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From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies

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FROM COMMITMENT TO COMPLIANCE: ENFORCEABILITY OF REMEDIAL ORDERS OF AFRICAN HUMAN RIGHTS BODIES

Roger-Claude Liwanga[*]

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INTRODUCTION

Many African governments have ratified numerous international and regional human rights instruments, including the International Covenant on Civil and Political Rights,[1] the African Charter on Human and Peoples' Rights ("African Charter"),[2] the Protocol on the African Court on Human and Peoples' Rights,[3] the Protocol on the Statute of the

1. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

2. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter African Charter].

3. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights, June 9, 1998, http://www.achpr.org/instruments/court-establishment/ [hereinafter Protocol to the African Charter].

African Court of Justice and Human Rights,[4] and the Rome Statute on the International Criminal Court (ICC),[5] among others. In ratifying these treaties, the States (countries) not only commit themselves to promoting the realization and respect for the rights provided for by these instruments,[6] but also to complying with the decisions of the judicial human rights bodies empowered to adjudicate human rights violations. In the case of human rights infringement, judicial human rights bodies, such as the African Court on Human and Peoples' Rights (ACtHPR) or the African Commission of Human and Peoples' Rights ("African Commission"), have several options in deciding how to address the wrongdoing committed by a State party. These bodies can order a State-violator to cease the violations of human rights, prosecute those involved in the violations, repair the damage caused to victims, and/or take other measures reinforcing human rights.[7] However, with no coercive power to

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4. Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008, 48 I.L.M. 317 [hereinafter Protocol on the Statute of the ACJHR]. In May 2012, the African countries' representatives adopted their own protocol. African Union, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, at 8, Exp/Min/IV/Rev.7 (May 15, 2012) [hereinafter Draft Protocol Amending ACJHR Protocol], https://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf. For the purpose of this article, the terms the "Protocol on the Statute of the ACJHR (for the old version of the ACJHR Statute)" and the "Draft Protocol Amending the ACJHR Protocol (for the amended version incorporating the provisions dealing with the ACJHR's International Criminal Law Section)" will be used interchangeably.

5. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

6. ICCPR, *supra* note 1, art. 1, para. 3.

7. *See* Democratic Republic of Congo v Burundi, Rwanda and Uganda, Communication 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], Holding (May 2003), http://www.equalrightstrust.org/ertdocumentbank/DRC%20v%20Burundi,%20Rwanda%20and%20Uganda.pdf; Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo, Communication 274/03 and 282/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 89 (Nov. 5, 2013), http://www.achpr.org/files/sessions/54th/comunications/274.03_et_282.03_/achpr54_decis__274_and_282_03_drc_2013_eng.pdf; Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan, Communication 379/09, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 142 (Mar. 12, 2014), http://www.achpr.org/files/sessions/14th-

enforce their decisions, the ACtHPR and the African Commission, as well as international courts, rely on the good faith of the States to implement their remedial orders.[8] Despite States' commitments to respect human rights and comply with courts' decisions, scholars examining the issue of State compliance with human rights bodies' decisions conclude that only a few judgments rendered are actually implemented by the concerned States.[9] Most decisions are either partially enforced or not enforced at all. This state of affairs leaves countless human

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eo/comunications/379.09/achpr14eos_decis_379_09_sudan_eng.pdf; Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt, Communication 334/06, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 233 (Mar. 3, 2011), http://www.achpr.org/files/sessions/9th-eo/comunications/334.06_/achpreos9_334_06_eng.pdf.

8. Gerald L. Neuman, *Bi-Level Remedies for Human Rights Violations*, 55 HARV. INT'L L. J. 323, 325 (2014).

9. Déborah Forst noted that the execution of judgments from the ECtHR has been unsatisfactory. And as of

> 31 December 2011, among the more than 10,000 cases pending before the Committee of Ministers for the supervision of the execution 2,278 were leading cases, i.e. cases which have been identified as revealing a new systemic/general problem in a respondent state, which had been pending for more than five years. Moreover, 1354 of the 1696 new cases which became final between 1 January and 31 December 2011, were repetitive ones.

Déborah Forst, *The Execution of Judgments of the European Court: Limits and Ways Ahead*, 7 VIENNA J. INT'L CONST. L., Feb. 2013, at 1, *available at* https://www.icl-journal.com/download/f1527ce403500a9ec58b8269a9a91471/ICL_Thesis_Vol_7_3_13.pdf (last visited Oct. 20, 2015). Research conducted by Frans Viljoen and Lirette Louw on State compliance with the recommendations of the African Commission revealed that "only 14 percent of State parties comply fully and in timely fashion with the decisions of the African Commission on Human and Peoples' Rights." *See* Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights: 1994–2004*, 101 AM. J. INT'L L. 1, 5 (2007). Statistics from studies done on States' compliance with human rights bodies decisions reveal that only 6 percent of the IACtHR's judgments are fully complied with by concerned States, 83 percent are partially complied with, and 11 percent are not complied with. *See* Darren Hawkins & Wade Jacoby, *Partial Compliance A Comparison of The European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35, 56 (2010).

rights victims without justice and reparations for prejudices endured.

This article explores some of the practical and legal reasons preventing the enforcement of the decisions of human rights courts in Africa. It posits that African States' noncompliance or partial compliance with human rights courts' decisions is linked to numerous variables. These variables include the politicization of the postadjudicative phase, coupled with the lack of sanctions against defaulting States; the nonexistence of a judicial enforcement mechanism at regional and domestic levels; the lack of participation of domestic courts in the enforcement of international courts' judgments; and the misuse of the notion of sovereignty on judicial issues. This article also recommends actions to increase the likelihood of enforceability of the human rights courts' remedial orders in Africa. Ultimately, this article suggests certain legislative reforms at both the regional and national level, to help create a special judicial enforcement regime[10] through which the domestic courts and National Human Rights Institutions ("NHRIs") will play a pivotal role in enforcing judgments of international and regional human rights judicial bodies. However, this article recognizes that this proposition, which would allow human rights victims and beneficiaries of an international judgment to seek enforcement of the verdict in their favor before the domestic court of the offending State, may not be a perfect solution. This issue stems from the practical challenges in the administration of justice in some African countries. For example, most judgments rendered in the Democratic Republic of Congo (DRC) by local tribunals on local disputes are not implemented by the concerned parties. How can these local tribunals enforce international judgments when even their own decisions are not actually implemented?

This article is structured as follows: Part I will examine the principal African human rights bodies (such as the African Commission, the ACtHR, and the African Court of Justice and Human Rights (ACJHR)), and explore the historical background of their establishments, powers, jurisdictions, and the *locus standi* of these bodies. Part II will analyze the concept of

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10. Richard F. Oppong, *Enforcing Judgments of the SADC Tribunal in the Domestic Courts of Member States*, *in* MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK 115, 116 (Anton Bösl et al. eds., 2010) (discussing the enforcement of international judgments).

compliance and the challenges for international decisions' enforcement. Part III proposes recommendations to increase the rate of enforcement of international judgments.

I. SYNOPSIS OF AFRICAN HUMAN RIGHTS BODIES

This Part will examine the historical background of the creation of the African human rights bodies and their powers, jurisdictions, and the *locus standi* of these bodies. This Part will also discuss the relationship between these judicial bodies that is governed by the principle of complementarity.

A. Historical Background

The African human rights system has gradually evolved since the adoption of the African Charter in 1981, which constitutes the "birth certificate" of African human rights bodies. To understand the development of the African human rights system, it is important to first comprehend the philosophy that animated the Organization of African Unity (OAU), which is considered the "maternity" of all continental human rights instruments in Africa.

The OAU was established on May 25, 1963, when the representatives of thirty-two countries signed the OAU Charter. Over the years, twenty-one other countries gradually joined the OAU, culminating with South Africa, which became the fifty-third member on May 23, 1994.[11] The main objective of the OAU was to end the colonization and apartheid in the African continent; to promote unity among African States; to coordinate cooperation for development; to safeguard the sovereignty and territorial integrity of its members; and to promote international cooperation within the framework of the United Nations.[12] However, while addressing the issues of socioeconomic rights, decolonization, and racial discrimination, the OAU Charter lacked explicit obligations for its members in regards

11. Fordham O'Wara, *Bibliographical Pathfinder: African System for the Protection and Promotion of Human Rights*, U. MINN. HUM. RTS. LIBR. (2002), https://www1.umn.edu/humanrts/bibliog/africanpathfinder.html.

12. *African Human Rights System*, INFO. PLATFORM HUMANRIGHTS.CH, http://www.humanrights.ch/en/standards/other-regions-instruments/african-human-rights-s (last visited Apr. 12, 2015).

to the protection of civil and political rights.[13] As a result, numerous massive violations of human rights were completely ignored in Africa.[14] The omission of human rights was at least partly tied to the OAU Charter's sacrosanct principle of noninterference in the internal affairs of State members.[15] Nevertheless, the international movement generated by both the 1950 adoption of the European Convention on Human Rights (establishing the European Court of Human Rights (ECtHR)) and the 1969 entry into force of the Inter-American Convention of Human Rights (establishing the Inter-American Court of Human Rights (IACtHR)) resonated throughout the African continent: the establishment of a system protecting human rights in Africa became a necessity.[16] It is in this context that the African Charter and its 1998 Protocol were adopted to create judicial human rights bodies in Africa with the fundamental mission of mandating States to respect of the rights guaranteed by the African Charter.[17]

B. Principal African Human Rights Bodies

The following section will analyze the principal African human rights bodies, including the African Commission of Human Rights, the African Court of Human Rights, and the future ACJHR. It will particularly analyze the powers, jurisdictions, and *locus standi* of these bodies.

1. African Commission of Human Rights

Article 30 of the African Charter created the African Commission as a "quasi-judicial" body to monitor the implementation of the African Charter's rights. Article 30 stipulates that "An African Commission on Human and Peoples' Rights, hereinafter called 'the Commission,' shall be established within the Organization of African Unity to promote human and peoples'

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13. *History of the African Charter*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., http://www.achpr.org/instruments/achpr/history (last visited Apr. 12, 2015).

14. *Id.*

15. *Id.*

16. INT'L FED'N FOR HUMAN RIGHTS, THE AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS: TOWARDS THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS 19–20 (2010) [hereinafter FIDH].

17. *Id.* at 22.

rights and ensure their protection in Africa."[18] One may wonder why the African Charter established a quasi-judicial body rather than simply providing for the creation of a court. The *travaux preparatoires* of the African Charter reveal that the majority of the treaty drafters rejected the idea of establishing a Court to enhance the protection of human rights in order to comply with the African legal traditions for the political settlements of disputes.[19] In establishing the African Commission as a quasi-judicial organ, the African Charter conferred the African Commission with a dual mandate of promoting and protecting human rights in the African continent.[20]

a. Jurisdiction and Standing

The African Commission performs its promotional mandate by implementing several tasks, such as: collecting documents and conducting research on African problems in the field of human rights; organizing seminars, symposia, and conferences; disseminating information, encouraging national and local institutions concerned with human rights, and making recommendations to governments; formulating and developing principles and rules relating to human rights to serve as the basis for the adoption of legislation by African governments; and cooperating with other African and international institutions working in the field of the promotion and protection of human rights.[21] The African Commission's promotional function also includes gathering information on the situation of human rights within a State party's territory, raising awareness of the African Charter, and improving the situation of human rights in Africa.[22] This catalog of promoting activities requires a substantial budget in order for the African Commission to efficiently execute its duties. However, the African Commission has long experienced a limited operating budget—for example, its budget in 2007 was estimated at $1,000,000 USD and in 2009 at $3,600,000 USD; whereas the ECtHR's budget was

18. African Charter, *supra* note 2, art. 30.
19. FIDH, *supra* note 16, at 23.
20. *Id*. at 22.
21. African Charter, *supra* note 2, art. 45.
22. ORG. OF AFR. UNITY, INTERIM RULES OF PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, r. 74 para. 3 [hereinafter AFR. COMM'N INTERIM RULES OF PROC.].

about €56,000,000 (or $100,000,000 USD) in 2009.[23] With regards to its mandate of protecting human rights, the African Commission's competencies consist of sending promotional and protection missions to States parties;[24] receiving communications from States parties, nongovernmental organizations (NGOs), and individuals for violations of human rights committed by a State party;[25] adopting recommendations on the human rights situations in countries or on specific issues relating to human rights;[26] sending urgent appeals to States parties;[27] scrutinizing State reports on legislative or other measures taken to give effect to the rights guaranteed by the African Charter and making recommendations in this regard;[28] and interpreting the provisions of the African Charter at the request of a State party, an institution of the African Union (AU), or an African NGO recognized by the AU.[29] From this description of the protection mandate, it appears that the African Commission has a broad jurisdiction over human rights issues, including contentious and advisory jurisdictions. In addition, the African Commission's jurisdiction applies only to States that have ratified the African Charter and its Protocol. Regarding the *locus standi*, the African Commission can receive complaints from States, NGOs, and individuals for violations of human rights committed only by a State party.[30] This means that the African

23. FIDH, *supra* note 16, at 23, 29.

24. AFR. COMM'N INTERIM RULES OF PROC., *supra* note 22, r. 24 para. 1.

25. African Charter, *supra* note 2, art. 47; *see also* Dawda Jawara v. The Gambia, Communication 147/95–149/96, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.] (May 11, 2000) [hereinafter Comm. 147/95–149/96], http://www.achpr.org/files/sessions/27th/comunications/147.95-149.96/achpr27_147.95_149.96_eng.pdf. In this case, the African Commission received a complaint from an individual, who was the former Head of State of the Republic of The Gambia. The complainant alleged the military junta, who overthrew his government, violated his fundamental human rights. *Id.* paras. 1–10. In *Ligue Camerounaise des Droits de l'Homme v. Cameroon*, the African Commission received a complaint submitted by an NGO. Ligue Camerounaise des Droits de l'Homme v. Cameroon, Communication 65/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Apr. 1997), http://www.chr.up.ac.za/images/files/publications/ahrlr/ahrlr_2000.pdf.

26. AFR. COMM'N INTERIM RULES OF PROC., *supra* note 22, rule 95.

27. *Id.* r. 23, para. 4.

28. African Charter, *supra* note 2, art. 62.

29. *Id.* art. 45, para. 3.

30. *Id.* art. 47.

Commission cannot adjudicate human rights violations in cases committed by non-state actors or nonparty States. For example, an individual cannot approach the African Commission for the violation of human rights committed by another individual. Accordingly, the African Charter set up specific criteria in order for cases to be admitted to the African Commission.

b. Admissibility

The issue of admissibility of complaints before the African Commission is regulated by Rule 105 of the African Commission Rules of Procedure,[31] and Article 56 of the African Charter.[32] Indeed, Rule 105 of the Rules of Procedure specifically deals with the process of admissibility and provides that once a complaint is lodged, the African Commission will request a complainant to present evidence and arguments on admissibility within two months.[33] The African Commission will then transmit a copy of the complaint to the responding State and request it to submit its arguments and evidence within two months from the time of its notification.[34] Upon receiving the responding State's submissions, the complainant may then comment on those submissions within a month.[35]

Article 56 of the African Charter sets up the criteria of admissibility and stipulates that complaints on human rights violations can be admitted by the African Commission if the complaints:

> 1. Indicate the authors of the complaint even if the latter requests anonymity;
>
> 2. Are compatible with the Charter of the Organization of African Unity or with the present Charter;
>
> 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity;
>
> 4. Are not based exclusively on news discriminated through the mass media;

31. AFR. COMM'N INTERIM RULES OF PROC., *supra* note 22, r. 105.
32. African Charter, *supra* note 2, art. 56.
33. AFR. COMM'N INTERIM RULES OF PROC., *supra* note 22, r. 105.
34. *Id*. r. 105, para. 1.
35. *Id*. r. 105, para. 3.

> 5. Are sent after the intervention of exhaustive local remedies, if applicable, unless it is obvious that this procedure is unduly prolonged;
>
> 6. Are submitted within a reasonable period from the time local remedies were exercised or from the date the Commission is seized of the matter; and
>
> 7. Do not deal with cases that have been settled by the States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.[36]

From the criteria listed above, it appears that there are seven conditions of admissibility for cases brought before the African Commission. In other words, a complaint would be declared inadmissible by the African Commission if it is: filed anonymously, nonspecific about the rights violated, drafted in insulting language, not based on the truth of facts, filed before exhausting local remedies, filed at an unreasonable time, or previously settled by other (quasi) judicial international bodies.[37] All seven criteria must be concurrently met,[38] and a complainant's failure to comply with any of the requirements will result in the rejection of his or her case.

In past years, the African Commission has dismissed numerous complaints for their noncompliance with the provisions of Article 56. Leading examples illustrating the implementation of the admissibility criteria include the case *Dioumessi and Others v. Guinea,*[39] in which the African Commission held a complaint inadmissible because of anonymity. In this case, the African Commission implicitly concluded that an anonymous communication implies not only the absence of the complainant's name, but also the lack or inaccuracy of contact information. Furthermore, the African Commission declared the complaint inadmissible because the complainant could not be

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36. African Charter, *supra* note 2, art. 56.

37. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL., FILING A COMMUNICATION BEFORE THE AFRICAN COMMISSION OF HUMAN AND PEOPLES' RIGHTS 9–17 (2013), http://www.redress.org/downloads/publications/1307%20Manual%20to%20the%20African%20Commission.pdf.

38. *Id.*

39. Dioumessi and Others v. Guinea, Communication 70/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 13 (Oct. 1995), http://www.chr.up.ac.za/images/files/publications/ahrlr/ahrlr_2000.pdf

reached at the provided address.[40] The African Commission upheld a similar position in the subsequent case of *Joana v. Madagascar*.[41] However, one may wonder what the African Commission's position would be if contact were reestablished with a complainant at a future date. In *Riffaat Makkawi v. Sudan*,[42] the African Commission reopened and admitted a complaint that it had initially declared inadmissible for anonymity, based on inaccurate contact information, when contact was reestablished with the complainant.[43]

Another criterion for rejection of complaints relates to the use of disparaging or insulting language directed against the concerned State and its governing institutions. The terms "disparaging" and "insulting" language are neither defined in the African Charter nor clarified by the African Commission in its decisions. In *Ligue Camerounaise des Droits de l'Homme v. Cameroon*,[44] the African Commission declared the complaint inadmissible for insulting language because it contained statements describing the Cameroonian government as a "regime of tortures" and called for the Cameroonian president to "respond to [the] crime against humanity" that was committed.[45] However, the African Commission did not explain with legal reasoning how calling for a perpetrator of a crime against humanity to be held responsible for his conduct amounts to "insulting language." In order to be considered insulting, the complaint's language should reach a certain degree of denigration or libel rather than being merely cutting, polemical, or sarcastic.[46] The position of the African Commission may perhaps be explained by extralegal or extrajudicial factors. Indeed, until recently

40. *Id.* para. 12.

41. Monja Joana v. Madagascar, Communication 108/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 11 (Oct. 1996), http://www.chr.up.ac.za/images/files/publications/ahrlr/ahrlr_2000.pdf

42. Rifaat Makkawi v. Sudan, Communication 311/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 258 (Nov. 2010), http://old.achpr.org/english/Session%20Report/48_OS%20report.pdf.

43. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL., *supra* note 37, at 9.

44. Ligue Camerounaise des Droits de l'Homme v. Cameroon, Communication 65/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Apr. 1997), http://www.chr.up.ac.za/images/files/publications/ahrlr/ahrlr_2000.pdf.

45. *Id.* ¶ 13.

46. EUR. COURT OF HUMAN RIGHTS, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA 38 (2004).

some members of the African Commission used to concurrently hold other internal or external executive governmental positions in their respective countries, including minister or ambassador.[47] As a result, it would be embarrassing, and possibly jeopardizing to their domestic careers, for members of the African Commission (particularly for those holding official functions at home) to accept complaints criticizing their own governments. Furthermore, the fact that certain members function as both the judge and a party in a matter, may affect the independence of the African Commission and lead to the frequent rejection of complaints using critical language.[48] Unlike the African Commission, the ECtHR held that the complainant's language must exceed "the bounds of normal, civil and legitimate criticism" in order to be perceived as insulting or abusive.[49]

An additional reason for the inadmissibility of most complaints concerns the nonexhaustion of domestic remedies. Before approaching the African Commission, it is mandatory that the complainant first pursue all legal and judicial mechanisms available locally to resolve the matter.[50] This requirement of exhausting local remedies constitutes a part of customary international law and is "based on the generally recognized rules of international (human rights) law"[51] that international human rights bodies are subsidiary to the domestic human rights courts, giving the latter the privilege to first adjudicate human rights violations.[52] This stipulation prevents the international tribunal from acting as a court of first instance; instead, international tribunals should serve as a body of last resort.[53] Accordingly, a complaint would be declared inadmissible by the African Commission if the case was still pending before the domestic tribunal or if the complainant failed to follow appropriate and available local judicial avenues. In *Majuru v Zimbabwe*, the African Commission dismissed the complaint for non-

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47. FIDH, *supra* note 16, at 24.

48. *Id.*

49. EUR. COURT OF HUMAN RIGHTS, *supra* note 46, at 38.

50. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL, *supra* note 37, at 10–11.

51. EUR. COURT OF HUMAN RIGHTS, *supra* note 40, at 22.

52. *Id.*

53. Majuru v Zimbabwe, Communication 308/2005, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 77 (Nov. 24, 2008), http://www.achpr.org/files/sessions/44th/comunications/308.05/achpr44_308_05_eng.pdf.

compliance with the requirement of exhaustion of local remedy.[54] However, to determine the complainant's compliance with this requirement, the African Commission focused on the availability, effectiveness, and sufficiency of local remedies. In *Jawara v The Gambia*,[55] the African Commission stated that, "A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint."[56] The burden of proof for the existence and exhaustion of local remedies weighs on the complainant by virtue of the principle *actori incumbit probation*. Once the complainant meets their burden, it then shifts to the State to demonstrate why remedies were not previously exhausted and how there are remedies available that can be used to solve the complaint.[57] This is the application of the procedural principle *in excipiendo reus fit actor*. Nevertheless, the exhaustion of local remedies is not an absolute requirement, and there are limitations to this criterion. The circumstances under which the exhaustion of local remedies is not a requirement include: the ousting of jurisdiction of courts;[58] unduly prolonged remedies;[59]

54. *Id.* ¶ 112.

55. Comm. 147/95–149/96, *supra* note 25.

56. *Id.* ¶ 32.

57. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL., *supra* note 37, at 12.

58. *Id.* at 13 (discussing the concept that the ousting of the court's jurisdiction is, for example, where a State-party has promulgated laws nullifying the jurisdiction of ordinary courts). S*ee also* Civil Liberties Organisation v. Nigeria, Communication 151/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 14 (1999), http://www.achpr.org/files/sessions/26th/comunications/151.96/achpr26_151_96_eng.pdf. In *Civil Liberties Org v Nigeria*, the African Commission upheld Nigeria's military government by adopting decrees ousting the jurisdiction of ordinary courts that had rendered the local remedies nonexistent, ineffective, or illegal. *Id.*

59. This situation occurs when there is an undue and unjustifiable prolongation of the case in the domestic courts. In *Odjouoriby Cossi Paul v. Benin*, the African Commission declared the complaint admissible after concluding that there was an undue delay of the Complainant's case before the national courts:

> The complaint filed the appeal against the judgment of the court of first instance is dated 19th September 1995 and the Commission was seized of the case on 8th April 1997, that is 20 months after the filing of the appeal. It appears from the practice of the Appeal Court ac-

the element of fear;[60] and the situation of serious human rights violations.[61]

Moreover, a complaint can be declared inadmissible if it is filed at an unreasonable time after local remedies were exhausted. Previously, the African Commission seemed to be "indulgent" in interpreting the "reasonable time" requirement.[62] Some complaints were declared admissible even after being dormant up to sixteen years following the exhaustion of domestic remedies.[63] However, after drawing inspiration from the IACtHR and ECtHR, the African Commission became more stringent in interpreting the "reasonable time" requirement.[64] In *Michael Majuru v. Zimbabwe*, the African Commission held that,

> The provisions of other international regional instruments like the European Convention on Human Rights and Fundamental Freedoms and the Inter-American Convention on Human Rights, are almost similar and state that they . . .

> cepted by the Supreme Court that average period ranges between 4 and 5 years.

See Odjouoriby Cossi Paul v. Benin, Communication 199/1997, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 28 (2004), http://www.achpr.org/files/sessions/35th/comunications/199.97/achpr35_199_97_eng.pdf.

60. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL., *supra* note 37, at 14. ("When the complainant has, out of fear, fled his/her own country where the alleged violation of human rights took place, and he/she could not therefore exhaust domestic remedies."); *see also, e.g.,* John D. Ouko v. Kenya, Communication 232/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 31 (2000), http://www.achpr.org/files/sessions/28th/comunications/232.99/achpr28_232_99_eng.pdf. In *Ouko v. Kenya*, by contrast, the African Commission found that there were elements of fear for the complainant and declared his complaint admissible. *Id.*

61. In *DR Congo v. Burundi, Rwanda and Uganda*, the African Commission noted that in the case where the violations of human rights are being perpetrated by the respondent States in the territory of the complainant State, the requirement of local remedies should not exist and the question of their exhaustion cannot therefore arise. *See* Democratic Republic of Congo/ Burundi, Rwanda, Uganda, Communication 227/1999, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 63 (2003), http://caselaw.ihrda.org/doc/227.99/view/en/.

62. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL, *supra* note 37, at 15.

63. *Id.*

64. *Id.*

> may only deal with the matter . . . within a period of six months from the date on which the final decision was taken . . . after this period has elapsed they will no longer entertain the communication.[65]

In this case, the African Commission declared the complaint inadmissible for being filed twenty-two months after the exhaustion of local remedies.[66] Thereby, the African Commission set the standard for a "reasonable time" period at six months.[67]

Additionally, complaints will only be admissible if they were not previously settled or pending before other international judicial bodies similar to the African Commission, such as the U.N. Human Rights Committee. Accordingly, in *Mpaka-Nsusu v. Zaire*, the African Commission dismissed the complaint because it had already been referred to the Human Rights Committee based on the violation of the International Covenant on Civil and Political Rights.[68] In this case, the African Commission's position might have been motivated by the necessity of respecting the *non bis in idem* principle. Yet, the African Commission can still accept complaints that were discussed by nonjudicial international bodies, such as United Nation's subcommission and special rapporteurs.[69]

Finally, complaints must specially address the violation of rights guaranteed in the African Charter rather than being an unclear statement concerning the general political situation of

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65. Majuru v Zimbabwe, Communication 308/2005, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 108 (2008), http://www.achpr.org/files/sessions/44th/comunications/308.05/achpr44_308_05_eng.pdf.

66. *Id.* ¶ 110.

67. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL., *supra* note 37, at 15.

68. Mpaka-Nsusu Andre Aphonse v. Zaire, Communication 15/1988, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 2 (1988), http://www.achpr.org/files/sessions/5th/comunications/15.88/achpr5_15_88_eng.pdf.

69. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL., *supra* note 37, at 16; *see also* Bakweri Land Claims Committee v. Cameroon, Communication 260/2002, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶¶ 49–53 (2004), http://www.achpr.org/files/sessions/36th/comunications/260.02/achpr36_260_02_eng.pdf. In *Bakweri Land Claims Committee v. Cameroon,* the African Commission declared the complaint admissible despite that the matter was initially discussed by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities. *Id.*

the responding State.[70] In addition, complaints should not be based solely on media reports; they must substantiated by other material evidence establishing the truth of the facts.[71]

The procedure before the African Commission is quasi-judicial by nature. Through this quasi-judicial process, the African Commission is charged with enforcing the rights guaranteed in the African Charter[72] by formulating nonlegally binding recommendations (as final decisions) to the respondent States.[73] This means that State violators of human rights do not have a legal obligation to comply with the African Commission's decisions in regards to the complaints lodged against them. The lack of binding decisions of the African Commission, combined with its delay in adjudicating cases,[74] has led to the calling for judicial bodies capable of rendering decisions with binding effects.

2. ACtHPR

As previously mentioned, unlike the European and Inter-American Conventions on Human Rights, the African Charter does not establish a judicial human rights body. However, owing to institutional weaknesses, lack of resources, the nonbinding effects of decisions, and the lack of decisional implementation, there was a need to create a more "powerful" continental judicial body to fill the gaps of the African Commission. As a result, the Protocol to the African Charter establishing the ACtHPR was adopted in 1998,[75] and entered into force in 2004 after its ratification by fifteen countries.[76] The ACtHPR was created with the clear mission of both complementing and enhancing the protective mandate of the African Commission.[77]

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70. EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS ET AL., *supra* note 37, at 9.

71. *Id.* at 10.

72. FIDH, *supra* note 16, at 26.

73. African Charter, *supra* note 2, art. 45, para. 1(a).

74. The timeframe for the review of complaints before the African Commission varies, but is often too long-ranging. The timeframe often lasts between two and eight years. *See* Mohamed L. Diakite v. Gabon, No. 73/1992, African Commission on Human and Peoples' Rights [Afr. Comm'n on H.P.R.] (May 11, 2000), http://corteidh.or.cr/tablas/22425.pdf (rendering a decision on a case in 2000 in which the complaint was brought before the African commission in 1992); FIDH, s*upra* note 16, at 26.

75. *Id.* at 29–30.

76. Protocol to the African Charter, *supra* note 3, art. 34, para. 3.

77. *Id.* art. 2.

a. Powers and Jurisdictions

The ACtHPR has the power to adjudicate the compliance of State parties with the provisions of the African Charter and other international and regional human rights instruments duly ratified by those countries. Accordingly, the ACtHPR has advisory, arbitral, and contentious jurisdiction. As an advisory court, the ACtHPR provides its opinions on any matter relating to the protection of human rights or any relevant human rights instruments at the request of State members, AU organs, and African organizations recognized by the AU.[78] The subject matter for advisory opinions cannot relate to the request pending before the African Commission; this requirement aims to avoid a conflict of jurisdiction between the African Commission and the ACtHPR.[79]

Additionally, the ACtHPR is competent to serve as an arbitral body, where it can amicably settle cases brought before it.[80] The arbitral competence of the ACtHPR resembles a diplomatic function through which the court must use amicable approaches to reconcile and resolve disputes between the parties in conflict.[81] However, the agreement between parties must comply with the African Charter's provisions rather than violate the rights guaranteed by these provisions.[82]

The ACtHPR may also be requested to exercise its contentious jurisdiction. Article 3(1) of the Protocol provides that the ACtHPR jurisdiction shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol, and any other relevant Human Rights instrument ratified by the concerned States.[83] This means, in performing its contentious jurisdiction, the ACtHPR has a dual function, consisting of either interpreting or applying the provisions of the African Charter and other relevant human rights instruments.[84]

Although this dual contentious function can be cumulatively performed, ACtHPR—to the extent that it can adjudicate whether or not the respondent State has efficiently applied a

78. *Id*. art. 4.
79. *Id*.
80. *Id*. art. 9.
81. FIDH, *supra* note 16, at 52.
82. Protocol to the African Charter, *supra* note 3, art. 9.
83. *Id*. art. 3, para. 1.
84. FIDH, *supra* note 16, at 51.

right guaranteed by the provisions of the African Charter—may also interpret some of these provisions.[85] For instance, in *Norbert Zongo and others v. Burkina Faso*, a case pertaining to the assassination of the journalist Norbert Zongo, the ACtHPR interpreted the provisions of the African Charter pertaining to the exhaustion of local remedies and ruled that Burkina Faso had failed to take appropriate action to "ensure that the rights of the Applicants for their cause to be heard by competent national Courts are respected."[86] The ECtHR and the IACtHR have also recognized a dual contentious function to interpret and apply human rights provisions.[87]

b. Standing Rights

According to Article 5 of the Protocol to the African Charter and Rule 33 of the Rules of ACtHPR, the ability to approach the ACtHPR is only held by: the African Commission, State parties to the Protocol, African Intergovernmental Organizations, and exceptional NGOs and individuals from States accepting the Court's jurisdiction. In other words, NGOs and individuals are denied the right to directly lodge complaints before the ACtHPR.[88] Instead, they must indirectly approach the Court by instituting complaints before the African Commission, hoping the latter will forward the matter to the Court. However, there is no absolute guarantee that in seizing the African Commission, the case will subsequently be referred to the

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85. *Id.*

86. Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and The Burkinabe Human and People's Rights Movement v. Burkina Faso, Case No. 013/2011, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 125 (June 21, 2013), http://dev.ihrda.org/fr/doc/013.11/view/; *see also African Court on Human and People's Rights Issues Judgment in Killing of Investigative Journalist*, INT'L JUST. RESOURCE CTR. (Apr. 8, 2014), http://www.ijrcenter.org/2014/04/08/african-court-on-human-and-peoples-rights-issues-judgment-in-killing-of-investigative-journalist/.

87. European Convention on Human Rights and Fundamental Freedoms, art. 32, para. 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; *see also* American Convention on Human Rights, art. 62, para. 3, Nov. 22, 1969, 9 I.L.M. 101 [hereinafter American Convention].

88. Protocol to the African Charter, *supra* note 3, art. 5, para. 3 & art. 34 para. 6; *see also* AFR. COURT OF HUMAN & PEOPLES' RIGHTS, RULES OF COURT, r. 33, para. 1 (2010), http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf.

Court. The African Commission may try to adjudicate the matter itself and make recommendations to the respondent State. The Commission may refer the case to the Court only when the respondent State fails to comply with the African Commission's recommendations. This process could take many years before the ACtHPR is actually able to hear the case. However, NGOs and individuals from States that have made a declaration accepting the jurisdiction of the Court for its citizens, can bring cases directly before the ACtHPR. As of March 2015, only five countries have made such a declaration authorizing their citizens to directly approach the Court, including Burkina Faso, Ghana, Malawi, Mali, and Tanzania.[89] It is worth noting that the ACtHPR is not the only international judicial human rights body that bars individuals from directly approaching the Court. Individuals and NGOs also lack standing to directly institute complaints before the IACtHR; they are required to lodge complaints through the Inter-American Commission of Human Rights.[90] However, unlike the African and IACtHR, the ECtHR is the only international judicial human rights body that automatically accepts complaints coming directly from individuals.[91]

c. Admissibility

According to the Protocol to the African Charter, the ACtHPR should rule on the admissibility of cases based on Article 56 of the African Charter.[92] The Protocol also emphasizes that the ACtHPR may request the opinion of the African Commission when deciding on the admissibility of complaints.[93] These inter-judicial interactions reflect the unique relationship between the ACtHPR and the African Commission.

d. Relationship Between the ACtHPR and the African Commission

Article 2 of the Protocol to the African Charter provides that "the Court shall . . . complement the protective mandate of the

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89. *The African Court on Human and People's Rights*, AFR. UNION, http://www.au.int/en/organs/cj (last visited Oct. 21, 2015).

90. American Convention, *supra* note 87, art. 44.

91. European Convention, *supra* note 87, art. 34.

92. Protocol to the African Charter, *supra* note 3, art. 6, para. 2.

93. *Id*. art. 6, para. 1.

African Commission on Human and Peoples' Rights . . . conferred upon it by the African Charter on Human and Peoples' Rights."[94] The complementary relationship between the ACtHPR and the African Commission is demonstrated through the collaboration on the issue of *locus standi*, where the African Commission serves as the road leading to the Court, particularly in the context when offending States do not allow their citizens to directly approach the Court. Their collaboration is also reflected in the Court's advisory jurisdiction where it can request the advisory opinion of the African Commission on human rights questions.[95] Furthermore, both the ACtHPR and the African Commission work together on the admissibility of cases where the ACtHPR demands the African Commission's opinion[96] or decides not to adjudicate the complaints brought before it and transfers them to the African Commission for examination.[97]

In conclusion, unlike the African Commission, the procedure before the ACtHPR is judicial, and the decisions rendered by the Court are legally binding for the offending States. And, according to Article 30 of the Protocol, the State Parties are required to comply with the Court's judgment.

3. ACJHR

It may be unclear why there is an ACJHR when the ACtHPR just entered into force in 2004. One may wonder what is wrong with the newly born ACtHPR that necessitates its replacement by a new Court. Before exploring these concerns, it is imperative to illustrate the context of the creation of the ACJHR.

In July 2002, the OAU was disbanded and replaced by the AU, which was entitled with the mission of achieving "an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in [the] global arena."[98] The AU was established on the basis of a Constitutive Act of 2000,[99] with a Court of Justice as its judicial organ.[100] The

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94. *Id*. art. 2.

95. *Id*. art. 4.

96. *Id*. art. 6, para. 1.

97. *Id*. art. 6, para. 3.

98. *AU in a Nutshell*, AFR. UNION, http://au.int/en/about/nutshell (last visited Apr. 13, 2015).

99. Org. of African Unity, Constitutive Act of the African Union, July 11, 2000, OAU Doc. CAB/LEG/23.15 [hereinafter AU Constitutive Act].

Court of Justice was set to be a separate and distinct Court from the ACtHPR mandated to adjudicate the compliance of the AU's State members with the AU's treaties and decisions.[101] Both the Court of Justice and the ACtHPR had jurisdiction to hear human rights complaints—the former had jurisdiction on human rights cases based on the AU Constitutive Act, and the latter had jurisdiction based on the Protocol to the African Charter.[102] It soon became obvious that the coexistence of multiple regional courts with overlapping jurisdictions could lead to a serious risk of conflicting jurisprudence, as the same rules of law might be interpreted differently in different cases.[103] In addition to the potential legal problem, there were also some practical concerns that maintaining two continental Courts would be challenging due to both insufficient human and financial resources. From this quagmire, there emerged the idea of merging the two Courts into a single Court.[104] In July 2008, the AU's State members adopted a Protocol[105] that merged the Court of Justice and the ACtHPR into a single Court called the ACJHR. Article 60 of the ACJHR Protocol provides that the Protocol and its Court's Statute will enter into force thirty days after the ratification of the Protocol by fifteen member States.[106] As of December 2014, only five states—Libya, Mali, Burkina Faso, Congo-Brazzaville, and Benin—had ratified the ACJHR Protocol.[107] Beyond the legal and practical challenges which occasioned the creation of a single and more powerful Court in Africa, another motivation for establishing

100. *Id*. art. 5, para. 1(d), art. 18.

101. FIDH, *supra* note 16, at 141.

102. FIDH, *supra* note 16, at 142.

103. S*ee* Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45, 102 (2000).See generally Marc Schulman, Note, *The African Court of Justice and Human Rights: A Beacon of Hope or a Dead-end Odyssey?*, INKULKDA STUDENT J.L. U. WITWATERSRAND, 2013, http://www.inkundlajournal.org/inkundla/2013-inkundla-2.

104. *Id*.

105. Protocol on the Statute of the ACJHR, *supra* note 4.

106. *Id*. art. 60.

107. *List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights*, AFR. UNION (Mar. 2, 2014), http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR_0.pdf.

such a Court seemed to be purely political. Indeed, according to numerous African leaders, it is important to create a continental criminal judicial institution to provide African solutions to African problems rather than having the ICC preoccupied with trying to solve African challenges by using Western standards, perceptions, and perspectives.[108] In other words, some African Heads of States (even if unfairly) perceive the ICC, whose competence consists of judging international crimes, as a judicial institution that principally targets African people (including political leaders) accused of perpetrating international crimes, such as crimes against humanity, genocide, war crimes, and crimes of aggression.[109] In response, for example, the AU adopted a resolution preventing its members from cooperating with the ICC in the arrest and transfer[110] of Omar Al-Bechir, President of Sudan[111] to the ICC.

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108. Murigi Macharia, *The Establishment of the African Court of Justice and Human Rights is Unstoppable, Says President Kenyatta as Kenya Commits Dollars One Million ($1 Million) to the New Judicial Institution*, PRESIDENT.GO.KE (Jan. 31, 2015), http://web.archive.org/web/20150405175158/http://www.president.go.ke/the-establishment-of-the-african-court-of-justice-and-human-rights-is-unstoppable-says-president-kenyatta-as-kenya-commits-dollars-one-million-1-million-to-the-new-judicial-institution/.

109. Since the establishment of the ICC, all twenty-two cases brought before it concern the nationals of the African countries. Some of these cases were referred to the ICC by States parties to the Rome Statute, such as Uganda, the DRC, the Central African Republic, and Mali. Others were referred to the ICC by the Security Council regarding the situation in Sudan, and the situation in Libya, which are both non-States parties to the Rome Statute. And some others cases were initiated *proprio motu* by the ICC itself (concerning particularly the situations in Kenya and Ivory Coast). *See Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Apr. 14, 2015).

110. Katherine Iliopoulos, *The African Union and the ICC*, CRIMES OF WAR, http://www.crimesofwar.org/commentary/the-african-union-and-the-icc/ (last visited Apr.14, 2015).

111. Prosecutor v. Bashir, Case ICC-02/05-01/09, Warrant of Arrest (Mar. 9, 2009), http://www.icc-cpi.int/iccdocs/doc/doc535163.pdf. Omar Al-Bashir is being prosecuted for war crimes, genocide, and crimes against humanity in connection with situations occurring in Darfur from 2003 to 2008.

a. Jurisdictions of the ACJHR

The ACJHR has competence *ratione materiae* of the ACtHPR, the Court of Justice, and the international criminal tribunal.[112] In other words, as a contentious jurisdiction, the ACJHR is not only empowered to adjudicate the compliance of its States members with both the human rights provisions (based on the African Charter) and the AU's Constitutive Act and treaties, but also to judge the State-members' citizens based on international human rights instruments.[113] Accordingly, the Draft Protocol amending the Protocol on the Statute of the ACJHR provides that the ACJHR is divided into three Sections: a General Affairs Section, a Human Rights Section, and an International Criminal Law Section.[114] The General Affairs Section is competent to adjudicate all cases, except those "concerning human and/or peoples' rights issues," which are saved for the Human Rights Section; the International Criminal Law Section is competent to hear cases relating to international crimes.[115] Each

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112. Olufemi Elias, *Introductory Note* to Protocol on the Statute of the ACJHR, *supra* note 4, at 314.

113. Article 28 of the Protocol on the Statute of the ACJHR provides:

> The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to: a) The interpretation and application of the Constitutive Act; b) The interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity; c) The interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned; d) Any question of international law; e) All acts, decisions, regulations and directives of the organs of the Union; f) All matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court; g) The existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; h) The nature or extent of the reparation to be made for the breach of an international obligation.

Protocol on the Statute of the ACJHR, *supra* note 4, art. 28.

114. Draft Protocol Amending ACJHR Protocol, *supra* note 4, annex art. 6, para. 1, at 8 (amending art. 16) ("The Court shall have three Sections: a General Affairs Section, a Human Rights Section, and an International Criminal Law Section.").

115. *Id.* annex art. 7, para. 1, at 9 (amending art. 17).

Section of the ACJHR has its own appointed judges[116] and may refer a case brought before it to the Full Court (all sections reunified) for consideration, if necessary.[117] Important to note is that the establishment of a permanent, regional, and criminal judicial body in Africa is revolutionary within the African justice system, even if the primordial intention of this innovation might have been to avoid the humiliation of seeing African political leaders being prosecuted before the ICC. An abrupt rupture with the ICC by African countries would have been perceived as a consecration of impunity for international crimes due to the vacuum that would have been generated for prosecuting international crimes in Africa. The ACJHR's International Criminal Law Section (with its three Chambers: the Pre-Trial, the Trial, and the Appellate Chambers[118]) was therefore established to fill the eventual gaps. Another innovation relates to the impressive list of international crimes that the ACJHR's International Criminal Law Section is competent to adjudicate. Unlike the ICC, which only tries cases of genocide, crimes against humanity, war crimes, and crimes of aggression, the International Criminal Law Section may additionally judge cases of an unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.[119] In other words, the International Criminal Law Section "has jurisdiction over many crimes, of which some are not yet fixed in the international criminal firmament, such as unconstitutional change of government or illicit exploitation of natural resources."[120] In light of this extended jurisdiction, a more practical question that can also be asked is: Will the ACJHR have a consequent budget and staff to properly perform the criminal law function in addition to human rights and other functions?[121] This question does not require an immediate answer,

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116. *Id.* annex art. 6, para. 3, at 8 (amending art. 6).
117. *Id.* annex arts. 8 & 9, at 9 (amending arts. 18, 19).
118. *Id.* annex art. 6, para. 2, at 8 (amending art. 16).
119. *Id.* annex art. 14, para. 1, at 13 (amending art. 28A).
120. Max Du Plessis, *Implication of the AU Decision to Give the African Court Jurisdiction over International Crimes,* INST. FOR SECURITY STUD., June 2012, at 7, www.issafrica.org/uploads/Paper235-AfricaCourt.pdf.
121. *Id.* at 5.

given that the Court itself is neither operational nor has its budget been voted.

Even though the Court is not yet officially operational, the ACJHR can issue advisory opinions over legal questions requested by the AU's organs, including the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council, and the financial institutions (e.g., the African Investment Bank, the African Monetary Fund, and the African Central Bank).[122] The request for an advisory opinion must clearly mention the subject matter and must not be related to a pending application before the African Commission or the African Committee of Experts.[123] This condition intends to limit situations of "jurisdictional overlap and to prevent cases where contentious complaints might be disguised and submitted as advisory opinions."[124]

Finally, in terms of the competence *ratione personae,* the ACJHR has jurisdiction over both juristic and natural persons. The ACJHR is empowered to try juristic persons, particularly State members for: their human rights violations committed against their own populations or other States' populations and their noncompliance with the AU's Constitutive Act and treaties.[125] The ACJHR can also adjudicate cases concerning non-State juristic persons, such as corporations, for their complicity or participation in the commission of international crimes.[126] In addition to juristic persons, the ACJHR can judge natural persons for their involvement in committing international crimes. These natural persons may include the Heads of States or governments, government ministers or officials, chiefs of armies, and leaders or members of rebel groups for their individual participation in the violation of international human rights instruments.[127] The dual competence *ratione personae* of the ACJHR is very innovative for an international or regional judi-

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122. Protocol on the Statute of the ACJHR, *supra* note 4, art. 53, para. 1.

123. *Id.*

124. Dan Juma, *Lost (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights,* 13 Y.B. U.N. L. (Max Planck Inst.) 267, 300 (2009), www.mpil.de/files/pdf2/mpunyb_08_jumaii.pdf.

125. Protocol on the Statute of the ACJHR, *supra* note 4, art. 28, para. 1.

126. Draft Protocol Amending the ACJHR Protocol, *supra* note 4, annex art. 22, at 31 (amending art. 46C).

127. Mbori Otieno, The Merged African Court of Justice and Human Rights (ACJ&HR) as a Better Criminal Justice System than the ICC, at 6 (June 3, 2014) (unpublished manuscript), http://ssrn.com/abstract=2445344.

cial body. Most international judicial bodies are competent to try the misconduct of either States or individuals, not both. For instance, the International Court of Justice (ICJ), the ECtHR, the IACtHR, and the ACtHR are only competent to hear cases relating to the misconduct of States against international human rights instruments and/or international law. Whereas, the ICC and the International Tribunals for ex-Yugoslavia and Rwanda are solely competent over individuals' misconduct against international human rights laws.

b. Applicable Laws and Standing

In carrying out its functions, the ACJHR is obligated to apply the AU's Constitutive Act, the African Charter, other relevant regional human rights instruments, the international treaties ratified by the concerned States, and the international customs and general principles of law. Entities eligible to submit cases to the ACJHR consist of: (1) State Parties; (2) the AU's Organs (including the Assembly, Parliament, Peace and Security Council, and other AU institutions); (3) AU-staff members on dispute appeals based on the Staff Rules and Regulations of the Union; (4) the Office of the Prosecutor of the ACJHR; (5) the African Commission; (6) the African Committee of Experts on the Rights and Welfare of the Child; (7) African Intergovernmental Organizations; (8) African NHRIs; and (9) NGOs/individuals from exceptional States accepting the Court's jurisdiction.[128] Like the ACtHPR, the ACJHR is not open to nonmembers of the AU or AU-State members that have not ratified the Protocol of the Court.[129] Two additional observations can be made about the entities eligible to approach the Court. First, there is a recognition of *locus standi* for two new entities, namely the African Committee of Experts on the Rights and Welfare of the Child, and the African NHRIs, which are the domestic human rights institutions established by States to promote and protect human rights at the national level.[130] Second, NGOs and individuals are once again denied the possibility to directly institute complaints before the

128. Protocol on the Statute of the ACJHR, *supra* note 4, arts. 29, 30.

129. *Id*. art. 29, para. 2.

130. *Resolution on Granting Observer [or "Affilliate"] Status to National Human Rights Institutions in Africa*, U. MINN. HUM. RHTS LIBR. (1998), http://www1.umn.edu/humanrts/africa/res-observer.html.

ACJHR, but they can indirectly lodge complaints to the Court through the African Commission. In addition to the African Commission, NGOs and individuals may currently use their NHRIs as an alternative channel to reach the Court. However, this alternative would depend on how the scope of competence of the NHRIs is defined by the respective authorizing domestic legislation. The ACJHR can also use its discretion by allowing some NGOs and individuals to directly seize it, particularly those residing in States that have formally recognized the jurisdiction of the Court in hearing cases from their nationals.

c. Admissibility

The admissibility of cases before the ACJHR depends on the subject matters of complaints. The rules differ depending on whether the complaints fall under the jurisdiction of the General Affairs Section, Human Rights Section, or the International Criminal Law Section.

In regards to cases handled by the General Affairs Section, the admissibility of complaints is regulated by Article 33 of the Protocol on the Statute of the ACJHR.[131] To be admissible, the complaint must indicate the subject of the dispute, the applicable law for the dispute, and the jurisdiction competent to hear the case.[132] Once the complaint is lodged, the Registrar will inform the State concerned by the complaint or dispute, all States members, and, if necessary, the organs of the Union whose decisions are in dispute.[133] Each party concerned by the dispute will have the possibility to intervene and make comments on the complaints.[134]

Article 34 of the Protocol on the Statute of the ACJHR dealing with the proceedings before the Human Rights Section is laconic on the rules regulating the admissibility of complaints lodged before this Human Rights Section.[135] The provisions of

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131. Protocol on the Statute of the ACJHR, *supra* note 4, art. 33.
132. *Id.* art. 33, para. 1.
133. *Id.* art. 33, para. 3.
134. *Id.* arts. 50, 51.
135. The Protocol on the Statute of the ACJHR provides:

> Cases brought before the Court relating to an alleged violation of a human or peoples' right shall be submitted by a written application to the Registrar. The application shall indicate the right[](s) alleged to have been violated, and, insofar as it is possible, the provision or provisions of the African Charter on Human and Peoples' Rights, the

the Protocol on the Statute of the ACJHR is ambiguous on the question as to what criteria needs to be met in order for a complaint to be admissible before the ACJHR's Human Rights Section. In light of these provisions, it appears that the complaint before the Human Rights Section should only mention the violated right(s) and the illegality of this act(s) vis-à-vis the human rights instruments ratified by the concerned State.[136] But, one may also wonder whether the complaint would not be declared inadmissible by the ACJHR's Human Rights Section if it is filed anonymously or at an unreasonable time or before exhausting local remedies.

Nevertheless, concerning the complaints under the jurisdiction of the International Criminal Law Section, the rule of admissibility of cases is set up by Article 46E, 46E *bis,* and 46F of the Draft Protocol amending the ACJHR Protocol.[137] These provisions established some preconditions for a case to be declared admissible. A State party willing to seize the International Criminal Law Section should have previously accepted the jurisdiction of the International Criminal Law Section and agreed that any criminal conduct committed in its territory and/or by its nationals is to be prosecuted.[138] Additionally, the criminal conduct, which is the subject matter of the complaints, should have been committed after the entry into force of the Protocol on the Statute of the ACJHR.[139] As of March 2015, the ACJHR is not yet operational. Acting as a complementary jurisdiction to the domestic and subregional courts, the International Criminal Law Section will reject the complaints on cases that were already adjudicated at the national or regional level[140] by virtue of the principle of *no bis in idem.*[141] Furthermore,

> Charter on the Rights and Welfare of the Child, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa or any other relevant human rights instrument, ratified by the State concerned, on which it is based. 2. The Registrar shall forthwith give notice of the application to all parties concerned, as well as the Chairperson of the Commission.

Id. art. 34.

136. *Id.*

137. Draft Protocol Amending ACJHR Protocol, *supra* note 4, annex art. 22, at 31–32 (amending arts. 46E, 46E *bis* & 46F).

138. *Id.* at 32 (amending art. 46E *bis*).

139. *Id.* (amending art. 46E, para. 1, as amended).

140. *Id.* at 33 (amending art. 46H, para. 2(c)).

141. *Id.* at 34 (amending art. 46I)

the International Criminal Law Section will not hear cases pending before the national and subregional jurisdictions.[142] However, the International Criminal Law Section can declare admissible a case that is being investigated or prosecuted by the domestic court, if the State is unwilling or unable to complete the investigation or prosecution.[143] To determine the inability of a State to prosecute or investigate, the International Criminal Law Section will assess whether the concerned State was unable, for example, to collect necessary evidence and testimony against the accused person and to try him/her owing to the collapse or unavailability of its domestic judicial system.[144] There is also no statute of limitations for crimes under the competence of the International Criminal Law Section, which means that the eligible entity can approach the International Criminal Law Section any time after the international criminal conduct was committed. However, there are time limitations for applications for the revision of a judgment: they are required to be filed no more than six months after the discovery of new facts or within ten years from the date of the judgment.[145]

It should be noted that these prerequisites for approaching the International Criminal Law Section are not an innovation introduced by the ACJHR's Protocol; other international judicial bodies, such as the ICC, impose similar requirements.[146] Like in the ICC, the official position of the accused person cannot provide judicial relief from prosecution or mitigate punishment before the International Criminal Law Section.[147] Unlike the ICC, no prosecutions or investigations can be initiated or continued against the AU's sitting Heads of State or Government, or senior government officials.[148] This immunity clause for the serving governmental leaders was recently introduced to the ACJHR's Protocol to prevent African leaders from being criminally held accountable for their commission of interna-

142. *Id.* at 33 (amending art. 46H, para. 1).
143. *Id.* (amending art. 46H, paras. 2(a), (b)).
144. *Id.* at 34 (amending art. 46H, para. 4).
145. Protocol on the Statute of the ACJHR, art. 48, http://www.refworld.org/docid/4937f0ac2.html (last visited Nov. 24, 2015).
146. Rome Statute, *supra* note 5, art. 17.
147. Draft Protocol Amending ACJHR Protocol, *supra* note 4, annex art. 22, at 32 (amending art. 46B, para. 2).
148. *Id.* annex art. 22, art. 46A *bis*.

tional crimes while in office. As of March 2015, Omar al-Bechir (President of Sudan),[149] Uhuru Kenyatta (President of Kenya),[150] and William Ruto (Deputy-President of Kenya)[151] are facing criminal charges before the ICC. Some may argue that the criminal immunity of sitting government officials is consistent with international law, which recognizes diplomatic immunity for diplomatic officers.[152] This statement is partially valid. Of course, diplomats enjoy diplomatic immunity while exercising their functions; but an ICJ's ruling has limited the scope of that immunity for certain violations of international

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149. Prosecutor v. Bashir, Case ICC-02/05-01/09, Warrant of Arrest (March 9, 2009), http://www.icc-cpi.int/iccdocs/doc/doc535163.pdf.

150. Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision of Judge Trendafilova, at 3 (Mar. 8, 2011). Since January 2012, Mr. Kenyatta was facing charges of crimes against humanity before the ICC in connection with the postelection violence in Kenya in 2007–2008. However, in March 2015, the ICC's Trial Chamber issued a decision withdrawing all charges against him due to lack sufficient evidence. Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision of Judge Ozaki, ¶ 12 (Mar. 13, 2015).

151. Prosecutor v. Ruto. ICC-01/09-01/11, Decision of Judge Trendafilova, at 3 (Mar. 8, 2011).

152. Under the Vienna Convention on Diplomatic Relations: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Moreover,

> [first, a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. [Second, a] diplomatic agent is not obliged to give evidence as a witness. [Third, no] measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence. [Finally, t]he immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

law. Indeed, in *Democratic Republic of Congo (DRC) v. Belgium,* which concerned an arrest warrant against the DRC's Foreign Minister, the ICJ held that: "[t]he official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[153] In other words, the ICJ wanted to convey that diplomatic immunity might not be operational in the case of a diplomat committing an international crime. In light of this ruling, the immunity clause within the ACJHR's Protocol, which enables sitting African government officials to avoid prosecution, appears to be retrogressive in terms of everyone's equality before the law.[154]

d. Relationship Between the ACJHR, ACtHPR, and African Commission

The rapport between the ACJHR, ACtHPR, and African Commission is governed by the principle of complementarity. The Protocol on the Statute of ACJHR provides that, in order to achieve the objectives of the African Charter, the ACJHR is established to supplement and strengthen the mission of the African Commission and the African Committee of Experts on the Rights and Welfare of the Child.[155] Article 38 of the same Protocol also emphasizes that the Rules of Procedures before the ACJHR should take into account the complementarity between the Court and other treaty bodies of the AU.[156] In regards to collaboration between the ACJHR and the ACtHPR, all cases pending before the latter that predate the entry into force of the Protocol on the Statute of ACJHR will be transferred to the ACJHR's Human Rights Section.[157] The same principle should also apply to unadjudicated cases pending before the ACtHPR while the ACJHR awaits full operational sta-

Vienna Convention on Diplomatic Relations, arts. 29, 31, Apr. 18, 1961, 500 U.N.T.S. 90.

153. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 56 (Feb. 14).

154. *Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights*, HUM. RTS. WATCH (Apr. 12, 2015), http://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and-hu.

155. Protocol on the Statute of the ACJHR, *supra* note 4, pmbl.

156. *Id*. art. 38.

157. *Id*. art. 5.

tus.[158] Furthermore, the ACJHR also cooperates with the African Commission and the NHRIs on the issue of *locus standi* since these institutions can approach the ACJHR on behalf of NGOs and individuals that lack the opportunity to directly seize the Court.[159]

Similar to the procedure in the ACtHPR, the procedure before the ACJHR is judicial, and its judgments produce binding effects on all parties who have initially accepted the Court's jurisdiction. According to Article 43(6) of the Protocol on the Statute of the ACJHR, all State Parties should comply with the Court's judgments, and the AU's Executive Council should monitor the execution of the ACJHR's judgments by the concerned States.[160] However, the relevant question is, how compliant are African States with the decisions of the African human rights bodies? This question will be answered in the upcoming Part, which deals with compliance, or noncompliance, with human rights courts' decisions in Africa.

II. (NON)COMPLIANCE WITH HUMAN RIGHTS COURT DECISIONS IN AFRICA

State parties to treaties, having recognized the jurisdiction of international or regional judicial bodies, are called to comply with decisions rendered by these bodies. This section will explore the concept of compliance and the challenges for the enforcement of international decisions. It will also formulate some recommendations on how to increase the rate of enforcement of international judgments.

A. Understanding the Concept of Compliance

There is no single definition articulating the concept of "compliance." Numerous scholars have suggested definitions to describe what constitutes compliance with (inter)national decisions. In light of Article 94(2) of the U.N. Charter, noncompliance is the failure by a State party to perform the obligations incumbent upon it under a judgment delivered by the ICJ.[161] According to Heather Jones, noncompliance is a defiance involving an indiscriminate dismissal of a court judgment as in-

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158. *Id.*
159. *Id.* arts. 29, 30.
160. *Id.* art. 43, para. 6.
161. U.N. Charter art. 94, ¶ 2.

valid, coupled with a refusal to obey it.[162] For Jana Von Stein[163] and Kal Raustiala,[164] compliance is the scale to which the behavior of a State conforms to a legal standard. This raises the question of distinguishing compliance from effectiveness, which is the degree to which the legal rules impact a State's behavior.[165] However, it is not uncommon for a State party to a Convention to fully obey with the provisions of the Convention based on their motivations that are not really related to the Convention itself.[166]

Most international and regional Conventions consecrate the State's obligation of compliance with international courts' decisions. According to the U.N. Charter, each State member should undertake to comply with the judgment of the ICJ.[167] Similar stipulations have been replicated by the European,[168] Inter-American,[169] and African treaties on Human Rights.[170] This obligation of compliance cannot be understood as reciprocal; each State party to the dispute is principally responsible for opting for a method in which the court's decision would be implemented.[171] In the context of the ICJ's decisions, the State's choice on its implementation method should not obligate the other party of the dispute who may contest it, which in turn could lead to another dispute between the concerned parties.[172]

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162. Heather Jones, *Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua*, 12 CHI.-KENT J. INT'L & COMP. L. 58, 59 (2011).

163. Jana Von Stein, *International Law: Understanding Compliance and Enforcement*, *in* INTERNATIONAL STUDIES ENCYCLOPEDIA 2 (Robert A. Denemark ed., 2010), *available at* www.personal.umich.edu/~janavs/vonstein-compendium.pdf.

164. Kal Raustiala, Compliance and Effectiveness in International Regulatory Cooperation, 32 CASE WESTERN. RES. J. INT'L L. 387, 387 (2000).

165. *Id.*; *see also* Hawkins & Jacoby, *supra* note 9, at 39.

166. Heath Pickering, *Why Do States Mostly Obey International Law?*, E-INT'L REL. STUDENTS (Feb. 4, 2014), http://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/.

167. U.N. Charter art. 94, ¶ 1.

168. European Convention, *supra* note 87, art. 46, para. 1.

169. American Convention, *supra* note 87, art. 68, para. 1.

170. Protocol to the African Charter, *supra* note 3, at art. 30.

171. CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 30 (2004).

172. *Id.* at 29.

Nevertheless, researchers catalogue three major categories of compliance, namely: noncompliance, partial compliance, and full compliance.[173] Indeed, the distinction between these three levels of compliance is illustrated through the following hypothetical example: Assume that a State X was condemned in 2010 and ordered by the Court to pay financial reparations to a victim of human rights abuses, to prosecute the perpetrators of the violations, and to reform domestic legislation on the protection of victims. In this hypothetical, there is noncompliance if State X does not execute any of the Court's remedial orders by 2015. If State X had paid the financial reparations and reformed its domestic legislation by 2015, but failed to prosecute the human rights violators, then there would be partial compliance. In contrast, there would be full compliance if the concerned State executed all components of the Court's order by 2015. From this hypothetical example, it is plausible that in the case on Armed Activities on the Territory of the Congo (*Democratic Republic of Congo v. Uganda*), Uganda has only partially complied with the ICJ's judgment on the dispute. In 2005, ICJ ordered Uganda to cease its military activities in the DRC, to get involved in the peace process, and to make financial reparations to the Congolese victims of human rights violations.[174] As of March 2015, Uganda has not made financial payments to the victims.[175]

Despite the binding effects of the decisions of international judicial bodies (such as the ICJ, the ICC, the ECtHR, the IACtHR, and the ACtHPR), numerous States have still not fulfilled their compliance obligations with the Courts' decisions. Statistics from studies conducted by Hawkins and Jacoby on States' compliance with human rights bodies decisions reveal that only 6 percent of the IACtHR's judgments are fully complied with by concerned States, 83 percent are partially complied, and 11 percent are noncomplied.[176] The same studies on States' compliance with the ECtHR's decisions by issues disclose the fol-

173. *See also* Courtney Hillebrecht, *Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals*, 1 J. HUM. RTS. 362, 366 (2009).

174. Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment 2005 I.C.J. 257 (Dec. 19).

175. KANDOLO, *L'Ouganda Refuse d'Indemniser la Rdc!*, FORUM DE AS (Mar. 24, 2015), http://www.forumdesas.org/spip.php?article3733.

176. Hawkins & Jacoby, *supra* note 9, at 56.

lowing: only 14 percent of the Court's verdicts on the right not to be tortured are enforced by the concerned States; 32 percent of decisions on protection of rights in detention are executed; 40 percent of decisions against discrimination are complied with; and 60 percent of decisions on freedom of expression are executed.[177] Like in Europe and America, the rate of African States' compliance with the African Commission's decisions are unsatisfactory.[178] According to Frans Viljoen and Lirette Louw's research, "only 14 percent of State parties comply fully and in timely fashion with the decisions of the African Commission on Human and Peoples' Rights."[179]

However, the fundamental question posed is: why do States not comply with the decisions of the international judicial bodies whose competences they have formally recognized? Before answering this question, it is important to know what might have led some compliant States to execute the remedial orders from international Courts. Heather Jones has noted that factors contributing to compliance include: external political influence, internal need for a definitive solution, and substance of the judgment issued.[180] First, external political influence consists of pressure from the international community, the involvement of international organizations (such as the U.N. Security Council empowered to enforce the ICJ's decisions), and the fear of developing a bad reputation as a result of noncompliance.[181] In regards to reputational costs, some would argue that this factor might only be pertinent for democratic regimes, rather than authoritarian regimes whose leaders may be less concerned about the damage to their country's reputation re-

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177. *Id*. at 73. Another study by Déborah Forst on the execution of the ECtHR's decisions disclosed that

> [a]mong the more than 10,000 cases pending before the Committee of Ministers for the supervision of the execution 2,278 were leading cases, i.e. cases which have been identified as revealing a new systemic/general problem in a respondent state, which had been pending for more than five years. Moreover, 1354 of the 1696 new cases which became final between 1 January and 31 December 2011, were repetitive ones.

See Forst, *supra* note 9, at 1.

178. Viljoen and Louw, *supra* note 9, at 5.

179. *Id*.

180. Jones, *supra* note 162, at 60.

181. *Id*.

sulting from noncompliance with human rights standards.[182] Second, another factor for compliance with international judgments may be the internal need for a definitive solution. This means that the conflicting parties may have a shared interest for the dispute to be settled, or may share a strong economic and/or cultural relationship, or may have a fear that noncompliance could lead to armed conflict between parties.[183] Finally, the substance of the judgment may also be a variable driving compliance, particularly if the content of the judgment is unambiguous and nondiscordant with the parties' self-interests, or if the decision offers a possibility of compromise and cooperation between parties.[184] Of course, ambiguous decisions are often subject to multiple interpretations from the parties, which may delay their implementation. However, some unenforced international decisions were drafted in clear terms or were delivered in the context of postarmed conflicts between disputing States. So, what are the practical and legal challenges for their enforcement?

B. Challenges for International Decision Enforcement

This section will explore from an international human rights perspective, the practical and legal challenges for the enforcement of international decisions. It will particularly emphasize the nonenforcement of decisions by African countries.

1. Politicization of the Postadjudicative Phase and Lack of Sanctions against Defaulting Parties

Offended States traditionally have "used various mechanisms to enforce international decisions, including international nonjudicial institutions, self-help,[185] and diplomatic negotia-

182. *Id.* at 65.
183. *Id.* at 68.
184. *Id.* at 72–75.
185. *See* Shabtai Rosenne, The International Court of Justice: An Essay in Political and Legal Theory 92–93 (1957). According to Rosenne,

> The doctrine of self-help supplies the theoretical basis for the actions of the injured judgment creditor, and leaves to that State full liberty to take measures as it deems necessary to obtain satisfaction of the judgment in its favour. Self-help resembles to acts of reprisals and/or retorsion. It may consist of posing acts that illegal in themselves but legalized or justified by the reference to the antecedent and continuing illegal act of the State against which they are directed (repris-

tions."[186] For instance, Article 94(2) of the U.N. Charter provides:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the International Court of Justice, 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.

Likewise, according to Article 46(2) of the European Convention on Human Rights, "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."[187] Similarly, Article 29(2) of the Protocol to the African Charter and Article 46(4) of the Protocol on the Statute on the ACJHR respectively state, "The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly" and "Where a party has failed to comply with a judgment, the Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment."[188]

From the above provisions, it appears that the enforcement of judicial decisions is solely attributed to nonjudicial institutions rather than judicial institutions. These international instruments are silent about the role of the domestic judicial bodies of offending States in enforcing international decisions. One might argue that there is nothing inefficient in securing the enforcement of international decisions through nonjudicial organs; after all, international courts lack their own police to enforce their decisions. One might also posit that the attribution of enforceability of the international courts' decisions to nonjudicial and political organs may be due to the traditional lack of *locus standi* of individuals appearing before international judi-

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> als); or they may consist of acts that are not illegal in themselves, but merely unfriendly or discourteous (retorsion).

Id.

186. Richard F. Oppong & Lisa C. Niro, *Enforcing Judgments of the International Courts in National Courts*, 5 J. INT'L DISP. SETTLEMENT 344, 346 (2014).

187. European Convention, *supra* note 87, art. 46, para 2.

188. *See* Protocol to the African Charter, *supra* note 3, art. 29, para. 2; Protocol on the Statute on the ACJHR, *supra* note 4, art. 46, para 4.

cial bodies.[189] These two arguments appear valid. Concerning the latter argument, individuals have, in fact, traditionally lacked the ability to approach the international courts. But today, numerous regional human rights courts recognize that individuals have the right to directly[190] or indirectly[191] approach them to seek remedies for their violated human rights. Regarding the former argument, it should be noted that recourse to nonjudicial mechanisms for international decisions enforcement is not a completely ineffective approach. However, scholars who focused on this subject were concerned about the lack of efficient success of these practices.[192] With regards to the Security Council's enforcement competence over ICJ decisions, the above Article 94(2) of the U.N. Charter provides that, "Security Council . . . may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[193] This wording implies that the Security Council has a discretionary power to either enforce or not enforce, compliance with the ICJ's decisions no matter whether the request of compliance was formally made by a State party favored by the decision.[194] This also means that the enforcement of the ICJ's decisions is not an "automatic"; instead, it is subjected to "political negotiation" between State political leaders sitting at the Security Council.[195] Therefore in terms of enforcement, the role of the ICJ is reduced to that of a "simple spectator" dependent on political negotiation.[196]

Additionally, political negotiation at the Security Council level also raises the issue of voting procedures. According to Article 27 of the U.N. Charter, all decisions of the Security Council must be made by an affirmative vote of nine of its fifteen mem-

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189. Oppong & Niro, *supra* note 186, at 346.

190. *See* American Convention, *supra* note 87, art. 44; European Convention, *supra* note 91, at art. 34.

191. *See* African Charter, *supra* note 2, art. 47; Protocol to the African Charter, *supra* note 3, at art.5.

192. Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EUR. J. INT'L L. 539, 540 (1995); *see also* Pammela Q. Saunders, *The Integrated Enforcement of Human Rights,* 45 N.Y.U. J. INT'L L. & POL. 97, 109 (2012); Schulte, *supra* note 152, at 39.

193. U.N. Charter, art. 94, ¶ 2.

194. Tanzi, *supra* note 167, at 541–42.

195. *Id.* at 541.

196. *Id.*

bers, which include the concurring votes of the five permanent members (China, France, Russia, United Kingdom, and the United States) who have the right to veto.[197] This voting procedure creates the risk that, for political rather than legal reasons, the Security Council would not be able to reach a decision enforcing compliance with an ICJ's judgment condemning one of its permanent members. In the *Case concerning Military and Paramilitary Activities in and against Nicaragua* between Nicaragua and the United States,[198] the former approached the Security Council to get enforcement of the ICJ's judgment rendered in its favor, after the United States failed to comply.[199] The United States, a permanent member of the Security Council, argued that the ICJ lacked the jurisdiction or competence to adjudicate and render decision on the matter.[200] The United States used its veto power, and no decision on enforcing compliance with the ICJ's judgment was reached by the Security Council.[201] The matter was subsequently submitted for consideration to the U.N. General Assembly, which also lacked competence to deal with a dispute on enforcement of the ICJ's decision.[202] It should be noted that the U.N. Security Council or General Assembly is not the only nonjudicial organ where the difficulty of reaching a decision over the enforcement of and compliance with judgments from international judicial bodies can be raised. Similar difficulty can also occur with enforcement decisions of regional human rights judicial bodies, such

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197. U.N. Charter, art. 27.

198. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

199. S.C. RES. 18428 (Oct. 28, 1986).

200. U.N. SCOR, 41st Sess., 2718 mtg. at 44–45, U.N. DOC. S/PV.2718 (Oct. 28, 1986). The representative for the United States said:

> We cannot sidestep the reality of the situation in central America by hiding behind a decision of the International Court of Justice, much less a decision that the Court had neither the jurisdiction nor competence to render. It does not suffice to clam, as some have done, that the Court must have had jurisdiction, because Article 36(6) of the Statute says that the Court may decide disputes concerning that jurisdiction.

Id.

201. *Id*. at 43. ("The United States will vote against the present draft resolution for essentially the same reason that it voted against the previous draft resolution on the subject in July.")

202. Tanzi, *supra* note 167, at 546.

as the ACtHPR and ACJHR. Provisions of both the Protocol to the African Charter (Article 29(2)) and the Statute of the ACJHR (Article 46(4)) also grant the AU's Council of Ministers the power to ensure compliance with judgments from the ACtHPR or ACJHR. The ACtHPR and ACJHR can seize the Council of Ministers and request that the Council take a decision enforcing the Court's judgment against a defaulting State. The voting procedure before the AU's Council of Ministers requires consensus in all decision-making processes; the failure of which will require decisions to be taken by a two-thirds majority of its voting members.[203] There is no information on a specific case where the AU's Council of Ministers decided on the noncompliance of an AU-State member with the Court's judgment. However, it is likely that the AU's Council of Ministers would be unable to reach the appropriate voting numbers for a decision to compel an AU-State member to comply with the Court's verdict. Still, even if the AU's Council of Ministers could reach a positive vote against a noncompliant State, the Protocol to the African Charter does not prescribe sanctions against defaulting States. The Protocol on the Statute of the ACJHR merely provides that the ACJHR should report situations of States' noncompliance to the AU Assembly,[204] which may take political and economic sanctions against defaulting States based on the AU's Constitutive Act.[205] Several notable observations can be made here. First, the AU Assembly's adoption of sanctions against noncompliant States is optional even if there is irrefutable evidence of noncompliance. Second, the characteristics of political and economic sanctions are ambiguous given that the provisions of the AU Constitutive Act on this issue are not "eloquent" enough. Third and finally, the ACJHR is not yet operational; one must wait until its entry into force to assess the efficiency of the AU Assembly's actions on noncompliance with the ACJHR's judgments.

Likewise in Europe, the Committee of Ministers must supervise the execution of the ECtHR's judgments.[206] Article 8 of the Statute of the Council of Europe provides that a member who fails to comply with the principles of human rights and funda-

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203. AU Constitutive Act, *supra* note 99, art. 11.
204. Protocol on the Statute of the ACJHR, *supra* note 4, art. 57.
205. AU Constitutive Act, *supra* note 99, art. 23, para. 2
206. European Convention, *supra* note 87, art. 46, para. 2.

mental freedoms, or fails to comply with the realization of these principles, may be suspended as a member of the Council.[207] For example, in the *Loizidou v. Turkey* case,[208] the Committee of Ministers was approached to enforce Turkey's compliance with the ECtHR decision.[209] Despite Turkey's noncompliance, the Committee of Ministers only threatened to take an exclusion measure against Turkey without implementing the measure itself.[210] In practice, no State has ever been excluded from the European Council for noncompliance with an ECtHR judgment.[211]

Due to the limitations of nonjudicial bodies to fully ensure States' compliance with international decisions, the question the international community needs to address is why should nondomestic (quasi) judicial institutions, and particularly those in Africa, have the power to enforce decisions from international and regional courts? What are the requirements that would need to be met in order to empower national (quasi) judicial institutions in Africa?

2. Lack of Participation by National Judicial Institutions in the Enforcement of International Judgments

The low rate of enforcement of international judgments may be partially due to the lack of involvement and/or competence of the domestic courts in the postjurisdictional stage of international proceedings. Empowering domestic courts to have jurisdiction over noncompliance with the judgments of international courts, would increase the likelihood that the beneficiaries of international judgments could get them enforced by approaching the municipal courts of the defaulting States and parties. As Constanze Schulte noted, adjudication before domestic courts might not only be an "efficient mechanism for the enforcement of ICJ decisions," but also for the implementation of international law in general.[212] Additionally Richard F. Oppong

207. Statute of the Council of Europe, art.8., May 5, 1949, C.E.T.S. 0001.
208. Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2216.
209. Elisabeth Lambert Abdelgawad, *The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability*, 69 ZAÖRV [J. COMP. PUB. L. & INT'L L.] 471, 492 (2009) (Ger.).
210. *Id.*
211. *Id.*
212. SCHULTE, *supra* note 171, at 77.

has emphasized that the use of domestic courts to enforce decisions of international courts would "enhance individual rights by depoliticizing the post-adjudicative phase of international litigation."[213] While there is important potential for the role of domestic courts in the enforcement of international judgments,[214] there is also a concern involving domestic courts in the determination of the enforcement regime of international courts' decisions. In other words: Should domestic courts perceive international judgments as "foreign decisions," as part of the national legal system, or otherwise?[215]

Indeed, numerous countries worldwide have provisions recognizing and enforcing decisions rendered by foreign-national courts under different conditions. For instance, in the Netherlands, judgments from foreign-national courts are not enforceable in the absence of bilateral treaties.[216] In the United States, decisions from foreign countries' courts are considered at relatively the same level as domestic judgments; based on the provisions of the Constitution regarding sister-state judgments,[217] whose scope is currently extended to cover other foreign nations' judgments.[218] According to the DRC's Code of Organization and Judicial Competence, judgments rendered by foreign countries' tribunals are enforceable in the DRC under certain conditions, including: the compliance of the said judgment with the DRC public order; the conformity of the judgment with the local legislation where it was delivered; and the respect of the defense's rights.[219] Similar to the DRC, the enforcement of for-

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213. Oppong, *supra* note 10, at 121.

214. SCHULTE, *supra* note 171, at 77.

215. *Id.*

216. Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 1, para. 10 (2009), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1848?rskey=aSSLSe&result=1&prd=EPIL.

217. Judgments delivered by "sister" states of the United States or territories of the United States are referred as "foreign judgments." Therefore, the provisions of the U.S. Constitution compel each state/territory of the United States to provide "full faith and credit" on sister-state judgments. *See* U.S. CONST. art. IV, § 1.

218. Michaels, *supra* note 216.

219. Ordonnance-Loi 82-020 portant Code de l'Organisation et de la Compétence Judiciares [Code of Organization and Judicial Competence] art. 117 (Dem. Rep. Congo), *available at* http://www.leganet.cd/Legislation/Droit%20Judiciaire/OL.31.03.82.n.82.020.htm.

eign judgments is not directly applicable in South Africa.[220] The South African court will enforce a foreign judgment if certain requirements are met.[221]

Another question concerning the enforceability of international judgments by domestic courts is whether individuals (or any non-state actors) with interests in the implementation of decisions from international human rights judicial bodies can approach the domestic courts of defaulting States for the enforcement of judgments delivered in their favor. *In Société Commerciale de Belgique (Socobel) v. Greek State*,[222] a private party for whom the Belgian government had exercised diplomatic protection, sought to enforce before a Belgian domestic court a judgment that had been rendered in its favor by the Permanent Court of International Justice. The Belgian Court refused to enforce that international decision by ruling that "a party which, by definition, was not admitted to the bar of an international court should be able to rely on a decision in a case to which it was not a party."[223] In *Medellin v. Texas*, the United States' Supreme Court held that an ICJ judgment "is not di-

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220. Roger Wakefield, *South Africa, in* ENFORCEMENT OF FOREIGN JUDGMENTS IN 28 JURISDICTIONS WORLDWIDE 108,109 (Mark Moedritzer & Kay C. Whittaker eds., 2012).

221. *Id.*; see *also Jones v. Krok*, 1995 (1) SA 677 (AD) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZASCA/1994/177.pdf (last visited Apr. 14, 2015). In *Jones v. Krok*, the South African court held that the following conditions must be met prior to enforcing foreign Judgment:

> (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence"); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment [sic] does not involve the enforcement of a penal or revenue law of the foreign state; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Business Act 99 of 1978.

Jones v. Krok, 1995 (1) SA 677 (AD) at 14–15 (S. Afr.).

222. Société Commerciale de Belgique (Belg. v. Greece), Judgment, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

223. *See* Oppong, *supra* note 10, at 119. *See also* SCHULTE, *supra* note 171, at 77.

rectly enforceable as domestic law in the state court."[224] The U.S. Supreme Court also emphasized that an ICJ judgment "creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted."[225] This Supreme Court's position was not an isolated case, U.S. judges have previously adopted a similar position on complaints brought before them on the same issue.[226] Similarly, in Africa, some domestic courts are reluctant to enforce international judgments in their jurisdictions. For instance in, *Republic v. High Court Accra, Ex parte Attorney General, NML Capital Ltd, and Republic of Argentina*, the Supreme Court of Ghana upheld that

> The orders of the International Tribunal of the Law of the Sea cannot be binding on the Ghanaian courts, in the absence of the legislation making the orders binding on the Ghanaian court. In any case, the orders of International Tribunal of the Law of the Sea given subsequent to the orders and ruling of the High Court cannot be a valid basis for the grant of *certiorari*, according to the authorities governing the grant of that remedy in this jurisdiction.[227]

However, in the DRC, local authorities generally use an "*à-la-carte* approach" when it comes to the enforcement of orders from international courts. For example in *Prosecutor v. Thomas Lubanga*, the DRC enforced the ICC Pre-Trial Chamber's warrant of arrest issued against Mr. Lubanga for the war crimes of enlisting children to participate in armed conflicts.[228] The DRC also complied with the ICC's orders in the subsequent cases that involved its two other citizens: *Germain Katanga* and *Mathieu Ngudjolo Chui*.[229] However, the Congolese authorities refused, based on political reasons, to enforce another ICC war-

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224. Medellin v. Texas, 552 U.S. 491, 506 (2008).
225. *Id.* at 522–23.
226. Breard v. Greene, 523 U.S. 371, 375–76 (1998).
227. *Republic v. High Court Accra*, Case J5/10/2013, 3 (Sup. Ct. Ghana 2013), http://www.pca-cpa.org/Supreme%20Court%20Decision9703.pdf?fil_id=2336.
228. Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Judgment (Mar. 14, 2012).
229. Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgment (Mar. 7, 2014); Prosecutor v. Chui, ICC-01/04-02/12-3, Judgment (Dec. 18, 2012).

rant of arrest delivered against Bosco Ntaganda for war crimes and crimes against humanity.[230] A similar "*à-la-carte* approach" was recently used by the Ivory Coast (Côte d'Ivoire) in the *Prosecutor v. Laurent Gbagbo*,[231] *Prosecutor v. Charles Blé Goudé*, [232] and *Prosecutor v. Simone Gbagbo* cases,[233] which concerned crimes against humanity committed in the context of the postelectoral violence in the Ivory Coast.[234]

Unlike the *Socobel*, *Medellin*, *Republic,* and other cases, the Constitutional Court of South Africa (CCSA) has recently adopted an innovative approach to dealing with claims relating to the enforcement of an international tribunal's judgment. Indeed, in *Government of the Republic of Zimbabwe v. Louis Karel Flick*,[235] the plaintiff approached a South African High Court to enforce the South African Development Community (SADC) Tribunal's order for costs, after unsuccessfully seeking the enforcement in Zimbabwe of a judgment rendered in his favor against the Republic of Zimbabwe by a subregional SADC Tribunal.[236] The plaintiff received favorable verdicts before

230. Prosecutor v. Ntaganda, ICC-01/04-02/06-309, Decision Pursuant to Article 61 of the Rome Statute on the Charges (June 9, 2014). Mr. Bosco Ntaganda is a former rebel-chief who became a General in the DRC's army. In 2006 the ICC issued an arrest warrant against him for war crimes and crimes against humanity. The DRC authorities have long refused to arrest him for the sake of peace in the country. However, Mr. Ntaganda was definitely arrested in Rwanda in 2013 and extradited to the ICC in The Hague where he is facing trial. *See* Penny Dale, *Profile: Bosco Ntaganda the Congolese 'Terminator*,*'* BBC AFR. (Aug. 25, 2015), http://www.bbc.com/news/world-africa-17689131.

231. Prosecutor v. Gbagbo, ICC-02/11-01/11, Concurring Opinion of Judges Gurmendi and Kaul (June 12, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1783399.pdf.

232. Prosecutor v. Blé Goudé, ICC-02/11-02/11, Concurring Opinion of Judges Gurmendi and Trendafilova (Dec. 12, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1879935.pdf.

233. Prosecutor v. Gbago, ICC-02/11-01/12, Warrant of Arrest (Feb. 29, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1344439.pdf.

234. Like in the DRC, the Ivory Coast enforced the ICC Pre-Trial Chamber's arrest warrant issued against Laurent Gbagbo and Charles Blé Goudé, but it refrained from complying with the ICC's order, which requested the arrest and extradition of the co-accused, Simone Gbagbo, to the ICC's headquarter in The Hague. *See Ivorians Divided over Simone Gbagbo Conviction*, DW.COM, http://www.dw.com/en/ivorians-divided-over-simone-gbagbo-conviction/a-18305986 (last visited Nov. 24, 2015).

235. *Gov't of the Republic of Zim v. Fick* 2013 (CC) (S. Afr.).

236. *Id.* ¶¶ 2–4.

both South African's High Court and Court of Appeals.[237] However, the CCSA was forced to adjudicate whether South African courts even had jurisdiction over complaints concerning the enforcement of the SADC Tribunal (which South Africa recognized the competence of) against Zimbabwe.[238] In its ruling, the CCSA held that the common law on enforcing foreign judgments can also apply to enforce judgments rendered by international courts and tribunals.[239] In other words, the CCSA has extended the common law on enforcement of foreign judgments to also cover international courts' decisions.[240] This position of the CCSA is innovative in the context of the African continent (or elsewhere in the world), where numerous domestic courts still opt for the traditional concept of excluding international judgments from the catalogue of "foreign judgments, thereby preventing international judgments from being enforced at the local level."[241]

One may wonder if the "revolutionary approach" of the South African courts will inspire other African countries. This would neatly resolve all the problems of enforcement of international judgments by simply considering them "foreign judgments." However, is the perception of international judgments as "foreign judgments" the proper avenue for the full enforcement of decisions of international courts? On the one hand, perceiving international judgments as "foreign judgments" would be a good approach to increase the likelihood of the enforcement of those judgments by the national courts of the defaulting States. However, it is unlikely that all African domestic courts, particularly those in dualist countries,[242] would extend the scope of their definition of "foreign judgments" to include international

237. *Id.* ¶ 16, 20.

238. *Id.* ¶ 54–59.

239. *Id.*

240. Oppong & Niro, *supra* note 186, at 357–58.

241. *See Republic v. High Court Accra*, *supra* note 227, Case J5/10/2013, 3 (Supreme Court of Ghana 2013); Medellin v. Texas, 552 U.S. 491, 506 (2008); Breard v. Greene, 523 U.S. 371, 375–76 (1998); *Société Commerciale de Belgique (Belg. v. Greece)*, *supra* note 222, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

242. Unlike the monist legal system, in the dualist countries, the international treaties duly ratified by the Executive branch of the State do not have force of law in the domestic legal arsenal unless they have been expressly given force by the Acts of Parliament.

judgments without some kind of legal reform. This issue will be further explored in the upcoming section of this article.

3. "Judicial Sovereignty" of the Domestic Courts vis-à-vis International Tribunals?

As previously noted, most domestic courts exclude the decisions of international and regional judicial institutions (such as the ICJ, ECtHR, ACtHPR, and IACtHR) from their definitions of "foreign judgments." This begs the question as to why domestic courts traditionally agree to enforce judgments from foreign countries (even without the existence of bilateral treaties), and yet at the same time, fail to ensure the execution of judgments of international courts, even though their States are bound by treaties that recognize international courts' jurisdictions. Is the "reluctance" of enforcing international judgments based on the idea of reaffirming the "judicial sovereignty/autonomy" of the national courts vis-à-vis the supranational courts, which are perceived as trying to "impose" their decisions on local tribunals? The answer is: possibly. First, the principle of recognition and enforcement of foreign countries' decisions at the local level is a relatively new subject.[243] This novel approach of enforcing judgments from foreign nations alters the traditional concept of the (national) territorial competence of domestic courts, according to which the national courts should only hear disputes over persons/things (properties) located in their national territory, or should adjudicate crimes committed abroad by their citizens in applying their national legislation. Second, some domestic courts may reciprocally tolerate executing judgments of "foreign nations" because they are involved in a sort of "horizontal relationship" between two equally national judicial bodies agreeing to enforce judgments delivered by each other. This intercourt horizontal relationship differs from the "vertical relationship" that appears to govern the rapport between international courts and domestic courts. In light of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICTY and national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law within the ICTY's competence; but the International Criminal Tribunal

243. Michaels, *supra* note 216, para. 6.

has primacy over national courts.[244] At any stage of the procedure, the ICTY may formally request the national courts to defer to its competence.[245] The primacy of the international court over the domestic court is also clearly replicated in the Statute of the International Criminal Tribunal for Rwanda (ICTR).[246] In the context of African countries, the relevant question is: Does the supposed supremacy of international tribunals entail many countries to not cooperate and comply with international judicial bodies' orders, such as the ICC? From a legal viewpoint, this is not the case. Unlike the ICTY and ICTR, there is no primacy clause in the Statute of Rome on the ICC. The relationship between the ICC and the domestic courts is based on complementarity rather than the primacy of the former. The point is that numerous governments in Africa, or elsewhere,

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244. U.N. TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INT'L HUM. L. COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA art. 9, paras. 1, 2 (2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. Article 9 states:

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in territory of the former Yugoslavia since 1 January 1991. 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Id.

245. *Id.*

246. In 1994, the U.N. Security Council resolved:

> 1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994. 2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

S.C. Res. 955, art. 8 (Nov. 8, 1994)

are reluctant to acknowledge the jurisdiction of and/or comply with injunctions of supranational or supraregional (judicial) institutions in the name of national sovereignty.[247] However, from the normative perspective, in ratifying an international treaty that recognizes the jurisdiction of an international court, the ratifying State and its organs (including the Government, Parliament, and Court) are bound to give effect to the concerned treaty.[248] Therefore, the ratifying State should not play the "national-sovereignty card" in order to avoid complying with international judgments.

III. RECOMMENDATIONS FOR THE ENFORCEMENT OF INTERNATIONAL JUDGMENTS

In light of the challenges for the enforcement of international judgments, the following recommendations are suggested in order to increase the probability of compliance with the decisions of international courts.

A. Legal Reforms to Empower the Domestic Courts to Enforce International Judgments

The lack of explicit provisions in international, regional, and national legislations that authorize the national tribunals to adjudicate compliance issues with international judgments, constitutes a challenge for the enforcement of judgments of international and regional courts. Accordingly, reforming the continental human rights instruments to incorporate such stipulations would represent an important step towards full compliance with the decisions of international human rights courts. In the context of the African continent, the incorporation of such provisions would not really be innovative. Indeed, some subregional economic integration community treaties in Africa already have provisions that explicitly compel domestic

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247. Bartram Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 403 (1998).

248. By the virtue of the principle *pacta sunt servanda*, "every treaty in force is binding upon the parties to it and must be performed by them in good faith." *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 115 U.N.T.S. 331. In the *Flick* case, the CCSA also ruled that the enforcement of judgments and orders of international courts or tribunals by the domestic courts are "based on international agreements that are binding on South Africa." *See Zimbabwe v. Fick*, 2013 (5) SA 325 (CC) ¶ 53 (S. Afr.).

courts to enforce States' compliance with the judgments of their respective community tribunals. For instance, Article 44 of the East African Community (EAC) Treaty states: "The execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which the execution is to take place."[249] According to the Economic Community of West African States (ECOWAS) Protocol on the Community Court of Justice,[250] "Execution of any decision of the Court shall be in form of a writ of execution, which shall be submitted by the registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State."[251] There are similar stipulations in the treaties of the Common Market for Eastern and Southern Africa (COMESA)[252] and the SADC.[253] It should be noted that there is

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249. East African Community Treaty, art. 44, Nov. 30, 1999, http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=173330.

250. Econ. Cmty of W. African States [ECOWAS], *Supplementary Protocol Relation to the Community Court of Justice*, A/SP.1/01/05 (Jan. 19, 2005), http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf.

251. *Id*.

252. Under the Treaty of the Common Market for Eastern and Southern Africa:

> The execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Member State in which execution is to take place. The order for execution shall be appended to the judgment of the Court which shall require only the verification of the authenticity of the judgment by the Registrar whereupon, the party in whose favor execution is to take place, may proceed to execution in accordance with the rules of civil procedure in force in that Member State.

Art. 40, Dec. 8, 1994, 34 I.L.M. 909.

253. Protocol on the Tribunal in the Southern African Development Community art. 32, Aug. 7, 2000, 32 I.L.M. 116. The protocol states that:

> 1. The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement. 2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal. 3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned. 4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned. 5. If the Tribunal establishes the existence

a remarkable difference between the provisions of these community treaties. On the one hand, the EAC and COMESA provisions limit the competence of the domestic courts on solely enforcing the pecuniary judgments. On the other hand, the ECOWAS and SADC provisions extend the competence of domestic courts to enforce both pecuniary and nonpecuniary judgments. Given that most decisions of international and regional courts (such as ICJ, ECtHR, or ACtHPR) consist of both pecuniary and nonpecuniary remedial orders, amendments to international and regional human rights instruments should consider authorizing domestic courts to obligatorily enforce all kinds of international judgments; failing to do so merely encourages partial compliance rather than full compliance.[254]

Additionally, reforming international legislation on the enforcement of international judgments would also necessitate the amendments of national laws. Although the amendment of national laws (as a result of international law reform), may not constitute a notable issue for monist countries,[255] it is a necessity for most dualist countries.[256] In dualist countries, such as Ghana, South Africa, or Zimbabwe, the international treaties duly ratified by the Executive branch of the government do not have force of law in the domestic legal arsenal unless they have been expressly given force by Acts of Parliament.[257] In other words, the national Parliaments of these respective countries should pass laws authorizing their domestic courts to enforce international judgments of international and regional human rights courts.

> of such failure, it shall report its finding to the Summit for the latter to take appropriate action.

Id.

254. Oppong, *supra* note 10, at 120–21.

255. In a monist legal system, the treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party. *See* 1958 CONST. art. 55 (Fr.). 2005 CONST. art. 215 (Dem. Rep. Congo); 1996 CONST. art. 45 (Cameroon); 1991 CONST. art. 151 (Burk. Faso); 1992 CONST. art. 116 (Mali).

256. Oppong, *supra* note 10, at 127.

257. *See* Const. of Ghana, 1992n art. 75; S. AFR. CONST., 1998, art. 231; Const. of Zimbabwe, 1979, art. 111B.

B. Increasing the Power of NHRIs in Monitoring the Enforcement of International Judgments

As earlier mentioned, NHRIs are the domestic human rights "watch dogs" in their respective African countries, and the Protocol on the Statute of the ACJHR has recognized their right to directly lodge complaints before the ACJHR for human rights violations committed in their countries. Explicitly increasing the power of the NHRIs would allow them to not only promote and protect human rights at the national level, but also to monitor the enforceability of international and regional human rights courts by the domestic courts. Granting NHRIs more power would ensure that the beneficiaries of international judgments would get their favorable verdicts enforced by domestic courts in a fair and timely manner.

Some may be skeptical about the practicability of having African domestic courts enforce international judgments, given that many judgments rendered by local tribunals on local disputes are not executed. How can African domestic courts enforce international judgments when their own local decisions are not enforced? For instance, in the DRC, only 40 percent of the decisions rendered by Congolese courts on local disputes are effectively executed.[258] Many parties can wait decades with a favorable Court decision before actually receiving the financial reparations granted to them by the Courts.[259] This problem is mostly related to issues of political interference, administrative dysfunction, and corruption within the justice system rather than a "purely juridico-judicial" problem.

CONCLUSION

The purpose of this article was not only to explore the practical and legal reasons preventing the African governments from fully complying with the judgments of international human rights judicial bodies, but to also recommend certain actions that would likely increase the enforceability of African courts' remedial orders in Africa. The noncompliance or partial com-

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258. *Kinshasa: 60% des Jugements Rendus par les Tribunaux ne son pas Executés* [*Kinshasa: 60% of the Judgments Delivered by the Courts are not Executed*], RADIO OKAPI (May 15, 2012), http://radiookapi.net/actualite/2012/05/15/kinshasa-60-des-jugements-rendus-par-les-tribunaux-ne-sont-pas-executes-des-pressions-politiques/.

259. *Id.*

pliance of African countries with human rights courts' decisions is linked to numerous variables, including: the politicization of the postadjudicative phase, coupled with the lack of sanctions against defaulting States; the nonexistence of a judicial enforcement mechanism at regional and domestic levels; the misuse of the notion of sovereignty on judicial issues; and more importantly, the lack of participation of domestic courts in the postadjudicative stage of the international proceedings.[260] Empowering domestic courts to have jurisdiction over noncompliance with the judgments of international courts would increase the likelihood that the beneficiaries of international judgments could get their verdicts enforced by approaching the municipal courts of the defaulting States and parties. Accordingly, this paper suggests reforming both continental and domestic laws to incorporate provisions that would authorize domestic courts to adjudicate on the enforcement of international judgments. However, this kind of legal reform cannot be materialized without a certain degree of political willingness on the part of States' representatives. Therefore, it is important for States to take effective actions regarding their commitments to promoting and respecting the human rights provisions that they have signed.

260. *See supra* Part II.