contributed to non-compliance with judgments of the African Court by the two selected case studies. The case studies were chosen for good reason. Tanzania is a host state to the Court and as such the expectation would be that it conducts itself in a manner that does not undermine the Court. Be that as it may, the thesis finds that Tanzania performs very badly on the compliance front. Rwanda on the other hand was a huge supporter of the Court and even made the declaration pursuant to Article 34 (6) giving individuals and NGOs the right to access the Court directly. However, it has openly and publicly declared that it will not co-operate with the Court thus undermining it.

The study also utilises the European and Inter-American system to draw lessons to improve compliance with judgments in the African set up. The thesis concludes by giving some recommendations to improve compliance with judgments of the African Court. Perhaps, future research could focus on coming up with more recommendations to improve compliance with judgments of the African Court on Human and Peoples' Rights.

Of significance is the merger of the African Court on Human and Peoples' Rights and the African Court of Justice into one Court. It will be interesting to see how compliance will pan out when the Court comes into operation. Research into this area to anticipate compliance patterns may be necessary before the Court comes into operation.

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