The African Court on Human and Peoples' Rights: assessing its effectiveness

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ABSTRACT: This article examines the effectiveness of the African Court on Human and Peoples' Rights using the compliance rate, the usage rate and the goal-based approaches. It uses a qualitative research method combined with purposive sampling and it consults the jurisprudence of the African Court and secondary sources to assess the effectiveness of the Court. The article submits that taking into consideration its relatively short period of operation and the volatile political environment in which it has been functioning, the African Court has been effective in presiding over sensitive cases involving issues such as freedom of expression, press freedom, and election disputes. Compliance with some of the Court's sensitive judgments also attests to some degree of its effectiveness. It is also reasoned that the African Court should in the future pay more close attention to factors that are capable of affecting its effectiveness. These factors include the soundness of the legal reasoning employed in delivering judgments, the composition of the African Court, the enforceability of reparation orders, and a holistic understanding of the socio-economic and political context of the state parties.

TITRE ET RÉSUMÉ EN FRANÇAIS

La Cour africaine des droits de l'homme et des peuples : évaluation de son efficacité

RÉSUMÉ: Cet article évalue l'efficacité de la Cour africaine des droits de l'homme et des peuples en s'appuyant sur trois critères principaux : le taux de conformité aux décisions, le taux d'utilisation de ses mécanismes et les approches basées sur les objectifs. La recherche adopte une méthode qualitative, combinant un échantillonnage raisonné et une analyse des arrêts de la Cour ainsi que des sources secondaires pertinentes. L'article soutient que, malgré sa durée de fonctionnement relativement courte et l'instabilité politique du contexte dans lequel elle opère, la Cour a su démontrer une certaine efficacité dans le traitement de dossiers sensibles, notamment en matière de liberté d'expression, de liberté de la presse et de contentieux électoraux. Le respect de certaines de ses décisions, particulièrement celles portant sur des enjeux sensibles, témoigne d'un degré significatif d'efficacité. Néanmoins, l'article souligne que la Cour devrait accorder davantage d'attention à plusieurs facteurs susceptibles d'améliorer son efficacité future. Parmi ces facteurs, figurent la solidité du raisonnement juridique employé dans ses décisions, la composition de la Cour, la force exécutoire des réparations ordonnées, ainsi qu'une compréhension approfondie du contexte socio-économique et politique des États parties.

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KEY WORDS: African Court on Human and Peoples' Rights; African Commission on Human and Peoples' Rights; effectiveness; compliance; usage

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1 INTRODUCTION

African Court on Human and Peoples' Rights (African Court) is one of the three main human rights bodies of the African Union. The other two are the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The African Commission is a quasi-judicial organ established by the African Charter on Human and Peoples' Rights (African Charter) with the mandate 'to promote human and peoples' rights and ensure their protection in Africa'.[1] Similarly, the African Children's Committee, a quasi-judicial body that promotes and protects children's rights enshrined in the African Charter on the Rights and Welfare of the Child (African Children's Charter), monitors the implementation of and interprets the provisions of the African Children's Charter.[2] The African Court is mandated to complement the protective mandate of the African Commission.[3] Unlike the two institutions, the African Court is vested with binding judicial power.

The idea of establishing a continental human rights judicial body was conceived during the 1961 African Conference on the Rule of Law which invited the African governments to

> study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that

1 Arts 30 and 45 of the African Charter. The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. For more on the promotion and protection mandate of the African Commission, see F Viljoen *International human rights law in Africa* (2012) 300-390; V Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000* (2002) 335-352.

2 Art 42, African Children's Charter.

3 Art 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on African Charter on Human and Peoples' Rights. The Protocol was adopted on 10 June 1998 and entered into force on 25 January 2004.

> recourse thereto be made available for all persons under the jurisdiction of the signatory States.[4]

Despite this early initiative, in 1981, instead of a court, the African Charter established the African Commission. The drafters of the Charter thought that Africa was not ready for a supranational judicial institution at that time.[5] Furthermore, establishing a judicial body was deemed a premature task[6] due to the stronghold the principle of non-interference had in the Organisation of African Unity (OAU) and states' unreadiness to give away part of their sovereignty.[7] Moreover, it was considered that the African Commission is compatible with the reconciliatory nature of dispute resolution entrenched in African culture and tradition.[8]

In the 1990s, a combination of internal and external factors such as the wave of democratisation across the continent,[9] advocacy by non-governmental organisations,[10] and development aid with a condition of strong protection for human rights[11] pushed African states to reconsider the idea of establishing a human rights court. After a series of deliberations on the draft, the African Court Protocol was adopted in 1998 and came into force in 2004 making the African Court a reality. The Court has been operating in a continent with many countries at an infant stage of democratic consolidation and building a human rights culture. Nonetheless, in its two-decade existence, the Court has been able to adjudicate hundreds of contentious cases and provide few advisory opinions.[12]

This article assesses the effectiveness of the African Court. Following this introductory part, the second part clarifies concepts and terminologies that run throughout the article. The third part discusses approaches used to assess the effectiveness of international or regional courts, namely the compliance rate, the usage rate and the goal-based approaches and uses the same to evaluate the effectiveness of the African Court. Part four discusses factors that affect the effectiveness of international or regional courts and considers the situation of the African Court in light of these factors. The final part provides concluding remarks.

4 International Commission of Jurists, *African Conference on the Rule of Law* (1961) 11.

5 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004 (2007) 101(1) *American Journal of International Law* 2.

6 Viljoen (n 1) 411-412.

7 G Bekker 'The African Court on Human and Peoples' Rights: safeguarding the interests of African states' (2007) 51(1) *Journal of African Law* 154-155.

8 E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31(4) *Howard Law Journal* 650.

9 Viljoen (n 1) 412.

10 Viljoen (n 1) 412; Bekker (n 7) 159.

11 Bekker (n 7) 158.

12 African Court, https://www.african-court.org/cpmt/statistic (accessed 10 October 2024). As of 2024, the African Court received 351 contentious cases and finalised 228; received 15 requests for advisory opinions and finalised them all.

2 CONCEPTUAL FRAMEWORK

It is important to clarify some of the important concepts and terminologies that are central to this paper. The first one is international courts (ICs). In the context of this research, ICs refer to permanent global, regional, and sub-regional judicial bodies with full judicial power to pronounce binding decisions. Yet, the focus of this article is human rights courts. International Courts, particularly in reference to those with global reach, have been defined as 'independent judicial bodies created by international instruments and invested with the authority to apply international law to specific cases brought before them'.[13] In a broader context, international judicial bodies are identified as having five basic criteria, namely, permanence, established by an international legal instrument, applying international law in deciding cases, using rules of procedure set in advance in considering cases, and rendering binding decisions.[14]

International courts have not been there from time immemorial. Rather they are a relatively recent historical development.[15] Their creation is related to the consolidation, codification, and development of international organisations and international law.[16] It was in the twentieth century that the international community started coming together with the view of establishing international judicial bodies.[17] Since then, the world has witnessed a good number of ICs with a wide range of jurisdictions on several matters such as international trade, investment matters, and criminal law. Hence, the operation of human rights courts should not be seen in isolation from the dynamics of international law and ICs that adjudicate other subject matters. The notable regional human rights courts are the European Court of Human Rights (European Human Rights Court or ECHR) and the Inter-American Court of Human Rights (IACtHR), with the African Court as the most recent one.

Another concept is the 'effectiveness of ICs' which is a fluid and complex notion with no agreed definition and assessment criteria. Effectiveness has been referred to as 'a measure of the success of regimes and governance systems in solving problems or moving systems toward desired outcomes.'[18] Others have defined the

13 Y Shany 'Assessing the effectiveness of international courts: a goal-based approach' (2012) 106(2) *American Journal of International Law* 225.

14 CPR Romano 'The proliferation of international judicial bodies: the pieces of the puzzle' (1999) 31(4) *New York University Journal of International Law and Politics* 713-714.

15 KJ Alter 'The evolution of international law and courts' in O Fioretos and others (eds) *Oxford handbook of historical institutionalism* (2016) 590.

16 FK Tiba 'What caused the multiplicity of international courts and tribunals' (2006-2007) 10 *Gonzaga Journal of International Law* 204.

17 S Katzenstein 'In the shadow of crisis: the creation of international courts in the twentieth century' (2014) 55 *Harvard International Law Journal* 156.

18 T Squatrito and others 'A framework for evaluating the performance of international courts and tribunals' in T Squatrito and others (eds) *The performance of international courts and tribunals* (2018) 7.

effectiveness of ICs as 'the degree to which a legal rule or standard induces the desired change in behaviour.'[19] Some have used the term 'performance of ICs' to describe essentially the same notion but with slight differences technically and scope-wise.[20] The performance of ICs has been addressed from two perspectives, namely 'outcome performance' referring to 'the degree to which the ICs attain substantive goals' and 'process performance' concerned with 'the degree to which the ICs practices measure up to intended or aspired procedural standards.'[21] Thus, although effectiveness and performance terminologies have been employed in various literature, the crux of these concepts, the factors affecting both, and the criteria of assessment, their assessment are in essence similar. Therefore, for consistency purposes, this article uses the word 'effectiveness' in a way that captures the accomplishments of ICs in influencing the behaviours of all stakeholders, mainly states in living up to their human rights obligations, their accessibility by the rights holders and the extent to which they achieved the goal they are established for.

3 THE AFRICAN COURT IN LIGHT OF APPROACHES TO ASSESSING THE EFFECTIVENESS OF ICs

Irrespective of their differences, in terms of, for example, years of existence, geographical reach, and jurisdiction, the question of effectiveness remains crucial and common to all ICs. Assessing the extent to which the activities of ICs have impacted the behaviour of states and non-state actors remains one of the challenging areas of research. Partly, this is because of the difficulty of establishing the causal relationship between the works of the ICs and the apparent conduct of states and non-state actors.[22] It is so also because of the lack of a globally agreed-upon set of criteria to assess the effectiveness of ICs. Nevertheless, different approaches can be and have been used as general benchmarks for evaluating the effectiveness of ICs without excluding the peculiarity of each court. This section, therefore, discusses the commonly used approaches to assess the effectiveness of ICs, namely, the compliance rate, the usage rate, and the goal-based approaches.

19 D Hawkins & W Jacoby 'Partial compliance: a comparison of the European and Inter-American Courts of Human Rights' (2010) 6(1) *Journal of International Law and International Relations* 39; K Raustiala & AM Slaughter 'International law, international relations and compliance' in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of international relations* (2002) 593.

20 Squatrito and others (n 18) 6.

21 As above.

22 D Abebe 'Does international human rights law in African courts make a difference?' (2017) 56 *Virginia Journal of International Law* 533.

3.1 Compliance rate approach

In the context of international law and institutions, the word compliance has two dimensions, usually termed as first-order compliance and second-order compliance.[23] First-order compliance refers to states' compliance with the substantive treaty provisions or rules entrenched in a given legal instrument.[24] Second-order compliance denotes 'compliance with the decisions of an authoritative body charged with the responsibility of interpreting provisions of a treaty or resolving disputes arising from the implementation of the treaty'.[25] Compliance is an outcome or 'a status that is attained' when the laws and the practices of a state are in line with the rules of a treaty and the judgments arising out of it.[26] Compliance is different from implementation in that the latter connotes 'the process of putting international commitments into practice: the passage of legislation, creation of institutions (both domestic and international) and enforcement of rules'.[27] In other words, implementation encompasses the multitude of steps taken by a state in putting international commitments into action while compliance, particularly, second-order compliance, enunciates the 'conformity between a remedial order of a judicial body and state behaviour or factual situation at the domestic level'.[28] The effectiveness of ICs is related to second-order compliance.

The compliance approach presupposes that courts have the power to compel the state parties to defend the claims levelled against them in a dispute and to comply with the resulting decision, albeit not in the strict sense like domestic courts.[29] Hence, the effectiveness of ICs depends on the extent to which the parties obey the contents of their judgments.[30] The notion of compliance, in turn, triggers the question

23 MP Ryan 'The logic of second order compliance with international trade regimes' (1992) *University of Michigan Working Paper* No 694 3-4; This categorisation was first made in R Fisher *Improving compliance with international law* (1981).

24 Ryan (n 23) 3; BA Simmons 'Compliance with international agreements' (1998) *Annual Review of Political Science* 78.

25 Ryan (n 23) 3; In some literature, the element of good faith is added, and compliance is defined as 'acceptance of the judgment as final and reasonable performance in good faith of any binding obligation.' See AP Llamzon 'Jurisdiction and compliance in recent decisions of the International Court of Justice' (2008) 18(5) *European Journal of International Law* 822.

26 R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 152; MG Burgstaller *Theories of compliance with international law* (2005) 103-189.

27 Raustiala & Slaughter (n 19) 539; Murray and others (n 26) 152.

28 VO Ayeni 'Introduction and preliminary overview of findings' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 9; K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32(3) *Case Western Reserve Journal of International Law* 392.

29 LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107(2) *Yale Law Journal* 283.

30 EA Posner & JC Yoo 'Judicial independence in international tribunals' (2005) 98(1) *California Law Review* 28.

of why states comply with the judgments of ICs. Scholars argue that justifications provided for why states obey international law are equally applicable to compliance with judgments of ICs.[31]

One of the justifications is that states are rational actors capable of identifying and pursuing their interests and hence 'only comply with a ruling if doing so offers a higher payoff than the alternative of refusing to comply'.[32] Put alternatively, states do a cost-benefit analysis and comply only when the benefits of complying triumph over the cost of non-compliance. In doing the analysis, states consider their reputation,[33] monetary elements and their present and future bargaining power.[34] Some argue that compliance is not an overnight achievement, but a behaviour learned over time through continuous engagements with several stakeholders such as civil society organisations (CSOs) and international organisations.[35] Thus, states' behaviour is shaped in a socialised environment through an 'iterative process of social learning'[36] where many parties interact and hence influence each other's practices, including compliance.[37] For instance, the interaction can involve naming and shaming as a means of ensuring compliance.[38]

31 C Hillebrecht 'The power of human rights tribunals: compliance with the European Court of Human Rights and domestic policy change' (2014) 20(4) *European Journal of International Relations* 1104; EA Posner & JL Goldsmith 'International agreements: a rational choice approach' (2003) 44(1) *Virginia Journal of International Law* 134-135; AT a 'A compliance-based theory of international law' (2002) 90(6) *California Law Review* 1860-1861; Hawkins & Jacoby (n 19) 41-43.

32 AT Guzman 'International tribunals: a rational choice analysis' (2008) 157(1) *University of Pennsylvania Law Review* 174 & 198.

33 Guzman (n 32) 198; Hawkins & Jacoby (n 19) 41; A Alkoby 'Theories of compliance with international law and challenge of cultural difference' (2008) 4(1) *Journal of International Law and International* 162 (emphasis that states assume reputation as having a monetary value in their relationship with other states). However, others argue that the impact of reputation in inducing compliance is either weaker or sophisticated as states possess multiple reputations which do not necessarily depend on non-compliance with a single treaty. For more elaboration, see GW Downs & MA Jones 'Reputation, compliance, and international law' (2002) 31(1) *Journal of Legal Studies* 95, 101-102 & 113.

34 HL Jones 'Why comply? an analysis of trends in compliance with judgments of the International Court of Justice since Nicaragua' (2012) 12(1) *Chicago-Kent Journal of International and Comparative Law* 65.

35 Alkoby (n 33) 155.

36 Hillebrecht (n 31) 1104.

37 Raustiala (n 28) 405.

38 Hillebrecht (n 31) 1104-1105; JH Lebovic & E Voeten 'The cost of shame: international organizations and foreign aid in the punishing of human rights violators' (2009) 46(1) *Journal of Peace Research* 80-85.

3.1.1 Criticism against the compliance approach

Critics of the compliance approach argue that compliance does not necessarily indicate states' behavioural change and hence is less helpful in assessing the effectiveness of ICs,[39] because effectiveness is concerned more with the extent to which the normative standards and court judgments induce the desired change in state practice.[40] High rates of compliance can occur without necessarily modifying the behaviour of states.[41] Moreover, scrutinising the nature of the remedies ordered in the judgments is necessary.[42] The reason is that 'low-cost' judgments 'that can be complied with, without sacrificing important state interests are more likely to be complied with than 'high-cost' judgments that 'adversely affect important state interests in a significant manner'.[43] For instance, payment of compensation might be taken as easy and complied with than remedies requiring a change of legislation. Worse still, a state may choose to comply with an order requiring it to change its laws and policies, but still refrain from implementing such laws. Further, partial compliance, a situation where a state complies only with some parts of the orders and leaves out others, adds another challenge to the compliance approach.

3.1.2 Compliance with the African Court judgments

The African Court has the power to make appropriate orders to remedy the violation of rights, including the payment of fair compensation or reparation when it finds a violation of a human right against a responsible state.[44] Further, article 27(2) of the African Court Protocol authorises the African Court to order provisional measures to avoid irreparable harm to the rights-holders. State parties have the obligation to comply with the judgment and to guarantee its execution.[45] Under article 29(2) of the African Protocol of the Court, the African Court must notify the Executive Council of the AU so that the latter 'shall monitor its execution on behalf of the Assembly'. Further, the African Court must submit a report of its activities to each regular session of the African Union Assembly.[46] The reports include 'the cases in which a State has not complied with the African Court's judgment'.

39 Raustiala & Slaughter (n 19) 539; Hawkins & Jacoby (n 19) 39.

40 Hawkins & Jacoby (n 19) 39.

41 LR Helfer 'The effectiveness of international adjudicators' in CPR Romano and others *Oxford Handbook on International Adjudication* (2014) 467.

42 Y Shany 'Compliance with decisions of international courts as indicative of their effectiveness: a goal-based analysis' in J Crawford & S Nouwen (eds) *Select proceedings of the European Society of International Law: third volume* (2010) 230.

43 Shany (n 42) 231.

44 African Court Protocol, art 27(1).

45 African Court Protocol, art 30.

46 African Court Protocol, art 31.

The African Court handed down its first merit judgment in 2013.[47] However, before that, the African Court had issued a provisional measure, particularly against Libya, which failed to comply with the orders.[48] In the first merit judgment, *Mtikila v Tanzania*, the African Court found that the ban on independent candidacy in elections violated the right to participate in the government of one's country and freedom of association of the applicant.[49] Further, the African Court ordered Tanzania to take 'constitutional, legislative and all other necessary measures within a reasonable time' to remedy the violations.[50] However, as of 2023, Tanzania has not amended its Constitution alleging that it requires conducting a referendum and it informed the Court that the referendum was still pending.[51] Nonetheless, the African Court used the terminology 'partial compliance' in its 2019 Activity Report in relation to the status of *Mtikila v Tanzania* case, but without providing an explanation on what amounts to 'partial compliance' in the context of this judgment. Thus, the problem of compliance began as early as the first merit judgment of the African Court.

It is important to closely consider the compliance status of Tanzania, given that most of the applications submitted to the African Court are against Tanzania. The majority of the applications brought against Tanzania involve the right to fair trial, putting in question the criminal justice system of the country.[52] Some of the violations include the absence of legal aid, denial of the right to appeal, non-adherence to the principle of presumption of innocence, unduly prolonged trial, and independence of the courts.[53] In most of these cases, Tanzania failed to comply with the orders of the African Court.[54] For instance, in *Thomas v Tanzania*, the African Court ordered Tanzania 'to take all necessary measures, within a reasonable time to remedy the violation found, specifically, precluding the reopening of the defense case and the retrial

47 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34.

48 *African Commission v Libya* (provisional measures) (2011) 1 AfCLR 17; E Polymenopoulou '*African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya*, Order for Provisional Measures 25 March 2011' (2012) 61(3) *International and Comparative Law Quarterly* 774.

49 *Mtikila v Tanzania*, paras 111 & 114.

50 *Mtikila v Tanzania*, para 126.

51 African Court Activity Report of 2023, Annex 2 https://www.african-court.org/wpafc/activity-report-of-the-african-court-on-human-and-peoples-rights-afchpr-1-january-31-december-2023/ (accessed 15 April 2024).

52 A Possi 'It is better that ten guilty persons escape than that one innocent suffer: the African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 *African Human Rights Yearbook* 314, 334; *Penessis v Tanzania* (merits), Application 013/2015, African Court (28 November 2019); *Thomas v Tanzania* (merits) (2015) 1 AfCLR 465; *Onyango & Others v Tanzania* (merits) (2016) 1 AfCLR 507; *Onyango & Others v Tanzania* (reparations), Application 006/2013, African Court (4 July 2019); *Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599; *Abubakari v Tanzania* (reparations), Application 007/2013, African Court (4 July 2019).

53 Possi (n 52) 322-331.

54 African Court Activity Report of 2020, Annex 2.

of the applicant.'[55] However, Tanzania has not complied with this judgment.[56]

It is helpful to discuss two important cases, one against Kenya (because it involves indigenous community concerns) and another against Rwanda (because it is one of the cases closely connected to Rwanda's decision to withdraw its declaration on direct access under article 34(6) of the African Court Protocol).[57] The application against Kenya was referred by the African Commission following the lack of response from Kenya on the African Commission's provisional measures that required suspension of eviction of the Ogiek community from Mau Forest.[58] In its provisional measures, the African Court also ordered Kenya 'to immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest Complex'.[59] Kenya did not provide the African Court with any progress to that effect.[60] It has established a Task Force for the implementation of the judgment on the merits, but failed to include the representatives of the Ogiek people.[61] In 2020, the Ministry of Environment acknowledged the receipt of the Task Force report, but did not publicise the content of the report.[62]

In relation to legislative measures taken to grant collective title to the Ogiek ancestral land to guarantee use and enjoyment by legal certainty, Kenya's response has been recorded in the Activity Report of the Court:[63]

> The Respondent State indicates that it has taken legislative measures to give effect to the Forest Conservation and Management Act No. 34 of 2016 and the Community Lands Act No. 27 of 2016 which provides that community land rights must be registered in accordance with the provisions thereof and the provisions of the land registration Act 2012. Furthermore, the Respondent State points out that on 25 January 2022 ten (10) Community land titles were processed: four (4) in West Pokot County, two (2) in Laikipia County, one (1) in Samburu County and two (2) in Kajiado County. As at 30 October 2020, two communities (Llingwesi and Musul of Laikipia County) successfully registered their communal lands with an area of 8675.5 and 2646.0 hectares.

55 *Thomas v Tanzania*, para 161.

56 African Court Activity Report of 2019, 19.

57 *African Commission (Ogiek) v Kenya* (merits) (2017) 2 AfCLR 9; *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165; *Umuhoza v Rwanda* (reparations) (2018) 2 AfCLR 202.

58 *African Commission (Ogiek)* (merits), paras 4 & 5.

59 *African Commission (Ogiek) v Kenya* (provisional measures) (2013) 1 AfCLR 193, para 25.

60 African Court Activity Report of 2016, para 21 https://rb.gy/nvouze (accessed 16 August 2020).

61 International Work Group for Indigenous Affairs 'Implementation of Historic African Court Ruling' 25 September 2018 https://www.iwgia.org/en/kenya/3281-implementation-of-african-court-ruling.html (accessed 19 September 2020).

62 M Chepkorir 'The Ogiek still hoping for implementation of African Court ruling three years later' 29 May 2020 https: //naturaljustice.org/the-ogiek-still-hoping-for-implementation-of-african-court-ruling-three-years-later/ (accessed 19 September 2020).

63 African Court Activity Report of 2023, Annex 2.

In 2022, the African Court pronounced a reparations decision in the *Ogiek* case where it ordered Kenya to pay the Ogiek community KES 57 850 000 (approximately) for material prejudice and KES 100 000 000 (approximately) for moral damage.[64] The Court also ordered Kenya to undertake an exercise of delimitation, demarcation and titling in order to protect the Ogiek's right to property, particularly the Mau Forest and its various resources. Time will prove whether Kenya implements this reparation.

In *Umuhoza v Rwanda*, the African Court dealt with a case involving an applicant sentenced to 15 years imprisonment for allegedly watering down genocide as well as aiding and abetting terrorism, among other charges. The African Court decided that the conviction and imprisonment of the applicant violated her right to freedom of expression and fair trial rights and hence ordered Rwanda 'to take all the necessary measures to restore the rights of the applicant'.[65] In the reparation judgment, the African Court ordered Rwanda to pay compensation for the material and moral injury the applicant sustained.[66] Though the African Court did not order the release of the applicant from prison, she was set free on 23 November 2018.[67] However, Rwanda did not report back to the African Court on the measures taken to implement the judgments. Furthermore, Rwanda notified the African Court 'that it will not cooperate with the African Court on this and other applications filed against it before the African Court'.[68] This is a clear indication of Rwanda's resistance to the African Court, particularly after withdrawing from the direct access declaration.

Further, some states complied with what can be considered as 'high-cost' judgments. One example is Burkina Faso, specifically in the judgment of *Zongo v Burkina Faso*.[69] This case is about the assassination of an investigative journalist, together with his companions in 1998. The African Court found that Burkina Faso violated article 7 of the African Charter in that it 'failed to act with due diligence in seeking, trying, and judging the assassins of Norbert Zongo and his companions'.[70] In the reparation proceeding, the African Court ordered Burkina Faso to pay compensation to the applicants for the material damage and moral prejudice and re-open the investigation with the view to bringing to justice the perpetrators.[71] Burkina Faso has

64 *African Commission (Ogiek) v Kenya* (reparations) paras 4-5.

65 *Umuhoza v Rwanda* (merits), para 172.

66 *Umuhoza v Rwanda* (reparations), para 74.

67 *Umuhoza v Rwanda* (reparations), para 30.

68 Activity Report of 2019, 20.

69 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (merits) (2014) 1 AfCLR 219; (reparations) (2015) 1 AfCLR 258.

70 *Zongo v Burkina Faso* (merits), paras 156 & 203.

71 *Zongo v Burkina Faso* (reparations), para 111.

complied with these orders and the African Court has recorded the same in its Activity Report.[72]

Another important judgment, partly because it deals with a determination of whether a treaty is a human rights treaty,[73] worthy of mentioning is *APDH v Côte d'Ivoire*.[74] In this case, the applicant alleged that the composition and the functioning of the Independent Electoral Commission (IEC) violate article 17 of the African Charter on Democracy, Elections, and Governance, and article 3 of the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance. The applicant claimed that the majority of the IEC members are government representatives or members of political parties and hence it was neither independent nor impartial. The African Court found that the provisions of the aforementioned treaties have been violated and ordered Côte d'Ivoire to amend its law.[75] Côte d'Ivoire reported to the African Court that 'it had adopted a new law altering the composition of the electoral management body' and currently the compliance report is under review.[76] Yet, irrespective of its compliance, *APDH v Côte d'Ivoire* can be considered as a progressive judgment because it involves a politically sensitive issue relating to election and will serve as a reference for future cases dealing with similar subjects.

In general, there is no uniform trend of compliance with the African Court's judgments. For one thing, the compliance rate varies across state parties. For instance, the situation of Tanzania exhibits a unique feature which scholars term 'litigation fatigue'.[77] Moreover, the weight attached to a given judgment has its impact on the prospect of compliance as witnessed in the politically sensitive case of *Umuhoza v Rwanda*, where the involvement of a prominent member of the opposition party presented a significant compliance challenge due to pushback from and unwillingness of the incumbent government. Compliance with judgments does not happen in a vacuum, but within the political and legal context of states. Thus, compliance should not be seen in isolation from factors external to the merits of the cases.

72 African Court Activity Report of 2018, para 18 https://en.african-court.org/images/Activity%20Reports/Activity%20report%20January%20-%20December%20%202018.pdf (accessed 16 August 2020).

73 The African Court decided that the African Charter on Democracy, Elections and Governance is a human rights treaty and hence falls within the ambit of the material jurisdiction of the African Court as per article 3 of the African Court Protocol.

74 *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668.

75 *APDH v Côte d'Ivoire*, para 153.

76 African Court Activity Report of 2019, 20.

77 SH Adjolohoun 'A crisis of design and judicial practice? curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1 at 10.

In addition, the domestic realities of states can positively or negatively affect their approach to compliance. Consequently, despite the low level of compliance[78] with the Court's decisions, considering the life span of the African Court, the nature of cases it has been dealing with, the lack of consolidated democracy in countries against which politically sensitive judgments were handed down, and success stories of compliance from some states, it is reasonable to say that the African has been effective. In addition, some level of non-compliance is expected and that does not detract from the effectiveness of the African Court as any court experiences some degree of non-compliance, especially during the early age of their establishment.

3.2 Usage rate approach

Another approach to assess the effectiveness of ICs is the usage rate approach. According to this approach, ICs are effective if they are used frequently, meaning that if they entertain many cases.[79] The measurement can be the number of cases ICs consider per year or cases submitted per state.[80] Accordingly, courts with high usage rates are considered to be more effective than courts that occasionally receive applications. If a court is ineffective or perceived to be ineffective, the users will have no incentive to access that court.[81] Thus, the level of effectiveness of ICs affects their usage and vice versa. The attitudes of the users about the effectiveness of a given court matter because individuals or states usually resort to judicial bodies when they have the confidence that these bodies are legitimate, independent, and dispense justice.[82] It is important to note that the perception of individuals, organizations, or states about ICs can be affected by their view toward the institution behind the establishment of the ICs or with which the ICs are more associated.[83]

The usage of ICs has a direct relationship with how private actors' access is designed.[84] For instance, the high usage rate of the European Human Rights Court is attributed, among other several factors, to individuals' direct access.[85] Individuals' direct access is so crucial in the context of human rights courts because whether it is individual or

78 The African Court, in its 2022 Activity Report indicated that 'of the over 200 decisions rendered by the Court, less than 10% have been fully complied with, 18% partially implemented and 75% not implemented'.

79 Guzman (n 32) 188; Shany (n 13) 227; Posner & Yoo (n 30) 28.

80 Posner and Yoo (n 30) 28.

81 Posner and Yoo (n 30) 28.

82 K Malleson 'Promoting judicial independence in the international courts: lessons from the Caribbean' (2009) 58(3) *International and Comparative Law Quarterly* 672 & 687.

83 E Voeten 'Public opinion and the legitimacy of international courts' (2013) 14 *Theoretical Inquiries in Law* 416.

84 KJ Alter 'Private litigants and the new international courts' (2006) 39(1) *Comparative Political Studies* 40, 43 & 46.

85 KJ Alter 'Delegating to international courts: self-binding vs other-binding delegation' (2008) 71(1) *Law and Contemporary Problems* 61.

group rights, the rights holder is an individual as a person or as a member of a group.[86] Even group rights are meant to ensure the collective interests of the individuals within the groups and hence reinforcing the argument that individuals' access to ICs plays a significant role in shaping the usage rate. Consequently, choice design of access to human rights courts can advance or impede the enforcement of human rights obligations.[87] It is noted that

> [t]he key issue for human rights adjudication is whether or not private litigants have access to an international legal system, and on what terms. Human rights advocates prefer a maximalist approach of direct private access to international judicial institutions that can offer binding legal remedies.[88]

Therefore, the architecture of the private litigants' access to international human rights courts directly affects the usage rate which in turn impacts effectiveness. In the context of this research, a user rate should be seen not only from the number of cases entertained by ICs but also from their accessibility to the rights holders.

3.2.1 Criticism against usage rate approach

The usage rate approach to effectiveness is not without its criticisms. One of them is that usage rates do not necessarily indicate the impact of the courts on the behaviour of states.[89] For instance, if the state is repeatedly accused of violations that have similar patterns, perhaps it might be so because it failed to address the root cause of the problem or not even attempting to address it. In such cases, the number of cases submitted to a court against that state shows the ineffectiveness of the court instead of its effectiveness. Moreover, it is argued that

> high usage or litigation rates may be indicative of the parties' perceived utility of turning to the court, but also of the inability of the court to generate, over time, adequate normative guidance that would reduce the number of legal disputes.[90]

Going by the same reasoning, in as much as the usage rate can be considered as evidence of effectiveness, it can also be argued that high usage rates may arguably show the failure of the courts in bringing practical changes.

3.2.2 African Court usage rate

If one applies the usage rate approach to assess the effectiveness of the African Courts, depending on the points of focus, different, seemingly

86 Leaving aside the debate whether individuals rights or group rights prevails or vice versa, when one considers how the international human rights frame is crafted, rights a person has as an individual are more in number than rights he or she enjoys because of membership to certain groups.

87 Alter (n 15) 599.

88 Alter (n 15) 599-600.

89 Guzman (n 32) 188.

90 Y Shany *Assessing the effectiveness of international courts* (2014) 5.

opposing conclusions can be drawn. One line of argument could be looking at the number of applications that the African Court received so far at surface value, perhaps in comparison with other regional courts' statistics, and then assess the extent to which the African Court has been effective. In this regard, to be methodologically fair, it is the first years of the operations of the other regional courts that have to be a point of reference, not their current caseloads.

In the first decade of their operation, the European Human Rights Court and Inter-American Court of Human Rights (IACtHR) handed down seven[91] and three[92] merits judgments, respectively. The African Court, on the other hand, rendered eight merits judgments.[93] This can be taken positively given that the restrictive design of individuals' and NGOs' direct access has been blocking several cases that could have potentially reached the African Court. However, it has been a point of criticism given the infant stage of human rights institutions in which the European Human Rights Court and IACtHR operated their first decade compared to the era of more international judicialisation of the twenty-first century in which the African Court operates.[94] Nonetheless, it is important to consider other factors such as the political landscape and the working time of the African Court. For instance, except for the President of the African Court, all judges perform their functions on a part-time basis, and this can extend the time in which cases are finalised although it is similar for the IACtHR, but not for the European Human Rights Court.[95]

Another dimension is to examine the total number of applications that the African Court received so far. As of April 2022, the African Court had received 325 applications in contentious matters.[96] Also, it had received 15 requests for advisory opinions and 4 applications for

91 *Lawless v Ireland*, application 332/57, ECHR, judgment, 1 July 1961; *De Becker v Belgium*, application 214/56, ECHR, judgment, 27 March 1962; *Wemhoff v Germany*, application 2122/64, ECHR, judgment, 27 June 1968; *Neumeister v Austria*, application 1936/63, ECHR, judgment, 27 June 1968; *The Belgian Linguistic case*, application 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, ECHR, judgment, 23 July 1968; *Stögmüller v Austria*, application 1602/62, ECHR, judgment, 10 November 1969; *Matznetter v Austria*, application 2178/64, ECHR, judgment, 10 November 1969.

92 *Velásquez-Rodríguez v Honduras,* IACtHR, merits judgment, 29 July 1988, Series C No 4; *Godínez- Cruz v Honduras*, IACtHR, merits judgment, 20 January 1989, Series C No 10; *Fairén-Garbi and Solís-Corrales v Honduras*, IACtHR, merits judgment, 15 March 1989, Series C No 6.

93 *Mtikila v Tanzania*; *Thomas v Tanzania*; *Onyango & Others v Tanzania* (merits); *Abubakari v Tanzania* (merits); *APDH v Côte d'Ivoire*; *Zongo v Burkina Faso*; *African Commission v Libya* (merits) (2016) 1 AfCLR 153; *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314.

94 F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 96.

95 African Court Protocol, art 15(4).

96 African Court https://www.african-court.org/cpmt/statistic (accessed 20 April 2022).

interpretation.[97] Although one can see this as good progress, a closer look at the details of the cases shows the other side of the story.[98] Among the submitted cases, there are cases submitted 'without any legal basis' either against a state that has not ratified the African Court Protocol or ratified the African Court Protocol but has not made the special declaration.[99] Accordingly, more than half of the cases submitted during the first five years of the African Court lacked a legal basis.[100] Hence, the total number of applications as it appears on the website of the African Court might not necessarily reflect the usage rate of the African Court.

It is important to examine Tanzania's uniqueness concerning its caseload. Within the first decade of the African Court, among cases submitted against states that have accepted direct access, approximately 81 per cent of the cases (71 out of 87), were against Tanzania.[101] From the usage rate approach, this can be considered as evidence of the effectiveness of the African Court. Less conceivably, one can argue that the redundancy of similar cases is because the African Court failed to generate normative guidance that helps to decrease submissions. Nevertheless, studies suggest rather the problem is within the criminal justice system of Tanzania, not the African Court's inability to provide a rights-based normative framework.[102] Additionally, in most cases involving the death penalty, the African Court has been ordering Tanzania to refrain from executing the death penalty.[103] Plausibly, such intervention can be one of the reasons for the flood of cases initiated by inmates from Arusha and the Kilimanjaro region[104] because 'most applications in subsequently submitted cases are from these two regions'.[105]

Despite this shortcoming, after the first decade, the number of cases reaching the African Court and judgments coming out has significantly increased. Moreover, it could be argued that had it not been for the African Court's access design, it would have received many more cases. In the case of the European Human Rights Court, the

97 As above; the IACtHR has rich jurisprudence of advisory opinions and adopted ten advisory opinions within the first decade of its operation. *See* HF Ledesma *The Inter-american system for the protection of human rights: institutional and procedural aspects* (2007) 979-980; JM Pasqualucci 'Advisory practice of the Inter-American Court of Human Rights: contributing to the evolution of international human rights law' (2002) 38(2) *Stanford Journal of International Law* 241-288.

98 Viljoen (n 94) 67.

99 Viljoen (n 94) 67-68.

100 Viljoen (n 94) 68.

101 Possi (n 52) 314; Viljoen (n 94) 68-69.

102 Possi (n 52) 334-336.

103 *Amini Juma v Tanzania* (provisional measures) (2016) 1 AfCLR 658; *Ally Rajabu and Others v Tanzania* (provisional measures) (2016) 1 AfCLR 590; *Armand Guehi v Tanzania* (provisional measures) (2016) 1 AfCLR 587; *Dominick Damian v Tanzania* (2016) 1 AfCLR 699; *John Lazaro v Tanzania* (provisional measures) (2016) 1 AfCLR 593; *Cosma Faustin v Tanzania* (provisional measures) (2016) 1 AfCLR 652.

104 Possi (n 52) 316.

105 As above.

removal of the gatekeeper, the European Commission of Human Rights in 1998, and allowing individuals to directly access the European Human Rights Court had a momentous impact on its utility.[106] For instance, three years after the reform, only in 2001, the European Human Rights Court delivered 888 judgments exceeding the total of 837 judgments it rendered from 1959 to 1998.[107] However, it was not an easy journey as it took more than three decades to firmly establish the legitimacy of the European Human Rights Court and build states' trust in it before abolishing the duality of the institutions. Similarly, over the years, if the African Court is able to gain similar legitimacy, particularly by surviving the resistance posed by the withdrawals, there would be a possibility of the African human rights system adopting similar practices to the European human rights system, at least as far as individuals and NGOs direct access is concerned.[108] Yet, this currently looks like an ambitious dream.

3.3 Goal-based approach

The goal-based approach is one of the methods used in social science to assess the effectiveness of organisations. Others include the system resource approach[109] and internal process or functioning approach.[110] According to the goal-based approach, 'an action is effective if it accomplishes its specific objective' and the same rule applies to organisations.[111] Hence, an organisation is effective when it achieves its goal. As such, identifying the goal of an organisation is an important part of assessing its effectiveness. The goal-based approach to assessing the effectiveness of ICs follows the same reasoning.[112] Accordingly, ICs are effective to the extent they execute their objectives or goals, which is their mandate.[113] It is important to note that the goal-based approach, especially in its application to the effectiveness of ICs, is a very recent development and there is no robust literature to substantiate its meaning with many practical examples.

106 Art 2(3) of the Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby.

107 Public Relations Unit of the ECHR 'ECHR Overview 1959-2019' (2020) 4 https://echr.coe.int/Documents/Overview_19592019_ENG.pdf (accessed 20 September 2021).

108 For more on the impact of withdrawals of direct access declaration see G Gadisa 'State parties' withdrawal of direct access to African Court of Human and Peoples Rights: the need to reinvigorate complementarity' (2023) 12(1) *Oromia Law Journal* 141-165.

109 E Yuchtman & SE Seashore 'A system resource approach to organizational effectiveness' (1967) 32(6) *American Sociological Review* 891-903; JL Price 'The study of organizational effectiveness' (1972) 13(1) *The Sociological Quarterly* 3-15.

110 WA Martz 'Evaluating Organizational Effectiveness' unpublished PhD thesis, Western Michigan University, 2008 41-45.

111 Shany (n 13) 231.

112 Shany (n 13) 229.

113 Shany (n 13) 237.

Depending on the nature of their work, the size of the organisation, and the interests of the stakeholders, ICs may have several goals. It has been argued that:

> the goals of international courts, as understood by their officials, are often a mirror image of the goals set by the mandate providers and communicated by them to courts, whether explicitly, implicitly, or as unstated objectives.[114]

The conventional norm is that the mandate providers set the goal of the ICs in legal documents establishing such courts. Some of the widely accepted goals of ICs, arguably the primary ones, are ensuring compliance with international norms and dispute resolution (inter-state and individuals' claims against states).[115]

3.3.1 Criticism against goal-based approach

The goal-based approach is also subject to criticism. Commentators argue that ICs should not be strictly confined to the initial intention of their creators and have to go beyond by adapting to the changing environment.[116] Further, others highlight that

> [w]hen assessing the value or effectiveness of international courts and tribunals scholars should not only proceed in terms of how well a given institution serves its constituted ends, but also how well it serves the unstated purposes.[117]

Therefore, it is important to think and look outside the box of the explicitly stated goal and see how the ICs help in solving the contemporary problems of their time. In addition, it is important to note that goal-based approach to assessing the effectiveness of ICs is a recent development that is yet to receive wide acceptance as it was originally meant to assess the effectiveness of organisations with different purposes and structures than courts. Hence, the uniqueness of judicial institutions is not factored into the conception of the approach itself. As such, in its application to assessing the effectiveness of ICs, the goal-based approach has not yet passed the test of time. Adapting the approach to the realities of ICs is a project that is still in the trial stage.

It is also equally important to note that, unlike organisations which set goals and attach timeframes for assessing their effectiveness, courts are most likely not to do the same as their effectiveness may take a long time to materialise due to the kind of cases they entertain. Often the impact of the work of ICs is felt over time, not overnight. For example, if the decision of an IC requires the respondent state to amend its Constitution, which usually involves many decision-makers and lengthy legislative processes, implementation of such a decision may take longer time than expected. Further, ICs, unlike domestic courts, do not have law enforcement agencies such as police that enforce their

114 Shany (n 13) 243.

115 Shany (n 13) 244-246.

116 Squatrito and others (n 18) 8.

117 DD Caron 'Towards a political theory of international courts and tribunals' (2006) 24(2) *Berkeley Journal of International Law* 410.

decisions within the timeframe set out in their judgment. Worse still, there are many other socioeconomic and political factors that affect the manner in which states react and respond to the decisions of ICs. For instance, a country going through political turmoil or transition is less likely to prioritise implementing the decision of ICs. Therefore, it is not easy to assess the effectiveness of ICs using the goal-based approach.

3.3.2 African Court in light of goal-based approach

To assess the effectiveness of the African Court in the eyes of the goal-based approach, it is important to mention the goal of the Court which is the mandate of the Court. The mandate of the African Court is to complement and reinforce the protective mandate of the African Commission.[118] The protective mandate of the African Commission encompasses considering individual communications and inter-state communication as well as conducting fact-finding or investigative missions.[119] Accordingly, in light of the goal-based approach, the effectiveness of the African Court cannot be examined in isolation from the nature and practice of the relationship it has with the African Commission.

The African Court Protocol does not provide details on what complementarity entails. However, some commentators have noted that it is meant to encourage each institution to focus on its strengths to support the overall effectiveness of the system.[120] Others have deconstructed complementarity and identified three interrelated and interdependent objectives, namely functional (enhancing the effectiveness of the African human rights system), relational (relating two institutions 'under a system of shared jurisdictional competence and collective enforcement'), and normative (realising norms envisaged under the African human rights system).[121] Further, complementarity has to be understood not only as the African Court supporting the African Commission but also the other way round, as viewing the two institutions as striving in a synergetic relationship to achieve the same objective, that of ensuring respect and protecting human rights on the continent.

Concerning the complementary relationship between the African Court and the African Commission, it is possible to say that the case referral system, particularly in contentious cases, plays a significant role, without ruling out the importance of the other engagement of the two institutions. The details of the referral mechanism are regulated by their respective Rules of Procedures. In this regard, therefore, the effectiveness of the African Court depends not only on its willingness to

118 African Court Protocol, preamble, para 7 & art 2.

119 Viljoen (n 1) 300.

120 ST Ebobrah 'Towards a positive application of complementarity in the African human rights system: issues of functions and relations' (2011) 22(3) *European Journal of International Law* 666.

121 D Juma 'Complementarity between the African Commission and the African Court' in Pan African Lawyers Union *Guide to the complementarity within the African human rights system* (2014) 8.

complement but also on the readiness of the African Commission to refer cases. As of December 2023, the African Commission has referred only 3 cases. Thus, in the absence of cases referred by the African Commission and rejected by the African Court, it is difficult to conclude that the latter is ineffective in fulfilling its goal of complementing the African Commission. Further, the fact that the African Court has been dealing with hundreds of applications coming from countries that have allowed individuals and NGOs direct access is another indication that the African Court is complementing the protective mandate of the African Commission.

4 FACTORS AFFECTING THE EFFECTIVENESS OF THE AFRICAN COURT

Several factors have implications for the effectiveness of ICs. Some are external to the courts, meaning they are beyond their ultimate control, mostly in the hands of the states, while others are those over which the courts can exercise a certain degree of control. Moreover, these factors are not necessarily legal but may stretch to the political, social, and economic spheres. This section discusses these factors while relating them to the realities surrounding the African Court.

One of the factors is the composition of the Court.[122] It is not questionable that the experiences of the judges and their specific expertise in subject matters over which a court exercises jurisdiction contribute to the effectiveness of a court. In this regard, article 11 of the African Court Protocol provides that judges are 'elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights'. So far, the composition of the African Court exhibits these standards, particularly in terms of pulling together judges with a strong human rights background both from academia and practice backgrounds.[123] To mention some, Justice Fatsah Ouguergouz of Algeria, Justice Gérard Niyungeko of Burundi and Justice Sophia AB Akuffo of Ghana are among the former judges who advanced human rights through pro-human rights legal rulings. For instance, in the *Femi Falana v African Union* case, Justice Akuffo is one of the judges who dissented from the majority decision and argued that article 34(6) of the African Court Protocol is inconsistent with the African Charter.[124]

122 LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107(2) *Yale Law Journal* 300.

123 African Court 'Former Judges' https://www.african-court.org/wpafc/former-judges/; 'Current Judges' https://www.african-court.org/wpafc/current-judges/ (accessed 22 April 2022).

124 *Femi Falana v African Union* (jurisdiction) (2012) 1 AfCLR 118, Separate Dissenting Opinion by Judges Akuffo, Ngoepeand Thompson, para 16.

Another factor is the authority or status of the instrument that ICs are charged with interpreting and applying.[125] The African Court has jurisdiction over 'all cases and disputes submitted to it concerning the interpretation and application' of the African Charter, the African Court Protocol, and 'any other relevant Human Rights instrument ratified by the States concerned'.[126] The African Charter enjoys universal regional ratification, with the exception of one AU member state, Morocco[127] and this can be considered as an indication that the Charter is an acceptable normative standard of the continent as far as human rights are concerned. In addition, the resolution, principles, guidelines, and general comments adopted by the Commission fill the gaps and feed in new developments and hence enrich the jurisprudence of the African human rights system. The case-law of the African Commission and the African Court reflects the fact that the Charter provisions set the human rights standards of which violations cannot be justified by national laws of the state parties.[128]

Moreover, the phrase 'any other relevant human rights instrument' in article 3(1) of the African Court Protocol indicates the wide reach of the subject matter jurisdiction of the African Court. There are instances where the African Court found the violations of 'non-African treaties' such as the Convention on the Elimination of All Forms of Discrimination against Women,[129] the International Covenant on Civil and Political Rights,[130] and also a violation of the Universal Declaration of Human Rights.[131] In this regard, the fact that the African Court has jurisdiction over a widely-ratified human rights treaty, the African Charter, which embraces the unique identities of the continent and wide substantive jurisdiction, can be factors that enhance the effectiveness of the African Court.

Another contributing factor is the quality of legal reasoning,[132] which has the potential of either enhancing state adherence to human rights norms or attracting criticism[133] because it is one of the elements that influence states' responses to judgments.[134] Strong legal reasoning 'would theoretically make it harder for states to ignore' the remedies

125 Helfer & Slaughter (n 122) 304-306.

126 African Court Protocol, arts 3 & 7.

127 African Union 'List of Countries which have Signed, Ratified/Acceded to the African Charter on Human and People's Rights' https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 8 June 2020).

128 *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995), para 15; *Mtikila v Tanzania*, para 109.

129 *APDF and IHRDA v Mali* (merits) (2018) 2 AfCLR 380, para 135.

130 *Anudo v Tanzania* (merits) (2018) 2 AfCLR 248, para 132.

131 *Penessis v Tanzania* (merits), para 168.

132 Helfer & Slaughter (n 122) 318.

133 A Follesdal 'Survey article: the legitimacy of international courts' (2020) *The Journal of Political Philosophy* 10.

134 JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the twenty-first century: the case of the Inter-American Court' (2008) 102(4) *American Journal of International Law* 794.

and authority of a court.[135] A sound argument as to why and how the conclusion is reached is more likely to enhance the rationality and the authority of the judgment.[136] Nonetheless, the quality of legal reasoning is not a guarantee for compliance. In this regard, the Court has been praised for some judgments,[137] and criticised for others.[138]

One of the points of criticism is the approach of the African Court to exhaustion of local remedies[139] concerning constitutional petitions, particularly in civil law, mostly in Francophone countries. The African Court considers constitutional remedies as extraordinary remedies and hence does not require applicants to exhaust them.[140] For instance, in *Ajavon v Benin*, the African Court ruled that the application was admissible without thoroughly assessing the effectiveness of the Benin Constitutional Court in addressing the constitutionality of the law establishing the Anti-Economic Crimes and Terrorism Court.[141] However, before the African Court rendered its decision on this case (29 March 2019), the Benin Constitutional Court had already declared unconstitutional the contested provision of law, article 12 of the law establishing the Anti-Economic Crimes and Terrorism Court (31 January 2019).[142] It is important to note that *Ajavon v Benin* is one of the cases that led to Benin's withdrawal of the declaration on direct access.

Another important factor is the domestic social, economic, political, and judicial context of state parties.[143] For instance, the nature of civic space in a country has its share in shaping the interaction with and response of the country to the ICs.[144] A vibrant CSOs environment can positively influence compliance with the judgments of human rights courts and also helps in bringing violations of rights to

135 Abebe (n 22) 574.

136 Helfer & Slaughter (n 122) 320-321.

137 International Justice Resources Centre 'African Court Addresses Freedom of Expression in Burkina Faso, in Landmark Judgment', 3 February 2015, https://ijrcenter.org/2015/02/03/african-court-addresses-freedom-of-expression-in-burkina-faso-in-landmark-judgment/ (accessed 23 August 2020); The Court was appreciated to take a progressive position in finding that custodial measures for the contravening defamation laws violates the right to freedom of expression.

138 Adjolohoun (n 77) 21-31.

139 Adjolohoun (n 77) 26-29; the exhaustion of local remedies is one of the admissibility requirements as set out under art 6(2) of the Court Protocol and art 56(5) of the African Charter.

140 *Onyango & Others v Tanzania* (merits), para 95; *Thomas v Tanzania*, para 65.

141 *Ajavon v Benin* (merits), Application 013/2017, African Court (29 March 2019), paras, 109-117 & 218.

142 DCC 19-055 of 31 of January 2019, Benin Constitutional Court; Adjolohoun (n 77) 28.

143 LJ Peritz 'Why comply? Domestic politics and the effectiveness of international courts' unpublished PhD thesis, University of California, 2015 129-132.

144 L Conant 'Missing in action? the rare voice of international courts in domestic politics' in M Wind (ed) *International courts and domestic politics* (2018) 20; A Chehtman 'The relationship between domestic and international courts: the need to incorporate judicial politics into the analysis' *Blog of the European Journal of International Law* 8 June 2020 https://www.ejiltalk.org/the-relationship-between-domestic-and-international-courts-the-need-to-incorporate-judicial-politics-into-the-analysis/ (accessed 23 August 2020).

the attention of the international community. Moreover, 'democratic states are more likely to honour their international commitments.'[145] Domestic realities of state parties are relevant in the context of the African Court. Most of the countries that are state parties to the African Court Protocol are far away from establishing a sustainable democratic system. Except for countries such as South Africa, Ghana, Mauritius, Kenya and Zambia, which are relatively open societies, other countries are either in the process of transition to democracy like The Gambia or unable to make meaningful progress like Libya. In other state parties such as Tanzania and Rwanda, there is a pattern of shrinking civic space. There is an extreme situation like Mali and Burkina Faso experiencing unconstitutional changes of government, which has led to their suspension from the AU membership.[146] Thus, the African Court struggles to ensure its effectiveness while operating in a politically volatile environment.

5 CONCLUSION

This article discussed the approaches for assessing the effectiveness of ICs, namely, the compliance rate, the usage rate, and the goal-based approaches and applied the same to assess the effectiveness of the African Court. Taking into consideration the young age of the African Court and the political atmosphere in which it is operating, the work the African Court has undertaken in rendering judgments that cover a wide range of human rights is commendable. Nevertheless, the challenges of low compliance with judgments, flaws in legal reasoning, and delays in delivering judgments cannot be overlooked. Yet, such shortcomings cannot detract from the effectiveness of the African Court.

Non-compliance problems are expected, given that the African Court has been responding to pressing socio-political and legal problems of the continent such as freedom of expression, fair trial and elections. To mitigate the risk of non-compliance, the African Court has to be cognizant of the human rights culture of the state parties and the sensitivities of disputes that are brought before it for determination and the political undertones of each case. In addition, the African Court has to be wise in crafting its judgments, especially with regard to reparations, as it is better to have few but enforceable judgments rather than numerous judgments that state parties refuse to enforce. However, this does not mean that the African Court should compromise on human rights. Rather it is to say that the African Court should always remain awakened to the realities of the context in which it is operating and devise relevant strategies that enable it to remain a fully functional human rights supervising body in Africa. Finally, it is important to invest in factors that can positively affect the effectiveness

145 Conant (n 144) 22.

146 Reuters 'African Union suspends Mali's membership after coup' 19 August 2020 https://uk.reuters.com/article/uk-mali-security/african-union-suspends-malis-membership-after-coup-idUKKCN25F22X (accessed 23 August 2020).

of the African Court including the composition of the courts and the quality of legal reasoning in the judgments.