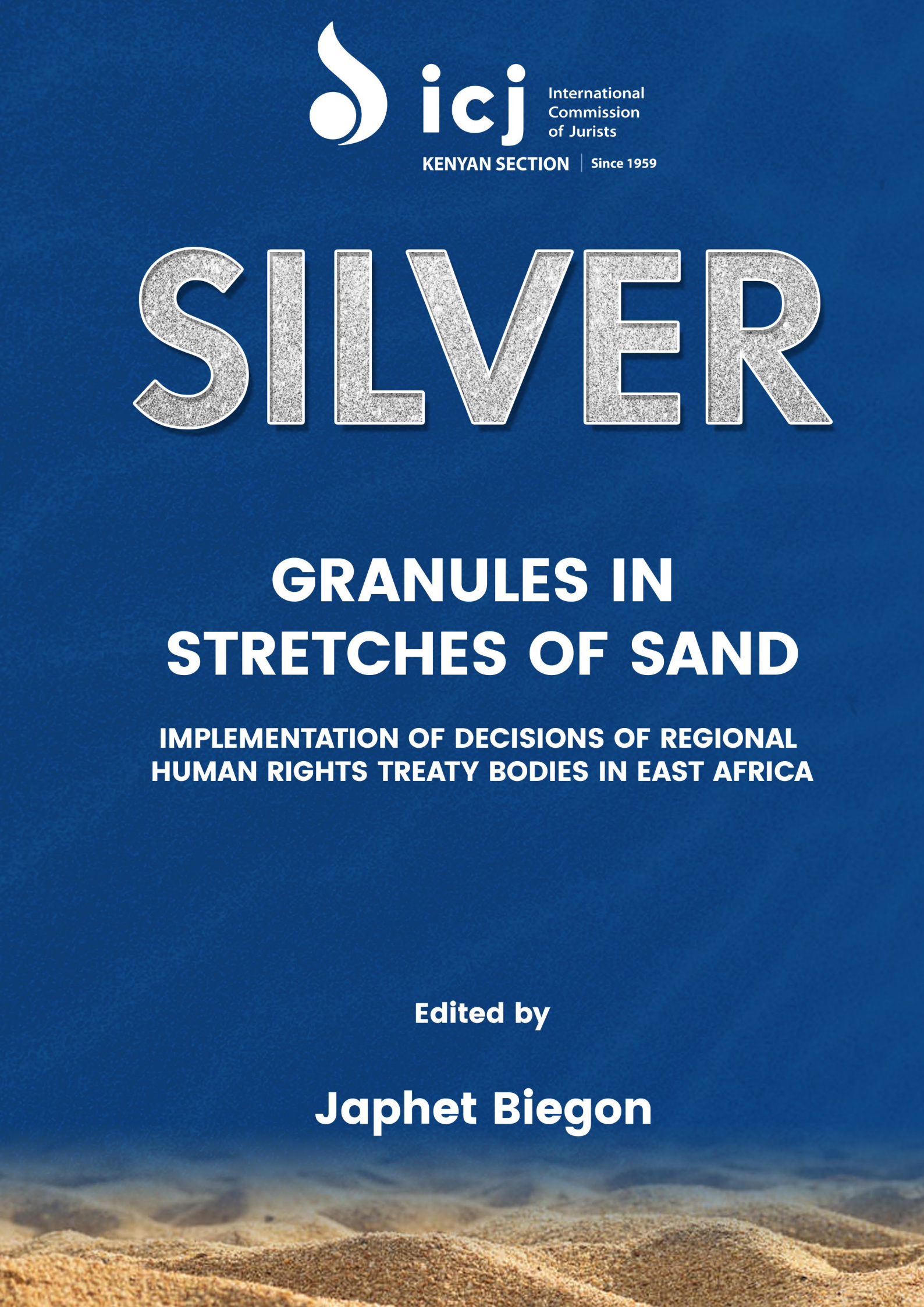
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SILVER
GRANULES IN
STRETCHES OF SAND
IMPLEMENTATION OF DECISIONS OF REGIONAL
HUMAN RIGHTS TREATY BODIES IN EAST AFRICA
Edited by
Japhet Biegon

Published by:

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)
ICJ Kenya House, off Silanga Road, Karen
P. O. Box 59743-00200 | Nairobi-Kenya
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PREFACE

The idea for this book emerged in the Kenyan coastal city of Mombasa where ICJ Kenya held its 2017 Annual Jurists Conference on the theme "State of human rights in Africa: Bridging the gap between aspirations, implementation and enforcement". A substantive part of the three-day conference (21-25 November 2017) was dedicated to what turned out to be a lively and captivating discussion on the extent to which states adhere to their regional and international human rights treaty obligations. Participants specifically pointed out the pressing need for up-to-date analyses and regular scrutiny of the patterns and trends of state implementation of decisions of African regional human rights treaty bodies. Hence, the birth of this book.

The book has been woven together by a brilliant cast of authors who are not only thought leaders on human rights scholarship in the region, but they are also actively engaged in regional an sub-regional human rights policy and judicial spaces. The Book focuses on the extent to which three East African countries – Kenya, Tanzania and Uganda – have implemented and complied with the decisions of the African Union regional human rights bodies, that is, the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the African Court on Human and Peoples' Rights. It presents new evidence and analysis, including a comparison on how the three countries react to different AU human rights bodies or to diverse kinds of regional decisions. Many of the regional decisions discussed in this Book have not been fully implemented. For this reason, the record of implementation may seem like a long stretch of desert sand. However, this record contains a few instances of implementation and compliance. In a sense, the authors have been able to find silver granules in stretches of sand.

The book comes at a critical juncture in the region. In recent years, the rule of law has been under attack and open defiance of court judgments has become more prevalent. The independence of judiciaries in the region has been undermined and threatened. In a span of less than six months, three countries – Benin, Cote d'Ivoire and Tanzania – have withdrawn the right of individuals and civil society organizations to directly access and file cases before the African Court on Human and Peoples' Rights. The need to reassert both the independence of courts and States' obligation to comply with decisions of courts, both domestic and international, has never been more pressing and urgent.

It is our hope at ICJ Kenya that jurists across the region will find this book useful and handy in their endeavour to build effective domestic and regional human rights enforcement mechanisms. The ICJ Kenya is grateful to the editor and the authors for their time and dedication in seeing through the production of the book. We are also grateful to the Open Society Foundation for the financial support in convening the 2017 Annual Jurists Conference and producing this book. We appreciate the splendid work of the secretariat team that worked on this project namely: Julie Matheka, Edigah Kavulavu, Joanne Mutonga. We are also grateful to the ICJ Kenya Governing Council for its support and guidance in this project as well as in our broader work relating to international justice.

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ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
AG	Attorney General
AGA	African Governance Architecture
AUC	African Union Commission
CAAFAG	Children Associated with Armed Forces or Armed Groups
CCJ	Community Court of Justice
CCM	Chama cha Mapinduzi
CEDAW	Committee on Elimination of All Forms of Discrimination Against Women
CEMIRIDE	Centre for Minority Rights Development
CERD	Committee on Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHRAGG	Commission for Human Rights and Good Governance
CPU	Child Protection Unit
CSO	Civil Society Organization
DDR	Disarmament, Demobilization and Reintegration
DRC	Democratic Republic of Congo
EAC	East African Community
EACJ	East African Court of Justice
EALS	East Africa Law Society
ECHR	European Court of Human Rights
ECOWAS	Economic Community for West African States
ESCR-Net	International Network for Economic, Social and Cultural Rights
EU	European Union
EWC	Endorois Welfare Committee
GIZ	German Organization for International Cooperation
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IDP	Internally Displaced Persons
IHRDA	Institute for Human Rights and Development in Africa
ILO	International Labour Organization
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KWS	Kenya Wildlife Services
LDU	Local Defence Unit
LHRC	Legal and Human Rights Centre
LRA	Lord's Resistance Army
MoU	Memorandum of Understanding
MRG	Minority Rights Group
NANHRI	Network of African National Human Rights Institutions
NGO	Non-Governmental Organization
NHRI	National Human Rights Institution
NIRA	National Identification Registration Authority
NLC	National Land Commission
ODM	Orange Democratic Movement
OPDP	Ogiek's People's Development Program
OSJI	Open Society Justice Initiative
PALU	Pan-African Lawyers Union
PNU	Party of National Unity
PSC	Private Security Companies
PSD	Peace Security Department
PSO	Peace Support Operation
REC	Regional Economic Community
SADC	Southern African Development Community
SOP	Standard Operating Procedure
TANU	Tanzania National Union

TJRC	Truth, Justice and Reconciliation Commission
TLS	Tanganyika Law Society
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UPDF	Uganda Peoples' Defence Forces
VRS	Vital Records System
WTO	World Trade Organization

CHAPTER ONE

IMPLEMENTATION IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: PROFILING CASE STUDIES ON TRENDS AND PATTERNS IN EAST AFRICA

Japhet Biegon

1. Introduction

Failed or disappointed by national judicial systems, victims of human rights violations and abuses in Africa are increasingly turning to the African regional human rights treaty bodies for recourse. The term 'regional human rights treaty bodies' is here understood to refer to three specific institutions established under the auspices of the African Union (AU) to supervise and monitor member states' compliance with AU norms and standards on human rights. These are: the African Commission on Human and Peoples' Rights (ACHPR); the African Committee of Experts on the Rights and Welfare of the Child (ACERWC); and the African Court on Human and Peoples' Rights (ACtHPR). These three institutions are the core institutional pillars of the 'African regional human rights system'.

The ACHPR is the oldest and most developed regional human rights treaty body in Africa. Established under the African Charter on Human and Peoples' Rights (African Charter),[1] and operational since 1987, the ACHPR has a quasi-judicial mandate to promote and protect human rights in Africa by, inter alia, determining individual and inter-state communications alleging violations of the African Charter. It also has jurisdiction to determine communications alleging violations of the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol).[2] The ACERWC is established under the African Charter on the Rights and Welfare of the Child (African Children's Charter).[3] In its 18th year now, this quasi-judicial body adjudicates communications involving alleged violations of children's rights as protected under the African Children's Charter.

The ACtHPR was constituted in 2006 in accordance with its enabling treaty, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).[4] Its principal mandate is to render legally binding judgments concerning alleged violations of the African Charter and "any other relevant human rights instrument ratified by the states concerned".[5] It is purposely intended and designed to complement the protective mandate of the ACHPR.[6] The ACHPR may refer or directly file cases before the ACtHPR,[7] as it did in the Ogiek Case. However, individuals and Non-governmental Organizations (NGOs) may file cases directly before the ACtHPR only if the concerned state has made a prior declaration allowing them to do so.[8] Out of the 30 states that have ratified the African Court Protocol, only 10 have ever made this declaration. These are: Benin, Burkina Faso, Cote d'Ivoire, The Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania, and Tunisia. However, as at the time of writing, four of the 10 countries (Benin, Cote d'Ivoire, Rwanda, and Tanzania) had withdrawn their declarations, citing different kinds of grievances against the ACtHPR.[9]

The regional bodies co-exist and operate alongside courts or tribunals established at the sub-

1. OAU Doc. CAB/LEG/67/3 rev.5, adopted 27 June 1981, entered into force 21 October 1986.

2. Adopted 11 July 2003, entered into force 25 November 2005.

3. OAU Doc CAB/LEG/24.9/49(1990), adopted 11 July 1990, entered into force 29 November 1999.

4. OAU Doc OAU/LEG/MIN/AFCHPR/PROT(1)Rev.2, adopted 10 June 1998, entered into force 25 January 2004.

5. African Court Protocol, Art 3.

6. African Court Protocol, Art 2.

7. African Court Protocol, Art 5(1)(a).

8. African Court Protocol, Art. 34(6) as read with Art. 5(3).

9. See International Justice Resource Center 'Benin and Cote d'Ivoire to withdraw individual access to African Court', 6 May 2020, available at https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/ (accessed 27 June 2020); Amnesty International 'Amnesty International 'Benin: Withdrawal of individual right to refer cases to the African Court a dangerous setback in the protection of human rights', 24 April 2020, available at https://www.amnesty.org/en/latest/news/2020/04/benin-le-retrait-aux-individus-du-droit-de-saisir-la-cour-africaine-est-un-recul-dangereux/ (accessed 27 June 2020); N de Silva 'Individual and NGO access to the African Court on Human and Peoples' Rights: The latest blow from Tanzania', 16 December 2019, available at https://www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/ (accessed 27 June 2020); 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.

regional level, such as the East African Court of Justice (EACJ) established within the East African Community (EAC) and the Community Court of Justice (CCJ) established within the Economic Community of West African States (ECOWAS).[10] These sub-regional tribunals primarily serve as judicial organs of Regional Economic Communities (RECs), but they increasingly adjudicate cases involving human rights issues.[11] The issue of implementation of decisions of sub-regional courts or tribunals falls outside the defined scope of this book. It suffices to note, however, that this is an issue that is equally ripe for critical analysis and there is already a bourgeoning literature in that regard.[12]

The number of cases submitted to and determined by the regional human rights treaty bodies, especially the ACHPR and the ACtHPR, has slowly but steadily increased since their respective inauguration. From its inception to the time of writing (June 2020), the ACHPR had received more than 600 communications.[13] Out of these, it had disposed of more than 400, including about 100 on the merits. Statistics by the ACtHPR shows that it had received 238 cases from its inception to September 2019 and that it had finalized 62 of these.[14] Unlike the ACHPR and the ACtHPR, the ACERWC has been sparsely utilized. It has received less than 20 communications during its entire existence.[15] With a growing body of caseload and jurisprudence, and in keeping with the trend in other regional human rights systems,[16] the issue of implementation of decisions of African regional human rights bodies is becoming ever more prominent in policy and academic discussions.

On the policy front, the issue of implementation now frequently features in the agenda of the regional human rights treaty bodies leading to a flurry of activities on the issue. The ACHPR, for example, has held several panel discussions on the theme of implementation during some of its recent ordinary sessions.[17] It took the discussion on the subject a notch higher in 2017 and 2018 when it organized two regional seminars in Dakar and Zanzibar respectively. These seminars brought together a range of relevant stakeholders to assess the status of implementation of the various forms of ACHPR decisions.[18] Fully funded by the European Union (EU), the two seminars also signify a shift amongst donors who seem to have become particularly interested and keen on what becomes of decisions of international or regional human rights bodies after they have been delivered.[19] On its part, the ACtHPR has spent the last few years developing a draft policy framework for reporting and monitoring execution of its decisions.[20] This draft framework was developed at the request of the AU Executive Council, which was yet to formally adopt it as at the time of writing.[21]

Other stakeholders of the regional human rights bodies, particularly National Human Rights Institutions (NHRIs) and Non-Governmental Organizations (NGOs), are also deliberately turning their focus to the issue of implementation. In addition to developing and publishing a set of guidelines on the role of NHRIs in monitoring state implementation of decisions of regional human rights bodies,[22] the Network of Network of African National Human Rights Institutions (NANHRI) has also conducted several workshops aimed at enhancing the capacity of NHRIs to undertake their implementation monitoring role.[23] A number of NGOs have equally rolled out activities, including

10. It is noteworthy that some authors consider these sub-regional courts or tribunals to be part of the "African regional human rights system". See e.g. C Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 African Human Rights Law Journal 225, 227; F Viljoen 'The African human rights system and domestic enforcement' in M Langford et al (eds) Social rights judgments and the politics of compliance: Making it stick (2017) 351, 356.

11. See e.g. J Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2013) 24 Duke Journal of Comparative & International Law 249; S Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 Journal of African Law 1; K Alter et al 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 American Journal of International Law 737.

12. See e.g. V Lando 'The domestic impact of the decisions of the East African Court of Justice' (2018) 28 African Human Rights Law Journal 463; H Adjolohoun 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the Koraou slavery judgment' (2013) 31 Netherlands Quarterly of Human Rights 342; K Nyman-Metcalf 'Why should we obey you? Enhancing implementation of rulings by regional courts' (2017) 1 African Human Rights Yearbook 167.

13. The ACHPR has not consistently issued statistics on the overall number of cases it has received or determined. But see Opening Statement on the Celebration of the Chairperson of the African Commission on Human and Peoples' Rights by Honourable Commissioner Lawrence Murugu Mute, Vice Chairperson of the African Commission on Human and Peoples' Rights, 2 November 2017, Banjul, The Gambia.

14. See http://en.african-court.org/index.php/cases/2016-10-17-16-18-21 (accessed 30 October 2019).

15. For the list of cases received and determined by the ACERWC see https://www.acerwc.africa/table-of-communications/ (accessed 31 October 2019). This list is incomplete, as it does not contain details of the latest communication received by the ACERWC in 2019.

16. Examples of the most recent academic analyses of implementation and compliance beyond the African regional human rights systems include the following: O Stiansen 'Delayed but not derailed: Legislative compliance with European Court of Human Rights judgments' (2019) 23 International Journal of Human Rights 1221; C Danceanu 'Systematic review of the causes of Latin American states' compliance with international human rights law' (2019) 41 Human Rights Quarterly 553; J Koorndijk 'Judgments of the Inter-American Court of Human Rights concerning indigenous and tribal land rights in Suriname: New approaches to stimulating full compliance' (2019) 23 International Journal of Human Rights 1615;

17. See e.g. Final communique of the 63rd Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 24 October – 13 November 2018, para 23(ii); Final Communique of the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 4-18 November 2015, para 18(xiii).

18. See Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights, 4-6 September 2018 available at https://www.achpr.org/news/viewdetail?id=3 (accessed 31 October 2019); Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights, 12-15 August 2017, Dakar, Senegal.

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

20. Draft Framework for Reporting and Monitoring Execution of Judgments and other Decisions of the African Court on Human and Peoples' Rights, Annexed to the Activity Report of the African Court on Human and Peoples' Rights, 1 January-31 December 2018, EX.CL/1126(XXIV).

21. See Decision on the 2013 Activity Report of the African Court on Human and Peoples' Rights, EX.CL/Dec.806(XXIV) para 9; Decision on the 2018 Activity Report of the African Court on Human and Peoples' Rights, EX.CL/Dec.1044(XXXIV), para 3.

22. See Network of African National Human Rights Institutions (NANHRI) Guidelines on the role of NHRIs in monitoring implementation of recommendations of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples' Rights (2016).

23. See e.g. Concept Note on the Regional Workshop of Africa National Human Rights Institutions on the Implementation Process of Decisions of the African Human Rights Bodies, 19-21 October 2016, Banjul, The Gambia, available at https://au.int/sites/default/files/newsevents/conceptnotes/31483-cn-regional_workshop_of_africa_national_human_rights_institutions_on_the_implementation_process_of_decisions_of_the_africa_human_rights_bodies_-_concept_note_and_program.pdf (accessed 1 November 2019).

holding workshops and publishing relevant research and advocacy materials, on the subject of implementation.[24] It is also now common for NGOs to call on the regional bodies to accord more attention to the issue of implementation and their follow-up or monitoring roles.[25]

In academic circles, a common departure point for discussions on the issue of implementation in the African regional human rights system is the 2007 seminal work of Viljoen and Louw analyzing state compliance with decisions of the ACHPR issued between 1993 and 2004.[26] This study filled an important gap in the literature. It was the first ever attempt to comprehensively and empirically document and analyse what happens to decisions of an African human rights treaty body after they have been delivered. More importantly, it identified factors that enhance or constrain compliance. Many more pieces of research with relevance to the issue of implementation in the African human rights system have since been published,[27] but only a handful attempt to comprehensively track what states actually do after they receive a decision from an African regional human rights treaty body.[28] As such, the level of scholarly and evidence-based knowledge of the extent of implementation of decisions issued after the cut-off point in Viljoen and Louw's study is still relatively low.

This book builds on and adds to the existing literature. The scope of the book is deliberately modest. Rather than examining state implementation of all decisions issued by the three regional human rights treaty bodies over the last 15 years or so, the book limits its focus to a small number of decisions issued in respect of a limited number of countries in a specific geographical region within the African continent. The focus of the volume is precisely on three neighbouring East African countries: Kenya, Tanzania and Uganda. These countries have a shared socio-political and cultural history. As the founding members of the East African Community (EAC), they also have longstanding economic and trade relations. The proximity of these countries to each other is in and of itself a potentially relevant factor in analyzing and understanding the rate of implementation of regional decisions in East Africa. The presumption here, albeit rebuttable, is that countries in the same region may "socialize" each other to respond in similar ways to their treaty obligations.[29]

2. Regional decisions concerning East African countries

Each East African country has received one or more adverse decisions on the merits from at least one of the African regional human rights treaty bodies. The resulting pool of decisions constitutes a firm basis for analyzing and drawing relevant deductions on the extent to which states in the region implement their treaty obligations, including the obligation to implement decisions of regional treaty bodies. To begin with, Kenya has received adverse decisions from all the three treaty bodies. As such, it offers a rare opportunity to obtain insights on how and whether there are any differentions in the way the country responds to decisions of the different regional treaty bodies. Indeed, Kenya presents a particularly interesting case study because all the four most recent adverse decisions against the country concern the plight and rights of indigenous and/or minority communities.

The first decision was issued by the ACHPR in February 2010 in the case of Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council (Endorois Decision).[30] In this case, the Endorois indigenous community successfully challenged their forced eviction from their ancestral land around Lake Bogoria by the Kenyan state. The ACHPR found that the forcible removal of the Endorois community from their ancestral land violated several rights under the African Charter, including the rights to religion, culture and development. Not so long after, the ACtHPR issued an almost identical decision, but in respect of a different indigenous community – the Ogiek. In the case of African Commission on Human

24. See e.g. Coalition for an Effective African Court on Human and Peoples' Rights Booklet on the implementation of the African Court on Human and Peoples' Rights (2016); Coalition for an Effective African Court on Human and Peoples' Rights, Concept note: Training on the implementation of the African Court on Human and Peoples' Rights decisions, 21-22 March 2018, Arusha, Tanzania.

25. See e.g. Amnesty International The state of African regional human rights bodies and mechanisms, 2018-2019 (2019) 36.

26. F Viljoen & L Louw 'An assessment of state compliance with the recommendations of the African Commission on Human and Peoples' Rights between 1993 and 2004' (2007) 101 American Journal of International Law 1. See also L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights', unpublished LLD thesis, University of Pretoria.

27. R Murray et al 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 African Human Rights Yearbook 150; R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 Human Rights Quarterly 349; R Murray & D Long The implementation of the findings of the African Commission on Human and Peoples' Rights (2015); V Ayeni (ed) The impact of the African Charter and the Maputo Protocol in selected African countries (2016); F Viljoen 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' in M Baderin & M Ssenyonjo (eds) International human rights law: Six decades after the UDHR (2010) 411; B Mezmur et al 'Follow-up as a choice-less choice: Towards improving the implementation of decisions on communications of the African Children's Committee' (2018) 2 African Human Rights Yearbook 200; C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights (2018) 18 African Human Rights Law Journal 27.

28. F Viljoen 'The African human rights system and domestic enforcement' in M Langford et al (eds) Social rights judgments and the politics of compliance: Making it stick (2017) 351; D Inman 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: Revisiting the Endorois and the Mamboleo decisions' (2018) 2 African Human Rights Yearbook 400; R Morhe & R Mensah 'State compliance with decisions of the African Court: The case of Alfred Agbesi Woyeme v Ghana' (2019) 3 African Human Rights Yearbook 435.

29. Regional socialization has been found to have an effect on states' decision to commit to or ratify human rights treaties. See B Simmons Mobilizing for human rights: International law in domestic politics (2009) 88-96; O Hathaway 'Why do countries commit to human rights treaties?' (2007) 51 Journal of Conflict Resolution 588.

30. ACHPR Communication 276/03, 46th Ordinary Session, 11-25 November 2009.

and Peoples' Rights v Kenya (Ogiek Decision),[31] the ACtHPR found that the persistent and routine forced evictions of the Ogiek indigenous community from their ancestral land in the Mau Forest violated several of their rights protected under the African Charter. In both the Endorois and the Ogiek decision, the concerned regional bodies required the Kenyan state to take specific remedial measures to redress the entire range of violations suffered by the respective indigenous communities.

The two other regional decisions against Kenya concern the plight of the Nubian community, especially as it relates to their right to nationality and land ownership. Kenyan Nubians have always been regarded as "aliens" or "foreigners" by the state, a status that has historically denied them citizenship and the bulk of rights and benefits that come with being formally recognised as a citizen. The first regional decision that considered the treatment of Kenyan Nubians shone a spotlight on the situation of Nubian children. In the Institute for Human Rights and Development in Africa (IHRDA) and Open Society Initiative on behalf of Children of Nubian descent in Kenya v Kenya (Nubian Children Decision),[32] the ACERWC found that Kenya's national civil registration and identity documentation procedures discriminated against Nubian children.

The second regional decision on the plight of Nubians, The Nubian Community in Kenya v Kenya (Nubian Community Decision),[33] covered both the issue of citizenship and land rights. Like the ACERWC, the ACHPR held that the Nubians are discriminated against in acquisition of identity documents. It also held that their rights to property and housing had been violated by frequent forced evictions as well as the lack of state recognition that the Nubians own the land on which they have lived for more than 100 years. In the two decisions, the concerned regional bodies listed rafts of measures that they required Kenya to take in order to redress the violations suffered by the Nubians.

Within the East African region and indeed across the entire African continent, Tanzania stands out as the country that has received the most number of adverse decisions from the ACtHPR.[34] The decisions cover diverse issues, but this book focuses on decisions dealing with only two, one politically sensitive and the other less so. These issues are: the right to fair trial and the right to contest for political office as an independent candidate. Narrowing down to these twin issues allows for the possibility of testing whether the country responds to ACtHPR decisions depending on their subject matter and political intricacy.

The cases concerning the right to fair trial were mainly filed by individuals serving prison terms after been convicted of serious offences under Tanzanian law. The focus in this volume is on six specific fair trial cases that are pretty much identical in the core issues they raised for determination.[35] In all the six, the ACtHPR found that the state had violated the right to fair trial of the applicants by failing to grant them legal aid during trial, amongst other minimum guarantees. The orders ultimately issued by the ACtHPR in respect of these cases are thus more or less similar in nature and framing.

The decision relating to the right to vie for political office as an independent candidate was issued by the ACtHPR in June 2013 in the case of Tanganyika Law Society and 2 others v Tanzania (Independent Candidacy Decision).[36] The applicants in the case had initially filed two separate cases before the ACtHPR,[37] but these were joined together for purposes of adjudication. The case challenged the provisions of the Tanzanian Constitution that requires individuals to belong to a political party as a precondition for vying for political office. In its decision, the ACtHPR held that these provisions violate the rights individuals to freedom of association and to freely participate in the government of their country. The ACtHPR directed the Tanzanian government to implement the relevant "constitutional, legislative and other necessary measures" that would offer a remedy to the violations.

In relation to Uganda, the book focuses on a communication that has the distinction of being the very first to be filed before the ACERWC: Michelo Hansungule and others (on behalf of children in northern Uganda) v Uganda (Children of Northern Uganda Decision).[38] The communication

31. ACtHPR Application 006/2012, Judgment of 26 May 2017.

32. ACERWC Communication 002/Com/002/2009.

33. ACHPR Communication 317/06, 17th Extra-ordinary Session, 19-28 February 2015.

34. Out of the 70 decisions issued by the ACtHPR by September 2019, 28 or 40% concerned Tanzania. See http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases (accessed 5 November 2019).

35. Alex Thomas v Tanzania, ACtHPR Application 005/2013, Judgment of 20 November 2015; Wilfred Onyango Nganyi & 9 Others v Tanzania, ACtHPR Application No. 006/2013, Judgment of 18 March 2016; Mohamed Abubakari v Tanzania, ACtHPR Application No. 007/2013, Judgment of 3 June 2016; Kennedy Owino Onyachi & Others v Tanzania, ACtHPR Application No. 003/2015, Judgment of 28 September 2017; Christopher Jonas v Tanzania, ACtHPR Application No. 011/2015, Judgment of 28 September 2017; Minani Evarist v Tanzania, ACtHPR Application 027/2015, Judgment of 21 September 2018.

36. ACtHPR Applications 009/2011 and 011/2011 (joined), Judgment of 14 June 2013.

37. Tanganyika Law Society & Legal and Human Rights Centre v Tanzania, ACtHPR Application 009/2011; Rev. Christopher Mtikila v Tanzania, ACtHPR Application 011/2011.

38. ACERWC Communication 001/Com/001/2005.

concerned the impacts of the armed conflict in Northern Uganda on children and the obligation of the state to protect children's rights in the context of that conflict. For a variety of reasons, including that it was submitted to the ACERWC at a time that it had not yet adopted its rules of procedure, the communication remained pending for more than seven years. In its decision dated April 2013, the ACERWC found that Uganda had failed in its obligation under the African Children's Charter to protect children from the impacts of the armed conflict, and in particular, from being recruited into participating in the conflict.[39] It issued a number of recommendations to the state, including one that required it to specifically prohibit the recruitment of children into armed conflict in its penal law.

3. Research focus

The pronouncement or publication of most, if not all, of the aforementioned regional decisions was received with considerable excitement and celebration. For example, the Endorois Decision was lauded as "a major victory for indigenous peoples across Africa".[40] It marked the first time that an African regional human rights treaty body had pronounced itself on a matter concerning the violations of the land rights of an indigenous community. The Ogiek Decision received a similar reception and became headline news both locally and internationally.[41] In the same vein, the Independent Candidacy Decision was upon delivery described as "a watershed moment for African human rights".[42] The Nubian Children Decision was described as "ground-breaking on a number of fronts".[43] The contribution of some of the decisions in articulating the normative content of specific human rights and the corresponding state obligations has also been the subject of academic scrutiny.[44]

This book looks beyond the jurisprudential or normative value of the decisions. It examines whether and under what conditions the concerned states have taken the requisite steps to implement the decisions. In particular, the book seeks to respond to three broad and interrelated questions:

a) What steps or measures, if any, have the concerned states taken to implement the decisions of the regional human rights treaty bodies?
b) Under what political, economic and social conditions has implementation taken place? Or in other words, what factors have enhanced or constrained implementation?
c) What follow-up or monitoring activities, if any, have the regional human rights treat bodies taken to ensure implementation by the concerned states? What has been the impact of these follow-up activities?

The answers to these questions go to the heart of the impact of the international human rights system more generally, and in this specific case, of the African regional human rights system. However, caution must be taken not to extrapolate or generalize the findings and conclusions of this study, as the sample of cases examined is rather small.

4. Defining implementation

The study of state implementation of (and compliance with) decisions of international and regional human rights treaty bodies has become a form of obsession amongst human rights scholars and practitioners. In the last two decades, a wave of empirical studies on the extent to and the conditions under which states implement the decisions of human rights treaty bodies has swept across the scholarship and practice world like a wildfire.[45] This fascination with implementation is neither misplaced nor illogical. State implementation of the decisions of human rights treaty bodies is arguably the best measure or predictor of the effectiveness and impact of these bodies.[46]

For victims of human rights violations, international or regional human rights treaty bodies mostly

39. African Children's Charter, Article 22.

40. Human Rights Watch 'Kenya: Landmark ruling on indigenous land rights' available at https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights (accessed 13 March 2018).

41. See e.g. 'Kenya's Ogiek win land case against government' available at https://www.aljazeera.com/indepth/features/2017/03/kenya-ogiek-win-land-case-government-170314135038447.html (accessed 13 March 2018).

42. 'A watershed case for African human rights: Mtikila and others v Tanzania' available at http://ohrh.law.ox.ac.uk/a-watershed-case-for-african-human-rights-mtikila-and-others-v-tanzania/ (accessed on 14 March 2018).

43. Minority Rights Group 'Nubians in Kenya have right to nationality: Time to implement the African Union decision", 19 October 2011, available at https://minorityrights.org/2011/10/19/bians-in-kenya-have-right-to-nationality-time-to-implement-the-african-union-decision/ (accessed 5 November 2019).

44. See e.g. E Ashamu 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya: A landmark decision from the African Commission' (2011) 55 Journal of African Law 300; E Fokala & L Chenwi 'Statelessness and rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee' (2013) 6 African Journal of Legal Studies 357; A Possy 'It is better that ten guilty persons escape than that one innocent suffer: The African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 African Human Rights Yearbook 311; 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; E Durojaye 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' (2012) 12 African Human Rights Law Journal 564.

45. A 2005 bibliography and annotation of major academic works on the concepts of compliance and implementation listed more than 140 entries. See W Bradford 'International legal compliance: Surveying the field' (2005) 36 Georgetown Journal of International Law 495.

46. See Y Shany 'Compliance with decisions of international courts as indicative of their effectiveness: A goal-based analysis' in J Crawford & S Nouwen (eds) Selected proceedings of the European Society of International Law (2012) 229.

constitute their very last hope in the pursuit of justice. This is not simply because international adjudication is by its very nature designed to be a recourse of last resort. More importantly, it is because the decision to resort to international adjudication is almost always taken after a long and broader struggle for justice and often after domestic judicial systems have failed, for one reason or the other, to redress the matter in question.

Yet, a decision by a human rights treaty body seldom brings matters to a conclusion as sweet to the ear of a victim as it is. The struggle for justice usually continues long after the delivery of a decision. It is state implementation of such a decision that ultimately counts. In other words, implementation is central in the process of translating a decision of a human rights treaty body from a paper tiger to a potentially life-changing state action, from a hollow hope to a substantive restorative measure. In this context, the term "implementation" is used here to refer to the state process of giving effect to an adverse decision of a regional or international human rights treaty body.[47] Depending on the nature and complexity of the decision of the treaty body, and specifically its order(s) or recommendation(s), implementation may entail the state taking a once-off single measure or a range of measures, including legislative, administrative, and judicial measures.

The term implementation is often used alongside several closely associated terms: compliance, impact, effect, effectiveness, and influence. Indeed, it is not uncommon for specific sets of these terms to be used interchangeably although they each have a separate and distinct meaning. For this volume, it is important to distinguish "implementation" from "compliance", two terms that tend to be frequently used together or in the place of each other. Compliance refers to a state of conformity or alignment between a state's behaviour or the factual situation at the domestic level and a decision of a regional or international human rights treaty body.[48] Compliance is essentially a status or an outcome while implementation is a process. In other words, the process of implementation has the potential of resulting in compliance. However, compliance may be attained independently of the process of implementation, that is, without any positive or deliberate step from the state concerned. It may be the product of sheer coincidence as noted by Raustiala,[49] or a dramatic change in the relevant circumstances leading to what Viljoen and Louw have referred to as "situational compliance".[50]

5. Following-up or monitoring implementation

One of the core aims of this volume is to document the follow-up or monitoring activities of the regional human rights bodies in respect of the decisions analyzed. It is thus imperative to clarify what is meant by "follow-up" or "monitoring" and what array of activities these bodies may undertake in that regard. Follow-up or monitoring refers to the process by which a regional or international human rights treaty body tracks and oversees implementation to ensure it is conducted in accordance with its decision and that it eventually meets the requirements of that decision. It is a process that is not only meant to gather information on what steps a state has taken to implement the decision of a human rights treaty body, but to also promote and facilitate actual implementation.[51] In this context, monitoring is both an end and a means to an end. It is also important to note that actors other than the treaty bodies, such as AU policy organs, NHRIs and NGOs, may also conduct monitoring activities in their respective capacities, on their own volition and for specific purposes.[52]

In a recent review of the monitoring mechanisms of the ACHPR and the ACtHPR, Murray et al offer a useful broad categorization of possible kinds of monitoring. They categorize monitoring into two: "reactive monitoring" which involves the treat body "receiving information on the extent to which the State has implemented any recommendations or orders"; and "proactive monitoring" which involves the treaty body "going out and seeking information where it is lacking; cross-checking that evidence and validating what has been said and then also making assessments on whether this is sufficient or not, based on some clear criteria of what is satisfactory implementation".[53] The rules of procedure of the African regional human rights treaty bodies provide the basis and tools for these bodies to conduct both reactive and proactive monitoring.

The ACHPR's Working Group on Communications is specifically mandated to "inform the African

47. Ayeni (n 23 above) 9; Murray et al (n 23 above) 152.

48. Murray & Long (n 23 above) 27-28; Ayeni (n 23 above) 9; Murray et al (n 23 above) 152.

49. K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 Case Western Reserve Journal of International Law 387.

50. Viljoen & Louw (n 22 above) 6-7.

51. Murray & Long (n 23 above) 30.

52. See e.g. NANHRI (n 18 above).

53. Murray et al (n 23 above) 153.

Commission on the status of implementation of its decisions on communications".[54] Rule 112 of the ACHPR's 2010 Rules of Procedure fleshes out how monitoring of implementation should be conducted in practice. It requires a state against which an adverse decision has been made to inform the ACHPR in writing of all measures it has taken or is taking to implement the decision.[55] This report must be submitted within 180 days of the state being issued with the decision. Following the review of a such report and if it deems it necessary, the ACHPR may ask the state concerned to submit additional information.[56]

Rule 112(5) requires the implementation of each decision of the ACHPR to be monitored by either the commissioner who led or supervised the drafting of the decision or another commissioner designated specifically for that purpose. Such a commissioner is mandated to take "such action as may be appropriate to fulfill his/her assignment" and to report on the extent to which the state concerned has implemented the decision in question at every ordinary session of the ACHPR.[57] Rule 112(8) allows the ACHPR to report cases of non-compliance to the relevant AU policy organs while Rule 112(9) mandates it to include information relating to its follow-up activities in the reports that it regularly submits to the AU Executive Council.

The Rules of Procedure of the ACERWC expressly stipulate that the functions of the chairperson include to "follow up compliance with the decisions, and implementation of the recommendations of the Committee".[58] The ACERWC may also deploy its state reporting procedure as a tool for monitoring implementation.[59] In this regard, the ACERWC's Guidelines on the Form and Content of State Party Reports require states to include information regarding the extent of implementation of decisions on communications issued against them.[60] However, the detailed rules governing the ACERWC's monitoring role insofar as implementation of decisions on communications is concerned are contained in two separate sets of guidelines: Revised Guidelines for the Consideration of Communications (Guidelines on Communications); and Guidelines for Implementation of Decisions on Communications (Guidelines on Implementation).[61]

Section XXI(1) of the ACERWC Guidelines on Communications provide for the timelines within which states should report to the ACERWC on the measures they have taken to implement its decisions.[62] It also provides for the consequences of failing to report within the stipulated timelines.[63] Like Rule 112 of the ACHPR Rules of Procedure, Section XXI(2) of the Guidelines on Communications mandate the ACERWC to appoint a rapporteur for each decision issued and to task that rapporteur to monitor and report on its implementation.

The Guidelines on Implementation provide for the ACERWC to hold implementation hearings. A hearing may be convened if the rapporteur responsible for monitoring the implementation of a decision so recommends or if the ACERWC determines that the implementation report submitted to it by the concerned state party "lacks clarity or is unsatisfactory".[64] During an implementation hearing, all relevant parties are invited to make oral submissions.[65] Implementation hearings serve a three-fold purpose. First, they are a forum for the ACERWC to determine the extent to which implementation of a decision has taken place, is taking place or if it is not taking place at all.[66] Second, they allow the ACERWC to identify any factors that may be impeding the concerned state from implementing the decision in full and to guide it accordingly.[67] Third, implementation hearings assist the ACERWC to make an informed decision on what actions should be taken when it is determined that the state in question has failed to implement a decision.[68]

Unlike the ACHPR and the ACERWC, the ACtHPR lacks a clear mandate to conduct follow-up in respect of its judgments. That role is instead expressly granted to the AU Executive Council. Article 29 of the African Court Protocol provides that after issuing a judgment, the ACtHPR shall notify the Executive Council, which "shall monitor its execution on behalf of the [AU] Assembly". Yet, under Article 31 of the African Court Protocol, the ACtHPR is required to report all cases

54. Resolution on the Mandate of the Working Group on Communications of the African Commission on Human and Peoples' Rights, ACHPR/Res.212(EXT.OS/XI)2012, para 4.

55. ACHPR Rules of Procedure, 2010, Rule 112(2)

56. ACHPR Rules of Procedure, 2010, Rule 112(3) & (4).

57. ACHPR Rules of Procedure, 2010, Rule 112(6) & 7.

58. ACERWC Revised Rules of Procedure, Rule 10(e).

59. Mezmur et al (n 23 above) 213-214.

60. Guidelines on the Form and Content of Periodic State Party Reports to be Submitted Pursuant to Article 43(1)(B) of the African Charter on the Rights and Welfare of the Child, para 15(e).

61.The ACERWC Guidelines on Communications are available at https://www.acerwc.africa/wp-content/uploads/2018/07/Revised_Communications_Guidelines_Final-1.pdf (accessed 7 November 2019) while the ACERWC Guidelines on Implementation are available at https://www.acerwc.africa/wp-content/uploads/2019/09/Implementation_Hearing_Guidelines_English.pdf (accessed 7 November 2019).

62. In the first instance, a state would be required to submit an implementation report within 180 days from the date it received the decision. If it fails to do so within this timeline, it shall be reminded and given a further 90 days to make the submission.

63. The only available measure available to the ACERWC in this regard is to report the state in question to the AU policy organs, which has the powers to impose appropriate sanctions.

64. ACERWC Guidelines on Implementation, Section I(2)-(3).

65. ACHPR Guidelines on Implementation, Section II(2).

66. ACERWC Guidelines on Implementation, Section II(1)(2).

67. ACERWC Guidelines on Implementation, Section II(1)(2).

68. ACERWC Guidelines on Implementation, Preamble, para 2.

of non-compliance with its judgments to the Executive Council. This is a task that the ACtHPR cannot practically discharge without first monitoring implementation of its judgments. For the ACtHPR to reach a non-compliance determination, it must first ascertain that no appropriate implementation steps have been taken by the concerned state.

It has accordingly been correctly argued that Article 31 of the African Court Protocol grants the ACtHPR a monitoring role, albeit indirectly and "even if it is only for purposes of reporting".[69] On this account, the draft framework for reporting and monitoring execution of judgments of the ACtHPR proposes the establishment of an implementation monitoring unit within the structure of the ACtHPR. It also makes the case for the ACtHPR to hold implementation hearings.

6. Obligation to implement regional decisions

One other important issue to address at the outset concerns the legal status of regional decisions. Do states have an obligation, treaty-based or otherwise, to implement the decisions of the African regional human rights treaty bodies? The answer to this question is clear and straightforward in respect of the judgments of the ACtHPR. Under the African Court Protocol, state parties have undertaken to "comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution".[70] In other words, the judgments of the ACtHPR are binding on state parties. They are under an unequivocal legal obligation to implement those judgments.

Given their quasi-judicial character, the decisions of the ACHPR and the ACERWC are usually considered, not least by state parties, to be recommendatory and legally non-binding in nature. In theory, these decisions belong to the category of non-binding international instruments and decisions referred to as "soft law" which are distinct from "hard law" instruments and decisions.[71] The two treaty bodies, however, view their decisions slightly differently, validly so and as they should. While they duly appreciate the hard/soft law dichotomy,[72] the treaty bodies reject the view that their decisions are completely devoid of legal obligations. Their reasoning is grounded on the principle of pacta sunt servanda - the state's general obligation under international law to implement in good faith all the treaties they have freely acceded to or ratified.[73]

It follows that state parties cannot simply disregard the decisions of the two regional treaty bodies. Having accepted the competence of the ACHPR and the ACERWC to determine communications, they are treaty-bound to give effect to the decisions of these bodies. According to the ACHPR, this obligation flows from Article 1 of the African Charter under which states have undertaken to give effect to its provisions.[74] Article 1 of the African Children's Charter carries a similar obligation.[75] Scholarly writings support the view taken by the ACHPR and the ACERWC.[76]

7. Reception of regional norms in East Africa

The specific purpose of this book is to assess the implementation of regional decisions in East Africa. However, it is imperative to provide, as a context and background, an overview of the reception, penetration and application of the African regional human rights norms and standards in the three East African countries.

To start with, all the countries in the region have ratified the core three regional human rights treaties. This is to say that they have all ratified the African Charter, the Maputo Protocol, and the African Children's Charter. The three countries have also ratified the African Court Protocol, but as noted above, it is only Tanzania that has taken the additional step of making a declaration allowing individuals and NGOs to directly file cases against it at the ACtHPR. However, the legal effect of this declaration will lapse in mid-November 2020, a year after Tanzania withdrew it. Of the three countries, only Uganda has ratified the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Moreover, none of the countries have ratified the 2016 Protocol to the African Charter on the Rights of Older Persons in Africa and the 2018 Protocol to the African Charter on the Rights of Persons with Disabilities in

69. African Court on Human and Peoples' Rights Comparative study on the monitoring and reporting mechanisms of relevant international and regional courts on human rights, EX.CL/1126(XXIV) Annex 2 (2018) 9.

70. African Court Protocol, Article 30.

71. See R Baxter 'International law in her infinite variety' (1980) 29 International & Comparative Law Quarterly 549.

72. On its website, for example, the ACHPR makes a distinction between binding treaties and soft law instruments. See https://www.achpr.org/resources (accessed 11 November 2019).

73. This principle is codified in Article 26 of the Vienna Convention on the Law of Treaties which reads as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

74. See e.g. International Pen & Others (on behalf of Ken Saro-Wiwa) v Nigeria (2000) AHRLR (ACHPR 1999) paras 113 and 116; Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties, ACHPR/Res.97(XXXX)06 (adopted at the 40th ordinary session, Banjul, The Gambia, 15-29 November 2006).

75. The provision reads as follows: "The member states of the Organization of African Unity parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake to take the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter".

76. See e.g. F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 Journal of African Law 1.

Africa.

The extent of domestic incorporation of the regional human rights treaties varies from one East African country to the other. Prior to the promulgation of the 2010 Constitution, international treaties ratified by Kenya had no automatic or direct application in the domestic legal order. Like in many common law countries, treaties had to be domesticated through an Act of Parliament to have legal effect. However, in some limited number of cases delivered in the years immediately before 2010, some Kenya courts made reference to international law instruments and acknowledged that those instruments had informed their decision.[77] The 2010 Constitution of Kenya appears to have transitioned the country from a dualist to a monist. Article 2(6) of the Constitution provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya". However, jurisprudence from the courts and scholarly analyses have shown the matter to be more complex and nuanced because the Constitution is not clear as to how international law instruments should be treated vis-à-vis domestic statutes. The prevailing view is that treaties occupy the same rank as statutes.[78]
In contrast to Kenya, Tanzania and Uganda have retained the dualist legal system they inherited from the colonial regime. However, courts in both countries increasingly make reference to and engage with the question of the interplay between international and domestic law. In Tanzania, courts have long relied on international law principles to interpret the provisions of the Constitution on human rights.[79] However, with a few exceptions, the level of analysis has almost always lacked depth and rigor. In Uganda, some courts have taken the path of judicial avoidance of questions of international law while other courts have used international law as a guide to constitutional interpretation.[80] In other instances, Ugandan courts have engaged in deeper reflections on the interaction between international and domestic law, and more specifically, on the place of international law in the domestic legal framework.[81]

8. Outline of the book

This book is structured into six chapters. This introduction is followed by the case studies on the extent to which the three East African countries have implemented and complied with decisions of the regional human rights bodies. In Chapter Two, Elvis Fokala examines Kenya's implementation of the two regional decisions concerning the rights of the Nubian community. He finds mixed results; progress in implementation has been constantly undercut by relapses. On the one hand, Kenya has made some efforts to implement certain aspects of the two decisions of the regional bodies. In June 2017, Kenya took a major leap forward when it formally acknowledged the land rights of the Nubian community. It issued a title deed in the name of the community for their land in the Kibera area of Nairobi. On the other hand, Kenya appears reluctant to fully implement aspects of the decisions relating to the right to nationality and protection from forced eviction. Fokala finds that members of the Nubian community are still subjected to arduous vetting procedures to obtain relevant registration documents. Forced evictions have also continued in Kibera. In July 2018, for instance, thousands of Kibera residents were forcefully evicted from their homes and places of business to create room for the construction of a road.

Fokala's analysis of the factors that have enhanced or impeded implementation of the Nubian decisions reveals an interesting paradox. The ACERWC has taken active steps to follow-up on the Nubian Children's Case, including by conducting a visit to the country. Yet, its recommendations remain largely unimplemented. On the contrast, the ACHPR has not proactively monitored the implementation of the Nubian Community Case. But its recommendation that the Kenyan state recognizes Nubian land rights over Kibera by granting them security of tenure has been fully implemented, although forced evictions have not abated. Fokala attributes this pattern of implementation to the fact that the recommendation of the ACHPR relating to the land rights of the Kibera Nubian neatly dovetailed into formal processes and community activism that were already underway at the domestic level.

In Chapter Three, Japhet Biegon and Amina Ahmed scrutinize the status of implementation of the Endorois and Ogiek Decisions, decided ten years and three years ago, respectively. Their analysis shows that both decisions have not been fully implemented despite concerted pressure and advocacy from many role players, ranging from the affected communities to the regional

77. J Ambani 'Navigating past the "dualist doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) International law and domestic human rights litigation in Africa (2010) 25, 29-30.

78. M Oduor 'The status of international law in Kenya' (2014) 2 Africa Nazarene University Law Journal 97; M Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13 African Human Rights Law Journal 415.

79. C Murungu 'The place of international law in human rights litigation in Tanzania' in Killander (n 77 above) 57.

80. B Kabumba 'The application of international law in the Ugandan judicial system: A critical enquiry' in Killander (n 77 above) 83.

81. As above. See also B Kabumba 'The application of African Union (human rights) law in Uganda: Trends and prospects from a comparative review' ((2018) 2 African Human Rights Yearbook 89.

bodies and UN human rights actors. The steps the Kenyan government has taken to implement the decisions are at best cosmetic and tentative. State implementation efforts have targeted the "lowest hanging fruits", such as the ACHPR recommendation to register the EWC. In implementing this recommendation, the government incurred little, if any, cost. Those recommendations that go to the root of the decisions, such as restitution of the ancestral lands to the communities or the payment of compensation and royalties, have remained unimplemented.

Biegon and Ahmed also find that task forces established by the government to look into the practical aspects of implementing the decisions have not yielded much. They have simply created the illusion of a government busy at work to implement the decisions, but with little tangible results to show for it in reality. More importantly, the duplicity of the government has been revealed by its continuing violations of the rights of the communities. The threat of forced evictions has remained hanging over the communities like the sword of Damocles. In certain instances, these threats have been made good.
Few cases decided by the African regional human rights bodies have attracted such huge attention as the Endorois and Ogiek Decisions. This attention has ensured that the issue of the implementation of the two decisions, but more so the Endorois Decision, has featured in the agenda of many international actors, including UN Charter and treaty-based human rights bodies. At least three UN human rights bodies have urged the Kenyan government to implement the regional decisions. The recommendations from these bodies have served to complement the pressure from the communities, regional bodies, and civil society actors. Yet, Kenya's commitment to implement the decisions seems to have only waned with time. Biegon and Ahmed discuss three factors that they argue may explain why the Kenyan government's score on implementation is poor. First, they point to the fact that the two cases involve the concept of indigenous peoples and the question of ownership of land, two knotty and intractable issues for Kenya. Second, they identify government political dynamics and changes that have either favoured or hampered implementation at different points in time. Third, they discuss the ambivalent role of the regional bodies in following-up and monitoring the implementation of the decisions.

Chapters Four and Five focus on Tanzania. Gift Kweka examines the extent to which Tanzania has implemented six of the 11 fair trial cases decided against Tanzania by the ACtHPR between 2015 and 2018. Her analysis is contained in Chapter Four where she finds little evidence of state implementation of the decisions. Kweka identifies multiple factors that account for this state of affairs, including the lack of clarity in several of the remedial orders issued by the ACtHPR, the lack of a domestic legal framework for enforcement of regional decisions, and the lack of political will on the part of the Tanzania state to implement the decisions.

The Tanzania fair trial cases reflect a systemic problem that is entrenched in the country's criminal justice system. Many indigent accused persons undergo unfair trials and are convicted of serious crimes without ever receiving legal representation. The enactment of the 2017 Legal Aid Act has the potential to remedy this problem if it is faithfully implemented. But as Kweka rightly notes in her Chapter, much more would still need to be done to build a fair criminal justice system in the country. For one, magistrates and judges would need to be constantly trained on what constitutes a fair trial. Yet, Tanzania's November 2019 withdrawal of its declaration allowing individuals and NGOs to directly file cases against it at the ACtHPR casts doubt on its willingness to undertake a comprehensive reform of its criminal justice system or respect human rights more generally.

In Chapter Five, Selemani Kinyunyu reflects on the rate of implementation of the Independent Candidacy Case. This decision was issued at a time when Tanzania had rolled out a constitutional review process during which the issue of allowing independent candidates to vie for the presidency was under consideration. This process has since effectively stalled and the decision of the ACtHPR requiring Tanzania to reform its laws to recognize independent candidacy has not been implemented. However, as ordered by the ACtHPR, the State did publish the full English text of the decision and a Swahili summary of it on the official government website. This positive step can be explained by the relatively low cost of publishing the decision on the government's website. It is also instructive that the ACtHPR did in fact help the Tanzanian government to draft a Swahili summary of the decision.

Like Kweka, Kinyunyu identifies the lack of clarity in the order given by the ACtHPR as well as the lack of a domestic enforcement framework as some of the reasons that potentially explain the non-implementation of the primary order of the Court. However, he argues that the defining factor that lies at the root of the non-implementation of the decision is the loss of appetite to finalize the country's constitutional review process. The new government that took office in

November 2015 has shown no interest in implementing constitutional reforms. Instead, a closed and repressive political environment has been created in which there has been a de facto ban on political activity by opposition parties, a crackdown on dissent, and the silencing of the media and human rights activists and defenders.

Chapter Six, authored by Busingye Kabumba, examines the implementation of the ACERWC's Children of Northern Uganda Case. His analysis shows that Uganda appears to have substantially complied with the ACERWC's decision, a marked departure from its failure to abide by adverse decisions rendered by other bodies, including the International Court of Justice (ICJ) and the ACHPR. Busingye argues that this rare case of compliance is surprising given the relatively recent establishment of the ACERWC and its lack of an enforcement mechanism, compared to, for example, the ICJ. He attributes Uganda's compliance with the decision to four main factors: Uganda's cooperation with the ACERWC throughout the consideration of the case; the fact that in the decision, the ACERWC did acknowledge that Uganda's had discharged some of its obligations under the African Children's Charter; the fact that the decision did not require monetary compensation; and the fact that the decision coincided with the political interests of the incumbent government.

CHAPTER TWO

LOOKING BACK TO LOOK AHEAD: STATE IMPLEMENTATION OF DECISIONS OF AFRICAN REGIONAL TREATY BODIES ON THE RIGHTS OF KENYAN NUBIANS

Elvis Fokala

1. Introduction

The Nubian case represents the first communication brought before the African Commission and the African Children's Committee by the same complainants on behalf of the people and children from the same community. As stated in the communications, the Nubian community is a small community located in central Nairobi. They have been in Kenya for over 100 years.[1] However, because of their religious and ethnic origins, they are forced to go through a lengthy and tedious vetting process to obtain Kenyan citizenship and identity cards. According to the communications, the Nubian community, including children, is a marginalized community with limited access to basic services such as land, education and health.[2] Also, in both communications, the complainants, linked the plight of the Nubian people and children as a resultant of their lack of recognition as Kenyan citizens.[3]

The central issue in both communications was stateless and the consequences of being stateless. According to the 1954 United Nations (UN) Convention Relating to the Status of Stateless Persons, a "stateless person" means "a person who is not considered as a national by any State under the operation of its law".[4] Even though Kenya is not a signatory to this instrument, there is a legal basis that supports this definition, established for example, in article 6 of the African Children's Charter, which protects the right of children to a nationality. Kenya is a signatory to the African Children's Charter.

After failed attempts from 2002 to 2005 to resolve the matter in Kenya and to satisfactorily exhaust local remedies as required by international law, the complainants, decided to approach the African Commission in 2006 and the African Children's Committee in 2009.[5] Reasons for not approaching the African Children's Committee simultaneously in 2006 are not given in the communications. However, one possible reason could be the lack of funding, as the complainants are NGOs who fundraise to defend the rule of law and rights of vulnerable people and children. In both communications, the argument on admissibility was based on the ground that it was impossible to find sustainable and acceptable local remedy to restore the dignity of the Nubians in Kenya, within reasonable time. According to the complainants, the procedure in Kenya was unduly prolonged. On the basis of article 56(5) of the African Charter, they opted to abandon the legal requirement to exhaust of local remedy.[6] Worth noting, the essential characteristic of the exhaustion of local remedy is its evident effectiveness to restore the dignity of a particular group of people who have been discriminated against in a particular state.[7]

1. The Nubian Community in Kenya vs The Republic of Kenya, ACHPR Communication 317/20016, para 2 available at http://www.achpr.org/files/sessions/17th-eo/comunications/317.06/communication_317.06_eng.pdf (accessed 31.03.2018). (Hereafter Nubian Community Case).

2. Nubians Peoples' Case, paras 1 – 6. See also, Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya, Com/002/2009, 22 March 2011 (Hereafter Nubian Children's Case) paras 2- 5.

3. Nubian People's Case, paras 5 – 6 and Nubian children's case, paras 4 – 5.

4. Convention Relating to the Status of Stateless Persons (1954), adopted by a Conference of Plenipotentiaries Convened by Economic and Social Council resolution 526 A (XVII), entered into force in 1960. It specifically protects the rights of stateless persons. Kenya is not a party to this Convention.

5. For details of attempts to exhaust local remedies see Nubian People's Case, paras 27 – 34. See also Article 56 of the African Charter.

6. See e.g. Nubian Community Case, para 27, where the OSJI argued that "real remedies are essentially non-existent in the Republic of Kenya, as every effort has been made to establish the Nubians' right to Kenyan citizenship by seeking remedies though proper domestic channels".

7. See e.g. Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria, ACHPR Communication No. 155/96, para 37-39.

The African Commission and the African Children's Committee are quasi-judicial bodies established by the African Charter and the African Children's Charter with the mandate to oversee the proper implementation of the provisions of the of their respective Charters.[8] Unfortunately, the decisions or recommendations of both bodies have no binding force. However, it is incumbent on States to act in good faith and to undertake all appropriate legislative, administrative, and other measures for the implementation of the recommendations provided in communications.[9]

2. Regional decisions on the rights of Nubians

In 2011 and 2015, the African Children's Committee[10] and the African Commission handed down progressive decisions in the communications brought before them by the IHRDA and the OSJI on behalf of the children and people of Nubian decent in Kenya, respectively. Worth noting, while this was the 225th decision of the Commission and the 11th decision relating to Kenya since the Commission was established in article 30 of the African Charter of 1981[11] it was the first ever communication decided by the African Children's Committee after it was established in article 32 of the African Children's Charter 1990.

2.1 Nubian Children's Case

On 20 April 2009, the IHRDA and the OSJI approached the African Children's Committee with a communication on behalf of the children of Nubian decent in Kenya.[12] This communication was brought before the Committee on the grounds that the government of Kenya was allegedly in violation of mainly article 6 (name and nationality), specifically, sub-articles (2 - right to have a birth registration), (3 – right to acquire a nationality at birth) and (4 – State duty to protect and promote the provision of article 6) and article 3 (prohibition on unlawful/unfair discrimination). As a result of these two alleged violations, the communication also mentioned a list of alleged consequential violations of interrelated provisions of the African Children's Charter, including Article 11(3) (equal access to education) and Article 14 (equal access to health care).

After careful consideration of the issues submitted in the communication, the African Children's Committee admitted the communication based on two broad considerations - admissibility[13] and the merits of the case. Indeed, much of the debate around the complaints in the communication were centred around reflections on the complications previous and current children of the Nubian community face due to their non-recognition as citizens of Kenya by the state.[14] In fact, albeit the adoption of the Constitution of Kenya in 2010, which protects, inter alia, a child's right to a name and nationality at birth in article 53(3), the government has made no effort to recognize children of Nubian decent as Kenyans even if they were born after the Constitution was enacted into law.

In 2011, the Committee handed down its decision in which it found the government of Kenya in violation of the allegations outlined in the communication and identified earlier in this chapter. Based on its findings and decision, the Committee, then proceeded to make a throng of progressive recommendations to the government of Kenya.[15]

The Committee recommended in particular that Kenya should:[16]

a)take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, acquire a Kenyan nationality and the proof of such a nationality at birth;
b)take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognized are systematically afforded the benefit of those new measures as a matter of priority;
c)implement its birth registration system in a non-discriminatory manner; and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.

8. S Ebobrah 'Reinforcing the identity of the African Children's Rights Committee: A case for limiting the lust for judicial powers in African quasi-judicial human rights mechanisms' (2015) 2 Transnational Human Rights Law Review 1.

9. The view that the onus rests with states parties to comply in good faith with the recommendations of human rights treaty views has been supported by state representative. See International Law Association Final report on the impact of findings of the United Nations treaty bodies (2004) at note 19. The report is available at https://docs.escr-net.org/usr_doc/ILABerlinConference2004Report.pdf (accessed: 13.04.2018).

10. Nubian Children's Case (as n 2 above).

11. A list of the decisions on communications brought before the ACHPR in relation to Kenya is available here: http://www.achpr.org/communications/decisions/?c=7 (accessed 4 April 2018).

12. For a detailed case review of this decision see E Fokala & L Chenwi 'Statelessness and rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee' (2014) 6 African Journal of Legal Studies 371.

13. Nubian Children's Case (n 2 above) paras 23-35.

14. E Durojaye & EA Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' (2012) 12 African Human Rights Law Journal 566.

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16. Nubian Children's Case, para 69(1-5).

2.2 Nubian Community Case

Prior to submitting the communication in respect of Nubian children to the African Children's Committee in 2009, the same complainants, OSJI and IHRDA, had submitted, an earlier communication to the African Commission on behalf of the Nubian community against Kenya.[17] This time however, as expected, the communication was based on Kenya's violation of the African Charter. This communication was brought before the Commission on the grounds that the government of Kenya was allegedly in violation of mainly article 2 (right to freedom from discrimination); article 3 (right to equality before the law and equal protection of the law); article 5 (prohibition of torture and cruel, inhuman and degrading treatment) and article 14 (right to property) of the African Charter. As a result of these four main alleged violations, the communication also includes a list of alleged consequential violations of interrelated provisions of the African Charter: Article 12 (denial of freedom of movement); Article 15 (denial of equal access to work); Article 16 (equal access to effective health care), and Article 17 (rights to equal access to education).

A few years after the African Children's Committee had passed its decision on the Children of Nubian decent, the African Commission, in February 2015, made a decision on the Nubian Community in Kenya in which it declared the government of Kenya to be in violation of articles 1, 2, 3, 5, 12, 13, 14, 15, 16, 17 (1) and 18 of the African Charter. In its recommendation, the Commission echoed the recommendations made by the African Children's Committee in 2011 but more so from a broader angle as it called on the government of Kenya to:[18]

a) establish objective, transparent and nondiscriminatory criteria and procedures for determining Kenyan citizenship;
b) recognize Nubian land rights over Kibera by taking measures to grant them security of tenure; and
c) take measures to ensure that any evictions from Kibera are carried out in accordance with international human rights standards.

2.3 Overview of both decisions

Overall, both decisions have been celebrated as groundbreaking decisions in Africa. For the Nubians in Kenya, the decisions represent relief and restoration. As indicated in the communications, the Nubians have been in Kenya for several decades without any legitimate recognition as Kenyans. They have lived in the Kibera slums in Nairobi and other areas since the 19th century without any security of tenure. For such a long time, they have endured the pain and ignominy of discrimination.[19]

Even though these issues were part of the claims of the complainants, both communications had one central issue – the eradication of statelessness in Kenya and especially within the Nubians. To the complainants, the fact that the Nubians in Kenya were stateless created an environment of uncertainty, including violations of basic human rights, which were multi-generational as they had been ongoing obstinately unimpeded for several decades. Consequently, the communications were not just related to the children and the people of Nubian decent in respect of whom the communications were brought before the African Children's Committee and the African Commission.[20] Rather, the communications were brought before the Commission and the Committee to fix the problems of the past, to protect the rights of, the current and future generation of Nubians.

Also, the positive impact of these decisions is further deepened by the fact that the government of Kenya had no interest in recognizing the Nubians as Kenyans. This is because before the recommendations were made by the ACHPR (2015) and the ACERWC (2011), the government had already enacted into law a piece of legislation, which could have positively responded to the plight of the Nubians in Kenya. For instance, in 2010, the parliament of Kenya enacted a new Constitution.[21] Chapter three of the Constitution protects a number of provisions around citizenship and birth registration which, if implemented without discrimination would have recognized the Nubians as citizens. Broadly, the logic of fronting the Constitution as a missed

17. Communication 317/ 2006 (n 7 above).

18. See generally Communication 317/2006 (n 7 above) para 171 (ii) (a)(b)(c).

19. For details on the "the relation between the British colonial presence in Kenya and the complex negotiations of cultural identity that accompanied it, with specific reference to the understanding of the law of property, and of dispossession and displacement" see e.g. A Hopikins 'Law, land and identity: Property and belonging in colonial Kenya' (2014) 1 SOAS Law Journal 139.

20. See for example, the communication brought before the African Commission on Human and Peoples' Rights in 2006. Communication 317/2006 – The Nubian Community in Kenya vs The Republic of Kenya http://www.achpr.org/files/sessions/17th-eo/comunications/317.06/communication_317.06_eng.pdf (accessed 31.03.2018).

21. Available here: http://www.kenyalaw.org/lex/actview.xql?actid=Const2010 (accessed 13.05.2018).

opportunity by the government of Kenya is because constitutional provisions are likely to have more direct effects on the political and institutional interests of a country and usually, it also demands a higher threshold for any amendment than a subsidiary legislation will require.[22]

Besides, prior to enacting the Constitution 2010, Kenya had enacted the 2001 Children's Act.[23] Of specific interest, the State in article 11 of the Act, commits to provide appropriate assistance and protection, to establish the identity of a child in case where the child's right to a name and nationality has not be fulfilled. Indeed, Groot admits that the crucial stage of confirming a person's nationality is the moment of birth – through birth registration.[24] Frankly, this Act proves that Kenya had the solution and means to fix the problems of the Nubians before the communications were brought before the Commission and the Committee. Why the State ignored this crucial Act and provision is also a negative indication of how serious Kenya takes the protection of children's right. Specifically, the fact that the government did not recognize the children of Nubian decent as Kenyans or register them at birth supports the fact that members of the Nubian community faced acute discrimination in Kenya.

3. Status of compliance and implementation

3.1 Nationality and citizenship

A cursory look of the history of Kenya and its challenges around granting or recognizing a particular community as citizens is a déjà vu. This assertion is supported by the fact that the communications brought on behalf of the Nubians in Kenya, is not the first and would not be the last of its kind in Kenya, which questions the government's commitment to article 5 of the African Charter, in respect of the right to nationality. It is worrying that the Nubians will not be the last community to seek the respect of their right to a nationality in Kenya. Indeed, the United Nations Commission on Human Rights' (Refugee Agency) 2017 report on statelessness around the world also identifies the Pemba in Kenya as another community in search of Kenyan citizenship.[25] The Makonde, for example, were also in the same situation but have since been recognised as the 43rd tribe in Kenya through a presidential directive in 2016.

Broadly, the recognition of the Nubians as Kenyans will be key for members of that community to escape the consequences of statelessness just like, for example, the Makonde.[26] However, a quick glance at Kenya's legislative and administrative trajectory on issues related to citizenship and nationality is worrying and possibly indicates that the Nubians might have to wait longer than anticipated. As it seems, there is constant ongoing amendment of laws around birth registration, identification and citizenship.[27] At the corresponding time, the Kenyan legislature is considering a bill on identification and registration of persons including birth and death registration and the access to national identity.[28] The consideration of the bill is ongoing, although Kenya has in place a 2011 Citizenship and Immigration Act,[29] and a 2015 subsidiary legislation on the Registration of Persons Act amongst others.

It is difficult at his point to confirm whether these ongoing amendments are caused by the recommendations from the Commission or the Committee. However, it is expected that since these amendments are ongoing after the recommendations from the Commission and the Committee, the drafters would consider the recommendation on nationality and citizenship. Generally, this is because, considering the intent and purpose of amending a piece of legislation, it is always aimed at improving the existing text to provide better protection to citizens. For the Nubians in Kenya, it would be a massive relief should the amendments result in responding positively to the recommendation from the Commission and the Committee calling on the State of Kenya to recognize them as Kenyans. This will be a huge legal victory and the real genesis of removing discriminatory practices that have characterized access to identity documentation in Kenya.[30]

In a nutshell, all these pieces of legislation are victories that must be underscored at least to highlight the effort of the State to recognize not only the Nubians but also other communities in Kenya with the same plight. Surely, it is worth noting as well that these legal and administrative

22. D Landau 'The importance of constitution-making' (2012) 89 Denver University Law Review 611.

23. Children Act No. 8 of 2001.

24. GR de Groot 'Children, their right to a nationality and the child statelessness' in A Edwards & L Van Waas (eds) Nationality and statelessness under international law (2014) 144.

25. See UNCHR This is our home: Stateless minorities and their search for citizenship (2017) available at http://www.unhcr.org/ibelong/wp-content/uploads/UNHCR_EN2_2017IBELONG_Report_ePub.pdf (accessed 13.05.2018).

26. UNCHR The Makonde: From statelessness to citizenship in Kenya available at http://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html (accessed 24.04.2018).

27. See for example, Registration of Persons available at http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%20107 (accessed 13.05.2018).

28. Registration and Identification of Persons Bill, Kenya Gazette Supplement No. 153 of 2014; Kenya Human Rights Commission Memorandum on the Registration and Identification of Persons Bill (2014).

29. Kenya Citizenship and Immigration Act No. 12 of 2011.

30. B Manby Citizenship and statelessness in Africa: The law and politics of belonging (2015).

measures guarantee citizenship by registration to two categories of stateless persons in Kenya – those who have lived (including their decedents) in Kenya continuously after Kenya's independence in 1963 and foreigners who arrived after independence, but who have lived legally in Kenya continuously for seven years. Actually, Nubians qualify for citizenship based on these categories but what is lacking is the political will of the government of Kenya to fully recognize them as Kenyans.

3.2 Land rights and security of tenure

The legal and administrative treatment of indigenous tenure has been a major subject in the history of kenya for decades. Legally, and thanks to the jurisprudence of the African Commission, the most prominent illustrative examples of which need be given just to reflect on how far back this issue dates is the Endorios case.[31] Even though the endorios have been recogised and have security of tenure, the fact that the Nubian and the Ogiek[32] cases still reflected similar issues, is worrying and to some extent, telling of how Kenya does not properly adhere to the recommendations of the Commission.

It is indeed a pity that the recommmendations from the ACHPR in these case relating to land rights and tenure have a commonality in that the ACHPR urges the government of Kenya to recognise land rights and security of tenure. As noted in the of the Nubian people, the violation of the land rights of the Nubians was one of the main reasons why the compliannts approached the ACHPR. From a rights perspective, the respect of the right to land and security of tenure has far-reaching effects, with the ability to reinforce, or damage, people's sense of their identity and to limit their access and enjoyment of other rights such as the right to housing.

Another aspect which also questions Kenya's adherence to the recommedation relating to land rights and security of tenure, is its Constituion of 2010, specifically the following: Article 40 (right to property); Article 60 (principles of land policy); Article 61 (classification of land); and Article 63 (community land). These provisisons and others are highlights of the 2010 Constitution. Notably, the Constitution was adopted before the ACHPR made its recomendation. Again, just like, the recomendation relating to nationality and citizenship, the Constitution is a missed chance which would have sent stronger signs of Kenya's willingness to resolve its aged communal land rights and security of tenure problem.

However, three pieces of legislation which could well be a display of Kenya's compliance or intent to complie with the recomendation relating to land rights and security of tenure from the ACHPR is its Land Act,[33] Land Registration Act,[34] and the National Land Commission Act,[35] all enacted in 2012. Even though these were promulgated into law before the recommedation of the Commssion in 2015, it is possible that after the decision of the African Children's Committee was passed in 2011, the government of Kenya could speculate some aspects, such as the recognition of communal land rights and security of tenure would feature amongst the the recomendations of the ACHPR. These pieces of legislation, together with the constitutional provisions relating to property and land rights indentified earlier, could well be the missing piece of the jigsaw to fix kenyans aged communal land rights and security of tenure and they jointly promise a properly functioning land administration and land rights delivery process which is necessary for kenya to aply comply with the recommendation from the ACHPR on land rights and security of tenure.[36]

It is very possible that it is thanks to the existence of these pieces of legislations that in June 2017, for the first time, members of the Nubian community were granted community land rights in Kenya.[37] Which also, hopefully, marks the beginning of the end of deep-rooted discrimination and marginalization of the Nubians. This is an outright compliance with the recommendation of the ACHPR calling on the State to recognize the land rights of the Nubians.

3.3 Forced evictions

In the Communication submitted before the Commission it is alleged that over the years, the Nubians have repeatedly been evicted from Kibera where they have settled for decades with no provision made for alternative housing; no compensation provided to the displaced and no notice

31. Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya, ACHPR Communication 276/2003.

32. African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR Application No. 006/2012.

33. Land Act No. 6 of 2012.

34. Land Registration Act No. 3 of 2012.

35. National Land Commission Act of 2012.

36. Land Registration Act of 2012, Articles 6(6) & (7).

37. Open Society Foundation 'After Long Struggle, Kenya's Nubian Minority Secures Land Rights' available at https://www.opensocietyfoundations.org/press-releases/after-long-struggle-kenyas-nubian-minority-secures-land-rights (accessed 13.05.2018).

of such evictions given to the occupants.[38] According to the United Nation (UN)s Committee on Economic Social and Cultural Rights (CESCR), forced eviction is "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".[39] In other words, eviction is not completely a violation of, for example Article 14 of the African Charter – right to property - if it is based on exceptionally good reasons such as enviromental concerns or protection of the ecosystem.[40] But just like in the Endorois Case, it was not the case in the Nubian Cases. It was simply an act of discrimination since the Nubians are and still not recognised as Kenyans.

According to the complainants the Nubians are only seeking for the recognition protection of their collective property rights in Kibera where they have lived for decades in order "to protect themselves against further forced evictions and encroachments, which threaten their cultural survival".[41] To be fair to the government of Kenya, this one recommenedation from the ACHPR in 2015 that the goverrnment has, so far, complied with to a great extent for two major reasons. First, the fact that the Nubians till reside in kibera, could be interpreted that kibera has been recognised as their homeland. Secondly, as already indicated, in June 2017, government issued a community land title to the Nubian community trust for 288 acres of land in the Kibera neighborhood, thus increasing their land space to 688 acres. This is a huge victory because over the years leading to the submission of the communication, the 4,197 acres originally allocated to the Nubians had been reduced to 400 acres by government sales of land for developments.[42]

4. Factors influencing implementation

4.1 Follow-up by treaty bodies

The ACHPR and the ACERWC have adopted rules of procedures guiding both treaty bodies to follow-up on the implementation of their recommendations to state parties.[43] Generally, the rational for follows-up procedures is not to police state parties to commit to implement recommendations of the beyond its means. It is meant to ensure that the state party concern is committed to taking reasonable step within reasonable time to adhere to the recommendations. The procedure should provide satisfactory objective information about the level of implementation.

For instance, the ACERWC has a duty to follow-up on the implementation of its recommendations, decisions and findings is guided by Rule 10(2)(e) where it mandates the chairperson of the Committee to, specifically "follow up compliance with the decisions, and implementation of the recommendations of the Committee" and where the chairperson or other measures taken by the Committee are unsuccessful, the Committee "may transmit its Concluding Observations or recommendations arising from its decision on communications to the Pan African Parliaments for follow-up" - rule 82(6). This rule is interesting in that it does not advise the Committee to transmit its concluding observation to the African Court for example, which is a judicial body with binding legal decisions. The Pan African parliament no doubt has the powers to coax a state party to comply with the recommendation of the Committee. This rule has not been implemented yet, and hopefully the Nubian case will not be the first.

Elsewhere, the State has an obligation to implement the recommendations of the Committee. Interestingly, section XXI(1) of the Revised Guidelines for the Consideration of Communications of the Committee for example, specifically mentsions timeframes within which a state should report back to the Committee on progress made to comply with its decsion. Under this subsection, a State Party has 180 days to report back. It it fails do to so, it will be a futher 90days. It it still fails to report back on measures taken to implement the decsions of the Committee, the matter will be refered to the Assembly of the African Union for appropriate intervention on the matter. Interestingly, to the best of the knowledge of the author, the State of Kenya failed to meet all these deadlines and only reported back during the 29th Session - basically about three years after the decision was made. Kenya was not referred to the Assembly as promised.

Some of the challenges faced by the Committee to follow-up on its recomndations could be

38. See Nubian Community Case at paras 160 – 163.

39. Committee on Economic, Social and Cultural Rights, General Comment No. 7 (1997) on the right to adequate housing: forced evictions).

40. See e.g. the decision of the Constitutional Court of South African in Government of the Republic of South Africa & Others v. Grootboom & Others, Judgement of 4 October 2000, para 83.

41. Nubian Community Case para 88.

42. Supra para 90.

43. See generally Rules of Procedure of the African Commission on Human and Peoples' Rights, Rule 112 (Follow-up on the recommendations of the Commission) See also the Revised Guidelines for the Consideration of Communications, Section XXI (Implementation of decisions of the Committee on communications) and, See also Rules 10(e) (duties of the chairperson) and 82(6) (Relations with African Union Organs, Institutions and Programs) of the Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child.

attributed to the fact that the Rules of Procedure does not prescribe to the Committee how to manage this follow-up process and it also fails to prescribe any targeted phases in the follow up process. Targeted phases are critical to ascertain level of compliance. This could also account for the reason why it took the Chair of the Committee three years to report back to the Committee's Session.

On the other hand, the African Commission's follow-up strategy and mandate is governed by its 2010 Rules of Procedure. Under Rule 82 (a – d), State Party's calls on state party's to do everything within its means to provide, assist and corporate with any mission that might be appointed to gahather information relating to a particu;ar communication. Rule 112 of the Commission's Rules of Procedure has a stricking similarity to Section XXI(1) of the African Children's Committee's Revised Guidelines for the Consideration of Communications. They provide simialr time limits for states to report back on the implementation of a recomendation. However, in cases where a state fails to report back the Commission, it "shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to any situations of non-compliance with the Commission's decisions". The Commitee's Revised Guidelines do not contain a similar provision.

The author finds it interesting that even though the Commission and the Committee are quasi-judicial bodies of the African Union, with striking similarity in terms of their mandates, they are different at the point of taking the referral where a State fails to comply with its recommendations. In case of failure to implement, the Committee refers that matter to the Pan African Parliament while the Commission refers the matter to a Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union. It would be interesting to investigate why there is this difference. Notwithstanding, that is not the basis of this chapter and section. This section will discuss the follow-up efforts that have been undertaken by the two treaty bodies, and more imporatantly, the contribution of those efforts in enhacing or ensuring implementation of their recommnedations in the Nubian Cases respectively.

4.1.1 ACERWC's visit to Kenya

Pursuant to rule 10(e) of the Revised Rules of Procedure of the Committee, the chairperson of the Committee acted on one of his duties to follow up on the compliance of the of the Committee's recommendations in the Nubian children's case. The chairperson of the Committee, visited Kenya in 2013 a couple of months after the decision was made and reported on his visit in 2017 during the 29th session of the Committee. Unfortunately, the reasons why it took three years to report back to the Session were not given. Generally, considering the urgency required to act swiftly and timely in the protection of children's in Africa,[44] this delay is unacceptable especially concerning countries with a poor record of implementing its own laws protecting children.[45]

Notwithstanding, in the report from the visit, it was noted that the government of Kenya has indeed made some effort to comply with the recommendations of the Committee, as the government is currently busy reviewing its legislature around citizenship and registration of persons. It has taken long, but this is a welcomed step. It is critical that the State moves fast to finalize this process as to recognize children of Nubian decent as Kenyans without them undergoing any arduous vetting process. From the look of things though, this will not happen in a great rush as there is still a lot, such as ascertaining political willing and for some Kenyans to accept Nubians as compatriots.

4.1.2 Kenya's report to the ACERWC

During its 29th session, the ACERWC invited Kenya to report to the committee on the measures it has taken to implement its recommendations in the Nubian Children's Case. Kenya's submission took place in the presence of the complainants, representatives of the Nubian community and civil society organizations. The present author observed those proceedings.

The delegation from the Government of Kenya, presented the country's position on the progress it has made in complying with the recommendations of the ACERWC in the Nubian Children's Case. The report did not only focus on measures that would resolve the current plight of the children

44. See e.g. Nubian Children's Case, para 31.

45. G Odongo, 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms' (2012) 12 African Human Rights Law Journal 135.

of Nubian decent. A welcomed approach especially since the aspects complained about in the communication were multi-generational in nature and did not only concern the generation of children in respect of whom the communication was brought before the Committee in 2009. The head of delegation promised that the government of Kenya is taking legislative, administrative and other measures to comply with the decision of the Committee on the Nubian children's case.

He then went on to report on the measures the State has taken to improve the legal framework in Kenya through the adoption of the 2010 Constitution, which protects a throng of issues related to the aspects raised in the recommendations. For instance, article 14 on citizenship by birth; article 15 on citizenship by registration and article 27 that protect every Kenyan's right to equality and freedom from discrimination. He then proceeded to list other measures that the State of Kenya has put in place.

First, based on the Constitution of 2010, the government has started a process of granting citizenship to descendants of migrants and stateless persons eligible for registration for citizenship. Secondly, the government has also opened an 8-year window of registration of children up to 29 August 2019 and has put in place a monitoring plan in health facilities to ensure that every birth is registered at any maternal health outlet. Thirdly, the government has also started conducting accelerated mobile registration, establishment of a guideline on orphan and vulnerable children, re-engineering the education management information system, sensitization of religious leaders on birth registration, distribution of registration guidelines to registration agents, ensuring that, government registers all birth as soon as they occur irrespective of any circumstance, subsidizing secondary school education, capitation increase in 2014/15 academic year, including fruits and vegetables in school feeding programs, health facilities development, commencing free child delivery services, including HIV/AIDS education in the school curriculum and making the principle of Non-Discrimination central to issues of health and education. The delegation proceeded to add that the government of Kenya has put in place a long-term vision up to 2030 that will address similar issues in various vulnerable groups within its social pillar.

The Committee welcomed the report from the state of Kenya and appreciated some of the issues they have listed as measures the government is taking to address the recommendations of the African Children's Committee. Unfortunately, a juxtaposition of the measures outlined by the government and the recommendations of the Commission and the Committee reveals the measures as weak and not specifically directed to resolve the plight of the Nubians in Kenya. True, a comprehensive approach to find resolves Kenya's health related issues is progressive but it does address the recommendation to facilitate access to health services to the Nubians.

1.1.3 Concluding observations

Concluding observations, just like general comments, are two critical pressure strategies under international law used by monitoring bodies such as the ACHPR and the ACERWC to make tangible recommendations to state parties on measures that can be taken at national level to complement the progress registered and the challenges faced in meeting their obligations under a particular human right treaty. However, as seen below, both measures are different in context and intention. Contrary to general comments, concluding observations is country-specific and is the result of, for example, the ACERWC's examination of a particular state party report. So far, the ACERWC has published 39 concluding observations of which two concluding observations are on Kenya's initial and first periodic state party report.[46] In both concluding observations, the ACERWC makes specific recommendations to Kenya on how to improve its implementation of the African Children's Charter. Of specific interest to this chapter is the ACERWC's second concluding observation on Kenya, which specifically includes its observation on the state's compliance with its decision in the Nubian Children's Case. In it, the ACERWC takes:

> note of the decisions rendered by the Committee, and the African Commission on Human and Peoples' Rights, the Committee regrets that there is a huge gap in the implementation of decisions concerning the Nubian children and their access to birth registration and the necessary documentation. The Committee rendered a decision in 2011, but the State has not implemented the decision fully and the situation remains to be the same for unregistered children. The Committee urges the State Party to urgently take measures to comply with the decision of the Committee as well as that of the Commission.[47]

46. See generally the African Children's Committee CO, available http://www.acerwc.org/concluding-observations/ (accessed: 16.04.2018).

47. Supra para 12. See also, para 23.

4.1.3 ACHPR's silence

Currently, there is no evidence of any effort made by the Commission after it made its recommendation on the Nubian people's case in 2015. The Commission did not bother to the extent that even in its Concluding Observation in 2016[48] no mention was made to ask Kenya to expedite the implementation of existing laws such as Kenya Citizenship and Immigration Act of 2011 to recognize Nubians as Kenyans. Notwithstanding, in paragraph 60 the ACHPR called on the government of Kenya "to take urgent measures to address indigenous peoples' specific needs in relation to land, education, health, employment and access to justice, and further ensure that affirmative action policies and measures adopted in this respect effectively and adequately benefit them". Broadly, this also involves the Nubians.

4.2 Effect of the vetting process

Possibly, the main deterring factor and perhaps a stronger signal that Kenya will not fully comply with the recommendations from the Commission and the Committee is the rigorous and lengthy vetting process required for obtaining nationality in Kenya. Prior to the Committee's decision in 2011 and the Commission's decision in 2015, the vetting process had no tangible legal base. Even though they were justified through the expansive interpretation of the provision of Section 8 of the Registration and Persons Act,[49] which permits registration authorities to request additional information to justify ones nationality – it was only in 2014 - before the Commission's decision - that the State, based on security concerns amended it security laws to firmly consolidate vetting within the security framework without any clear safeguards to guide registration authorities.[50]

This chapter argues that even though the State has made legislative, and to some extent administrative attempts, to comply with the recommendations from the Commission and the Committee, the difference in the level of compliance with both decisions lays in the vetting process. It should be noted that some Nubian adults already have Kenyan citizen – of course it was after they were vetted. But, the brunt of the vetting process is weightier on the children of Nubian decent who still have to face the arduous and discriminatory vetting process to justify their nationality.

The vetting process affects children more than adults because childhood statelessness have far reaching consequences that threaten a child's access to education, health care, standard of living and related developing entitlements.[51] The requirement for a child to provide additional information during vetting processes to register his/her citizenship in Kenya inadvertently creates unnecessary administrative complications, which could distort a child's development.[52] Beyond complying with the recommendations, as a matter of urgency, the State needs to establish a legal balance between security and rights – in the case of children, this chapter argues that the State should adopt a rights based approach rather than a security based approach in granting children Kenyan citizenship. A rights-based approach will not only enable the State to meet its commitment under its constitutional principles, it will also enable the State to meet its promise in its Children's Act of 2001. Largely, it will also facilitate a justified respect for children's right to a nationality protected under article 6 of the African Children's Charter. Relating to Nubian adult in still to acquire a Kenya nationality, a right based approach will also help guarantee their enjoyment to rights pertaining to adults such as land rights and security of tenure.

As the Commission and the Committee noted, Nubians are indiscriminately and unreasonably impacted by the government's current policies on issuance of citizenship.[53] Broadly, Kenya is actively failing its children and its indigenous groups - especially those from communities such the Nubians and those born in the coastal regions of the Country. In a conversation with a resident at the coast – Mombasa – it was equally troubling to learn that children born in this area are also subjected to unscrupulous vetting procedures to justify their nationality. Indeed, in 2015, the Commission on Administrative Justice reported that there is widespread distrust and uncertainty even in the government's confidence of its administrative proficiency in the vetting process and the issuance of registration and documentation due to persistent corruption.[54] Children from these areas continue to face systematic discrimination because of the way the

48. Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya, adopted at 19th Extraordinary Session, 16 - 25 February 2016, Banjul, Gambia.

49. See generally the Registration of Persons Act of 1973 (amended by the Registration of Persons of 1987) available at www.kenyalaw.org (accessed 17.05.2018).

50. See, sec. 23 of Security laws (amendments) act of 2014. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws_Amendment_Act_2014.pdf (accessed 17.5.2018).

51. V Aragón 'Statelessness and the right to nationality' (2013) 19 Southwestern Journal of International 341.

52. Equal Rights Trust & Kenya Human Rights Commission In the spirit of harambee: Addressing discrimination and inequality in Kenya (2012) available at http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf (accessed 21.05.2018)

53. See e.g. Nubian Children's Case, para 55.

54. Commission on Administrative Justice Stateless in Kenya: An investigative report on the crisis of acquiring Identification documents in Kenya (2015).

system of administration is structured with respect to their community.

5. Way forward

Kenya's citizenship legal framework and the procedure required to attain citizenship is uncertain and complicated especially for people from minority communities like the Nubians. Indeed, Kenya is a special case as it embodies characteristics and challenges that arise from countries that have experienced legacies of discrimination and a combination of a complex national legal framework that govern citizenship. One of the complex challenges surrounding children's right to a nationality in Kenya is that its citizenship laws are complex and selectively implemented at the national level. If the State plans to comply with the decision of the African Children's Committee, it would need to, as a matter of urgency, improve its administrative and technical capacity for civil registration. This will be key to ensure that the State also meets its commitment to the Committee and to ensure that it follows and keeps to the timelines set in Agenda 2040.

The first two signs that Kenya needs to flag as a strong intention to comply with the decision of the Committee would be to outlaw its vetting process. The vetting procedure implemented in Kenya is demeaning, corrupt, embarrassing and a central contributor to Kenya's failure to uphold its commitment under the African Children's Charter. It is also the central issue that distinguishes Kenya's level of compliance between the decision of the Commission and the Committee. Furthermore, Kenya must extricate citizenship from security risk issues by exempting children from Section 23 of its Security Laws.[55] It is vicious to approach children's rights protection (especially their right to a nationality) from a security perspective as anyone has the potential to be a security risk.[56] In fact, not granting children the right identity document or leaving them stateless does not help to curb security but would frustrate the child from enjoying their rights and the State from carry out any comprehensive investigation in the event of any security issue. Jayaraman believes that significant legal impediments at the national level could prevent States from fully implementing proposed security plans.[57] It is common knowledge that Kenya has a history of security issues, but having stateless communities is a bigger and existing security problem that needs to be addressed with urgency.

At the regional level, there is a crucial need for both organs (Committee and Commission) to collaborate and work jointly with the government of Kenya to find lasting solutions to solve Kenya's citizenship challenges. Such collaboration could begin with the appointment of a special rapporteur to thoroughly investigate issues around statelessness in Africa with specific focus on Kenya in this case. This will provide the much-needed research and support the Committee and Commission need to ascertain the level at which Kenya has complied with the decision in respect of the Nubian community as a whole and related cases in Kenya. Also, the urgency required in the implementation of children's rights in general indirectly compels the Committee to put in place better and progressive accountability measures with the intention to mount reasonable pressure on states to comply with its decisions. A record of all actions under taken by the Committee to investigate state compliance could be one of such measures. It is saddening that the secretariat those not have any report from the visit of the Committee to Kenya. Such reports will not only assist the secretariat track the level of compliance, but it will also give the Committee an importunity to improve its approach to follow up on compliance of its decisions.

6. Conclusion

To conclude, it is worth noting that all three major aspects in the Nubian cases – nationality and citizenship, land rights and security of tenure, and forced evictions – are interlinked. As noted by the ACERWC in the Nubian Children's Case, access to a nationality or citizenship has critical and tangible implications to access other rights such as basic public services and to enjoy other economic opportunities. Simply put, having a nationality or citizenship is parallel to having the right to have and enjoy rights. It is dignifying. What is worrying in the case of Kenya is the reluctant approach that the State has adopted towards addressing the recommendations from the regional bodies. It is equally disturbing to note that despite some of the efforts that the ACERWC has put in place to mount reasonable pressure on Kenya, children's citizenship issues are still subjected to arduous vetting procedures that continue to marginalize children from minority communities in Kenya.

On the other hand, the State has made some reasonable effort to comply with the recommendations

55. Security laws (supra note 55 above).

56. S Jayaraman 'International terrorism and statelessness: Revoking the citizenship of ISIL foreign fighters' (2016) 17 Chicago Journal of International Law 178.

57. Jayaraman (n 56 above) 118.

of the ACHPR. In fact, the State has taken more steps to comply with the recommendations of the ACHPR as compared to those of the ACERWC. This could be based on two major reasons. First, it could be argued that the recommendations from the ACHPR are not necessarily new, that is, the State of Kenya is familiar with them through the decision in the Endorios Case, for example. As such, the government was already working to fix problems related to land rights and security tenure in the country. Second, government of Kenya has a weak political will to implement laws relating to children.

CHAPTER THREE

STATE IMPLEMENTATION OF REGIONAL DECISIONS ON THE RIGHTS OF INDIGENOUS COMMUNITIES IN KENYA

Japhet Biegon & Amina Ahmed

1. Introduction

The rights of indigenous peoples or communities have gained increasing acceptance and visibility in Africa in the last two decades. The African regional human rights bodies have been the driving force behind this recognition, with the African Commission on Human and Peoples' Rights (ACHPR) leading the way. Prodded and supported by Non-governmental Organizations (NGOs) concerned with and working on human rights issues affecting indigenous peoples in Africa, the ACHPR established the Working Group on Indigenous Populations or Communities in Africa in 2000.[1] The establishment of the Working Group has been aptly described as an "epic step".[2] This is primarily because of the central role it has played in clarifying the concept of "indigenous peoples" through its work,[3] and most famously, in its seminal report issued in 2003.[4] In this report, it also unequivocally affirmed the existence of indigenous peoples in Africa. Later, through an advisory opinion,[5] the Working Group played an influential role in nudging the majority of African states to accept and endorse the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[6]

Standard setting and normative articulation has not been the only contribution of the ACHPR in promoting and protecting the rights of indigenous peoples in Africa. Indeed, its most significant contribution has been through its complaints or communications procedure. In 2010, the ACHPR issued a landmark decision on the concept and rights of indigenous peoples in the case of Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois Community) v. Kenya (Endorois Decision).[7] In this decision, the ACHPR found that Kenya's forced eviction and expulsion of the Endorois community from their ancestral land to create space for a national reserve and subsequently allowing mining in that land violated numerous rights under the African Charter on Human and Peoples' Rights (African Charter), including the right to property, education, culture, and development. The ACHPR issued several recommendations, including that the Kenyan state compensates the community for the violations they had suffered.

In November 2009, just at the time the ACHPR was finalizing the consideration of the Endorois Decision, it received yet another case concerning the rights of an indigenous community in Kenya, the Ogiek. After about two years, the ACHPR opted to refer the case to the African Court on Human and Peoples' Rights (ACtHPR) on the ground that it revealed serious and massive human rights violations. Registered at the ACtHPR as African Commission on Human and Peoples' Rights v. Kenya (Ogiek Case),[8] it raised similar issues like those in the Endorois Decision. In May 2017, the ACtHPR issued its judgment (Ogiek Decision) in which it found that the frequent forced evictions

1. Resolution on the Rights of Indigenous Peoples' Communities in Africa, ACHPR/Res.51 (XXVIII)00 (adopted at the 28th Ordinary Session, Cotonou, Benin, October 2000).

2. K Bojosi 'The African Commission Working Group on Experts on the Rights of Indigenous Communities/Populations: Some reflections on its work so far' in S Dersso (ed) Perspectives on the rights of minorities and indigenous peoples in Africa (2010) 95.

3. See Bojosi (n 2 above). See also K Bojosi & G Wachira 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights (2006) 6 African Human Rights Law Journal 382.

4. Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/Communities, ACHPR/Res.65 (XXXIV)03 (adopted at the 34th Ordinary Session, Banjul, The Gambia, 20 November 2003).

5. Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (adopted at the 41st ordinary session, Accra, Ghana, May 2007).

6. UN Doc A/C.3/61/L.18/Rev.1.

7. ACHPR Communication 276/2003, 46th Ordinary Session, 11-25 November 2009; (2009) AHRLR 75 (ACHPR 2009).

8. ACtHPR App. No. 006/2012.

of the Ogiek from their ancestral land violated, inter alia, religious, cultural and land rights of the Ogiek. The ACtHPR ordered Kenya to remedy these violations.

This Chapter examines the extent to which Kenya has implemented the decisions in the Endorois and Ogiek cases. Coincidentally, the decisions of the African regional human rights bodies concerning indigenous peoples all relate to Kenya. Before the Endorois Decision, the ACHPR had received two communications dealing with the indigenous peoples' rights,[9] but both of them were not decided on their merits, as they were declared inadmissible. Coincidentally also, two of the major decisions of the regional bodies dealing with the rights of minority groups relate to Kenya. These are: The Nubian Community in Kenya v. Kenya,[10] decided by the ACHPR in 2015 and Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya v. Kenya,[11] decided by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in 2011. Fokala discusses the extent of the implementation of these two decisions in Chapter Two. The relative flurry of cases against Kenya at the regional bodies concerning the rights of indigenous peoples and minorities reveal contestations at the domestic level on the recognition of the existence and rights of these groups. This Chapter delves into these contestations using implementation of the two regional decisions as an analytical frame.

2. Overview of the decisions

This section provides brief summaries of the Endorois and Ogiek decisions. It does not delve into the arguments made by the parties in their written submissions or during oral hearings. Nor does it interrogate the reasoning of the treaty bodies or the jurisprudential path that they took to reach the decision. As shown below, scholars have already examined these decisions in great detail. The focus here is to outline, briefly, the circumstances that led to the cases to reach the concerned regional bodies. It also outlines the recommendations or orders issued by the relevant regional bodies. This sketch allows for a firm appreciation of the analysis on the extent of implementation that we present later in Section 3.

2.1 Endorois Decision

The Endorois are an indigenous pastoralist community of about 60,000 people. They have historically resided around the Lake Bogoria area in the Rift Valley of Kenya. In 1973, the Kenyan State evicted about 400 Endorois families from part of this ancestral land in order to establish the Lake Hannington Game Reserve, which was later renamed Lake Bogoria Game Reserve. The community's access to Lake Bogoria areas, where they grazed cattle, had religious sites, and performed cultural practices, was subsequently restricted. In 1986, a section of the community, comprising of 170 families, was compensated for the eviction. But other promises of the government, including that the community would receive a percentage of the tourist revenue generated by the Game Reserve, were never met. Instead, the government granted concessions to private companies to conduct mining inside the Lake Bogoria area. The community was not consulted before these concessions were granted. Nor did the community receive any benefits from the mining.

In 2000, the community took their grievance to the Kenyan High Court, which found that the Endorois' claim to the disputed land had been extinguished by the operation of the law.[12] After they failed to find any satisfactory redress at the domestic level, the Endorois community filed a complaint before the ACHPR in 2003. They alleged that the dispossession from their ancestral land violated numerous of their rights under the African Charter, including the right to property, religion, culture and development. The communication also questioned Kenya's refusal to register the Endorois Welfare Committee (EWC), a representative body established by the community to advance its interests. In its decision issued in February 2010, the ACHPR validated the claims by the Endorois.

9. Bakweri Land Claims Committee v Cameroon (2004) AHRLR 43 (ACHPR 2004); Anuak Justice Council v Ethiopia, ACHPR Communication 299/05, 39th Ordinary Session, 11-25 May 1995.

10. ACHPR Communication 317/2006, 17th Extraordinary Session, 19-25 February 2015.

11. ACERWC, Communication 002/2009, 22 March 2011.

12. For a summary of the domestic case see A Barume Land rights of indigenous peoples in Africa (2014) 105-110.

The ACHPR made six distinct recommendations to Kenya. First, it called on the government to recognize the ownership rights of the Endorois and restitute the community to its ancestral land. Second, it asked that the community be granted unrestricted access to Lake Bogoria and the community's sites for religious and cultural rites. Third, the ACHPR recommended that the Kenyan government pays compensation to the community for the loss they had suffered. Fourth, it asked the government to pay royalties to the community from any existing economic activities in the Lake Bogoria area. The fifth recommendation required the government to register the EWC while the sixth called upon the government to engage in dialogue with the community for the effective implementation of the decision. The ACHPR also asked Kenya to report back to it on the measures taken to implement the decision within three months.

The Endorois Decision is globally celebrated for its jurisprudential value both in the realms of indigenous rights and the right to development. It has been lauded as "a major victory for indigenous peoples across Africa".[13] Amongst other things, it marked the first time that an international tribunal had found a violation of the right to development. The decision has generated a lot of academic interest and it has been the subject of analysis by scholars in Africa and beyond.[14] Relatively less attention has been paid to the extent to which the Kenyan government has implemented the decision.[15]

2.2 Ogiek Decision

The Ogiek are a hunter-gatherer community who inhabit the Mau Forest Complex in the Rift Valley of Kenya. Like the Endorois, their population is considerably small, as they number between 35,000 and 45,000. They have lived in the Mau forest for hundreds of years and they consider it their ancestral land. As forest dwellers, they depend on it for food, shelter, livelihood and identity. However, their stay in the Mau forest has always been interrupted by routine forced evictions by the government. These evictions span several decades. At each instance, the Ogiek have resisted and objected to the evictions, including by seeking the intervention of the courts and engaging in advocacy with relevant government authorities.[16] Things escalated in October 2009 when the government issued an eviction notice requiring the Ogiek to vacate the forest within 30 days. The government based the eviction notice on the ground that the Mau forest was not only a reserved water catchment zone but it was also a designated government land.

Faced with imminent expulsion from their ancestral land, the Ogiek filed a case before the ACHPR in November 2009, challenging the notice, which they argued was a perpetuation of the historical injustices they had long suffered. Invoking its procedure for provisional measures, the ACHPR promptly asked the Kenyan government to suspend the evictions pending the determination of the case. Although the Kenyan government did not follow through with its notice to evict the Ogiek, it did not formally respond to the request for provisional measures. As the situation of the Ogiek was still precarious, the ACHPR decided in July 2012 to refer the case to the ACtHPR, arguing that it revealed serious and massive human rights violations. The case alleged violations of seven rights under the African Charter: the right to property, freedom from discrimination, right to life, freedom of religion, right to culture, right to freely dispose of wealth and natural resources, and the right to development. The Ogiek's prayers in the case included that the Kenyan government recognize Ogiek's ownership of their ancestral land and to pay compensation for the loss they had endured for decades.

As a first step, the ACtHPR issued an order for provisional measures similar to the one that the ACHPR had issued in 2009. An eight-year long legal process then ensued. The ACtHPR issued its judgment on 26 May 2017. It found the Kenyan government had violated all the rights claimed by the Ogiek, except the right to life. The ACtHPR ordered the Kenyan government to take "appropriate measures" within a reasonable time to remedy the violations of the Ogiek's rights and to inform

13. Human Rights Watch 'Kenya: Landmark ruling on indigenous land rights' available at https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights (accessed 13 March 2018).

14. See e.g. E Ashamu 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya: A landmark decision from the African Commission' (2011) 55 Journal of African Law 300; J Gilbert 'Indigenous peoples' human rights in Africa: The pragmatic revolution of the African Commission on Human and Peoples' Rights (2011) 60 International & Comparative Law Quarterly 245; G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 Africa Affairs 24.

15. See F Viljoen 'The African human rights system and domestic enforcement' in M Langford et al (eds) Social rights judgments and the politics of compliance: Making it stick (2017) 351, 379-386; D Inman 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: Revisiting the Endorois and the Mamboleo decisions (2018) 2 African Human Rights Yearbook 400; A Mmari 'The challenges surrounding the implementation of the right to development in the African Charter of Human and Peoples' Rights in light of the Endorois case', Unpublished LLM dissertation, University of Pretoria, 2012; H Ekefre 'Implementation of the decisions of Africa human rights treaty bodies: A study of the Endorois and Nubian Children's decisions', Unpublished LLM Dissertation, University of Pretoria, 2015.

16. See Barume (n 12 above) 95-105.

the Court of those measures within six months. The Court reserved its decision on reparations, which was still pending as at the time of completing this Chapter.

Like the Endorois Decision, the Ogiek Decision was received with much joy and celebration. It is the first decision of the ACtHPR to consider the rights of indigenous peoples. It reasserted the collective rights of indigenous peoples and reaffirmed the obligation of states to promote and protect these rights. On the day it was issued, it made headlines news both locally and internationally.[17] The Ogiek Decision has also attracted a significant amount of academic interest and there is now a burgeoning scholarly literature on the case.[18]

3. Status of implementation

It is slightly more than a decade since the ACHPR issued the Endorois Decision while three years have passed since the ACtHPR delivered the Ogiek Decision. As this section shows, both decisions have not been fully implemented despite concerted pressure and advocacy from many role players, ranging from the affected communities to the regional bodies and UN human rights actors. The steps the Kenyan government has taken to implement the decisions are at best cosmetic and tentative. State implementation efforts have targeted the "low hanging fruits", such as the ACHPR recommendation to register the EWC. In implementing this recommendation, the government incurred little, if any, cost. Those recommendations that go to the root of the decisions, such as restitution of the ancestral lands to the communities or the payment of compensation and royalties, have remained unimplemented.

The Task forces established by the government to look into and advise the appointing authorities on the practical aspects of implementing the decisions have not yielded much. They have simply created the illusion of a government busy at work to implement the decisions, but with little tangible results to show for it in reality. More importantly, the duplicity of the government has been revealed by its continuing violations of the rights of the communities. The threat of forced evictions has remained hanging over the communities like the sword of Damocles. In certain occasions, these threats have been made good. In the paragraphs that follow, we discuss the government behaviour in relation to the three main kinds of its response to the decisions: the implementation of low cost recommendations or orders; the establishment of taskforces; and the continuing prevalence of violations. In the first instance, however, the section describes the government's initial positive response to the decisions, a stance that quickly evaporated.

3.1 Initial commitment on implementation

The Kenyan government has never openly rejected the findings and recommendations or orders in the Endorois and Ogiek Decisions. On the contrary, it has always signaled, both expressly and impliedly, that it is committed to implementing the decisions. The clearest statement of commitment came soon after the ACHPR issued the Endorois Decision. In an elaborate and huge ceremony organized by the Endorois to celebrate the decision, the then Minister for Lands, Honourable James Orengo, publicly announced the government's willingness to implement the decision. He particularly said that the government had "no option but to implement the African Commission recommendations".[19] He undertook to prepare a cabinet memorandum for the implementation of the decision. Although it reiterated its commitment during the November 2010 ordinary session of the ACHPR,[20] this commitment quickly started to waver, and in the long-term, it has proven to be a "false positive",[21] one designed to deflect pressure and criticism from local and international actors.

After the March 2010 statement by the Minister for Lands, many months passed without a cabinet memorandum or any visible progress in the implementation of the Endorois Decision. In January 2011, a Member of Parliament asked the Minister to outline to the National Assembly the steps the government had taken to implement the Decision. The Minister explained that although he had a

17. See e.g. 'Kenya's Ogiek win land case against government' available at https://www.aljazeera.com/indepth/features/2017/03/kenya-ogiek-win-land-case-government-170314135038447.html (accessed 13 March 2018).

18. R Rösch 'Indigenousness and peoples' rights in the African human rights system: Situating the Ogiek judgment of the African Court on Human and Peoples' Rights (2017) 50 VRÜ Verfassung und Recht in Übersee 242; L Claridge 'Litigation as a tool for community empowerment: The case of Kenya's Ogiek' (2018) 11 Erasmus Law Review 57.

19. 'Will state respect community's land rights', The Standard, 23 March 2010, cited in G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2011) 111/442 African Affairs 24, 41.

20. Viljoen (n 15 above) 380.

21. See B Simmons Mobilizing for human rights: International law in domestic politics (2009) 18.

copy of the Decision, he would not move forward the process of implementation until he received "an authenticated or sealed" copy.[22] This explanation has been described as a "flimsy excuse" by one commentator,[23] and "churlish and obstructionist" by another,[24] because even after the Minister received the sealed copy, he took no tangible steps to implement the Decision.[25]

In subsequent years, the Kenyan government has continued to express its commitment to implement the Endorois Decision, at least before international audiences. During the 2013 mid-term assessment of its report under the United Nations (UN) Universal Periodic Review (UPR), the government informed the UN Human Rights Council (HRC) that the country's Attorney General and the Ministry of Lands were working on the modalities of implementing the Decision.[26] It had a similar message for the World Heritage Committee four years later in 2017.[27] However, recent reports to international or regional human rights bodies, such as the Combined 8th–11th Periodic Report to the ACHPR,[28] and the National Report submitted to the HRC as part of the third UPR cycle,[29] are particularly striking because of the conspicuous absence of any discussion on the implementation of the Endorois Decision, or more generally, the protection of indigenous communities.

3.2 Low cost and tentative implementation measures

Despite backpedalling on its initial commitment, the Kenyan government has taken some (tentative) steps to implement some aspects of the decisions with low cost implications. First, the government has granted registration to the EWC in compliance with the recommendation of the ACHPR in the Endorois Decision. The EWC, previously known as the Endorois Welfare Management Committee, was formed in 1985 to advance the common interests of the Endorois related to, inter alia, land rights and community recognition. Before lodging the case before the ACHPR, the EWC had on two separate occasions unsuccessfully applied for registration. The denial of a formal status to the EWC was a calculated strategy by the government to engage in "negotiations" with carefully selected members of the Endorois community, thereby bypassing the EWC, which had the legitimate authority to negotiate on behalf of the community. As discussed below, the registration of the EWC allowed it to have a seat at the negotiation table. It was also able to apply for observer status before the ACHPR, which it received during the Commission's 53rd ordinary session held in April 2013.

Second, a mechanism for the involvement of the Endorois in the management of the Lake Bogoria National Reserve has been established. On 24 May 2014, the Kenya Wildlife Service (KWS), the Baringo County Government, the Kenyan Commission to the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the EWC signed a Memorandum of Understanding (MoU) establishing the Lake Bogoria National Reserve Management Committee.[30] Christened the Kabarnet Declaration, the MoU is significant as it recognizes the Endorois as a community and the EWC as their representative organization. More importantly, it designates the Management Committee as the key body with the responsibility of managing the affairs of the Lake Bogoria National Reserve, including matters of revenue allocation and benefit sharing. The EWC sits in the Management Committee as the representative organization for the Endorois community. After its establishment, the Management Committee embarked on developing a joint integrated management plan for the Lake Bogoria National Reserve. The completion date for the plan was set for December 2016, but it appears it had not yet been finalized as at the time of writing.

The formation of the Management Committee and the inclusion of the EWC in its membership is a crucial step towards implementing the recommendations of the ACHPR relating to payment of royalties and unrestricted access to Lake Bogoria. However, the authors could not establish whether in practice, the EWC has been meaningfully engaged in the management of the Lake Bogoria National Reserve or if it has participated effectively in decision-making. It is noteworthy, though, that in early 2019 a member of the EWC raised concerns with the World Heritage

22. Kenya National Assembly Official Record (Hansard), Tuesday 18 January 2011, p. 18.

23. Lynch (n above) 41.

24. Viljoen (n 15 above) 380.

25. M Odhiambo 'A solution to the forced displacement of the Endorois in Kenya: Working towards the implementation of the African Commission on Human and Peoples' Rights Decision (November 2008 – October 2011) (2012) 18.

26. UPR Info Mid-term implementation assessment: Kenya (2013) 28.

27. Kenya Lake System in the Great Rift Valley, available at http://whc.unesco.org/en/soc/3626 (accessed 29 June 2020).

28. Combined 8th-11th Periodic Report on the African Charter on Human and Peoples' Rights, November 2014.

29. National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Kenya, A/HRC/WG.6/KEN/1, 11 November 2019.

30. Kenya Lake System in the Great Rift Valley, available at http://whc.unesco.org/en/soc/3231 (accessed 29 June 2020).

Committee about the state and governance of Lake Bogoria in relation to the Endorois.[31]

It is also noteworthy that the community received royalties from a bio-prospecting company in December 2014 as part of an agreement entered between the company and the KWS.[32] The community has also been granted access to Lake Bogoria, but this is based on an ad hoc agreement between the community and the county government.[33] A few members of the Endorois community have been employed at the Lake Bogoria National Reserve, mainly because of community demonstrations and picketing that disrupted tourism at the Reserve and compelled the Baringo County government to negotiate with the community.[34]

3.3 Establishment of task forces

The most prominent response of the Kenyan government to the Endorois and Ogiek Decisions has been the formation of task forces to advice it on various aspects related to the implementation of the decisions. The Task Force for the Implementation of the Endorois Decision (Endorois Task Force) was established four years in September 2014 through a Gazette Notice signed by the President.[35] While its official name may create the impression that it is responsible for implementing the Decision, the terms of reference of the task force make it clear that it is an advisory body. In this regard, the Task Force has four substantive terms of reference: (a) study the Endorois Decision and provide guidance on its political, security and economic implications; (b) examine the potential environmental impacts on Lake Bogoria and the surrounding area as result of implementing the Decision; (c) examine the practicability of restitution of Lake Bogoria and the surrounding area to the Endorois community, taking into account that lake is classified as a World Heritage Site by UNESCO; and (d) assess the amount of compensation payable to the Endorois community for losses suffered and for settlement of royalties owed from existing economic activities on and around Lake Bogoria.

The establishment of the Endorois Task Force signalled a potential turning point, considering that four years had passed without much progress in implementing the Endorois Decision. However, the manner of its establishment as well as its composition immediately raised concerns. The Task Force was established without any consultation with the Endorois community and in contravention of the ACHPR recommendation that the government consults with or engages in dialogue with the community regarding the implementation of the Decision. Moreover, the Task Force has no representation at all from the Endorois community. Its five core members are exclusively state officials, drawn from the Office of the Attorney General, Ministry of Lands, Ministry of Culture, the Kenya National Commission on Human Rights (KNCHR) and the Baringo County Government. Although the Gazette Notice establishing it provides that the Task Force may co-opt not more than three additional members, it has no express obligation to include representatives of the Endorois. Nor is it required to specifically consult with the Endorois community.

Despite the fact that it had six months to submit an interim report to the President, and a final one after a year from its establishment, the Endorois Task Force did not do much for many months because of lack of funds. About a month after it was formed, the Task Force held its first and only meeting with the Endorois community.[36] Although this was an encouraging gesture, the Task Force did not give the Endorois sufficient notice for the meeting and has never returned to more meaningfully engage with the community.[37] As at the time of writing, the legal status of the Task Force was unclear, as its mandate had not been renewed for a extended period of time.

The government, through the Cabinet Secretary for Environment and Forestry, first established the Task Force for the Implementation of the Ogiek Decision (Ogiek Task Force) in October 2017.[38] Its core mandate mirrored that of the Endorois Task Force insofar as it was required to study the Ogiek Decision and recommend measures to provide redress to the Ogiek. However, it had additional mandate areas, including studying domestic judgments relating to the Ogiek's occupation of the Mau Forest, examining the effect of the Ogiek Decision on other similar cases in other areas in the country, establishing the registration status of the land claimed by the Ogiek, studying all land related laws and policies to see how they address the plight of the Ogiek and raising awareness about the rights of indigenous peoples. Once again, the government neither

31. Kenya Lake System in the Great Rift Valley, available at http://whc.unesco.org/en/soc/3922 (accessed 29 June 2020).

32. Kenya Lake System in the Great Rift Valley, available at http://whc.unesco.org/en/soc/3231 (accessed 29 June 2020).

33. OHCHR & EWC meeting report, Nakuru. Kenya, 25-26 July 2016, available at https://www.accahumanrights.org/images/reports/EWC/EWC_OHCHR_Nakuru_report.pdf (accessed 29 June 2020).

34. ESCR-Net The emerging leadership of Endorois women: An indirect impact of the Endorois case (2019) 12.

35. Task force on the Implementation of the Decision of the African Commission on Human and Peoples' Rights contained in communication No. 276/2003 (Centre for Minority Rights Development on behalf of Endorois Welfare Council vs Republic of Kenya), Gazette Notice No. 6708, 19 September 2014.

36. 'First meeting of the Kenya task force for the implementation of the Endorois decision' available at https://www.escr-net.org/news/2014/first-meeting-kenyan-task-force-implementation-endorois-decision (accessed 30 June 2020)

37. ESCR-Net (n 34 above) 13.

38. Task force on the implementation of the decision of the African Court on Human and Peoples' Rights issued against the government of Kenya in respect of the rights of the Ogiek community of Mau, Gazette Notice No. 10944, 23 October 2017.

consulted the concerned community in establishing the Task Force nor were representatives of the community included in it.[39] The Task Force comprised of government officials from the Office of the President, Office of the Deputy President, Ministry of Environment, Ministry of Lands, National Lands Commission (NLC), Office of the Attorney General, Ministry of Culture, National Treasury, KNCHR and the Kenya Forest Service.

The Task Force had six months to complete its work, but this period lapsed before it could deliver its final report. The failure to deliver on its expected output was in part due to lack of funds, which effectively paralysed the operations of the Task Force for the greater part of the six-month period.

In October 2018, a new Cabinet Secretary for Environment and Forestry established a new task force,[40] overhauling the mandate of the previous one. The core mandate of the new Task Force remained making recommendations on how to give effect to the Ogiek Decision, but the additional mandate areas revolved around the participation of indigenous communities in the sustainable management of forests. In this regard, it was required to review existing relationships between indigenous communities and public institutions involved in the management of forests with a view to: identifying any working mechanisms; documenting any grievances and available redress mechanisms; identifying models for sustainable access and user rights of indigenous communities in relation to forests; and identifying any innovative models on climate change adaptation and mitigation.

Initially required to submit its final report within six months, the term of the Task Force was extended for another six months from April 2019 and then for a further three months from November 2019.[41] In the course of 2019, the Task Force conducted hearings in different parts of the country and met with forest-dwelling communities in the Mau Forest Complex, Mount Elgon Forest and Mukogodo Forest.[42] The Ogiek community had the opportunity to present a community memorandum to the Task Force in February 2019.[43] As at the time of writing, the final report of the Task Force had been submitted to the Cabinet Secretary but it was yet to be made public. There are doubts whether the Task Force has made recommendations that will ensure full implementation of the Ogiek Decision. In June 2019, the Ogiek Peoples' Development Program (OPDP) and Minority Rights Group (MRG) expressed concern that some members of the Task Force had questioned whether the Ogiek are an indigenous people, notwithstanding the African Court's clear finding on this matter.[44] A commentator has recently also observed that because the Task Force did not adopt an approach that involved the Ogiek in identifying and mapping their ancestral lands in the Mau Forest, it is "unlikely to chart a viable way forward".[45]

The circumstances surrounding the formation of the Endorois and Ogiek task forces and their ensuing protracted processes have only served to fuel scepticism about the government's commitment to implement the regional decisions. This scepticism has been made stronger given Kenya's unpleasant history of task forces. Together with commissions of inquiry, task forces have been traditionally used to circumvent justice, bury the truth, and deflect or deflate public outrage and concern on key issues of governance and human rights.[46] The reports of these bodies have rarely been promptly released to the public, if at all. In those instances when they have been released, the recommendations have not been acted upon. It is thus unsurprising that the Endorois and Ogiek task forces are seen in light of this history and that much is not expected of them. Still, the communities continue to hope for and demand the full implementation of the regional decisions.[47]

3.4 Continuing violations

Even with the insistence that it is committed to implement the regional decisions and notwithstanding the establishment of task forces to advise it on the implications and modalities of implementation, the Kenyan government has continued to violate the rights of the Endorois and the Ogiek. Forced evictions of the communities from their lands or threats thereof have not

39. 'Kenyan government task force to implement African Court's Ogiek judgment deeply flawed, MRG and OPDP say' available at https://minorityrights.org/2017/11/13/kenyan-government-task-force-implement-african-courts-ogiek-judgment-deeply-flawed-mrg-opdp-say/ (accessed 30 June 2020).

40. Task force on the implementation of the decision of the African Court on Human and Peoples' Rights issued against the government of Kenya in respect of the rights of the Ogiek community of Mau and enhancing the participation of indigenous communities in the sustainable management of forests, Gazette Notice No. 11215, 25 October 2018.

41. See Gazette Notice No. 4138, 25 April 2019.

42. See e.g. 'Notice of field visits and public hearings, 11-20 June 2019' available at http://www.environment.go.ke/wp-content/uploads/2019/06/Public-Notice-Final-II.pdf (accessed 30 June 2020).

43. Memorandum from the Ogiek Community to the Task Force on the Implementation of the Ogiek Decision, Nakuru, 6 February 2019, available at https://www.ogiekpeoples.org/images/downloads/Ogiek-MOU-to-Taskforce-2019.pdf (accessed 30 June 2020).

44. 'Two years on, Kenya has yet to implement judgment in Ogiek case – MRG statement' available https://minorityrights.org/2019/06/05/two-years-on-kenya-has-yet-to-implement-judgment-in-ogiek-case-mrg-statement/ (accessed 30 June 2020).

45. L Dominguez 'Step one towards implementation: Delimiting, demarcating and titling Ogiek ancestral lands in the Mau forest' in OPDP et al Defending our future: Overcoming the challenges of returning the Ogiek home (2020) 14, 15.

46. See AFRICOG Postponing the truth: How commissions of inquiry are used to circumvent justice In Kenya (2008); AFRICOG A study of commissions of inquiry in Kenya (2007).

47. See OPDP et al Defending our future: Overcoming the challenges of returning the Ogiek home (2020).

ended. The Ogiek, for instance, faced fresh rounds of forced evictions from the Mau Forest in mid 2019, prompting the community to consider returning to the African Court for protection.[48] But perhaps the strongest indication that the plight of the Ogiek and the Endorois is still precarious and that the government has little regard for the rights of indigenous communities came between December 2017 and February 2018 when the Kenya Forest Service forcefully evicted the Sengwer, another forest-dwelling community, from the Embotut Forest. After a fact-finding mission to the Embotut Forest, the KNCHR issued a report detailing violations of various rights of the Sengwer, including the burning of more than 150 homes and the killing of one Sengwer community member.[49]

Other forms of violations of the rights of the Endorois and the Ogiek have been subtle, relating mainly to the failure of the government to consult and involve the community in making key decisions affecting their ancestral lands. In 2011, the Kenyan government successfully applied for Lake Bogoria (and other lakes in the Rift Valley) to be listed as a UNESCO World Heritage Site. The Endorois were not consulted at all during the listing process even though they have a clear stake in Lake Bogoria. The listing was challenged not only by the community and other NGOs in letters addressed to UNESCO,[50] but also by the ACHPR, which saw it as a direct contravention of the Endorois Decision.[51] As a consequence of the concerns raised, the World Heritage Committee adopted a decision in 2014 requiring the Kenyan government to 'ensure full and effective participation of the Endorois in the management and decision-making of the property, in particular the Lake Bogoria component, through their own representative institutions".[52]

In another instance in early 2014, the government sought to unilaterally sub-divide a parcel of land claimed by the Endorois with the intention of issuing title deeds in favour of non-Endorois individuals.[53] Endorois community members who organised a demonstration to protest the exercise were brutally beaten by the police.

4 Factors affecting implementation

Few cases decided by the African regional human rights bodies have attracted such huge attention as the Endorois and Ogiek Decisions. This attention has ensured that the issue of the implementation of the two decisions, but more so the Endorois Decision, has featured in the agenda of many international actors, including UN Charter and treaty-based human rights bodies. Consider, for instance, the range of actors that have called for the full implementation of the Endorois Decision.

To begin with, barely three months after the decision was issued by the ACHPR, the question of its implementation came for discussion before the HRC during the review of Kenya's UPR report on 6 May 2010. In particular, Bolivia recommended that Kenya should "implement the recommendations and decisions of its own judicial institutions and of the African Commission on Human and Peoples' Rights, particularly those relating to the rights of indigenous peoples".[54]

The extent of the implementation of the decision also came up during Kenya's review of its combined second to fifth periodic reports to the UN Committee on Economic, Social and Cultural Rights (CESCR) in February 2016. The CESCR expressed concern that implementation had been "long delayed".[55] It regretted that the Endorois were neither represented in the Endorois Task Force nor consulted in regard to its work.[56] The CESCR recommended that the government implements the decision "without further delay" and ensure that the Endorois are adequately represented and consulted at all stages of the implementation process.[57] It also advised the government to set up a mechanism for facilitation and monitoring of the implementation process.[58] In November 2017, the UN Committee on Elimination of All Forms of Discrimination against Women

48. See 'Battle for the Mau: Despite court ruling, Ogiek face new eviction threats', 19 June 2018, available at https://www.theeastafrican.co.ke/news/ea/Ogiek-face-new-eviction-threats/4552908-4620670-m4kp8j/index.html (accessed 30 June 2020); 'Ogiek to fight Mau evictions in African Court, 15 July 2018, available at https://www.nation.co.ke/kenya/news/ogiek-to-fight-mau-evictions-in-africa-court--67330 (accessed 30 June 2020).

49. KNCHR The report of the high level independent fact-finding mission to Embotut Forest in the Elgeyo Marakwet County (2020). See also Amnesty International Families torn apart: Forced evictions of indigenous people in Embotut forest, Kenya (2018).

50.A copy of one of the letters is available at http://www.forestpeoples.org/sites/fpp/files/publication/2013/11/letter-unesco-re-endorois-18-11-133.pdf (accessed 30 June 2020).

51. Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site, ACHPR/Res.197(L)2011 (adopted at the 50th Ordinary Session, Banjul, The Gambia, 24 October – 5 November 2011).

52.'Kenya Lake System in the Great Rift Valley and Australia's Ningaloo Coast inscribed on UNESCO's World Heritage List' available at http://whc.unesco.org/en/news/765/ (accessed 30 June 2020).

53.'Rights group urges Kenya's government to stop parceling Endorois community land without consultation', 20 February 2014, available at https://minorityrights.org/2014/02/20/rights-group-urges-kenyan-government-to-stop-parcelling-endorois-community-land-without-consultation/ (accessed 30 June 2020).

54. Report of the Working Group on the Universal Periodic Review: Kenya, UN Doc A/HRC/15/8, 15 June 2010, para 110.114.

55. Concluding observations on the combined second and fifth periodic reports of Kenya, E/C.12/KEN/CO/2-5, 6 April 2016, para 15.

56. As above, para 15.

57. As above, para 16.

58. As above, para 16.

(CEDAW) called for the implementation of the decision, with a focus on the rights of Endorois women.[59] Most recently in May 2019, the UN Working Group on business and human rights cited both the Endorois Decision and the Ogiek Decision in recommending that Kenya should develop framework on eviction and settlement that pays specific attention to the protection needs of indigenous communities.[60]

The recommendations from the UN bodies have served to complement the pressure from the communities, regional bodies, and civil society actors. Yet, Kenya's commitment to implement the decisions seems to have only waned with time. Progress has been slow such that a decade has already passed without the full implementation of the Endorois Decision. It is likely that the Ogiek Decision will meet a similar fate. This begs the question: what factors have affected the implementation of the decisions? Put differently, what accounts for the poor rate of implementation? This section discusses three factors that we argue may explain why the government's score on implementation has turned out to what it is. These are: the nature of the cases; government political dynamics and changes; and the role of the regional bodies in following-up and monitoring the implementation of the decisions.

4.1 Nature of the cases

Our first hypothesis is that the Endorois and Ogiek Decisions concern two knotty and intractable issues for Kenya: the concept of indigenous peoples and the question of land ownership. On the first issue, Kenya has had an enduring stand against the concept of indigenous peoples. It has long refused to acknowledge the existence of indigenous peoples in the country, arguing that "all Kenyans of African descent are indigenous to Kenya".[61] This stand explains why the county has never ratified the International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples. It is also the reason that Kenya was one of the three African countries that abstained from the vote on the adoption of the UN Declaration on the Rights of Indigenous Peoples.

At the domestic level, Kenya's discomfort with the notion of indigenous peoples is evident in the choice of the relevant terminologies used in the 2010 Constitution. In place of "indigenous peoples", the Constitution uses the terms "marginalized" and "minority". Still, the Constitution's definition of a "marginalized group" includes "an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy".[62] Another particular relevant definition is that of "community land" under Article 63 of the Constitution. It includes "ancestral lands and lands traditionally occupied by hunter-gatherer communities" and lands "lawfully held, managed or used by specific communities as community forests, grazing areas or shrines". Even with these constitutional provisions that directly apply to the Endorois and the Ogiek, the Kenyan government has remained obstinate in its official denial of the existence of indigenous communities in Kenya and their claim for ancestral lands that cover forests, game reserves or parks and mining sites.[63] Full implementation of the Endorois and Ogiek Decisions will require the Kenyan state to change its overall position on indigenous peoples, an action that the ACHPR Working Group on Indigenous Populations/Communities in Africa had long advised it to do.[64]

The refusal to acknowledge indigenous peoples is intricately tied to the second issue of land ownership. Systematic dispossession of communities and individuals from that which they claim to be their ancestral land has been a feature of Kenya's body politic from the colonial period to the present. For this reason, "historical land injustices" are pervasive in the country and lie at the heart of the regular communal conflicts and instances of deadly political violence, such as the 2007-2008 post-election violence.[65] In the past, many ad hoc land commissions were established to resolve the country's "land question", but to no avail.[66] The Truth, Justice and Reconciliation Commission (TJRC), established in the aftermath of the 2007-2008 post election violence, also examined this question.[67] The government, in part because of the findings and

59. Concluding observations on the eighth periodic report of Kenya, CEDAW/C/KEN/CO/8, 22 November 2017, para 44-45.

60. Report of the working group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/41/43/Add.2, 21 May 2019, para 25.

61. Report of the Working Group on the Universal Periodic Review: Kenya, A/HRC/15/8, 17 June 2010, para 109.

62. Constitution of Kenya, Art 260.

63. See T Kabau 'Towards a coherent legal regime for the protection of indigenous peoples' land rights in Kenya' in M Mbondenyi et al (eds) Human rights and democratic governance in Kenya: A post-2007 appraisal (2015) 83.

64. Report of the African Commission's Working Group on Indigenous Populations /Communities: Research and Information visit to Kenya, 1-19 March 2010 (2012) 84.

65. See Republic of Kenya Report of the Commission of Inquiry into Post Election Violence (CIPEV) (2008).

66. For example: Commission of Inquiry into Illegal/Irregular Allocation of Public Land (Ndungu Commission); Commission of Inquiry into the Land System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land, and New Institutional Framework for Land Administration; Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya

67. See Report of the Truth Justice and Reconciliation Commission, Volume IIB (2013).

recommendations on issues of land, has never expressly accepted the TJRC report.

There is now in place a permanent National Land Commission (NLC) that is mandated to address past and present land injustices. In May 2014, the NLC established the Task Force on Historical Land Injustices to formulate a bill to provide for the investigation and adjudication of claims arising out of historical land injustices.[68] On the basis of adopted regulations,[69] the NLC now receives claims of historical injustices, but effectively addressing these claims remains a conundrum. The Endorois and Ogiek Decisions, especially the recommendations on restitution, compensation and recognition of ancestral lands, have thus ran directly into the controversies and difficulties of solving the broader land question in Kenya. It is unlikely that the decisions will be implemented separate from the multitude of existing or potential claims from other communities, including indigenous communities.

4.2 Political dynamics and changes

Implementation of decisions of regional or international human rights bodies takes place in a political context. It is indeed political actors who steer the process and determine the direction of travel. This has been the case with the Endorois and Ogiek Decisions. Political dynamics and changes in the country may thus explain the stalled implementation of the two decisions. The Endorois Decision was issued at a time when the incumbent government was a "marriage of convenience" that had been patched together in the aftermath of the 2007-2008 post-election violence. It was comprised of political rivals from the Party of National Unity (PNU), on the one hand, and the Orange Democratic Movement (ODM), on the other. Although they had agreed to form a government of national unity, the two parties were engaged in constant political fights and disputes throughout the tenure of the coalition government. As Odhiambo has rightly observed, a key of this government was its "singular lack of cohesion and unity of purpose".[70] This situation adversely affected the implementation of the Endorois Decision.

Under the coalition government, the Ministry of Lands was responsible for leading the implementation of the decision. It was headed by Honourable James Orengo of the ODM, a luminary in the struggle for democracy and human rights in Kenya. It was not surprising that he joined the community in celebrating the decision and announced that the government would implement it in full. However, politicians from the rival party headed other ministries and offices with critical roles to play in implementing the decision, such as the Ministry of Justice, Ministry of Finance and the Ministry for Environment. For this reason, Minister Orengo's public declaration that the government would implement the Endorois Decision was counterproductive in the end because it potentially triggered opposition and resistance from the other ministries.[71] This partly explains why the government initially committed to implement the decision, but later appeared to grow cold feet.

In 2013, Kenya held its first election under the 2010 Constitution. The election ushered not only a new leadership under President Uhuru Kenyatta but it also brought in a new devolved system of governance. The result is that the implementation of the Endorois Decision, and later of the Ogiek Decision, became a shared responsibility between the national government and the relevant county governments. If coordinating the various ministries, offices and departments responsible for implementing regional decisions was previously a challenge, as indeed it was, then the entry of county governments into the space complicated matters and added a new layer of bureaucracy and actors.

As the discussion in Section 3 above shows, the County Government of Baringo has taken more proactive measures to implement aspects of the Endorois Decision falling within its competence and purview, such as access to the Lake Bogoria National Reserve and employment of Endorois community members. It has also engaged more actively with the community. The national government, on the contrast, has been less than willing to play its part. This accounts for why core aspects of the decision, such as recognition of ownership, restitution and payment of compensation, have remained unimplemented.

The 2013 election had another unforeseen, but positive, impact on the implementation on the decisions. Amongst those who joined the new government as part of the civil service was Korir Singo'e who had played a role in the founding of CEMIRIDE and the submission of the Endorois

68. Task force on the formulation of legislation on investigation and adjudication of complains arising out of historical land injustices, Gazette Notice No. 3139, 20 February 2014.

69. The National Land Commission (Historical Land Injustices) Rules 2016.

70. Odhiambo (n 25 above) 19.

71. Odhiambo (n 25 above) 20.

and Ogiek cases to the regional bodies. Indeed, he was part of the litigation team for the Endorois case. Leveraging his new position and access to influential political actors, Korir played a role, albeit behind the scenes, in the establishment of both the Endorois and Ogiek task forces. He was subsequently appointed to serve in the Ogiek Task Force.

4.3 Steps and missteps in monitoring implementation

Subsequent to issuing the decisions, the regional bodies have remained actively engaged in following-up and monitoring implementation. The ACHPR has particularly undertaken a flurry of follow-up activities never seen in any other case. The ACtHPR has not done much in terms of following-up implementation of the Ogiek Decision, apart from listing the case in its activity report as one in which full implementation is still pending.

The ACHPR kicked off its post-decision follow-up activities almost immediately after it issued the Endorois Decision. Barely a month after issuing the decision, the ACHPR's Working Group on Indigenous Populations/Communities in Africa undertook a mission to Kenya from 1 March to 19 March 2010. One of the recommendations that came out of the missions was for Kenya to implement the Endorois Decision.[72] In November 2011, the ACHPR once again called for the implementation of the decision in the context of pointing out that the designation of Lake Bogoria as a World Heritage Site without consulting the Endorois community was a contravention of the Decision.[73]

The ACHPR would make similar statements in subsequent years, including in a resolution adopted in November 2013,[74] and in its concluding observations on Kenya's combined 8th–11th periodic reports adopted in February 2016.[75] Most recently in a communiqué issued after a workshop on indigenous peoples and extractive industries in Kenya that was held in October 2019 in Nairobi, the ACHPR urged the Kenyan government to reconstitute the Endorois Task Force.[76] In this communiqué, the ACHPR also asked the Kenyan government to implement the Ogiek Decision.

Apart from the above statements, the ACHPR considered a convened a dedicated hearing between the parties in April 2013 to determine the extent to which the Decision had been implemented.[77] In September 2013, it organised a workshop in Nairobi to evaluate the progress in implementing the Decision.[78] In May 2015, it considered an implementation report prepared by one of its members charged with following-up the implementation of the Decision.[79]

The above follow-up activities have served to put pressure on the Kenyan government to implement the Endorois Decision. However, they have also revealed the ACHPR's failings in following-up and monitoring the implementation of its decisions. For example, the ACHPR has not considered the issue of implementation at each of its every ordinary session as required under Rule 112(7) of its Rules of Procedure. Under this Rule, a report on the status of implementation of a decision should be held in public. However, in the one instance that the ACHPR considered such a report in respect of the Endorois Decision, it did so in a private and confidential sitting. The ACHPR has also not consistently included information in its activity reports relating to progress in implementing the decision as envisaged under Rule 112(9) of its Rules of Procedure. Moreover, given the long delay in implementing the decision, it should have been expected that the ACHPR would have referred the case to the relevant AU policy organs in terms of Rule 112(8) of its Rules of Procedure. Despite a request from the EWC and other civil society organizations,[80] the ACHPR has never done so.

5. Conclusion

The Endorois and Ogiek decisions are major wins for the concerned indigenous communities. Upon their delivery, they were globally celebrated as landmark decisions in terms of jurisprudence and precedent setting. Both communities organized elaborate and huge celebrations to feast,

72. Report of the African Commission's Working Group on Indigenous Populations/Communities: Research and information visit to Kenya, 1-19 March 2010 (2012) 84.

73. Resolution on the protection of indigenous peoples' rights in the context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site, ACHPR/Res.197(L)2011 (adopted at the 50th Ordinary Session, Banjul, The Gambia, 24 October – 5 November 2011).

74. Resolution calling on the Republic of Kenya to implement the Endorois Decision, ACHPR/Res.257(LIV) 2013 (adopted at the 54th Ordinary Session, Banjul, The Gambia, 22 October – 5 November 2013).

75. ACHPR concluding observations and recommendations – Kenya: Combined 8th-11th periodic report, 2008=2014 (adopted at the 19th Extra-ordinary session, 16-25 February 2016).

76. National Dialogue on the Rights of Indigenous Peoples' and Extractive Industries, from 7 to 8 October 2019, Nairobi, Kenya, available at https://www.achpr.org/news/viewdetail?id=203 (accessed 1 July 2020).

77. 34th Activity report of the African Commission on Human and Peoples' Rights, para 16.

78. Final communiqué of the workshop on the status of the implementation of the Endorois decision of the African Commission on Human and Peoples' Rights, 23 September 2013, available at https://www.achpr.org/news/viewdetail?id=139 (accessed 30 June 2020).

79. Final communiqué of the African Commission's 56th ordinary session, May 2015, para 34(iv).

80. Letter of support to communication no. 276/2003: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, 22 February 2017, available at https://www.escr-net.org/sites/default/files/attachments/2017_slwg_letter_of_support_to_the_endorois_case.pdf (accessed 30 June 2010).

dance, and bask in the glory of their victory. However, the victory at the regional bodies has not translated to significant tangible changes in the plight of the communities, primarily because the decisions are yet to be fully implemented. This Chapter has traced the implementation process of the two decisions and found evidence of progress in relation to those aspects of the decisions that are less costly and complex. However, the core of the decisions, relating to recognition of ownership of ancestral lands, restitution and compensation, are yet to be implemented. The Chapter argues this may be explained by three factors; the nature of the cases insofar as they relate to the thorny concept of indigenous peoples and historical land injustices; government political dynamics and changes; and the ambivalent role of the regional bodies in following-up and monitoring the implementation of the decisions.

CHAPTER FOUR

IMPLEMENTING DECISIONS OF THE AFRICAN COURT ON THE RIGHT TO FAIR TRIAL IN TANZANIA: MIRAGE OR REALITY?

Gift Kweka

1 INTRODUCTION

The African Court on Human and Peoples' Rights (ACtHPR) is the regional court mandated to ensure the protection of human rights within the African continent. It complements other African Union (AU) human rights enforcement mechanisms, particularly the African Commission on Human and Peoples' Rights (African Commission).[1]The ACtHPR was established in 1998 by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).[2] The Protocol came into force on 25 January 2004 and has thus far received 30 ratifications.[3] The ACtHPR has both a contentious and advisory jurisdiction in interpreting or applying the African Charter on Human and Peoples' Rights (African Charter), the African Court Protocol and other human rights instruments ratified by state parties to disputes before it.[4]

Direct access to the ACtHPR is automatic for all states that have ratified the African Court Protocol. However, Non-Governmental Organizations (NGOs) and individuals do not enjoy a similar level of access. Under Article 34(6) of the African Court Protocol, state parties must make a declaration accepting the competence of the Court to receive cases from individuals and NGOs with observer status before the African Commission.[5] As at the time of writing, only nine of the 30 state parties had accepted the competence of the Court pursuant to Article 34(6). These are: Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Mali, Malawi, Tanzania, and Tunisia. Rwanda accepted the competence of the ACtHPR in 2013 but withdrew its declaration in 2016.[6]

This chapter examines the extent to which Tanzania has implemented the six cases selected from the 11 fair trial cases decided by the ACtHPR between 2015 and the end of 2018. In order to attain this objective, the Chapter starts by giving an overview of international, regional and domestic legal framework governing the right to fair trial. Thereafter a general assessment of the five fair trial decisions by the ACtHPR is made with a view of highlighting the norms the Court has reinforced. The chapter further examines the extent to which Tanzania has implemented the decisions of the Court by examining the institutional framework for implementing the decisions, factors that have necessitated or impeded the implementation and the role played by the ACtHPR in the implementation process. A conclusion shall thereafter be made as to whether the implementation of the decisions is a mirage or reality.

2 The right to fair trial

The right to fair trial is an inherent human right that must be adhered to in both civil and criminal court proceedings. In practice, the rights are mostly noticeable in criminal proceedings.[7]Fairness in adjudication of cases is one of the characteristics of democratic societies in contemporary world. [8]It is a procedural means of guaranteeing the rule of law.[9]The right to fair trial covers

1. African Court Protocol, Article 2.

2. Adopted by Member States of the Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998.

3. The list of the countries that have ratified the African Court Protocol is available at http://www.african-court.org/en/ (accessed 15 April 2018).

4. African Court Protocol, Articles 3 & 4; Rule 26 of the 2010 Rules of Court.

5. African Court Protocol, Articles 34(6) & 5(3).

6. https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/

7. D Harris 'The right to a fair trial in criminal proceedings as a human right' (1967) 16 International & Comparative Law Quarterly 353.

8. C Dlamini 'The effects of customs, religions and traditions on the right to a fair trial in Africa' (2000) 33 Comparative & International Law Journal of Southern Africa 318

9. Human Rights Committee, General Comment No. 32, 27 July 2007.

different aspects of criminal proceedings at pre-trial phase, trial and post-trial phases.[10]It seeks to safeguard against infringement of other basic human rights, particularly the rights to life and liberty.[11]Therefore, there is a positive obligation imposed on different state actors to ensure that the relevant domestic and international laws that guarantee fair trial are observed and upheld.

2.1 International human rights law

The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 marked the first time in history that an international law instrument codified the right to fair trial. This right is now protected in numerous binding international human rights law instruments, including the International Covenant on Civil and Political Rights (ICCPR),[12]the African Charter, the Inter-American Convention on Human Rights, and the European Convention on Human Rights. International humanitarian law instruments (such as the 1949 Geneva Conventions) and statutes of international tribunals and courts (such as the Rome Statute of the International Criminal Court) do also contain provisions on the right to fair trial.[13]In terms of Article 14 of the ICCPR, the broad elements of the right to fair trial include the following: equality before the law; a fair and public hearing by a competent and impartial court; presumption of innocence; guarantees to protect and assist the accused during proceedings; the proper handling of juvenile persons; right of appeal or review; compensation in case of miscarriage of justice; protection from double jeopardy (ne bis in idem); and protection from conviction for a conduct that did not constitute a crime at the time it was committed (nullumcrimen sine legenullapoena sine lege).

At the African regional level, the key human rights treaty, the African Charter, provides for the right to fair trial under Article7 (as read with Articles 5, 6 and 26). The right to fair trial is also recognised under the Protocol on the Rights of Women in Africa (Maputo Protocol) and the African Charter on the Rights and Welfare of the Child. Article 7 of the African Charter is not as elaborate as Article 14 of the ICCPR. It only provides for a limited number of guarantees, in particular the right to appeal, presumption of innocence, right to defence, and the right to be tried within a reasonable time by an impartial court. It also embodies the principles of nullumcrimen sine legeandnullapoena sine lege. Given the limited scope of Article 7, the African Commission's 1999Dakar Principles and Guidelines on the Right to a Fair Trial and Legal Assistance are a useful normative tool for a fuller and contemporary understanding of the right to fair trial under the African Charter. Also the development of the fair trial norms have been contributed much by the African Commission through its interpretative role entrusted to it by the General Assembly.[14] The interpretative powers of the Commission are discharged by elaborating resolutions and making specific recommendations on human rights matters affecting Africa.[15] The developed norms through this process are soft laws which have been from time to time referred to by the ACtHPR when residing on the fair trial cases as provided for under the African Charter.[16]

The Dakar Principles provides for a wide range of fair trial guarantees, including the right to access a lawyer as well as legal aid. It also contains provisions applicable to arrest and detention and criminal proceedings involving children.

2.2 Tanzanian domestic law

Article 13(6) of the 1977 Tanzanian Constitution provides for the right to fair trial. It reads as follows:

> To ensure equality before the law, the state authority shall make procedures which are appropriate, or which take into account the following principles, namely:
> (a)when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;
> (b) no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence;
> (c) no person shall be punished for any act which at the time of its commission was not an offence under the law, and also no penalty shall be imposed which is heavier than the

10. Lawyers Committee for Human Rights What is a fair trial? A basic guide to legal standards and practice (2000) 4-25.

11. International Covenant on Civil and Political Rights, Article 9; International Pen and Others (on behalf of Saro-Wiwa) v Nigeria (2000) AHRLR 212 (ACHPR 1998), normally where imprisonment is the sentence given the right to liberty is restricted and in cases of death penalty the right to life is restricted. Hence, if no due process of law was followed and the accused was wrongly convicted, the inherent right to life and liberty are infringed.

12. ICCPR, Article 14.

13. See generally Y McDermott Fairness in international criminal trials (2006).

14. N Udombana'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 African Human Rights Law Journal 299.

15. Ibid

16. Ibid

penalty in force at the time the offence was committed;
(d) for the purposes of preserving the right or equality of human beings, human dignity shall be protected in all activities pertaining to criminal investigations and process, and in any other matters for which a person is restrained, or in the execution of a sentence;
(e) no person shall be subjected to torture or inhuman or degrading punishment treatment.[17]

The above principles on the right to fair trial have been expounded in the Penal Code (Cap 16 of 1981) and the Criminal Procedure Act (Cap 20 of 1985). The latter legislation has provisions that are relevant to the right to fair trial. For instance, it provides for accelerated trial and disposal of cases and the right of an accused person to be defended.[18] In order to guarantee the right to equality before the law which includes legal representation stated in article 13(6) of the Constitution, Tanzania passed the Legal Aid Act in March 2017, repealing the Legal Aid (Criminal Proceedings Act) of 1969.[19] The Minister for Legal and Constitutional Affairs is expected to pass regulations for the Legal Aid Act in order to give effect to the provisions of the Act.

Tanzanian Courts have expounded on the contours of the right to fair trial on a number of occasions.[20] Decisions have included the 2007 judgment of the Court of Appeal in the case of Isidori Patrice v. Republic where it affirmed the requirement of disclosing the nature of the offence in the particulars of offence. The Court stated that, failure to do so is manifestly wrong and cannot be cured under section 388 of the Criminal Procedure Act, 1985.[21]

Despite the progressive judicial decisions on issues of fair trial and elaborate legal framework guaranteeing the right to fair trial, Tanzania has still found itself before the ACtHPR on account of failure to uphold the principles that ensure the right to fair trial is realized in criminal proceedings. This state of affairs reveals Tanzania's existing actual and legal challenges in the quest of delivering justice that meets international standards.[22] It is noted that one of the causes of failure of delivering justice is the lack of considerable diligence on part of judges and magistrates in performing their duties.[23] This goes together with the challenges of poor infrastructural resources and the inefficacy of the whole justice system.[24]

3 The Tanzanian Fair Trial decisions

The ACtHPR has issued five decisions against Tanzania reinforcing specific norms that Tanzania must uphold to guarantee the right to fair trial. This part gives a general assessment of the norms reinforced by the ACtHPR in order to provide a map for the assessment of Tanzania's implementation status of the decisions of the ACtHPR a core objective of the current chapter. Reading the decisions of the ACtHPR, it is clear that the Court has reinforced a number of norms that are intrinsic in the right to fair trial provided for under article 7 of the African Charter for which Tanzania failed to guarantee. The chapter has made a meticulous analysis of the cases in terms of factual background of the cases, the issues for determination, main findings and finally a highlight of the orders that were given in order to assess the extent to which Tanzania has implemented such orders in the subsequent sections of this chapter.

3.1 Alex Thomas Case

In this case, the Applicant alleged that there has been an undue delay in consideration of his request for the review of the decision of the Court of Appeal of 29 May 2009 to uphold his conviction. He states that he applied to the Court for the review of the decision on 5 June 2009.[25] Mr. Thomas farther stated that the undue delay was in violation of Articles 1, 7(1) (a) (c) and (d) of the Charter and Article 14(3) (d) of the International Covenant on Civil and Political Rights.[26] In its decision the ACtHPR ordered unanimously that the Respondent is to take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant.[27] Secondly the court stated farther that, although the application did not state that particular facts exhibit exceptional

17. Article 13 (6) (a) to (e).

18. Criminal Procedure Act, Sections 192-194, 310.

19. Act No. 9 of 2017.

20. DPP v. Daudi Pete Criminal Appeal No. 28 of 1990 affirmed the right to bail; Dibagula v. Republic Criminal Appeal No. 53 of 2001 failure to observe the right of fair hearing and Laurent Joseph v. Republic [1981] T.L.R 352 Dealt with the lack of legal representation.

21. Criminal Appeal No. 224 of 2007.

22. Hon. Mr. Justice RV Makaramba The Practical and Legal Challenges of Justice Delivery in Tanzania: Experience from the Bench A Paper to be presented at the Annual Conference and General Meeting (AGM) of the Tanganyika Law Society to be held at the Arusha International Conference Centre, Arusha, Tanzania, from the 17th – 18th February, 2012 http://www.comcourt.go.tz/comcourt/?wpfb_dl=37 (accessed 2 May 2018).

23. A Magalla & D Mpelumbe, Criminal Justice in Tanzania: Challenges and Solutions, 2016, p. 10, available at https://www.academia.edu/28248180/Criminal_Justice_System_in_Tanzania.

24. CP Maina et al (ed) Law and justice in Tanzania: Quarter of the Century of the Court of Appeal (2007) 207.

25. Ibid para 3.

26. Ibid, operative part, para vii.

27 Ibid, operative part, para ix.

circumstances, but was of the firm view that since the Applicant has been in prison for 20 years out of the 30 year term of imprisonment and that the reopening of the defence case or a retrial 'would result in prejudice and occasion a miscarriage of justice.[28]

In the decision of this case the court did not make specific order for release of the Applicant probably on the ground that there were no special or compelling circumstance for such an order.[29] In other words, this part was left for Tanzania to remedy the violation in an appropriate manner despite the fact that the Applicant had been imprisoned for 20 years as a result of a trial which violated Article 7 of the Charter.[30]

3.2 Mohamed Abubakar Case

The ACtHPR in this application was invited to determine, among other issues, the allegation that the applicant had not been afforded with the right to defend himself and the assistance of a lawyer at the time of his arrest; farther not having been afforded with the right to free assistance of a lawyer during the judicial proceedings. The Applicant was of the view that failure of being afforded with the right to defend his case and provide free legal assistance in the proceedings was in violation of both Articles 7 of the Charter and 14 of the International Covenant on Civil and Political Rights.[31] The court found out that the fact that the Applicant was not represented in the time of arrest and in court constitutes a violation of Article 7 of the Charter because the fact of not having access to a lawyer for a long time after arrest affects the victims' ability to defend themselves.[32]
With regard to free legal assistance of the law during court proceedings the court was invited to determine the issue as to whether or not that the state had an obligation to provide the applicant the service of a lawyer under the free legal aid scheme; and it was observed that Article 7 does not specifically address the issue of providing free legal aid, however the International Covenant on Civil and Political Rights explicitly provides in its Article 14(3) (d) that "in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality.....(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[33]

It follows therefore from the above observation that Article 7 read together with Article 14(3) (d) of the covenant, guarantee for anyone charged with a criminal offence, the right to be automatically assigned a Counsel free of charge, where he does not have the means to pay him, whenever the interests of justice so require.[34]The court stated further in referring the decision in Alex Thomas v. Tanzania that an indigent person under prosecution for criminal offence is particularly entitled to free legal assistance where the offence if serious, and the penalty provided by the law is severe.[35] The court unanimously ordered the respondent state to take all reasonable measures within reasonable time to remedy all the violations established, excluding a reopening of the trial, and to inform the court of the measures so taken within six months from the date of this judgment.

3.3 Wilfred Onyango and 9 Others Case

The application brought before the ACtHPR was concerning the prolonged and undue delay in finalizing the alleged case of forcefully kidnapping and abduction which is Criminal Application No 16 of 2006, still pending before the High Court of Tanzania at Moshi at the time of application. In this case the ACtHPR was not called upon to investigate the circumstances under which the Applicants were brought into Tanzania, a matter that was raised only before the domestic courts and not before the ACtHPR.

The issue was whether prolonged and undue delay of in finalizing cases at the national courts amounts to violation of Article 7 of the African Charter. The applicants submitted that their rights to be tried within a reasonable time had been violated by the national because the case has taken long time without being disposed of. The said application No. 16 of 2006 was filed before

28. Ibid.

29. Alex Thomas V Tanzania, para 157.

30. See Misha Plagis, The legacy of request for interpretation on remedies: Analysis of the Alex Thomas V Tanzania (2018).

31. Mohamed Abubakar v. The United Republic of Tanzania, para 127.

32. Ibid, paras 121 and 122.

33. ICCPR, Article 14(3).

34. Ibid, para 138.

35. Ibid, para 139.

the High Court of Tanzania on June 2006; it was dismissed on 16 September 2008 which took a period of about two years.[36] They subsequently appealed before the Court of Appeal of Tanzania in 30 September 2008, whereas the Court of Appeal delivered its ruling on 14 February 2011, which took another period of two years and five months from the time the High Court dismissed their application No. 16 of 2006.[37] For the purpose of assessing whether or not the duration of the proceedings in the case were reasonable, the ACtHPR advanced three criteria which are first complexity of the case, secondly conduct of the applicants and finally conduct of the domestic judicial authority.

Complexity of the case, the ACtHPR borrowed the jurisprudence developed in the European Court of Human Rights (ECtHR) which provides factors such as the nature of facts that are to be established, the number of accused persons and witnesses, international elements of the case, the joinder of the case to other cases and the intervention of other persons in the procedure may justify longer proceeding. However, the ECtHR has warned that even in very complex cases unreasonable delay may still occur.[38] The court concluded that the case was not complex one as the advanced above factors are not featured in the case thus the delay had nothing to do with the complexity of the case and was as such unjustified.[39]

In the question of the conduct of the applicant the court stated that, the applicant's duty is only to show diligence in carrying out the procedural steps relevant to him, to refrain from using delay tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings which was not established in this case.[40]
The conduct of judicial authority in handling the applicants' case the court adopted the arguments which were advanced by the applicants that there were over 55 adjournments in the life of the case by the Resident Magistrate's Court in Moshi, and farther in the first four years of the case, only one witness testified and throughout the cases the applicants questioned the very length of the trial. Up to a year after they had been charged, the most frequent reasons for seeking adjournment was that they still constituting the police file, that investigation were still ongoing.[41]
The applicants had also attempted to communicate with their counsel in vain, they wrote a letter to the High Court on 16 August 2013, requesting it to set a date for the hearing of their matte the same was not responded to.[42]

The ACtHPR found that the time was unreasonable not because of the complexity of the case, nor action of the applicants but more so because of lack of due diligence on the part of the national judicial authority. The court thus concluded that the responded breached Article 7 (1) (d) of the African Charter, which guarantees the right to be tried within a reasonable time.[43] Accordingly the court ordered the respondent to provide legal aid for the proceedings pending in the domestic court. Also, the respondent ordered to take appropriate measures within a reasonable time to expedite and finalise all criminal appeals by or against the Applicants in the domestic courts.[44]

3.4 Christopher Jonas Case

This is another case in which Tanzania was brought before the ACtHPR for the alleged violation of the right to fair trial in the national courts, The Applicant and one Erasto Samson were jointly charged with stealing money and various items of value from one Habibu Said on 1 October 2002, using violence and injuring the victim in the face with a machete. The applicant was subsequently found guilty by the District Court of Morogoro and sentenced to thirty (30) years imprisonment and twelve (12) strokes of the cane the other accused was tried in absentia. Being aggrieved by the decision of the District court, the Applicant appealed to the High Court of Tanzania, an appeal which was dismissed on the day of 12 September 2005. On 21 September 2005 the applicant filed an appeal to the Court of Appeal of Tanzania which was similarly dismissed with regard to the thirty years imprisonment, but the twelve strokes of the cane were set aside.[45]

The main issues brought before the ACtHPR relevant to this study are as follows; first the allegation that the Applicant was charged and convicted on the basis of a deposition which

36. Ibid. para 119.

37. Wilfred Onyango& 9 Others, (ibid para 120).

38. See Ferantelli and Santangelo v Italy (Application 1987/92) concerning murder case which took sixteen years in Wilfred Onyango& 9 Others, (ibid para 139.

39. Ibid, para, 144.

40. Judgment of July 1989, Application 11681/85 p. 35 in Wilfred Onyango& 9 Others (ibid para. 148), also decision of Union Alimentaria Sanders SA V. Spain cited in Wilfred Onyango& 9 Others.

41. Wilfred Onyango& 9 Others, ibid para 151

42. Wilfred Onyango& 9 Others, para 152

43. Ibid, para 155

44. Ibid, operative part ix and x, p 55.

45.Application No 011/2015, ibid, p. 4

does not corroborate the particulars on the charge sheet.[46] Secondly the allegation that during the proceedings the Applicant was not afforded legal assistance.[47]

With regard to the first issue which is the allegation that the Applicant was charged and convicted on the basis of a deposition which does not corroborate the particulars on the charge sheet, the applicant argued that the trial magistrate and the Appellate Judges grossly erred in law and in fact for having taken into account the core statement of Prosecution Witness 1 (PW1), which statement does not corroborate the particulars on the charge sheet, especially the list of the items alleged to have been stolen, their respective value and the total estimated amount.[48]

In view of the discussion in the first issue the ACtHPR found that the Court finds that the evidence of the national courts has been evaluated in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter and equally dismissed the Applicant's allegation that he had been charged and convicted on the basis of a single deposition which does not corroborate the particulars on the charge sheet, and held that there was no violation of Article 7 (1) (c) of the Charter in this regard.[49]

Another issue was the allegation that during the proceedings the Applicant was not afforded legal assistance, just like in the cases of Alex Thomas and Mohamed Abubakar. The ACtHPR held that the respondent state should have offered the applicant, propio motu and free of charge, the services of a lawyer throughout the judicial procedure. Having failed to do so, the Respondent violated Article 7(1)(c) of the African Charter.[50] As it was in the case of Alex Thomas, the ACtHPR also ordered the respondent state to take appropriate measure to remedy the Applicant's violation of the right to fair trial.[51]

3.5 Kennedy Owino and Another Case

In this case, the applicants' allegation relates to violations of Articles 1, 3, 5, 6 and 7 of the African Charter. The ACtHPR made an assessment of each of the alleged violations, the Respondent's responses thereto and the merits of the parties' claims. In the sequence of events which gave rise to the various alleged violations, the Court deemed it appropriate to examine first those allegations relating to article 7 of the Charter which is whether the respondent violated the right to fair trial by conducting the alleged illegal extradition and by executing the alleged unlawful identification parade.

(i) The alleged illegal extradition

The Applicants stated that they were extradited from Kenya unlawfully as there was no extradition treaty between Kenya and Tanzania. They also allege that they were prevented from exercising their rights of appeal following the order of extradition issued by the Nairobi Law Court on 22 March 2003 as they were immediately taken to Tanzania by a contingent of both Kenyan and Tanzanian police. [52] On this issue, Tanzania argued that the extradition of the Applicants was not illegal as it was carried out in accordance with the Extradition Acts of both countries on a reciprocal basis. It annexed a document titled the "Extradition Act, 1965' showing an extradition agreement between Tanzania and Kenya. On this basis, Tanzania contended that the allegation lacked merit and prayed for its dismissal.[53]

However, the court observed that its jurisdiction is only limited to allegations involving the responsibility of Tanzania, as Kenya had not made a declaration allowing individuals and NGOs to access the Court and is was not party to the proceedings. The Court farther observed that it was Kenya that extradited the Applicants and that Tanzania could not be held responsible for the conduct of Kenya in the course of the extradition. Therefore, the allegation of the Applicants that they were extradited unlawfully and that their extradition violated their right to appeal under article 7(1)(a) of the Charter was accordingly dismissed.[54]

46. Ibid, p.15
47. Ibid, p. 17
48. Ibid, p. 15, para 59
49. Ibid, paras 69 and 70.
50. Ibid, para 78.
51. Ibid.
52. Ibid, para 75.
53. Ibid, (n. 52) para 76.
54. Ibid, para 79.

(ii) The allegation related to violation of the identification parade

With this regard the applicants' arguments were that the identification parade exercise of 25 March 2003 was carried out after their pictures and descriptions taken by I.T.V and TVT media, the day before at the Namanga border, were in most of the local newspapers and had been aired by different TV channels in Tanzania. According to the applicants this had made it easier for some witnesses to identify them, and therefore, the identification parade was null, as it was not carried out following standard procedures.[55] The respondent in this issue stated that the identification evidence was highly scrutinized by the Court of Appeal in Criminal Appeal No. 48 of 2006, that the Court of Appeal discarded any evidence that was not watertight, and only admitted the identification evidence that met the standard of "proof beyond reasonable doubt". In that respect, therefore, the Respondent prayed for the court to dismiss such an allegation.[56]

However, the court made a care consideration of the arguments of both parties and it stated by first quoting Article 7(1) of the Charter which has enshrined principles of to the right to be heard as follows:

i. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
ii. The right to be presumed innocent until proved guilty by a competent court or tribunal;
iii. The right to defence, including the right to be defended by counsel of his choice;
iv. The right to be tried within a reasonable time by an impartial court or tribunal.

The court upon consideration of the arguments of both parties came with the main issue that whether the identification parade that led to the conviction of the Applicants was conducted in manner contrary to the Charter or other international human rights standards.[57] In this regard the court noted that the only evidence on which the Court of Appeal relied to sustain the conviction of the Applicants by the High Court is the testimony given by an eye witness (PW 8) who claimed to have identified the Applicants during the identification parade and that the witnesses who participated in the identification parade have, while providing their testimony, indicated that they did not see the Applicants on TV before the date of the said parade. However, the Applicants further allege that their images were disseminated not only on TV but also through newspapers before the parade, which the Respondent did not directly refute that argument.[58]

According to the court, in criminal proceedings, identification parade is not necessary and cannot be carried out if witnesses previously knew or saw a suspect before the identification parade and it is the practice in the jurisdiction of the Respondent State.[59] The court farther argued that the records of both the High Court and the Court of Appeal do not show that this requirement was fulfilled. Although some of the witnesses provided affidavits stating that they had not watched TV before the identification parade, neither of them (including PW 8 whose only testimony was used to sustain conviction) clearly stated that he/she did not see the images of the Applicants before the said parade in local newspapers. This implies that the identification parade was conducted despite the fact that the witnesses may have had a chance to see the Applicants in local newspapers.[60]

In light of the probability that witnesses may have seen the Applicants on local TV channels and newspapers, the safeguards which applied in the assessment of the evidence were inadequate.[61] Given that the conviction of the Applicants depended only on evidence from a single witness testimony obtained during this identification parade, there is an additional reason to doubt the context in which they were convicted. In these circumstances, the Court concludes that the procedural irregularities in the identification parade affected the fairness of the Applicants' trial and conviction therefore there was a violation of the right to a fair trial of the Applicants under Article 7 (1) of the Charter.[62] The court ordered the Respondent State to take all necessary measures that would help erase the consequences of the violations established restore the pre-existing situation and re-establish the rights of the Applicants. Such measures could include the release of the Applicants. The Respondent was farther ordered to inform the Court within six (6) months, from the date of this judgment of the measures taken.[63]

55. Ibid para 80.
56. Ibid, para 81.
57. Ibid, (n. 52) para 84.
58. Ibid, para 85.
59. Ibid, (n. 52) para 86.
60. Ibid, para 87.
61. Ibid
62. Ibid, (n. 49) para 89. See also decision in the case of Werema Wangoko Werema And Waisiri Wangoko Werema V United Republic of Tanzania, Application No. 024 of 2015, Judgment of 7 December 2018, p. 20.
63. Ibid.

3.6 Minani Evarist Case

The Applicant in this case alleged two violation of right to fair trial which include the violation of the Applicant's right to have his case heard by the court and the violation of a right to legal aid.[64] In the first issue the applicant argued that the Court of Appeal failed to examine all his arguments and therefore affected the merit of each of his plea and addition stated that the court should have conducted voire dire examination of witnesses before they were allowed to testify.[65]

The Court dismissed the above allegation for lack of sufficient evidence and also for the reason the allegations were very general. The court farther adopted the decision in Alex Thomas which states that "general statement to the effect that a right has been violated is not enough. More substantiation is required."[66] However, the court has not stated as to what amounts to a general statement, and what were the missing substantiation which would warrant sufficient proof of the allegation.

The failure to provide legal aid to the applicant was found a violation of the Applicant's right to a fair trial, and accordingly the respondent state was ordered to compensate the Applicant sum amounting to three hundred thousand Tanzanian shillings (Tshs 300,000). But the court refused to grant order for release of the Applicant because an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances. The court added if an Applicant sufficiently demonstrates or the Court itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice.[67] From this case the court stated that it has the power to order for appropriate remedies which include the release of the Applicant.[68]

4. STATUS OF IMPLEMENTATION

Tanzania has not implemented the decisions of the ACtHPR given in the cases of Alex Thomas and Wilfred Onyango Nganyi as indicated in the Court's report to the AU Executive Council.[69] There is further no report indicating that Tanzania has implemented any other orders given in the fair trial cases. In other cases where provisional measures were given, Tanzania reported to the Court that it is unable to implement the orders.[70] The reports available have not indicated reasons given by Tanzania for its inability to implement the provisional orders. Efforts to have interviews with the relevant authorities on these issues proved a failure. Therefore, the author had received no official communication from the Government at the time of completing the Chapter.

4.1 Release of applicants

Release of the applicants is one of the remedy ought to be ordered against the respondents found to have violated the right to fair trial during the proceedings resulted to the convictions of the applicants. Bu the ACtHPR has been reluctant to specifically give orders for the release of the aggrieved applicants, an issue that raises questions on its competence for delivering effective remedy to human rights victims.[71] It is an expectation of every litigant to receive effective remedy in case it is declared by the competent court that his or her rights have been violated.[72]

The reason given by the ACtHPR to justify its position is that release is granted on the basis of the existence of the special and compelling reasons for such an order.[73] However such an order is ordered against the respondent to comply in accordance with the laws of the particular states. See for instance in Alex Thomas v United Republic of Tanzania, in an application by the respondent state to seek for clarification and interpretation of orders made thereof it was stated that the most appropriate form of remedy for violation of the right to a fair trial is to act in such a way that the victim finds himself or herself in the situation that he or she would have been had the violation found not been committed.[74]

64. Ibid, p 12.

65. Ibid, para 51.

66. Ibid, para 57.

67. Minani Evarist Case, ibid, para. 82.

68. See Article 27(1) of the Protocol to African Court on Human and Peoples' Right,

69. Ibid, (n.33) p13.

70. Ally Rajab v. Tanzania Application No. 007/2015 and John Lazaro v. Tanzania Application No. 003/2016.

71. See article 3(1) and (2) of the African Charter.

72. A Possi 'It is better that ten guilty persons escape than that one innocent suffer: The African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 African Human Rights Yearbook 311-336.

73. Alex Thomas v United Republic of Tanzania

74. Ibid.

According to the ACtHPR in the Alex Thomas Case, Tanzania had two alternatives: to reopen the case in compliance with the rules of a fair trial or take all appropriate measures to ensure that the Applicant finds himself in the situation preceding the violations. But this would not have been a just measure, in as much as the Applicant had already spent 21 years in prison, more than half of the prison sentence, and given that a fresh judicial procedure could be long.[75]

In the second option, Tanzania had a room for evaluation to enable it to identify and activate all the measures that would enable it to eliminate the effects of the violations established by the Court. From these arguments proves the normative nature of the ACtHPR to order the respondent states to decide on the appropriate measures to remedy the human rights violations.

As for Tanzania, the laws provide for many possible remedies for wrongfully convicted persons such as the applicant in the discussed cases; that these remedies include, but are not limited to, the following:

a) Remission of sentence, provided for under the Penal Code Chapter 16, which at Section 27 (2) provides for the remission of a prison sentence in respect of which the United Republic of Tanzania can file an application at the Court of Appeal for the remission of the Applicant's given sentences.
b) Outright or conditional discharge provided for under Section 38 of the Penal Code which confers powers on the Court which convicted an offender to order his absolute or conditional discharge, provided that the offender does not commit another offence during the period of conditional discharge, and such period must not exceed 12 months.
c) Presidential pardon, provided for under Article 45 of the Constitution of the United Republic of Tanzania, pursuant to which the President of the United Republic of Tanzania may grant pardon with or without condition, to any person convicted of an offence by a court. With this regard the fact that the applicants had been convicted through inappropriate proceedings may be used as a reason for release of the applicants.

4.2 Provision of legal aid and enactment of legal aid legislation

The African Charter does not have provisions explicitly requiring states to provide legal aid services. However, the African Commission has provided elaboration on the right to legal aid as a pivotal requirement for fair trial.[76] In the same spirit the ACtHPR has in a number of cases affirmed the right to legal aid for those accused of committing crimes to be implicit in article 7 (1) (c) of the Charter by interpreting it in light to article 14 (3) (d) of the ICCPR.[77] This right imposes an obligation on states (particularly the judiciary) to ensure that legal aid services are made available at all stages of criminal proceedings without the need of the accused to request.[78] The ACtHPR stated in the case of Christopher Jonas that Tanzania ought to offer free legal assistance proprio motu.[79]

The legal framework that governed provisions of legal aid services prior to the enactment of the Legal Aid Act 2017 included article 13(6)(a) of the Constitution of the URT, section 310 of the Criminal Procedure Act, Legal Aid (Criminal Proceedings) Act 1969[80] and Legal Aid (Criminal Proceedings) Rules 2014. Prior to the 2014 rules, provision of legal aid was discretion of the judge who had the responsibility of issuing a certification. This limited provision of legal aid services to only capital punishment, a practice that was declared to be against fair trial standards by the ACtHPR.[81] The 2017 Legal Aid Act has effectively cured this lacuna. There is no reference to the decisions of the ACtHPR in the deliberations towards the adoption of the law. Factors that motivated the adoption of the 2017 law included the need to regulate paralegals and legal aid providers who have been offering legal aid services with no comprehensive regulatory framework.[82] It can therefore not be said that, the decisions of the ACtHPR triggered the adoption of the law.

The ACtHPR stated that, provision of legal aid does not make a distinction between the different categories of offences provided the conditions are met.[83] The ACtHPR has stipulated four factors

75. Alex Thomas case, para. 33

76. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (supra note 42 above).

77. Onyachi & Njoka Case, para 98.

78. Nganyi & Njoka Case, para 182.

79. Onyachi Case, para 75 – 78; Thomas case, para 123.

80. 1969.

81. Abubakari Case, para 138 – 139.

82. Interview with the Office of the Attorney General.

83. Abubakari Case, para 141.

that must be considered in determining whether a person qualifies for legal aid or not. These include: the seriousness of the crime; the severity of the potential sentence; the complexity of the case; the social and personal situation of the defendant; in cases of appeal, the substance of the appeal (whether it contains a contention that requires legal knowledge or skill); and the nature of the "entirety of the proceedings, for example, whether there are considerable disagreements on points of law or fact in the judgments of lower courts.[84]

In the case of Mohamed Abubakari, the ACtHPR made an interesting remark that suggests that provision of legal aid is subject to the financial capacity of the state. The Court stated that "respondent state did not demonstrate that it had no capacity to grant legal aid to indigent persons."[85] The 2017 Legal Aid Act and its regulations are expected to cure many of challenges faced in the provision of free legal representation during criminal trials to persons who need such services.

5. Factors accounting for (non)implementation

A number of factors accounting for (none) implementation of ACtHPR fair trial decisions have been observed of which some are inherently emanating from the court which include the failure of rendering clear orders against the respondents and some factors are as a result of lack of political will by the states parties to the Court. This part of the chapter has analysed how all the stated factors and others have in one way or another impacted on the implementation process of the fair trial decisions of the court.

5.1 Clarity of ACtHPR orders

Clarity of orders of the court is paramount aspect to ensuring its implementations by the respective states. The ACtHPR has been consistently faced with the challenge of not providing clear orders and directives in some of its decisions resulting to failure or delay of its implementation. A very clear evidence is in the case of Christopher Jonas where the court did not issue any order although it found Tanzania to be in violation of article 7 (1) (c) of the African Charter.[86] The question is how and what Tanzania has to implement if not at all any specific order was issued against it?

This is not all. In some cases, such as the Alex Thomas the court seemed to use complex or rather vague wording in its orders making it difficult for the respondent to understand what actually the meaning of the said orders was. This is evident when Tanzania requested for interpretation of the phrase "all necessary measures" used in the case, but also what exactly the violations found were and how to remedy them seemed not clearly stipulated by the court in the case of Alex Thomas.[87]Another evidence of the vague wording used by the court in its orders is found in the case of Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire[88]and the subsequent request for interpretation on the measures that Côte d'Ivoire could take to remedy the situation.[89]

The impact of issuing orders which are not clear in terms of words used and most importantly the directives on how to remedy the situation may be used by states as tact for delaying the implementation of the same resulting to failure of justice on the part of the victims.

5.2 Political will

Political environment is considered to be conducive where states are committed to ensuring that the decisions given by regional courts are implemented at domestic level. This is evidenced in the European human rights system where the decisions of the European Court of Human Rights have received some level of implementation in European countries.[90] Unlike in some of the African countries such as Tanzania and others in which the orders of the ACtHPR has faced obstacles in its implementation.

On part of Tanzania, the fact that it has ratified the ACtHPR protocol and has consistently allowed its citizen to file cases in the court is itself an evidence of political will to implement the protocol. But the challenges are now on the implementation of the orders issued by the court; it has

84. Alex Thomas Case, para. 118. Abubakari Case, paras. 138 -139; Onyachi Case, para 105.

85. Abubakari Case, para 144.

86. Jonas Case, order vi.

87. Request for interpretation Alex Thomas v. Tanzania, para 31.

88. See Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (see operative part para.7)

89. See request for interpretation in the case of ADPH V Côte d'Ivoire, para 16.

90. Open Society Justice Initiative From judgment to justice: Implementing international and regional human rights decision (2010) 52.

deliberately not implemented the orders issued against it in the case of Alex Thomas which brings in more queries on part of the will of Tanzania to adhere to the court's orders. In this case it was found that Tanzania had violated Article 7 of the Protocol as such it was orders to release the applicant and such other measures which would help to erase the consequences of the violations established and restore the pre-existing situation and re-establish the rights of the applicant,[91] which has never been done so far.

5.3 Domestic legal framework

The enforcement of human rights in Tanzania is governed by the Basic Rights and Duties Enforcement Act of 1994. This law is applicable to proceedings brought before domestic courts and therefore useful in order to fulfill the requirement of exhaustion of local remedies, an admissibility test before the ACtHPR.[92] All domestic proceedings are lodged before the High Court and can be appealed to the Court of Appeal.[93]

In dealing with the enforcement of judgments from regional and international courts in Tanzania, the Reciprocal Enforcement of Foreign Judgments Act recognizes only judgments from other countries.[94] There is therefore no legal framework in Tanzania that regulates the enforcement of regional or international courts decisions. Due to the fact that Tanzania is a dualist state, international law and domestic law are two separate legal rules.[95] For international law to be applied in domestic courts there must be an Act of parliament that implements such norms. The same is true when it comes to judicial decisions by regional or international courts. They do not have a direct application in Tanzania. The position is different when dealing with Monist states.[96] South Africa has had a more progressive judicial decision on the applicability of international courts decisions in South African the case of Government of the Republic of Zimbabwe v. Louis Karel Flick,[97] the court gave an innovative interpretation of foreign judgment to include judgment by international courts or tribunals. In Tanzania, there is no similar judicial interpretation of the law. This lacuna has negatively affected the implementation of the ACtHPR decisions in Tanzania. Persons whose rights have successfully been upheld by the ACtHPR have been left at the mercy of the political will of the country to realize their rights something which defeats the purpose for allowing individual cases before the ACtHPR.

It is noted that, there is an absence of a link between the ACtHPR and domestic courts in Tanzania. In 2015 the ACtHPR noted the need to have a comprehensive dialogue on implementation of the decisions of the regional courts/mechanisms through domestic courts.[98] To date, there is nothing concrete that has emerged from this lesson that was learnt from other jurisdictions. The office of the Attorney General (AG) particularly the Department of Constitutional and Human Rights is responsible for litigating cases before the ACtHPR. Once judgments are given, the AG's office disseminates the decisions to respective ministries for implementation. The implementation of the decisions is therefore the responsibility of the Ministry of Constitutional and Legal Affairs and any other ministry as may be required. Courts are not involved in the implementation process. The implementation of the decisions is inspired by policies of the country in relation to the order given. The political factor plays a key role on whether Tanzania implements the decisions or not. A lot of questions need to be taken into account including the existing national policies on the issue and the extent to which such order may demand for legal or institutional reforms. Example, when considering the implementation of the decision in the case of Armand Guéhi v. United Republic of Tanzania[99] although not a one of the five fair trial cases, Tanzania reported to the Court on measures it has taken to implement the provisional order. Tanzania stated that "it is in consultation with relevant national stakeholders on how to implement the order of the Court."[100] This implies that the implementation of the order may be delayed, or it may not be implemented depending on what the outcome of the consultation will be. This is true for any other order including the fair trial orders that may require a similar process.

91. Alex Thomas v Tanzania, para 39.

92. The Basic Rights and Duties Enforcement Act Cap 3 of 1994. Section 4 states that, "[i]f any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

93. Section 4 and section 14 of the Basic Rights and Duties Enforcement Act.

94. Section 3, Cap 8 R.E 2002.

95. GJ Kweka 'Legal Framework for the Prosecution of International Crimes in Tanzania: Dualism Nightmare?' (2017) 2 Tanzania Lawyer 86-106.

96. Example Democratic Republic of Congo has been applying international law without domesticating the instruments. Further judgments by the International Criminal Court have been enforced directly without any need for domestic court to intervene.

97. 2013(CC) (South Africa).

98. Final Communique/ Outcomes of the 2nd African Judicial Dialogue on the Theme "Connecting National and International Justice" 4-6 November 2015http://en.african-court.org/images/Other%20Reports/20151113_-_Final_Outcome_Statement_2nd_African_Judicial_Dialogue_CLEAN.pdf (accessed 29 April 2018).

99. Application No. 001/2015.

100. Report on the Activities of the African Court on Human and Peoples Rights 1 January –31 December 2016 (n. 103), 12.

5.4 Role of the Tanzania Human Rights Commission

Apart from the office of the AG and relevant ministries, the Tanzanian Commission for Human Rights and Good Governance (CHRAGG) established in 2000 by the 13th amendment to the Constitution of Tanzania and became operational in 2001 is responsible for strengthening the promotion and protection of human rights and good governance in Tanzania.[101] The role of the Commission in the implementation of the ACtHPR decisions is significant. This significance is contributed by the issues addressed in the guidelines on the role of Network of African National Human Rights Institutions (NANHRI) in monitoring implementation of recommendations of the African Commission on Human and Peoples´ Rights and judgments of the African Court on Human and Peoples´ Rights developed by the NANHRI in 2016.[102] Having made recognition of the existing gap between decisions of the ACtHPR and the efforts taken by states to implement the decisions, the NANHRI articulated eight (8) guiding principles which must be taken aboard when CHRAGG or any other human rights institution follows up or monitors the decisions of the ACtHPR or the African Commission.[103] The principles aim at increasing the implementation rate of both ACtHPR decisions and African Commission recommendations and ensure reliable and accurate information is received from states.

The Guidelines also contain other principles to be taken aboard at different stages of proceedings including during the process of a communication, procedure once a decision or judgment has been adopted and published and monitoring implementation of the findings at the national level.[104] CHRAGG is therefore expected to engage with the Government and other stakeholders to establish how Tanzania is to implement the fair trial decisions by the ACtHPR. There are no reports that have been made public which indicate the efforts taken by CHRAGG to monitor the implementation of fair trial decisions. In March 2017, President Justice Sylvain Ore during a one-day visit at the CHRAGG addressed the issue of implementation of fair trial decisions. Justice Ore "asked the CHRGG to advise the Government on the importance of implementing the rulings following repeated cases lodged at the Court over claims of violating principles of fair trial."[105]

5.5 Follow-up by the ACtHPR

Judgments given by the ACtHPR are required to be transmitted to member states and the African Commission.[106] The African Court Protocol additionally gives the ACtHPR an obligation to report every state that has not complied with its judgment during the regular sessions of the Assembly.[107] These provisions allow the ACtHPR to follow up the implementation of its decisions.

The ACtHPR has severally publicly urged Tanzania and other African countries to implement its decisions. President Justice Sylvain Ore has in two occasions made public statements on the need for African states to implement the decisions of the Court. In 2016 Justice Ore spoke of how non-implementation attacks the very core purpose of establishing the ACtHPR. He said, "It is for this reason that each player of the system should be able to ask the question as to the use of investing so many resources to establish a court when the enforcement of its decisions is completely unsustained or left entirely to the discretion of States without any follow-up mechanism."[108] In 2017, Justice Ore made a specific statement to Tanzania on the need to work with CHRAGG to facilitate the implementation of the fair trial decisions of the Court. He stated that "in order to meet international standards of rights provision, there are standards that should be met including legal representation … it does not mean that the government is reluctant to implement the rulings, but CHRAGG is a good platform to connect the ACtHPR and the Government in order to ensure the rulings issued are implemented."[109]

In the effort to establish working mechanism, the ACtHPR during the 26th Ordinary Session of the Executive Council held in January 2015, presented a comprehensive study on the setting up of a tangible reporting and compliance mechanism that will necessitate the following up process on the implementation of the ACtHPR decisions. The Executive Council took note of the Study. The recommendations from the study were being considered by the AUC within the framework of

101. Information available at http://www.chragg.go.tz/ (accessed 1 May 2018).

102. Network of African National Human Rights Institutions (NANHRI) 'Guidelines on the Role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples´ Rights and Judgments of the African Court on Human and Peoples´ Rights' 2016 https://nhri.ohchr.org/EN/ExternalPublications/Guidelines%20on%20Implementation%20of%20decisions%20of%20Regional%20Human%20Rights%20Organs%20English%20Version.pdf (accessed 28 April 2018).

103. Ibid, p. 8.

104. Ibid, p. 8-12.

105. L Kolumbia 'Implement our rulings, rights court tells TZ Government' The citizen, 2 March 2017, available at http://www.thecitizen.co.tz/News/Implement-our-rulings--rights-court-tells-TZ-govt/1840340-3833490-t7lylhz/index.html (accessed 14 April 2018).

106. Ibid, article 29 (1).

107. Ibid, article 31.

108. Momanyi (supra note 89 above).

109. Kolumbia (supra note 126 above).

the review of the Rules of Procedures of Policy Organs of the Union. The author was not able to ascertain its current status.

5.6 Role of the AU Executive Council

The African Court Protocol gives the AU Executive Council the mandate to monitor the execution of judgments rendered by the Court on behalf of the Assembly.[110] There has been no special mechanism or measures adopted by the Executive Council to ensure states' compliance with the decisions of the ACtHPR.[111] The Executive Council has continued to just urge member states "to commit unconditionally to and comply with judgments rendered by the Court."[112] This practice by both the Executive Council and the ACtHPR is contributed by the lack of specific provision in the African Court Protocol and the African Charter providing for sanctions to default states. The only sanctions that can be given against a default state should the Assembly deem fit after deliberating on the report on defaulting state must be in line with the provisions of the AU Constitutive Act. This is a farfetched option which leaves such important decisions unsupported by clear and authoritative provisions of law. The lacuna has therefore negatively affected the enforcement of the Courts decisions.

6 Conclusion

From the assessment in this chapter one thing is clear; the ACtHPR has reinforced international standards pertaining to fair trial in all phases of criminal proceedings. The decisions of the Court against Tanzania have revealed the lack of consistency in upholding fair trial standards by local judicial institutions including the prosecution. The inconsistency is seen on the number of cases decided locally which have also upheld the requirements of different fair trial standards and the number of applications received by the ACtHPR on alleging violations of the same right. One can, therefore, not ignore the pressing need for continued training of judicial officers in the area of standards required for trials that meet international and regional human rights standards. This necessity was also recognised by the ACtHPR which recommended the establishment of a training institution for judicial excellence in Africa in the quest of addressing the challenges facing delivery of justice in Africa.[113]If this desire is achieved, the current problem of infringement of fair trial standards during criminal proceedings as a result of lack of due diligence of national judicial authorities will be substantially addressed.

On the issue of implementation of the decisions of the ACtHPR, Tanzania has not done much to ensure the implementation takes place. One must therefore conclude that the implementation of ACtHPR fair trial decisions in Tanzania is a mirage. It was noted in the 2016 and 2017 reports of the activities of the ACtHPR that, Tanzania has not furnished reports on the implementation of the decisions of the Court on fair trial standards. This has made justice to remain in judgment papers and fail to transcend to an actual change that will bring about real justice to the victims. The absence of legal framework guaranteeing the enforcement of regional courts' decisions is one factor that has crippled the implementation of the ACtHPR decisions in Tanzania. It is high time that the legal framework governing the enforcement of foreign judgments in Tanzania is amended to provide room for regional courts decisions. This will bridge the existing gap of disjuncture between the ACtHPR and domestic courts.

Other issues such as the lack of established mechanism to follow up on the implementation of the ACtHPR decisions cannot be overlooked. It is recommended that, the study conducted by the Court on the establishment of follow up mechanism be finalized so as to provide more teeth to the Court. The mechanisms available have proven inadequate thus far. There is also a need for the CHRAGG to work closely with other stakeholders on how Tanzania can implement the fair trial decisions of the ACtHPR. Tanzania being the host of the ACtHPR and having ratified the African Court Protocol and accepted individual and NGO communications must set a good example to the rest for rest of state parties to the African Court Protocol by implementing the decisions of the Court.

110. Ibid, article 29 (2).

111. O Olukayode 'Enforcement and implementation mechanisms of the African Human Rights Charter: A critical analysis (2015) 15 Journal of Law, Policy & Globalization 15.

112. Executive Council, 22nd Ordinary Session, 21-25 January 2013, EX.CL/783(XXII), "Report on the Activities of the ACtHPR", para 116.

113 Final Communique/ Outcomes of the 2nd African Judicial Dialogue (supra note 116 above) 6.

CHAPTER FIVE

STATE IMPLEMENTATION OF AFRICAN COURT'S DECISION IN THE TANZANIAN INDEPENDENT CANDIDACY CASE

Selemani Kinyunyu

1. Introduction

In early June 2011, two separate cases were filed against Tanzania before the African Court on Human and Peoples' Rights (ACtHPR). The first case was filed on 2 June 2011 jointly by the Tanganyika Law Society (TLS) and the Legal and Human Rights Centre (LHRC), a Tanzanian human rights non-governmental organization.[1] On 10 June 2011, the second case was filed by Reverend Christopher Mtikila, a Tanzanian religious leader, politician and leader of the Democratic Party.[2] Both cases concerned the right of individuals in Tanzania to contest as independent candidates for political offices in the country. The cases challenged the compatibility of Article 39, 67 and 77 of the Tanzanian Constitution as contained in the Eleventh Constitutional Amendment Act with articles 2 and 13(1) of the African Charter on Human and Peoples' Rights. The 11th Constitutional Amendment Act stated that individuals seeking to vie for local government, parliamentary, and presidential elections must be sponsored by a political party. As they were based on similar set of facts and raised one and the same issue, the ACtHPR consolidated the two cases for purposes of adjudication and they are what have come to be jointly known as the Independent Candidacy Case.

The African Court issued its decision on the Independent Candidacy Case in June 2013. It found that Tanzania's legal framework that prohibited the right to independent candidacy violated the African Charter. The Independent Candidacy Case raised many novel legal and policy issues in addition to attracting massive public interest in Tanzania and beyond. Perhaps more importantly, it is significant to the discourse on implementation of the African Court's decisions as it was the first case that the Court considered on its merits. Therefore, the case provides an opportunity to reflect on the rate of implementation of the decisions of the African Court, and more generally, on the challenges entwined in the implementation of international court decisions.

To date, and five years down the road of a merit finding in favour of the Applicants, the right to independent candidacy is still a mirage in Tanzania. This Chapter is organized into five principle parts. Part one considers the historical background to the case, part two considers the judgment and impact of the case, part three examines the rate of implementation of the decisions, part four analyses factors that contributed or hindered implementation and part five concludes the chapter.

2 Historical background

In order to be able to understand the relevance of the Independent Candidacy Case to the question of implementation of the African Court's decisions it is important to take a brief step back into Tanzania's history.

Tanzania was formed following the merger of Tanganyika (Tanzania mainland) and Zanzibar on 26 April 1964. While the independence of Tanganyika on 9 December 1961 was a product of a negotiated concession with the British colonial government, independence in Zanzibar was achieved by way of a bloody revolution on 12 January 1964. Tanzania's first leader, Mwalimu Julius Nyerere needing to unify the nascent state, implemented a form of African socialism known as Ujamaa in 1967 through the Arusha Declaration. Two of the primary tenets of ujamaa were: (a) the creation of a one-party state as a means to solidify the cohesion of the newly independent Tanzania; and (b) the institutionalization of social, economic, and political equality to be regulated by a central government.

1. Tanganyika Law Society and Legal and Human Rights Centre v. Tanzania, ACtHPR App. No. 009/2011, filed on 2 June 2011.

2. Rev. Christopher R. Mtikila v. United Republic of Tanzania, ACtHPR App. No. 011/2011, filed on 10 June 2011.

The need to unify the country was especially important for Mwalimu Nyerere at the time as Tanzania was a vast and diverse country with over 125 ethnic groups with its an almost even split of its population belonging to either the Muslim and Christian faiths. The young Tanzania also bordered eight countries, Kenya to the North, Mozambique, Zambia and Malawi to the South, the then Zaire (Congo), Rwanda, Burundi and Uganda to the West. Of these eight countries, 5 countries Burundi, Mozambique, Rwanda, Uganda and the then Zaire were considered unstable and there were risks that an unified Tanzania could easily get sucked into regional conflicts and civil war.

The ruling party, the Tanzania National Union (TANU), which evolved into the current Chama Cha Mapinduzi (CCM), played a strong role in state-building and the creation of Tanzania's body politic. All spheres of public life were governed by allegiance to CCM. Entry into public service, access to jobs and education and scaling the social ladder was determined by membership and loyalty to the ruling party. The CCM became more than just a political party, it was an identity and a social movement.

The values that CCM embodied were personalized in the selfless Nyerere and were so intertwined with the Tanzanian society that during the late 1980s and early 1990s when the winds of multiparty democracy were blowing across Africa, a vast majority of Tanzanians preferred to remain in a one-party state than to move to a pluralist democratic order. It took Nyerere's personal insistence which was against the wishes of the CCM higher leadership and the mood of the country to open up the political space to allow multi-party politics.

In 1992, the Eighth Constitutional Amendment Act was adopted by parliament, turning Tanzania into a democratic state that practised multi party politics. It provided:

> "(1) No person shall be entitled to hold the office of the President of United Republic unless he:
> (a) is a citizen by birth of the United Republic by virtue of the citizenship law;
> (b) has attained the age of forty years;
> (c) is a member and is a contestant sponsored by a political party; and
> (d) is otherwise qualified for election as a member of the National Assembly or of the House of Representatives."[3]

Despite creating a multi-party regime, the amendments required aspirants for presidential, parliamentary and local government posts to belong to and be sponsored by political parties.[4] In 1993, Reverend Christopher Mtikila challenged the requirement that candidates had to be sponsored by political parties. In 1994, the high court found in his favour and declared the amendments that barred independent candidacy unconstitutional.

In late 1994, parliament passed the Eleventh Constitutional Amendment act which had the effect of undoing the judgment of the high court and barring independent candidacy. The government's rationale was that it was still in the process of state building and that allowing independent candidacy at such an early stage would fracture Tanzania's delicate social fabric.[5] Undeterred, Reverend Mtikila returned to the high court in 2005 to challenge the prohibition of independent candidacy and in 2006, the high court once again found in his favour.

The state being dissatisfied with this decision, appealed to the Court of Appeal of Tanzania in 2009. The following year, the Court of Appeal upheld the government's appeal and noted that the question of independent candidacy was of a political nature and referred the matter to parliament for further debate. It was widely felt that the Court of Appeal decision relied on technicalities and did no deliver substantive justice by creating a superficial distinction between independent candidacy being a political as opposed to legal matter.[6] Well aware that CCM had a majority in parliament and that an amendment to allow independent candidacy would not be easy to come by, civil society and the political opposition began calls for wholesale constitutional reforms through the development of a new constitution that would be subject to a popular referendum.

Throughout Tanzania's multi-party political phase, opposition parties were largely weak and fragmented while CCM remained strong especially on mainland Tanzania winning all the

3. See M Wambali 'The practice on the right to freedom of political participation in Tanzania' (2009) 9 African Human Rights Law Journal 6.

4. See M. Wambali 'The practice on the right to freedom of political participation in Tanzania' (2009) 9 African Human Rights Law Journal 5.

5. Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v. Tanzania, App. No. 009/2011 & 011/2011, Judgment, paragraph 90.1

6. See "The Controversy Over Independent Candidacy" available at https://www.thecitizen.co.tz/oped/1840568-1803962-ig4r37/index.html (accessed 16 April 2019); A Makulilo 'The independent candidate case by the African Court of Human and Peoples' Rights revisited' (2017) 5 International Journal of Human Rights and Constitutional Studies.

presidential elections with significant margins. The situation on the semi-autonomous island of Zanzibar which elects its own president and parliamentarians was different as elections had historically been a very close contest. On numerous occasions the opposition had contended that the ruling CCM government had rigged the opposition out of a win including the October 2010 elections that came only four months after the court of appeal decision that was handed down in June 2010. The height of the political tension in Zanzibar however was in 2001 when security forces killed at least 45 opposition supporters.[7] A majority of Zanzibari's were therefore in support of a constitutional review process which they felt would serve as a basis for renegotiating the union structure and granting the isle greater political and economic autonomy including a possible path to full independence.

The timing of the Court of appeal decision and the calls for a new constitution did not do CCM any favours in the 2010 general elections. Opposition parties gained a massive groundswell of support around the push for a new constitution as opposition candidates were able to garner 37.17% of the total vote up from 19.72 % in 2005. On the other hand, CCM's popularity dropped from 80.23% in 2005 to 62.83% in 2010. In Zanzibar, CCM won the presidential election by the finest of margins garnering 50.11% while the opposition 49.14% of the vote.[8]

CCM came out of the 2010 general elections victorious but well shaken. Reading the mood on the ground especially in Zanzibar where the drums of cessation were beating loud, CCM promised that it would deliver a new constitution for the union.[9] A government of national unity was also formed between the opposition and CCM in Zanzibar in the hopes that it would avail time for political and constitutional dialogue around the recurring impasse around elections in Zanzibar.[10] In 2011, the Constitutional Review Act was adopted and this gave much hope to Tanzanians that a new constitution recognising the right to independent candidacy would be adopted.

3 .The path to the African Court

On 9 July 2010, the East Africa Law Society (EALS) and Tanganyika Law Society (TLS) convened a roundtable to discuss and analyse the decision of the court, identify the implications of the decision for democracy, rule of law and international justice, formulate recommendations for the way forward and convene an ad hoc working group to carry forward the recommendations of the consultation.

The roundtable brought together a range of actors notably the Legal and Human Rights Centre and members of the academia including Professor Jwani Mwaikusa who was invited by the court of appeal to serve as amicus. Reverend Christopher Mtikila was also present while his counsel that represented him before the court of appeal did not attend. The judiciary was invited but decline to attend.[11]

The consultation observed that the decision and reasoning of the court of appeal was bad in law and that it would bar independent candidates from contesting at the general elections thereby infringing severely human rights and democratic space in Tanzania. There were two options considered as remedies. Either filing a review at the court of appeal or filing a case at the ACtHPR. A working group was appointed to steer the process and it was eventually agreed that litigation at the African Court remained the only viable option.[12] It was further agreed that LHRC, TLS and Reverend Mtikila would partner to bring the case to the African Court with the support of the East Africa Law Society (EALS) and the Pan African Lawyers Union (PALU) which had expertise in litigation before regional fora.

Research and drafting took place between July 2010 and June 2011 and several factors contributed to the extended drafting process. During this period, Professor Jwani Mwaikusa, a key resource to the technical team who had been invited to serve as amicus curiae in the proceedings before the court of appeal, had argued in favour of independent candidacy and was widely critical of the court of appeal decision was shot and killed.[13] There was heightened speculation that his killing was related to his views about the case or in relation to his work as a defence lawyer before the International Criminal Tribunal for Rwanda. At the same time, efforts to have Reverend

7. See "Tanzania: Zanzibar election massacres documented" available at https://www.hrw.org/news/2002/04/10/tanzania-zanzibar-election-massacres-documented (accessed 16 April 2019)

8. See "Tanzania elections" available at http://africanelections.tripod.com/tz.html (accessed 16 April 2019)

9. S Burchard Constitution-making in Tanzania: The undoing of a country? (2014) 5.

10. N Minde et al 'The rise and fall of the Government of National Unity in Zanzibar: A critical analysis of the 2015 elections' (2018) 17 Journal of African Elections 5.

11. See Concept Note Roundtable Consultation on the Theme: "The Court of Appeal Judgement in "The A.G V. Reverend Christopher Mtikila" – Ramifications for Democracy, Rule of Law and International Justice In Tanzania"

12. See Report of the Roundtable Consultation on the Court of Appeal's Decision of The A.G V. Reverend Christopher Mtikila Sea Cliff Hotel, Dar-Es-Salaam 9 July 2010. East Africa Law Society

13. See Tanzania lawyer at Rwanda genocide court shot dead available at https://www.bbc.com/news/world-africa-10649739 (accessed 16 April 2019)

Mtikila partner with the Legal and Human Rights Centre and the Tanganyika Law Society proved challenging.

The working group on the case noted that it would be prudent to ensure that the case was able to get past any jurisdictional hurdles including locus standi requirements in light of the fact that the court had not heard any cases on the merits and as such not established its jurisprudence on accessibility standards before the court. It was also felt that bringing together the largest and most visible non-governmental and advocacy organisation in the country (LHRC) and the bar association (TLS) would assist in levering human, financial and technical resources to the case and further assisting in advocacy and publicity of the case. On 2 June 2011, LHRC and TLS filed the case before the African Court. For among the reasons stated above, Reverend Mtikila chose not to be part of the application filed by LHRC and TLS. He instead chose to file his own case, which was lodged at the Court's registry on 10 June 2011. The applications were largely identical in respect to the alleged violations and reliefs sought.

4 The decision of the African Court

Following the exchange of pleadings and a public hearing, the ACtHPR delivered its judgment on 14 June 2013. It found that the application was admissible before the court, unanimously that Tanzania had violated article 10 and 13(1) of the African Charter and that by a vote of 7 to 2, Tanzania had violated articles 2 and 3 of the African Charter. The court directed Tanzania to take constitutional, legislative and all other necessary measures to give effect to the judgment within a reasonable time. It also directed the second applicant (Reverend Christopher Mtikila) to file submissions on reparations.[14] Three judges also penned individual separate opinions related to the Court's style of reasoning on jurisdictional bases that is not materially relevant to the gist of this Chapter.

The merits judgment itself did not make any tangible orders for the state to implement – these were reserved for further discourse at the reparations stage. The judgment is however notable for two reasons. First, it went into great lengths to examine and refute Tanzania's contention that the prohibition of independent candidacy was a political question. In negating Tanzania's argument that the Court should apply the margin of appreciation, the Court found that the denial of the right to independent candidacy also gave rise to legal obligations under the African Charter particularly the right to freely participate in government pursuant to Article 13.

Secondly, and without reason, the judgment ordered only Reverend Christopher Mtikila to file arguments on reparations. The other applicants, LHRC and TLS were not invited to be party to the reparations proceedings. This decision had the effect of terminating the participation of LHRC and TLS as parties to the case. This grave error has had a significant bearing on the implementation of the Court's decision to this date as will be explained further on in this chapter.

In the Court's judgment on reparations which was delivered on 13 June 2014, the Court ordered Tanzania to report on the measures it had taken to implement the Court's merit judgment within 6 months of the date of the ruling on reparations, publish an official Swahili summary of the merit judgment, publish the full merit judgment on the government's official website for the period of one year and report on the measures it had taken to implement the publication of the summary and merit decisions.

5. Impact of the Independent Candidacy Case

The Independent Candidacy Case has had a significant impact both in Tanzania and across the continent. The mere filing of the case and the public discussion and interest that it caused was one of the factors that contributed to the initiation of a constitutional review process in Tanzania. Even though Tanzanians are yet to adopt a new constitution, there is a strong sentiment that any new constitution must include the right to independent candidacy.

It has also been reported that LHRC may seek to approach the African Court in a fresh case to challenge Tanzania's non-implementation.[15] Will LHRC file a fresh case under Article 1 of the African Charter alleging that Tanzania had filed to comply and give effect to its obligations under the Charter? Alternatively, will LHRC file an application for enforcement under the existing case? In the absence of clear rules under the Court's Protocol and Rules of Procedure, how will the Court

14. See Judgment in Application No. 009/2011 and 011/2011 Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v. United Republic of Tanzania at page 55.

15. See NGOs file independent candidacy case against Dar in African Court available at http://www.theeastafrican.co.ke/news/NGOs-file-independent-candidacy-case-against-Dar-African-Court/-/2558/2675580/-/xqi092z/-/index.html (accessed on 16 April 2019)

decide on these issues? The discussions around how to compel Tanzania to implement the Court's decision through subsequent litigation before the African Court will also set an interesting precedent for future instances of non-compliance and for the practise of the Court.

The Independent Candidacy Case has also had significant jurisprudential value. It presents the first time that the African human rights system has established a legally binding precedent that provides for the right of political aspirants to vie as independent candidates. This contributed to broadening the interpretation of a rights-based approach to democratic and political rights within the continent.

The independent candidate's case has also contributed to the body of human rights law around how the African Court will apply international law principles such as the margin of appreciation and the doctrine of continuing violations. It set an important marker by the Court that it would not shy away from cases that had strong political overtones. The Court has since gone on to interpret the African Charter on Democracy Elections and Governance as well as delve into other cases where political questions arose.[16]

6 Status of implementation

In both the merits judgment of the Court and the reparations ruling, the Court made 5 orders that form the basis for implementation of the Court's decision. For the purposes of clarity, they are set forth below;

a) Directed Tanzania to take constitutional, legislative and all other necessary measures to give effect to the judgment within a reasonable time.
b) Ordered Tanzania to report on the measures it had taken to implement the Court's merit decision within 6 months of the date of the ruling on reparations
c) Ordered Tanzania to publish an official swahili summary of the merit judgment
d) Ordered Tanzania to publish the full merit judgment on the government's official website for the period of one year
e) Ordered Tanzania to report on the measures it had taken to implement the publication of the summary and merit decisions.

Of the 5 explicit orders, 2 orders relate to periodic reporting of Tanzania's implementation of the Court's decision. These are the orders related to reporting on the implementation of the court's merit judgment and subsequently reporting on the measures to publish the summary of the judgment and the full merits decision.

This periodic reporting, even though it is administrative and relates to the Court's procedure itself is important. If a state that substantively implements the Court's decision but does not report to the Court, it could be referred to the Executive Council for non-compliance. The Court itself has adopted reasoning that infers that its findings/ judgements are in themselves a form of reparations.[17]

Tanzania periodically reports to the Court on its compliance with the Court's decisions. On occasion, its reports have been filed out of the prescribed time and on other occasions, the reporting has been incomplete.

Of the three remaining orders, Tanzania has implemented two orders that is to publish the official summary of the judgment in Swahili as well as to post the full merit judgment on a government website. While these orders were complied with, they were done outside the time prescribed by the Court. With respect to the order to publish the summary of the decision of the Court, this was done, however Tanzania has not reported on its compliance with this decision.[18]

On the third substantive order, that is to take constitutional, legislative and all other necessary measures to give effect to the judgment, Tanzania has not implemented this order. Tanzania is yet to amend its constitutional or legal dispensation to allow for independent candidacy either through wholesale amendment of the constitution and subjection of the draft constitution to a referendum or partial amendment of the constitution through the introduction of a constitutional

16. Actions pour la protection des Droits de l'Homme (APDH) v. Cote d'Ivoire, Application 001/2014; Ingabire Victoire Umuhoza v. Republic of Rwanda, Application 003/2014; The African Commission on Human and People's Rights v. Libya, Application 002/2013.

17. Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v. Tanzania, App. No. 009/2011 & 011/2011, Judgment on Reparations, para. 37.

18. The author was able to confirm the presence of the summary on an official government website which page has since been taken down. See also 2018 Mid-Term Activity Report of the African Court on Human and Peoples' Rights (AfCHPR) EX.CL/1088(XXXIII), page 8.

amendment bill. It therefore can be said that Tanzania is in partial compliance with the Court's decision even though, the most crucial aspect of the Court's decision has not been implemented.

7 Conditions under which Implementation has taken place

With respect to amending its constitutional and legal framework to allow for independent candidacy, Tanzania's main argument was that at the time, it was undergoing a constitutional review process under which the issue of independent candidacy was being considered.[19]
The constitutional review process has since stalled and the Tanzanian president John Magufuli who is also the chairperson of the CCM party together with other ruling party officials have publicly declared that the constitutional review process is not a priority for the government. [20]
The lack of clarity and follow-up on the Tanzania's compliance with the Court's decision has also been complicated following the death on 4 October 2015 of Reverend Mtikila.[21] Given that Reverend Mtikila was the sole litigant in the reparations proceedings and the court chose to exclude LHRC and TLS, there is no litigant to prosecute Tanzania's non-compliance and shall be examined in more detail below. While there may have be some validity at the time to the government's arguments that the constitutional review process provided a window for aligning the government's legal dispensation to allow for independent candidacy, it is contended that this was neither the most desirable or most direct option for Tanzania in terms of complying with the Court's judgment.

First, the constitutional review process was not a sure shot. There was no guarantee that the draft constitution would specifically remedy the absence of independent candidacy in Tanzania's legal framework. To this end, an examination of the final draft constitution (version of September 2014[22]) which would have been subject to a referendum shows that it did not explicitly include the right to independent candidacy. An additional reason why the constitutional review process was not an effective remedy was that it was still subject to a popular referendum in which the public would vote for the draft constitution. Even if the government included provisions related to independent candidacy in the draft constitution, Tanzanian citizens could still have rejected the draft constitution due to other factors. Indeed, the final draft constitution was subject to much criticism and it was likely that it would not have received popular support should it have been subjected to a popular referendum.[23]

Secondly, there was no requirement for Tanzania to completely overhaul its constitutional architecture to provide for independent candidacy. The government could have for example submitted a constitutional bill to parliament considering the Court's findings to ensure that it complies with the Court decision. It is argued that this could have been the most efficient and time sensitive option for the government to take to comply with the Court's decision. The failure of the government to amend its legal framework in a timely manner disenfranchised aspirants for presidential, parliamentary and local government positions during the 2015 general elections.

8 Factors accounting for (non)implementation

8.1 Cost of implementation

Of the two substantive orders that the Court issued, implementation was enhanced for two reasons. First, the Court chose remedies that were fairly simple to implement. With respect to the Court's order to publish a summary of the judgment, the drafting of the summary was done by the Court's registry. This meant that the state only had to publish the summary.
Secondly, the proximity of the Court to the state given that it is located within Tanzania meant that follow-up, clarifications and the appropriate filings was eased.

8.2 Lack of clarity and specificity of the judgement

It is contended that the African Court's judgment failed to provide clarity to the state both in terms of substance as well as the time period within which Tanzania was to comply with its decision. The Court's order that Tanzania should "take constitutional, legislative and all other necessary measures to give effect to the judgment within a reasonable time" while all encompassing,

19. Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v. Tanzania, App. No. 009/2011 & 011/2011, Judgment on Merits, para. 90.1.

20. See 'New Katiba Not Priority says Magufuli' available at https://www.thecitizen.co.tz/News/New-Katiba-not-priority--says-Magufuli/1840340-3441622-10h8d3l/index.html (accessed on 16 April 2019)

21. See 'Reverend Mtikila dies in car crash' available at https://www.thecitizen.co.tz/News/1840340-2898366-y9c8trz/index.html (accessed on 16 April 2019).

22. Available at https://www.zlsc.or.tz/documents/2nd%20Draft.pdf (accessed on 16 April 2019).

23. See 'Tanzania's Draft Constitution: from Ownership to Renunciation' available at http://constitutionnet.org/news/tanzanias-draft-constitution-ownership-renunciation (accessed on 16 April 2019).

is not specific. Considering that the Court found that the question of independent candidacy was primarily a legal one, it could have ordered the state to amend its constitutional and legal framework to provide for independent candidacy. The vagueness of the order is what may have granted Tanzania the wiggle room to argue that the constitutional review process was a measure being taken to give effect to the judgment of the Court.

Furthermore, the absence of a defined timeframe in the Court's decision directing Tanzania to amend its constitutional and legal framework to provide for independent candidacy has created legal obligations that are elastic to the point of being fleeting. The measure of "reasonable time" is undefined, subject to argumentation and conjecture and would require the Court and the parties to engage in a lengthy process of monitoring and reporting.

8.3 Locking out TLS and LHRC

It is contended that locking out the 1st applicants, TLS and LHRC, from the reparations proceedings has severely impacted the implementation of the Court's decision. At the time the Court's judgment was issued in 2013, it was a matter of public record that the government was considering initiating a constitutional review process. In this regard, TLS and LHRC were two of the most prominent civil society groups advocating for the review of the constitution. In barring them from participating in the reparations proceedings, the Court lost the opportunity to engage with litigants who would have provided it with critical information and perspectives on the ongoing constitutional reforms. The TLS and LHRC as institutions with a wider constituency would have been better placed to serve as a useful channel of information to the wider Tanzanian public about the status of the implementation of the case. This could have served to maintain public interest on the case and pressured the government to implement the necessary reforms. The TLS and LHRC were also in a better position to represent advance the public interest value of the case and the ultimate remedy would not just benefit the 2nd Applicant who had presidential ambitions but the wider Tanzanian society.

In addition, the major remedy of the Court's decision related to holistic constitutional and legal reforms that the 1st applicants were better placed at monitoring and reporting on. TLS for example had a designated representative on the Constitutional Review Commission and its perspectives could have assisted the Court in determining the level of compliance by Tanzania. In addition, TLS and LHRC were better placed in assessing whether any proposed reforms would meet the requirements of the Court's decisions.

To date, it remains unclear why the Court chose to lock out TLS and LHRC from the reparations proceeding and whether, in light of the death of the 2nd Applicant Reverend Mtikila, the 1st Applicants would be reinstated into the proceedings in the interest of the public.

8.4 Absence of an implementation framework

Another hindrance to the implementation of the Independent Candidacy Case is the lack of a defined framework for monitoring compliance and implementation of the Court's decisions. The current framework which relies on the exchange of reports and pleadings is not sufficient to test the veracity of claims made by states about compliance and implementation. This may be one of the reasons for the Court's easy acceptance of Tanzania's explanation that the constitutional review process was a sufficient measure to implement the Court's decisions without a detailed interrogation.

The lack of a defined implementation framework that makes compliance monitoring primarily a judicial function subjects the implementation of the Court's decisions to political fora like the Executive Council of the African Union. At the level of the Executive Council, a non-compliant state retains more leverage to influence discussions on non-compliance. This could explain why despite several decisions that intimated that Tanzania may not have fully implemented the Court's decision, the Executive Council has not done much in terms of sanctioning Tanzania's non-compliance.[24]

Furthermore, in the absence of a clear monitoring framework for decisions of the Court, it is not clear whether it has adopted an active or passive implementation strategy. In some cases, the Court has engaged Tanzania in formal discussions[25] around non-implementation of decisions

24. See decisions of the Executive Council on the Activity Report of the African Court on Human and Peoples' Rights 2016 -2019.

25. See "The Solicitor General of Tanzania Dr Clement Mashamba held discussions with the African Court's Registrar Dr Robert Eno in Arusha, TZ. The two parties held constructive dialogue aimed at speeding up 117 Applications of Tanzanians pending at Pan African Court, among other issues" available at https://twitter.com/court_afchpr/status/1030449110388756487?lang=en (accessed 16 April 2019)

and in others it has communicated its concerns on the lack of compliance with its decisions through orders and letters. The lack of a clear strategy by the Court of its monitoring mandate may not be expressing the seriousness that the matter requires.

8.5 Policy reorientation by Tanzania

The largest factor that has influenced the non-implementation of the Court's decision is the change in policy by the government of Tanzania on the question of constitutional reforms. Despite the fact that the draft constitution did not explicitly provide for the right to independent candidacy, the views received by the Constitutional Review Commission showed wide scale support for the inclusion of independent candidacy in a potential new constitutional dispensation.[26] It is therefore possible that the right to independent candidacy may have been included in the constitutions for Tanzania mainland and Zanzibar that would have followed a possible new union constitution. The public pronouncement by CCM officials against any constitutional reforms in the short term is a big signal that Tanzanian government has lost appetite for constitutional reforms.

The lack of interest in implementing constitutional reforms and therefore the right to independent candidacy can be explained by three reasons. First, between the fourth and fifth phase governments there has been a shift from a more liberal democratic culture to a more closed and repressive political environment. During the fifth phase government, there has been a shrinking of political and civic space that has been manifested in the de facto ban on political activity, attacks on the media and opposition parties and limiting public participation and critique of government.[27] The government has also come out to state that it will no longer be interested in ratifying the African Charter on Democracy, Elections and Governance. Given the existing policy environment, it would be unlikely that independent candidacy would be introduced.

Secondly, the 2015 elections marked the stiffest test for CCM since independence. The ruling party was left divided following a bitter and hard-fought nomination process for the CCM presidential candidate. There were several notable defections from CCM to the opposition including two former prime ministers and several former cabinet ministers. It was also rumoured that at the time, a large number of other members of parliament would defect to the opposition depending on the outcome of the presidential elections. Given the 2015 experience, it would therefore not be politically expedient for the ruling CCM party to put in place amendments that would potentially weaken it.

A third factor is that implementing the court's decision would require some form of constitutional amendment. It is likely that discussions related to such a constitutional amendment would reignite debates related to autonomy for Zanzibar and put at risk the fragile status of the union between Tanzania mainland and Zanzibar at a time when the ruling CCM party is at its weakest in Zanzibar. A significant number of Zanzibari's from both the ruling CCM party and opposition groups are united on the need for more autonomy and independence for the isles and view the 1977 constitution as outdated and constraining. It would therefore be difficult for the sitting government to initiate conversations on a single aspect of constitutional reforms (independent candidacy) without this attracting fervour on other constitutional issues including the state of the union.

The above factors demonstrate the lack of political will on the part of the government to implement the decision of the court.

8.6. Follow up by the Court

The African Court has made some attempts to follow up on implementation of the decision. The Court has reported Tanzania's non-compliance to the AU Executive Council on at least four occasions.[28] In addition, the Court has raised the issue of implementation of its decisions in meetings with the Tanzanian government.

It is also unclear whether the measures taken by the Court have had any tangible impact. As has been observed previously, the lack of a clear monitoring and implementation framework for the Court has hindered it ability to effectively engage Tanzania on its non-compliance with

26. See C Maingraud 'Katiba mpya? Dynamics and pitfalls of the constitutional reform process in Tanzania MAMBO! I FRA' at page 4; A Katundu and N P Kumburu 'Tanzania's Constitutional Reform Predicament and the Survival of the Tanganyika and Zanzibar Union' (2015) 8 Journal of Pan African Studies 111.

27. See Tanzania MPs grant government sweeping powers over political parties

Available at https://www.cnbc.com/2019/01/30/reuters-america-tanzania-mps-grant-government-sweeping-powers-over-political-parties.html (accessed on 16 April 2019) and Freedom in the World 2019 Report on Tanzania available at https://freedomhouse.org/report/freedom-world/2019/tanzania (accessed on 16 April 2019)

28. See Activity Reports of the African Court on Human and Peoples' Rights from 2016 to 2019.

its decision. In addition, the fact that Tanzania has a massive caseload of 131 pending matters before the Court out of the court total caseload of 205 matters (approximately 63% of the case load) has also meant that the Court has multiple priorities when engaging the Tanzanian government.[29]

Despite this, there are additional measures that the Court could have taken that are within its Rules of Procedure including conducting fact-finding missions, high level visits as well as conducting implementation hearings by way of formal court proceedings or engaging in implementation consultations with the state.

9. Conclusion

The Independent Candidacy Case has been partially complied with by Tanzania, even though the real crux of the judgment remains unimplemented. Being the first case before the African Court to be decided on the merits, the independent candidate's case is a good example of the challenges, opportunities and constraints around the implementation of decisions of human rights bodies.

The lack of clarity in the Court's judgment both with respect to better defining the measures to be implemented, creating time limits for compliance and locking out TLS and LHRC from the reparations proceedings hamstrung the court. On the other hand, the fact that the litigants themselves did not sufficiently follow up the matter remained a constraint. Despite all this, the clear absence of political will by Tanzania to implement the decision remains the largest barrier to compliance. The subjection of states to international human rights bodies has always related to the question of sovereignty. While measures can be taken to demand compliance as well as apply pressure on states to conform, the ultimate decision for states to fulfil their international obligations is subject to their own convenience. Sovereignty is still very much alive!

29. See Status of Cases before the African Court as at 15 April 2019.

CHAPTER SIX

ASSESSING UGANDA'S IMPLEMENTATION OF DECISIONS OF INTERNATIONAL ADJUDICATION: THE MICHELO HANSUNGULE CASE

Busingye Kabumba

1.Introduction

A traditional challenge to the authority of international law has concerned the apparent lack of mechanisms for the enforcement of its normative obligations. The issue of compliance may, therefore, be said to be a historical and, in many ways, foundational one. Modern responses to this ancient question usually invoke Henkin's now famous observation: 'It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[1] However, the dense and ever-growing body of scholarship around the effectiveness of international law betrays the continuing spectre of the compliance-based challenge to the legitimacy and validity of international law.

The work in this area has, especially lately, turned also to a consideration of state compliance with the decisions of international courts and tribunals. While some of the literature broadly considers adherence to judicial decisions in the international legal system,[2] other strands analyze the implementation of judgments of particular courts. Studies have, for instance, considered compliance with decisions of the International Court of Justice (ICJ);[3] the dispute settlement system established under the World Trade Organization (WTO);[4] the European Court of Human Rights (ECHR);[5] the Inter-American Court of Human Rights (IACtHR);[6] the African Commission on Human and Peoples' Rights (ACHPR);[7] the African Court on Human and Peoples' Rights (ACtHPR);[8] the (now defunct) tribunal of the Southern African Development Community (SADC

1. L Henkin How nations behave (1979) 47.

2. C Giorgetti 'What happens after a judgment is given? Judgment compliance and the performance of international courts and tribunals' in T Squatrito et al (eds) The performance of international courts and tribunals (2018); C Hillebrecht 'Rethinking compliance: The challenges and prospects of measuring compliance with international human rights tribunals' (2009) 1 Journal of Human Rights Practice 362; D Kapiszewski and M Taylor 'Compliance: conceptualizing, measuring, and explaining adherence to judicial rulings' (2013) 38 Law and Social Inquiry 803-835; JS Wariobа 'Monitoring compliance with and enforcement of binding decisions of international courts' (2001) 5 Max Planck Yearbook of United Nations Law 41; AV Huneeus 'Compliance with judgments and decisions' in CPR Romano, KJ Alter and Y Shany (eds) The Oxford handbook of international adjudication (2014) 437; LR Helfer 'The effectiveness of international adjudicators' in CPR Romano, KJ Alter and Y Shany (eds) The Oxford handbook of international adjudication (2014) 464; WM Reisman 'The enforcement of international judgments' (1969) 63 American Journal of International Law 1; JI Charney 'Disputes implicating the institutional credibility of the court: Problems of non-appearance, non-participation and non-performance' in L Damrosch (ed) The International Court of Justice at a crossroads (1987) 288; J Martinez 'Enforcing the decisions of international tribunals in the US legal system' (2005) 45 Santa Clara Law Review 877; D Abebe 'Does international human rights law in African courts make a difference? (2017) 56 Virginia Journal of International Law 527; Y Shany Assessing the effectiveness of international courts (2014); K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 Case Western Reserve Journal of International Law 387; Y Shany 'Compliance with decisions of international courts as indicative of their effectiveness: A goal-based analysis' in J Crawford & S Nouwen (eds) Selected proceedings of the European Society of International Law (2012) 229; KJ Alter 'Do international courts enhance compliance with international law?' (2003) 25 Review of Asian & Pacific Studies 51; FM Palombino 'Compliance with international judgments: Between supremacy of international law and national fundamental principles' (2015) 75 Zeitschrift für ausländisches diffentliches Recht und Völkerrecht 503; CJ Carrubba and MJ Gabel 'Courts, compliance, and the quest for legitimacy in international law' (2013) 14 Theoretical Inquiries in Law 505; HD Phan 'International courts and state compliance: An investigation of the law of the sea cases' (2019) 50 Ocean Development & International Law 1.

3. C Schulte Compliance with decisions of the International Court of Justice (2004); AP Llamzon 'Jurisdiction and compliance in recent decisions of the International Court of Justice' (2008) 18 European Journal of International Law 815; C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 American Journal of International Law 434; ME O'Connell 'The prospects for enforcing monetary judgments of the International Court of Justice: A study of Nicaragua's judgment against the United States' (1990) 30 Virginia Journal of International Law 891; HL Jones 'Why comply? An analysis of trends in compliance with judgments of the International Court of Justice since Nicaragua' (2012) 12 Chicago-Kent Journal of International & Comparative Law 58; A Tanzi 'Problems of enforcement of decisions of the International Court of Justice and the law of the United Nations' (1995) 6 European Journal of International Law 539; LE Carter 'Compliance with ICJ provisional measures and the meaning of review and reconsideration under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals (Mex v US) (2003) 25 Michigan Journal of International Law 117; P Couvreur 'The effectiveness of the International Court of Justice in the peaceful settlement of disputes' in Muller AS, Raič D and Thuránszky JM (eds) The International Court of Justice: Its future role after 50 years(1997) 83.

4. S Charnovitz 'The Enforcement of WTO Judgments' (2009) 34 Yale Journal of International Law 558; ML Movsesian 'Enforcement of WTO rulings: An interest group analysis' (2003) 32 Hofstra Law Review 1; JF Colares 'The limits of WTO adjudication: Is compliance the problem?' (2011) 14 Journal of International Economic Law 403.

5. EL Abdelgawad (2008) The execution of judgments of the European Court of Human Rights (2008); M Marmo 'The execution of judgments of the European Court of Human Rights: A political battle' (2008) 15 Maastricht Journal of European and Comparative Law 235.

6. DA Gonzalez-Salzberg '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' (2014) 13 Revista do Instituto Brasileiro de Direitos Humanos 93. See also D Hawkins and W Jacoby 'Partial compliance: A comparison of the European and Inter-American Courts of Human Rights' (2010) 6 Journal of International Law and International Relations 35.

7. F Viljoen and L Louw 'State compliance with recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 American Journal of International Law 1; R Murray and D Long The implementation of the findings of the African Commission on Human and Peoples' Rights (2015); J Biegon 'Non-participation in the communications procedure of the African Commission on Human and Peoples' Rights' (2014) 2 African Nazarene University Law Journal 1.

8. RJV Cole 'African Court on Human and Peoples' Rights: Will political stereotypes form an obstacle to the enforcement of its decisions?' (2010) 43 Comparative and International Law Journal of Southern Africa 23; CS Martorana 'The new African Union: Will it promote enforcement of the decisions of the African Court on Human and Peoples' Rights' (2008) 40 George Washington International Law Review 583; RC Liwanga 'From commitment to compliance: Enforceability of remedial orders of African human rights bodies' (2015) 41 Brooklyn Journal of International Law 100.

Tribunal);[9] the Court of Justice of the Economic Community of West African States (CCJ);[10] and the East African Court of Justice (EACJ).[11]

At the same time, the difficulty of evaluating compliance cannot be overstated. Aside from the conceptual difficulties presented by the notion itself, there are real questions as to the degree of explanatory power – in terms of understanding how or why international law works – of studies which focus on a few institutions or jurisdictions. On the other hand, broader analyses are themselves obviously susceptible to overgeneralization, and might not identify, or give proper consideration to, important nuances presented by particular cases. Indeed, it is possible that only a combination of these approaches might achieve a more comprehensive, and coherent, account of the authority of international law in the contemporary world.

In these circumstances, this Chapter does not, and cannot, pretend to be comprehensive. It reflects upon the nature and extent of the compliance by one state – Uganda - with the decision of one international tribunal: that of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in Michelo Hansungule and Others (On behalf of children in Northern Uganda) v The Government of Uganda ('the Michelo Hansungule Case').[12] The limited scope of this work obviously restricts the general applicability of the conclusions drawn and recommendations made.[13] In addition, the study was completely desk-based, and only relied on that information which could be gleaned from a review of primary and secondary literature, in print and online. The absence of field-based data and information from key informants constitutes a further, and important, methodological limitation of this study. The findings presented are thus, in many respects, tentative and exploratory. The Chapter is accordingly only presented as a very modest contribution to work that is being, and must be, undertaken on a much larger scale, by various international law scholars across the globe.

It is on the basis of the above caveats, therefore, that this study is presented. The Chapter begins with an account of the Hansungule decision, including a background to the Communication and the main arguments presented therein, as well as an elaboration of the substantive findings and recommendations made by the ACERWC. It then analyzes the extent to which Uganda has complied with the Committee's decision and considers factors which might account for the developments in this regard. Finally, it reaches a general conclusion and makes tentative recommendations, drawing upon the findings of the study.

2 Background to the case

This case was submitted to the ACERWC by Professor Michelo Hansungule of the Centre for Human Rights at the University of Pretoria, acting on behalf of the children of Northern Uganda. The Communication related to a part of Uganda which had been the theatre of a long-standing conflict.[14] It was with particular reference to the rights of the children of Northern Uganda, as one of the groups uniquely affected by the conflict, that this Communication was submitted to the Committee. The Communication was brought specifically with reference to the period from 2001 to 2005.[15]

It was submitted that, through both its actions and omissions, the government of Uganda had violated a range of rights of the children of Northern Uganda, guaranteed under the African Charter on the Rights and Welfare of the Child ('the African Children's Charter') that is to say:

9. RF Oppong 'Enforcing judgments of the SADC Tribunal in the domestic courts of member states' (2010) Monitoring Regional Integration in Southern Africa Yearbook 115; E de Wet 'The rise and fall of the tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' (2013) 28 ICSID Review 45. For a response to de Wet, see MJ Wasinski 'Endemic disregard for the international rule of law in Africa?' (2014) 3 Polish Review of International and European Law 7.

10. ES Nwauche 'Enforcing ECOWAS law in West African national courts' (2011) 55 Journal of African Law 181; M Adigun 'Enforcing ECOWAS judgments in Nigeria through the common law rule on the enforcement of foreign judgments' (2019) 15 Journal of Private International Law 130.

11. A Possi 'An appraisal of the functioning and effectiveness of the East African Court of Justice' (2018) 21 Potchefstroom Electronic Law Journal 1; V Lando 'The domestic impact of the decisions of the East African Court of Justice' (2018) 18 African Human Rights Law Journal 463; J Otieno-Odek 'Judicial enforcement and implementation of EAC Law' in E Ugirashebuja et al (eds) East African Community law: Institutional, substantive and comparative EU aspects 467.

12. Michelo Hansungule and Others (On behalf of children in Northern Uganda) v The Government of Uganda Communication 1/2005.

13. It does bear noting that Uganda has not been a frequent respondent before international courts and tribunals. Some of the limited instances of adverse decisions rendered by international tribunals in respect of Uganda include: Democratic Republic of Congo v Burundi, Rwanda and Uganda, ACHPR Communication 227/1999 (DRC Communication'); Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v Republic of Uganda, ACHPR Communication 339/2007 (Okiring Communication); Thomas Kwoyelo v Uganda, ACHPR Communication 431/12; Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Judgment of 19 December 2005 (Armed Activities Case'); James Katabazi and 21 others versus Secretary-General of the East African Community and Another, EACJ Reference No. 1 of 2007; Hon. Sitenda Sebalu v The Secretary General of the EAC, the Attorney General of the Republic of Uganda, Hon. Sam Njuba and Electoral Commission of Uganda, EACJ Reference No. 1 of 2011. For a review of some of these cases see generally JT Gathii 'The under-appreciated jurisprudence of African regional trade judiciaries' (2010) 12 Oregon Review of International Law 245; B Kabumba 'A missed opportunity: The legacy of the Armed Activities Case on the right to self-defence under international law' (2007) 8 Griffin's View on International and Comparative Law 109; D Ngabirano (2018) Military courts are not for civilians: Unpacking the decision of the African Commission on Human and Peoples' Rights (ACHPR) in respect to Communication 339/2007 (on file with the author).

14. Following the capture of state power in 1986 by the National Resistance Movement/Army (NRM/A) led by Yoweri Kaguta Museveni, remnants of the previous regimes, together with newer political forces, mounted a military challenge to Museveni's government with the Northern part of the country as their main operational base. The rebels unleashed a campaign of terror, the significant brunt of which was borne by the people of Northern Uganda. Over the years, the communities of the North were subjected to widespread killings, abductions, rapes, looting, mutilations and a host of other violations. As with many other conflicts around the world, women, children, the elderly, persons with disabilities and other groups with vulnerabilities, suffered uniquely during the conflict period. For an account of this conflict, see O Otunnu Crisis of legitimacy and political violence in Uganda, 1979 to 2016 (2017).

15. Para 5, Decision of the Committee.

i) the right to life, survival and development;[16] i) the right to education;[17] ii) the right to the enjoyment of the best attainable state of physical, mental and spiritual health;[18] ii) the right to protection from involvement in armed conflict;[19] and the right to protection from sexual abuse and violence.[20]

The Communication was presented to the Secretariat of the ACERWC in 2005,[21] and had the distinction of being the very first Communication submitted to the Committee.[22] There was, however, a delay in considering the Communication, attributed to some extent to the fact that, at the time of its submission, the African Committee had not yet devised guidelines for the handling of Communications.[23] In the event, the Communication was re-submitted in 2010, following the adoption of appropriate guidelines by the Committee.[24] The Committee considered the admissibility of the Communication in its 16th session in Addis Ababa, Ethiopia in November 2010.[25] Subsequently, the Complainants and Uganda presented oral arguments before the Committee during its 18th session in Algiers, Algeria in November 2011.[26] This was followed by an investigative mission by the Committee to Uganda, at the invitation of the respondent State.[27] This mission lasted a week, and was undertaken in February 2013.[28] A decision on the Communication was finally rendered at the 21st session of the Committee, held in Addis Ababa, Ethiopia, from 15-19 April 2013.

3. Substantive determinations

3.1 Right to education

The Committee determined that there had been no violation of this right.[29] The Committee took cognizance, in this regard, of the actions undertaken by the government of Uganda to realize the right to education of children affected by the conflict,[30] and noted that no evidence had been provided regarding the use of educational institutions for military purposes, or of indiscriminate attacks on schools.[31]

The Committee further noted that, under both the African Children's Charter and general international law, the standard for the realization of the right to education, in the context of armed conflict, was one of 'reasonableness'.[32] Applying this standard, the Committee was satisfied that, based on the evidence before it, the government of Uganda had taken all reasonable steps to fulfil its duties in respect of the right to education.[33]

3.2 Right to health

The Committee found that there had been no violation in this respect.[34] Aside from its recognition of the steps taken by the government,[35] the Committee determined that no evidence had been presented to demonstrate: i) a failure by the government to comply with Article 14 of the African Children's Charter; ii) mismanagement of public resources meant for health; iii) withholding of medicines and other supplies; iv) indiscriminate attacks on medical facilities; v) interference with the efforts of non-governmental organizations and other actors to the realize the right to

16. African Children's Charter, Article 5.

17. African Children's Charter, Article 11. It was alleged that the government of Uganda had violated this right in a number of ways: i) insufficient budgetary provisions for the education, especially in relation to areas affected by the conflict; ii) the utilization of educational establishments for military ends and the indiscriminate attacks on schools; iii) the failure to institute significant mechanisms to ensure access to education for former child soldiers; and iv) the insufficiency of quality and accessible educational institutions for children in Internally Displaced Persons (IDP) camps - Para 62, Decision of the Committee.

18. African Children's Charter, Article 14.

19. African Children's Charter, Article 22.

20. African Children's Charter, Articles 16 & 27.

21. Para 12, Decision of the Committee.

22. Uganda itself ratified the African Children's Charter on 17 August 1994.

23. Para 13, Decision of the Committee.

24. As above.

25. Para 14, Decision of the Committee.

26. Para 16, Decision of the Committee.

27. Para 17, Decision of the Committee.

28. As above.

29. Decision of the Committee, Para 63-65, referring to Articles 11 and 22 of the African Children's Charter and Article 77 of Additional Protocol II to the Geneva Conventions of 12 August 1949. Under Article 22 (1) of the Charter, States are obliged to 'respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child'.

30. Decision of the Committee, Para 66. These included: i) the establishment of schools in the IDP camps; ii) the Peace, Recovery and Development Programme (PRDP); iii) the Acholi Bursary Scheme for Education in Pader, Kitgum, Amuru and Gulu districts; iv) increase in budgetary allocation for education, with some special focus on children in conflict areas; and v) more general programmes such as vocational skilling, provision of capital for income generating activities and other campaigns aimed at assisting 1.3 million children from the North and North Eastern parts of the country to attain primary education.

31. Decision of the Committee, para 67-68.

32. Decision of the Committee, para 69.

33. Decision of the Committee, paras 70-71.

34. Decision of the Committee, paras 72-73, referring to Article 14 of the African Children's Charter.

35. Decision of the Committee, para 74. The Committee took note of the following efforts by the government: i) the establishment of clinics in the IDP camps as well as mobile clinics, all attended by qualified health practitioners; ii) the training of health workers all levels; iii) the struggle to ensure the maintenance of immunization for children; iv) food aid and other humanitarian assistance for children; v) the provision of boreholes in the IDP camps to enhance access to safe drinking water; and vi) the reported provision of psychosocial counselling in certain reception centres.

health and vi) any form of discrimination in terms of actions related to the provision of health services.[36]

3.3 Protection from sexual abuse and violence

The Committee noted that many children in Northern Uganda had been abused by the Lord's Resistance Army (LRA) and expressed its hope that the LRA leadership would ultimately be held accountable for these atrocities.[37] However, the Committee determined that there was no cogent evidence to support a finding that officers of the Uganda Peoples' Defence Forces (UPDF), had themselves been involved in such abuse and violence or been complicit in the same.[38] According to the Committee, based on its own investigative mission to the affected area, this claim had not been made out, aside from a number of 'unconfirmed reports and incidents'.[39] The Committee similarly determined that there was no evidence to support the allegation that the government of Uganda had failed in its duty to investigate, prosecute and punish sexual abuse and violence against children, whether on the part of the UPDF or the LRA.[40]

3.4 Protection from abduction

The Committee acknowledged that children had been severally abducted by the LRA, including from Internally Displaced Persons (IDP) camps.[41] However, the Committee determined that there had not been a violation of the duty to protect, given the 'prevailing conflict' and the 'inhumane methods of operation of the rebels'. According to the Committee, these factors were significant obstacles in the way of the government's attempts to protect the children of Northern Uganda.[42]

3.5 Protection from involvement in armed conflict

The Committee did find that there had been a violation of the obligation not to recruit children in armed conflict, whether by force or on their own volition.[43] The Committee observed that although the UPDF Act of 2005 expressly prohibited, under its Section 52, the recruitment of persons into the army ranks unless they had attained the age of 18,[44] there was a gap in the constitutional provisions in this regard.[45] As such, the Committee determined that there was sufficient evidence, from its own investigative mission as well as authoritative reports of the United Nations, among others, that the UPDF had in fact recruited and used child soldiers in the armed conflict, particularly in the 105th battalion.[46]

The government of Uganda was also faulted for: i) the absence of a comprehensive birth registration mechanism, consistent with Article 6 of the African Children's Charter, which enabled loopholes for child recruitment; ii) the repatriation of former LRA child soldiers to the Chieftaincy of Military Intelligence, or UPDF units, rather than to civilian child protection specialists; iii) procedures for debriefing or questioning of former LRA child soldiers or abductees which were not manifestly consistent with the principle of the best interests of the child; iv) provisions in the Amnesty Act of 2000 which might create room for impunity, in terms of negating the rights to child victims to remedies, including to reparations; and v) the emergence of local militia groups, so-called Local Defence Units (LDUs) and others, whose recruitment processes did not rigorously prevent the recruitment of child soldiers.[47] In this respect, the Committee stressed that any consent on the part of such child soldiers was of no legal consequence, as the African Children's Charter provided no such exception.[48]

36. Para 75, Decision of the Committee.

37. Decision of the Committee, para 77, referring to Articles 27 and 29 of the African Children's Charter.

38. Decision of the Committee, para 78.

39. As above.

40. As above.

41. Decision of the Committee, para 79, referring to Article 29 of the African Children's Charter.

42. Decision of the Committee, para 80.

43. Decision of the Committee, pars 40-60 referring to Article 22 (2) of the African Children's Charter.

44. Decision of the Committee, para 44.

45. Decision of the Committee, para 45. Although Article 34 (4) of the 1995 Constitution, contained language which might protect children from recruitment into the army, the protection in this regard was undermined by the terms of Article 34 (5), which was to the effect that the reference to 'children' in Article 34 (4) related to persons below the age of 16. Article 34 (4) provides that: 'Children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development'.

46. Decision of the Committee, para 46.

47. Decision of the Committee, paras 48-56.

48. Decision of the Committee, paras 57-59.

3.6 Right to life, survival and development

Strangely, the Committee does not appear to have made any determination regarding the alleged violation of this right.

3.7 Recommendations made

As evident from Section 2.2.1 above, out of the several allegations against it, Uganda was only found to be in breach of the obligation, under Article 22 (2) of the African Children's Charter, not to involve children in armed conflict.[49]

Following upon this finding, the Committee made a number of recommendations for action by the government of Uganda: i) that the Penal Code Act be amended to contain 'an explicit and comprehensive' provision for the criminal responsibility of any person who recruited or used persons below the age of 18 in conflict situations;[50] ii) that the government fully effect the standard operating procedures (SOPs) with respect to the reception and processing of children rescued from armed forces, and further implement broad disarmament, demobilization and reintegration (DDR) programmes, working with the African Union, United Nations and other stakeholders;[51] iii) that the government of Uganda take all requisite legislative, administrative and other measures to guarantee the universal and comprehensive registration of births in Uganda;[52] iv) that the government institutes administrative measures to ensure that all armed forces, including private security companies, only recruit and use persons of 18 years and above with respect to any conflict situations;[53] and v) that with respect to children accused of offences relating to participation in conflicts, the government of Uganda utilize mechanisms of accountability other than detention and criminal prosecution.[54]

4 Assessing Uganda's compliance with the decision

This section assesses the extent to which the Uganda has taken steps, since the Committee's decision in April 2013, to comply with the recommendations contained therein. This analysis is carried out with reference to the specific recommendations of the Committee, and in the order in which they were made.

4.1 Amendment of the Penal Code

This recommendation does not appear to have been fully implemented. The last amendment to the Penal Code Act was undertaken in 2007, six years before the ACERWC's decision was rendered, and did not address the issue of recruitment or use of children in conflict situations.[55]

Another opportunity was presented by the amendment of the Children Act[56] by the terms of the Children (Amendment) Act of 2016.[57] In terms of Section 7 of the Amendment Act, the former Section 8 of the Children Act was substituted with a broader provision, with some language addressed to the challenge of child soldiers. The original Section 8 had simply provided as follows:

> No child shall be employed or engaged in any activity that may be harmful to his or her health, education or mental, physical or moral development'.

Under the new Section 8, no person may 'employ or engage a child in any activity which may be harmful or hazardous to his or her health, or his or her physical, mental, spiritual, moral or social development.[58] In addition, under Section 8(2) of the Act as amended, the minimum age of employment of a child is stated as 16 years. Further, according to the new Section 8(3), for the

49. Para 81, Decision of the Committee. Uganda was, by extension, found to have breached Article 1 (1) of the African Children's Charter (requiring Member States to recognize the rights, freedoms and duties stipulated in the Charter and to 'undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of [the] Charter').

50. Para 81.1, Decision of the Committee.

51. Para 81.2, Decision of the Committee.

52. Para 81.3, Decision of the Committee.

53. Para 81.4, Decision of the Committee.

54. Para 81.5, Decision of the Committee. The government of Uganda was also required to report to the Committee regarding the implementation of the above recommendations within six months from the date of the notification the decision. In addition, in terms of its Rules of Procedure, the Committee determined to appoint one of its members to monitor the implementation of the decision - Para 81.6, Decision of the Committee.

55. The Penal Code (Amendment) Act 2007, Act No.8 of 2007. The amendment abolished corporal punishment (in accordance with a Constitutional Court decision in that regard – Simon Kyamanywa v Uganda Constitutional Reference No.10 of 2000); amended the offence of defilement to provide for, among others gender neutrality of the victim, a broader scope for acts amounting to defilement, and higher sentences in case of aggravating factors; and amended the penal provision relating to aggravated robbery to include imitations of deadly weapons within the meaning of 'deadly weapons' for purposes of that offence.

56. Cap 59, Laws of Uganda. The Act commenced on 1 August 1997.

57. The Children (Amendment) Act, 2016, assented to by the President on 20 May 2016. The amendment does not appear to have been necessarily prompted by the decision in the Michelo Hansungule case. For a consideration of the background to the amendment see, generally, P Kwagala 'An analytical overview of Uganda's proposed Children (Amendment) Bill, 2015' available at http://cepa.or.ug/wp-content/uploads/2018/06/272813227-Analytical-Overview-of-Bills-on-Children-s-Rights.pdf (last accessed 15 August 2019) and P Bigirimana 'Presentation on the Children (Amendment) Act 2016 and the Draft Children Regulations, 2016' available at http://judiciary.go.ug/files/downloads/Enhancing%20the%20Rule%20of%20Law%20through%20Land%20and%20Family%20Justice%20by%20Hon%20Pius%20Bigirimana.pdf (last accessed 15 August 2019).

58. Section 8 (1), Children Act (as amended).

purposes of that section, 'harmful or hazardous employment' is defined as including:

> ... work which exposes a child to physical or psychological torture, sexual abuse, work underground, work at dangerous heights or in confined spaces, work with dangerous machinery, equipment and tools, or manual handling or transportation of heavy loads, work with chemicals and dangerous substances, work under extreme temperatures, high levels of noise, or working for longer hours; or any other form of child labour which includes slavery, trafficking in persons, debt bondage and other forms of forced labour, forced recruitment for use in armed conflict, prostitution, pornography and illicit activities. [Emphasis added]

It is evident from the terms of Section 8(3) of the Children Act (as amended) that, to some extent, the ACERWC's recommendation in this area was fulfilled, in so far as the provision explicitly prohibits the recruitment of child soldiers. This notwithstanding, the provision falls short of the ACERWC's recommendation in a number of material ways. First, the provision only prohibits 'forced' recruitment, which seems to leave open the possibility of the 'voluntary' recruitment of child soldiers. Second, the stipulation of 16 years as the minimum age for the employment of children appears to leave room for the employment of children above the age of 16 years, but below 18, in any circumstances not regarded as harmful or hazardous under the parameters stipulated under Section 8(3). Third, the provision refers to 'recruitment for use', an evidently narrower prohibition than that contemplated by the ACERWC which envisaged the banning of the 'recruitment or use' of child soldiers.

Further, under Section 11 of the Amendment Act, a new Section 42A was inserted in the Children Act. According to the new Section 42A, every child has the right 'to be protected against all forms of violence including sexual abuse and exploitation, child sacrifice, child labour, child marriage, child trafficking, institutional abuse, female genital mutilation, and any other form of physical or emotional abuse'. While this provision has some bearing on the protection of children from involvement in conflict, it does not contain the full range of protection envisaged by the ACERWC's recommendation.

Another shortcoming of the intervention represented by the 2016 Amendment Act is the fact that it left untouched Section 109 of the Children Act, which relates to the general sanction for offences under the Act. According to Section 109, a person who contravenes any of the provisions of the Act commits an offence and, with the exception of a person convicted under Section 98,[59] is liable on conviction to a fine not exceeding one hundred thousand shillings (or about 30 United States Dollars) or to imprisonment not exceeding six months, or to both such fine and imprisonment. Given the seriousness of the offences in question, this omission too, constitutes a significant shortcoming in terms of implementing the Committee's recommendations in this respect.

4.2 Disarmament, demobilization and reintegration

There is evidence of some progress in this area. According to a 2014 report published by the Defence and Security Division (DSD) of the Peace and Security Department (PSD) of the African Union Commission (AUC),[60] it appears that the Uganda government and relevant African Union Peace Support Operations (PSOs) have established a Child Protection Unit (CPU) to manage children rescued from armed groups.[61]

The CPU acts as a 'transit site' for Children Associated with Armed Forces or Armed Groups (CAAFAG) who are 'in the process of being referred to a national DDR programme'.[62] In the context of this cooperation with the African Union, it appears that a number of Uganda Peoples' Defence Forces (UPDF) soldiers have been trained in child protection awareness issues, and a mechanism established for the transfer of CAAFAG from the CPU to the Uganda DDR process.[63]

Aside from this information, however, it is not clear to what extent the government of Uganda has fully effected the SOPs and implemented a national DDR programme, in terms envisaged by this recommendation of the Committee.

59. The reference to Section 98 appears to have been in error, as that provision relates to the aftercare of child offenders released from detention. It is possible that the intended reference was to Sections 93 and 94, which deal with jurisdiction of the Family and Children Court over children charged with criminal offences, and the kind of penal sanctions that may be levied against children found guilty of crimes.

60. See African Union Commission (2014), DDR and Children: Operational guideline available at http://www.peaceau.org/uploads/au-operational-guidance-note-on-children-in-ddr.pdf (last accessed 15 August 2019).

61. AUC (n 60 above) 12.

62. As above.

63. As above.

4.3 Registration of births

Under the Births and Deaths Registration Act of 1973,[64] all births in Uganda had to be registered.[65] However the practice consistently fell far short of this legal requirement. Every year, about 1.5 million children are born in the country,[66] and it would appear that, for a long time, the government processes for birth registration were simply not fit for purpose in terms of ensuring the registration of all these births.

In 2015, the legal and institutional mechanism for birth registration was overhauled, with the enactment of the Registration of Persons Act.[67] Under this new Act, registration of every birth in Uganda is 'free and compulsory'.[68] In addition, under the 2015 Act, a parent, guardian or the person having charge of a child, must immediately after the date of birth or finding of a child notify the registration officer for the purpose of registration of the birth of that child.[69] This requirement, of immediate notification, is a significant change from the provisions under the old Births and Deaths Registration Act, which allowed up to three months for such notification.[70] The 2015 Act also established a robust new institution – the National Identification and Registration Authority (NIRA) – charged with the full implementation of the new legal regime thereby established.[71]

In addition to the above legislative and institutional developments, since 2013 the government has developed a Mobile Vital Records System (Mobile VRS), with support from the United Nations Children's Fund (UNICEF) and in partnership with Uganda Telecom.[72] The Mobile VRS is aimed at harnessing low cost technology to register births in communities and hospitals and to convey this data to a central government server in real time.[73] This system has been implemented in all 135 government and missionary hospitals in the country, as well as in 58 out of the 112 District local governments.[74] Thus far, from this innovation, among others, national birth registration rates have increased from about 30% in 2011 to about 60% as at the end of 2014.[75] This is already a significant improvement, given that previously, over the 5-year period from 2006 to 2011, the increase in national registration rates had been a paltry 9%, that is to say, moving from 21% in 2006 to 30% in 2011.[76]

The government plans to extend the Mobile VRS to the remaining 54 districts, as well as to the more than 200 Health Center IVs which were selected as birth registration centers in the later part of 2014.[77] This innovation is aimed at ensuring that birth registration happens for all children, including those in the remotest parts of the country.[78] According the targets set under the collaboration between the government of Uganda and UNICEF, it is hoped to register a birth registration rate of 90% for all children under the age of 5, by the year 2020.[79]
It would appear, having regard to the above developments, that the ACERWC's recommendation in respect of the achievement of a comprehensive registration of births in Uganda has been significantly implemented, even though more action continues to be required for its full realization.

4.4. Administrative measures

The fourth recommendation of the ACERWC required Uganda to institute 'administrative measures to ensure that all armed forces, including private security companies, only recruit and use persons of 18 years and above with respect to any conflict situations'. In this regard, section 52(2)(c) of the Uganda Peoples' Defence Forces (UPDF) Act of 2005 provides that no person may be recruited into the army unless, among other things, they are at least 18 years of age. It would appear that, at least since the Committee's decision in 2013, the UPDF has adhered to this requirement. For instance, during a public round of recruitment which occurred in October 2015, one of the stipulated requirements was that applicants be aged between 18-30 years (for

64. Cap 309, Laws of Uganda.

65. Section 7, Births and Deaths Registration Act.

66. See Republic of Uganda, Justice Law and Order Sector (JLOS), 'Mobile birth registration in Uganda' available at http://www.jlos.go.ug/index.php/joomla/item/473-mobile-birth-registration-in-uganda (last accessed 15 August 2019).

67. Registration of Persons Act No. 4 of 2015.

68. Section 28, Registration of Persons Act.

69. Registration of Persons Act, Section 30(1). Under Section 31 (1) of the Act, upon the birth of a child, it is the duty of both the father and mother of the child; or in their absence, the occupier of the house in which the child is born; or, in the absence of any of these persons, the guardian or the person having charge of the child, to give notice of the birth to the registration officer of the registration area in which the birth occurs. In terms of Section 31 (2), where a birth occurs in a prison, hospital, orphanage, barracks or quarantine station, the officer in charge of the establishment in which the birth takes place must ensure that the parents or guardian or person having charge of the child notify the registration officer of the birth.

70. Section 7, Births and Death Registration Act.

71. Registration of Persons Act, Sections 4-27.

72. Republic of Uganda (n 66 above).

73. As above.

74. As above.

75. As above.

76. As above.

77. As above.

78. As above.

79. As above.

professionals) and 18-25 years (for other recruits).[80]

However, it is unclear what steps have actually been taken by the government to achieve greater oversight over Private Security Companies (PSCs). These entities have gained increasing significance given the scale of their operations, human resources and economic power especially with respect to external deployment in conflict situations. For instance, in 2009, it appears that remittances from Ugandan mercenaries deployed in foreign theatres of conflict exceeded the country's earnings from exports of its more traditionally lucrative cash crop – coffee.[81] The significance of PSC activities is similarly evident when one considers that, as of 2016, at least 20,000 Ugandan mercenaries were deployed abroad by private contractors.[82] By comparison, as of 2016, active soldiers in the national army – the UPDF – stood at about 46,400.[83] In other words, PSCs stand at about half the strength of the national army, in terms of the men and women who serve in their ranks. Given this reality, the absence of clear information regarding the level of oversight over their operations, is problematic.

That regulation which seems to have been exercised over the activities of PSCs seems to be reactive rather than proactive – with commitments in this respect usually following highly publicized incidents of insecurity. For instance, in April 2015, following a marked increase in killings around the country, the Uganda Police declared what were described as 'tougher guidelines' for PSCs, aimed particularly at taking stock of all firearms in the country and marking them for easier tracking and regulation.[84] While this particular intervention was aimed at registration and identification of firearms, comments attributed to the then Deputy Police Spokesperson, Polly Namaye, indicate broader challenges in this area – including with regard to the verification of the ages of persons recruited. According to the report, Namaye appeared, among other things, to have decried the lack of rigorous verification at the recruitment stage, which was being done 'randomly' and 'without proper documentation'.[85] As such, it is not unlikely that persons below the age of 18 years are still being recruited by PSCs, and exposed to the danger of involvement in conflict situations in and outside the country.

It would appear, therefore, that there has only been partial compliance with the Committee's recommendation in this regard, with the critical outstanding action relating to ensuring that PSCs adhere to the minimum age requirements in their recruitment processes.

4.5 Alternative mechanisms of accountability

This recommendation appears to have been largely complied with by the government of Uganda. Aside from the prominent ongoing prosecutions of two high-level former child soldiers at the International Criminal Court (Dominic Ongwen) and in the International Crimes Division of the Uganda High Court (Thomas Kwoyelo), it appears that a large number of lower ranking child soldiers were granted amnesty under the Amnesty Act of 2000.

Indeed, according to one account, from 2000 to 2012, at least 26,232 individuals benefitted from blanket amnesty.[86] Although it is not immediately clear how many of these individuals were, in fact, former child soldiers, the significant number in question points towards a government policy to prefer amnesty (and alternative accountability mechanisms such as the traditional process of mat oput) to detention and criminal prosecution. In fact, a significant early contention by Thomas Kwoyelo's defence team was founded on the constitutional guarantee of non-discrimination, which questioned why he had been singled out for criminal prosecution while many other former child soldiers, who were alleged to have committed similar crimes, had benefitted from blanket amnesty.

It is also noteworthy, that the government's compliance in this respect appears to have preceded the Committee's recommendation, with most amnesties having been granted prior to 2013.

80. See 'Army recruitment of medics, lawyers underway' The New Vision 12 October 2015 available at https://www.newvision.co.ug/new_vision/news/1410356/army-recruitment-medics-lawyers-underway (last accessed 15 August 2019).

81. See DG Herbert 'Uganda's top export: mercenaries' Bloomberg Business Week 10 May 2016 available at https://www.bloomberg.com/features/2016-uganda-mercenaries/ (last accessed 15 August 2019).

82. As above.

83. See https://data.worldbank.org/indicator/MS.MIL.TOTL.P1?view=chart quoting The International Institute for Military Studies 'The Military Balance' (last accessed 15 August 2019).

84. See Z Nakabugo 'Police issues tougher guidelines for security firms' The Observer 5 April 2015 available at http://observer.ug/news-headlines/37176-police-issues-tougher-guidelines-for-security-firms (accessed 15 August 2019).

85. As above.

86. J LaBranche 'Difficulties in re-integrating Uganda's child soldiers' available at http://humantraffickingcenter.org/difficulties-in-re-integrating-ugandas-child-soldiers/ (last accessed 15 August 2019).

5 Factors that might explain the extent of compliance

From the foregoing analysis, it appears that there has been significant compliance by the government of Uganda with the Committee's decision of April 2013.

In our view, this high degree of compliance may be tentatively attributed to four main factors: (i) Uganda's cooperation with the Committee; (ii) the substance of the decision; (iii) the financial implications of the decision; and (iv) coincidence of interests.

This listing is by no means exhaustive, and each of these factors is itself subject to further exploration through, preferably, more rigorous field-work. With these provisos, we consider these factors below.

5.1 Uganda's cooperation with the Committee

There is some support for the contention that the cooperation by a State with an international adjudication mechanism, or its lack thereof, has a direct bearing on that State's likelihood ofcooperation with the final decision rendered by that body.[87] Examples abound, in the history of international dispute settlement, of States whose non-compliance or delayed compliance was foreshadowed by their previous opposition to, or non-participation in, the adjudicator's exercise of jurisdiction in the particular cases. These include Albania in the Corfu Channel Case;[88] the United States in the Nicaragua Case;[89] Iran in the Hostages Case;[90] South Africa in the Namibia Opinion;[91] and Israel in the Wall Opinion.[92]

On this basis, it is arguable that Uganda's cooperation with the Committee, including its invitation to the ACERWC to conduct an investigative mission in the country, was an early indication of the State's commitment to the process, and willingness to comply, in good faith, with the Committee's eventual decision and recommendations. At the same time, it bears noting that Uganda actively participated in the proceedings leading up to the decision in the Armed Activities Case,[93] and yet appears to have failed to comply, to date, with the International Court of Justice's direction to compensate the Democratic Republic of Congo (DRC) for the violations of international law identified by that Court. Thus, this factor – cooperation with the adjudicatory body - is somewhat undermined as an explanation for Uganda's substantial compliance with the decision and recommendations of the ACERWC.

5.2 Substance of the decision

As noted earlier,[94] the Michelo Hansungule case was the first communication submitted before the ACERWC. In many ways, therefore, it served as a learning opportunity for all the parties involved in the proceedings, including the Committee itself.

In this context, the cooperation rendered by Uganda, including through extending an invitation to the ACERWC to conduct an investigative mission was evidently welcomed and appreciated by the Committee.[95] This appreciation might have informed the deference evident in the Committee's decision in a number of critical areas that were the subject of the complaint. Aside from the findings of there being insufficient evidence to support particular allegations, in a number of other material areas, the ACERWC expressly appreciated the efforts undertaken by the government of Uganda in terms of discharging its obligations under the African Children's Charter, and related instruments, and rejected the claims of violations.

As such, having received the ACERWC's validation and affirmation in critical areas, it is possible that the government was more inclined to accept the findings of violation reached by the Committee, and to commit itself to remedying the same along the lines recommended by the Committee.[96]

87. See, for instance, Reisman (n 2 above) 2-4 (In numerous statements, the Permanent Court and the International Court of Justice have refused even to consider the possibility of non-compliance. Yet the practice of the Courts shows a refined sensitivity to the problem. When the Court anticipated that a State was likely to impugn a judgment, it not infrequently disseized itself of jurisdiction. In other cases, issues were formulated restrictively or the final judgment was almost Delphic in ambiguity'). See also, generally, Biegon (n 7 above).

88. Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania), Judgment of 9 April 1949.

89. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Judgment of 27 June 1986.

90. Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) Judgment of 24 May 1980.

91. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion of 21 June 1971.

92. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion of 9 July 2004.

93. Armed Activities Case (n 13 above).

94. See Section 2.1 above.

95. See Para 17, Decision of the Committee ('After the oral arguments, the Respondent State kindly invited the African Committee to undertake an investigative mission to Uganda, in particular to Northern Uganda ... The African Committee is grateful for the manner in which the Respondent State facilitated the investigative mission into the country').

96. The Committee's deference was evident even as it found fault with Uganda on the single issue of involvement of children in conflict – Para 50, Decision of the Committee ('Moreover, unfortunately, both in its submissions, oral arguments, and

5.3 Financial implications of the decision

The ACERWC's recommendations did not include any provision for monetary compensation to any specific individuals or entities. There was, therefore, no direct or specific financial burden upon the State, arising from the Committee's decision. It might be the case that the absence of such an award increased the likelihood of the Uganda government's compliance with the decision, in so far as it did not significantly distort the government's budgetary planning.[97]

It is, of course, true that a number of the Committee's recommendations did have budgetary implications, especially those which required legislative and other administrative measures to be imposed, as well as those which required greater oversight over private actors. Nonetheless, it is suggested that the absence of a requirement of a direct payment to particular individuals or entities, provided the government greater discretion in terms of implementing those recommendations which did have indirect budgetary implications. This may be contrasted with the government's notorious failure to comply with a number of monetary awards rendered at the domestic[98] and international[99] levels.

The absence of a specific and discrete monetary award in this case might also have rendered those recommendations with budgetary implications more capable of implementation in so far as this could be done with the support of development partners, in the context of analogous processes, without direct reference to the ACERWC's decision. This might explain, for instance, the apparent choice made to include the prohibition of recruitment of child soldiers in an amendment to the Children Act, rather than to the Penal Code Act as envisaged in the ACERWC's decision.

5.4 Coincidence of interests

In a number of instances, there appear to have been coincidences between the ACERWC's recommendations and the State's own planning and priorities.

A good example in this instance relates to the recommendation regarding the establishment of a universal and comprehensive birth registration system. There appears to have been government commitment in this respect, quite aside from the Committee's recommendation. The impetus, from the government side, for birth registration appears to have been informed by a need to have a comprehensive data base of persons in Uganda (citizens and non-citizens) as a means both for socio-economic planning and, perhaps more importantly, security purposes.

This might explain why the Registration of Persons Act of 2015 explicitly linked the registration of births to the acquisition of a National Identity Card;[100] which has itself subsequently been made a precondition for the acquisition of, or access to, a number of apparently mundane and unrelated good and services, such as obtaining a SIM card, opening a bank account, obtaining a driving permit, obtaining a passport, and executing a land transfer, among others.[101]

5.5 Additional considerations

To the above factors could be added even more, such as the relatively long time between the filing of the Communication in 2005, and its eventual determination in 2013. During this time Uganda might have been encouraged to take remedial steps in advance of the decision, perhaps even as a means of bolstering its case before the Committee.

In addition, Uganda's substantial compliance with the ACERWC's decision was likely as a result of the efforts of various domestic and foreign actors, such as the Uganda Human Rights Commission, the ACERWC itself, United Nations specialized agencies, civil society organizations and other stakeholders.

However, as noted earlier, in the absence of actual fieldwork, it is difficult to definitively assess

also during the investigative mission undertaken by the Committee, the Government has not been able to provide detailed and concrete evidence about the legislative and other measures, such as the use of child-sensitive procedures to protect children from hardship during questioning ...').

97. See, generally, O'Connell (n 3 above).

98. See, for instance, Uganda Radio Network 'Gov't to take 74 years to clear Shs 676bn outstanding court awards' The Observer, 14 April 2018 available at https://observer.ug/news/headlines/57459-gov-t-to-take-74-years-to-clear-shs-676bn-outstanding-court-awards (last accessed 15 August 2019).

99. Uganda has, to date, not satisfied the monetary awards ordered in the DRC Communication (n 13 above); the Okiring Communication (n 13 above); the Kwoyelo Communication (n 13 above) and the Armed Activities Case (n 13 above).

100. Registration of Persons Act, Sections 68 & 69

101. In terms of Section 65 (1) of the Registration of Persons Act, the information in the national register may be used for: issuing national identification cards; issuing passports; immigration and passport control; national security purposes; statistical purposes; monitoring money laundering and human trafficking; taxation; law enforcement; public administration; providing social services; facilitating the provision of information to a person entitled to receive the information and any other purpose as may be determined by the Minister.

the extent to which these and other factors might have informed Uganda's implementation of the Committee's decisions.

6 Conclusion

This Chapter set out to analyze the decision of the ACERWC in the Michelo Hansungule case and to assess the extent of, and explanations for, compliance therewith by the State of Uganda.

The Chapter demonstrates that Uganda appears to have substantially complied with the ACERWC's decision, a marked departure from its failure to abide by adverse decisions rendered by other bodies, including the ICJ and the African Commission on Human and Peoples' Rights. This circumstance is surprising, given the relatively recent establishment of the ACERWC, as compared to, especially, the ICJ. It is even the more surprising since the ICJ's decisions are ultimately enforced by the United Nations Security Council.[102]

In these circumstances, the factors identified as possible explanations for Uganda's extensive compliance with the Committee's decision have significant implications for actors in international relations and international society – in so far as they might indicate possible avenues for achieving greater compliance with the outcomes of the international dispute settlement processes.

102. Article 94 (2), United Nations Charter ('If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment').

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