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Decoding implementation of African Commission on Human and Peoples' Rights decisions on communications in Botswana, Kenya and Ethiopia

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Summary: *This article evaluates the implementation status of decisions by the African Commission on Human and Peoples' Rights on individual communications involving Botswana, Ethiopia and Kenya. The analysis includes all publicly-available decisions on the merits against these countries as at the end of 2022. The primary objective is to determine whether these states have complied with the Commission's decisions. The findings indicate that none of the three countries has fully complied with the decisions. Kenya has partially implemented two of the three decisions against it, while Botswana has only partially complied with one out of four decisions. Ethiopia has not complied with either of the two decisions against it. The article also reveals that the Commission's monitoring of the implementation of its recommendations has been*

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generally inadequate, except for the Endorois *case against Kenya, where it undertook relatively commendable follow-up.*

Key words: *African Commission; communications; decisions; implementation; follow-up; Botswana; Ethiopia; Kenya*

1 Introduction

Inaugurated on 2 November 1987, the African Commission on Human and Peoples' Rights (African Commission) is the continent's oldest human rights-monitoring body, responsible for promoting and protecting human and peoples' rights by interpreting and monitoring the implementation of the African Charter on Human and Peoples' Rights (African Charter), which established and defines its roles.[1] It fulfils its protective mandate by adjudicating individual complaints[2] submitted against member states to the African Charter and rendering decisions with remedial measures, termed 'recommendations', as a matter of principle when violations are found, although 'recommendations' may also be included in exceptional cases without finding violations.[3] The 'recommendations', which are often understood as not binding by themselves,[4] arguably become binding once included in the Commission's activity reports and adopted by the political organs of the African Union (AU).[5]

In its nearly four decades of operation, the African Commission has received hundreds of alleged cases of human rights violations through its individual complaints procedure and has in many instances found states in violation. While its decisions are often progressive, they are rarely effectively implemented.[6] This implementation gap has been

1 Arts 30 & 45 African Charter.
2 Art 55 African Charter.
3 See eg *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003) (*Bosch*).
4 The African Commission considers the African Charter, thereby its decisions on individual communications, as imposing obligations on states per art 1 of the African Charter. R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 13. See eg *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 113-116.
5 F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law*; C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 30; G Sowe & E Bizimana 'Implementation of human rights decisions in the African human rights system' in R Murray and D Long (eds) *Research handbook on implementation of human rights in practice* (2022) 79.
6 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American*

attributed to different interplaying factors, including those related to the Commission, the decisions, and the implementing states.[7]

This article aims to contribute to the discourse by assessing the implementation status of decisions against the three states and the follow-up measures taken by the African Commission. As of 2022, there were four publicly-available Commission decisions against Botswana: *Spilg & Other v Botswana* (*Spilg*);[8] *Interights & Ditshwanelo v Botswana* (*Interights*);[9] *Modise v Botswana (Modise*);[10] and *Good v Botswana* (*Good*).[11] For Kenya, there were three decisions: *Ouko v Kenya* (*Ouko*);[12] *Centre for Minority Rights Development & Others v Kenya* (*Endorois*);[13] and *Nubian Community in Kenya v Kenya* (*Nubian*).[14] Ethiopia has had two decisions: *Haregewoin Gabre-Selassie and Institute for Human Rights and Development in Africa (IHRDA) v Ethiopia* (*Dergue Officials*);[15] and *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia* (*Equality Now*).[16]

The article is structured into five main parts. The first part is this introduction. The second part defines 'implementation' and outlines factors influencing it, laying the foundation for the discussion. The third part introduces the decisions against each state, highlighting the recommendations issued. The fourth part, which is at the crux of the article, assesses states' implementation status. The article concludes with a summary of findings and key recommendations.

Journal of International Law 2-6; F Viljoen & V Ayeni 'A comparison of state compliance with reparation orders by regional and sub-regional human rights tribunals in Africa: Case studies of Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe' (2022) 26 *International Journal of Human Rights* 1651; Okoloise (n 5) 42-46; M Mutua 'Looking past the Human Rights Committee: An argument for demarginalising enforcement' (1998) 4 *Buffalo Human Rights Law Journal* 239; Murray & Long (n 4); Sowe & Bizimana (n 5) 79-80.

7 Viljoen & Louw (n 6) 12-31; GM Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 468. See also report of the meeting of the brainstorming meeting on the African Commission on Human and Peoples' Rights 9-10 May 2006, Banjul, The Gambia para 66.

8 *Spilg & Others v Botswana* (2011) AHRLR 3 (ACHPR 2011).

9 *Interights & Ditshwanelo v Botswana* Communication 319/06 African Commission (*Interights*).

10 *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

11 *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010).

12 *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000).

13 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).

14 *The Nubian Community in Kenya v Kenya* Communication 317/2006 African Commission, 38th Annual Activity Report (2015).

15 *Haregewoin Gabre-Selassie and IHRDA v Ethiopia* Communication 301/05, African Commission (*Dergue Officials*).

16 *Equality Now EWLA v Ethiopia* Communication 341/2007, African Commission (*Equality Now*).

2 Conceptualising implementation

Drawing on existing scholarly works,[17] the article approaches implementation as the process and steps that states take in response to decisions against them by the African Commission. It is the linchpin in the long journey toward vindication of victims of rights violations; as rightly observed, '[a] decision is as good as its implementation and what matters to victims is that decisions are complied with'.[18]

The issue of implementation defies a single explanation, as it is not a linear process but rather a dynamic one shaped by different factors.[19] Thus, any inquiry into the implementation status of decisions and the variables at play requires consideration of these dynamics. It typically entails gathering information on the measures states adopt to implement decisions, evaluating their progress based on this data, and systematically categorising their compliance level.[20] In this regard, extensive research exists across various forms, including case studies on specific human rights bodies and rulings, country-level analyses, and comparative approaches across different judicial bodies or states, where scholars and other stakeholders assess and gauge the extent of compliance.[21] Viljoen and Louw investigate the steps taken by states to comply with the recommendations made in those decisions and classify the implementation status into five categories: full compliance, where states fully and timely comply with the recommendations; non-compliance, where states fail to implement any recommendations; partial compliance, where states make partial progress without full compliance; situational compliance, where compliance, either full or partial, results from changes in 'circumstances (or situations)' that coincidentally align with the Commission's decisions; and unclear compliance, where there is no information on compliance status.[22] This article uses this categorisation to assess states' implementation status.

The investigation of factors influencing implementation status is another critical aspect of research on implementation that is relevant

17 R Murray & D Long 'Introduction to the research handbook on implementation of human rights in practice' in Murray & Long (n 5) 2; J Biegon 'Implementation in the African regional human rights system: Profiling case studies on trends and patterns in East Africa' in J Biegon (ed) *Silver granules in stretches of sand: Implementation of decisions of regional human rights treaty bodies in East Africa* (2020) 12-13; Viljoen & Louw (n 6) 4-8; R Murray 'Addressing the implementation crisis: Securing reparation and righting wrongs' (2020) 12 *Journal of Human Rights Practice* 6; Murray & Long (n 4) 27.
18 Sowe & Bizimana (n 5) 79-80 (abstract).
19 Viljoen & Louw (n 6) 7; Murray (n 17) 2.
20 Viljoen & Louw (n 6) 4-8.
21 Refer to the sources cited between nn 5 & 10.
22 Viljoen & Louw (n 6) 4-8.

to the article. Existing research has pinpointed various factors,[23] with the key factors relevant to the article discussed in four groups as follows.

The first category pertains to the issues involved in a specific decision and the nature of the remedies prescribed therein.[24] For example, decisions with clear and specific remedies are often seen as more effective in promoting their implementation than those with vague or general remedies.[25] In the context of the rulings made against the selected states, the article considers, in passing, how these factors play out.

The second category includes factors relating to the institution from which the decisions emanate. It has been argued that several factors linked to the decision-making body, including perceptions of the binding or non-binding nature of its findings (though considered to have limited impact),[26] its legitimacy, and the extent of its follow-up measures, may play a role in explaining status of implementation.[27] In this article, the primary focus is on 'monitoring and follow up' as a factor in the implementation process, while leaving out other factors such as its quasi-judicial nature and the non-binding nature of its decisions, as these apply uniformly to all case studies and do not account for variations in compliance.[28]

The third set of factors influencing implementation stems from the legal, political and social conditions within the states responsible for implementation.[29] For example, it has been suggested that states with stronger human rights records at the time of implementation tend to comply more readily than those with weaker ones.[30] In this regard, the article highlights whether the implementation status of the selected states correlates with their human rights records, assessing whether Botswana, with a stronger human rights record, exhibits better compliance than Kenya and Ethiopia.

The final set of factors concerns the role different stakeholders play in the implementation of decisions. For example, it is suggested that the involvement of complainants (victims and their legal

23 See eg Viljoen & Louw (n 6) 4-8; Murray & Long (n 4) 31-43; Murray & Long (n 17) 3-13.
24 Viljoen & Louw (n 6) 4-8; Murray & Long (n 17)10.
25 Murray (n 17) 4-5; Viljoen & Louw (n 6) 7; Murray & Long (n 4) 22.
26 Murray (n 17) 9.
27 For a more detailed discussion on factors related to the African Commission, see Viljoen & Louw (n 6) 13-17.
28 Viljoen & Louw (n 6) 12.
29 Murray & Long (n 17) 11; Viljoen & Louw (n 6) 23-28.
30 Viljoen & Louw (n 6) 23-28; Sowe & Bizimana (n 5) 79.

representatives) in follow-up efforts, along with increased awareness and active participation from civil society organisations and media in the concerned states, enhances the likelihood of implementation.[31] As far as available information allows, this article considers how these factors play out in the selected states. It is important to note that the factors discussed in the four groups above are not exhaustive, and the presence of one or more factors does not automatically result in implementation, as the process involves a complex interplay of various dynamics.

3 Communications: African Commission's decisions against Botswana, Kenya and Ethiopia

3.1 Justifying the selection of countries

The African Commission has rendered decisions against many African states, and due to limitations of space and time, it is not feasible to address all decisions. Therefore, the authors have chosen to focus on three states as case studies, taking into account various criteria. These criteria include their representation of varying human rights records, the presence of two or more decisions against them, the reasonable time they have had to implement the decisions, and the landmark nature of the decision.

The first criterion, the representation of states with varied human rights records, is used in selecting the case study states as it provides an opportunity to highlight whether a correlation exists between a country's human rights record and its adherence to the Commission's decisions. The human rights records used to select the three countries are based on assessments from Freedom House and the Cato Institute at the time the Commission's decisions were expected to be implemented. Freedom House has rated Botswana as 'free' since 1973, and all decisions made by the Commission against it, along with their expected implementation times, fall within this period.[32] Ethiopia has been rated 'not free' since 2011,[33] and both

31 Murray (n 17) 11; Murray & Long (n 4) 69-86.

32 R Lekalake 'Botswana's democratic consolidation: What will it take?' (2016) 30 Afrobarometer Policy Paper 1, https://www.afrobarometer.org/wp-content/uploads/2022/02/ab_r6_policypaperno30_democracy_in_botswana.pdf (accessed 11 August 2024); Freedom House 'Freedom in the world 2024: Botswana', https://freedomhouse.org/country/botswana/freedom-world/2024 (accessed 11 August 2024).

33 The findings of Freedom in the World 2011 include events from 1 January 2010 to 31 December 2010. See 'Freedom in the World 2011' 232, https://freedomhouse.org/sites/default/files/2020-02/FIW_2011_Report_PDF.pdf (accessed 23 August 2024); Freedom House 'Freedom in the World 2024:

Commission's decisions against it fall within this period. Turning to Kenya, since 2003 (covering events from a January to 31 December 2002) it has been rated 'partly free',[34] and the implementation periods for all three decisions against it, including the *Ouko* case from before January 2002, fall within this 'partly free' status. Although *Ouko* was decided in November 2000, Kenya could only be notified about the decision after the Assembly of the Organisation of African Unity (OAU) (now the African Union (AU)) considered and adopted the Commission's annual activities report (which included the *Ouko* case) in July 2001, marking the start of the implementation period.[35] Since Kenya did not implement the decision during the five-month window between July 2001 and the start of its 'partly free' status in January 2002, the implementation period for the decision extended into the 'partly free' period, aligning logically with the selection criteria for this article.[36] These Freedom House ratings correspond with Cato Institute's annual Human Freedom Index rankings of the three countries. When comparing the rankings of the three countries by the Cato Institute during the periods when the decisions against them were expected to be implemented, Botswana consistently ranks highest among the three, followed by Kenya and Ethiopia.[37]

The second criterion considered is the issuance of two or more decisions against the states in question by the Commission, allowing for an analysis of whether states respond differently to different decisions and, if so, what factors might explain these differences. Consequently, the selected countries each had two or more decisions rendered against them: Botswana had four, Kenya had three, and Ethiopia had two.

Ethiopia', https://freedomhouse.org/country/ethiopia/freedom-world/2024 (accessed 24 August 2024).

34 Freedom House 'Freedom in the world-2003' (2003) 299, https://freedomhouse.org/sites/default/files/2020-02/Freedom_in_the_World_2003_complete_book.pdf (accessed 23 August 2024).

35 The 14th Annual Activity Report of the African Commission, which included the decision in *Ouko,* was adopted by the Assembly of OAU in July 2001. See the 14th Annual Activity Report of the Commission (2000-2001) 73-77. The Ouko decision text states July 2000 as the notification date, but this likely reflects a typographical error, as notification would have occurred after the Assembly of OAU's adoption of the Commission's annual activities report in July 2001, in line with art 59 of the African Charter and the codified practices in subsequent Rules of Procedure of the Commission (2010 and 2020).

36 The findings of Freedom in the World 2003 include events from 1 January 2002 to 31 December 2002. See Freedom House (n 34).

37 The Cato Institute 'The human freedom index 2019' (2019) 95, 153 & 213, https://www.cato.org/sites/cato.org/files/human-freedom-index-files/human-freedom-index-2019.pdf (accessed 12 October 2024). The ranking from 2008 to 2017 for the three countries is included in this report. See 'Human freedom index 2019' for the rankings of the three countries from 2000 onwards 91, 153 & 213, https://www.cato.org/sites/cato.org/files/2023-12/human-freedom-index-2023-full-revised.pdf (accessed 22 August 2024).

Building on this, the third criterion is whether a reasonable amount of time had elapsed, considered sufficient for compliance, between the issuance of the decisions against the states and the time of writing this article. Recognising that the 'reasonable time' for implementation differs based on the nature of recommendations and a country's capacity, both of which play a role in assessing the reasonableness of the time needed for implementation in a specific decision, the authors chose to select states against which decisions were made as long ago as possible. This strategy is used to ensure, as much as possible, that sufficient time has passed for compliance with each decision under consideration, irrespective of the nature of the recommendations issued or the capacities of the states urged to implement them. Thus, the selection of the three states was made with this consideration, as the decisions against them were rendered several years ago, albeit with differences in the exact duration, with the most recent decisions being approximately a decade old. This relatively long implementation window minimises the risk of premature judgments about states' implementation statuses. It also prevents the differences in elapsed time from becoming a primary explanation for variations in implementation, whether by decision or among states, allowing for greater emphasis on other factors that influence implementation and avoiding skewed comparisons among the states.

The other factor that influenced the selection of the three states as case studies for this article is the ground-breaking and celebrated nature of some of the Commission's decisions against them. These decisions were notable for establishing norms, setting precedents, or addressing critical domestic concerns. For instance, *Endorois* was celebrated as the first legal recognition of African indigenous peoples' rights over traditionally-owned land,[38] and *Equality Now* is the Commission's first decision on rape, abduction and the forced marriage of a child.[39] Likewise, complaints decided against Botswana are worthy of follow up, as the issues addressed in these complaints, particularly those related to the use of capital punishment, are contentious human rights issues in the country.

38 Human Rights Watch 'Kenya: Landmark ruling on indigenous land rights' 4 February 2010, https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights (accessed 23 August 2024); ESCR-Net 'The *Endorois* case' 5 June 2018, https://www.escr-net.org/resources/the-endorois-case/ (accessed 23 August 2024). See also G Pentassuglia 'Indigenous groups and the developing jurisprudence of the African Commission on Human and Peoples' Rights: Some reflections' (2010) *UCL Human Rights Review* 150 163.

39 Equality Now 'Victory for Makeda' 3 March 2016, https://equalitynow.org/news_and_insights/victory-for-makedavictory_for_makeda/ (accessed 23 August 2024); Tackling Violence against Women website 'Equality Now and *EWLA v Ethiopia*', https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/makeda/ (accessed 11 August 2024).

In the next part the article discusses, country by country, the nature of the complaints where these countries were found in violation and the recommendations issued by the Commission.

3.2 Botswana

The four merit decisions against Botswana involve causes of action related to the use of capital punishment, erasure of citizenship and deportation. Each is discussed in turn.

3.2.1 Spilg & Others v Botswana

The *Spilg* case dealt with the imposition of capital punishment on Kobedi for murder and his secret execution, which occurred after the complaint had reached the Commission but before it acted.[40] The complaint challenged Botswana's actions and omissions related to capital punishment as violations of the African Charter, specifically, the mandatory death penalty for murder, execution by hanging, the disregard of crucial evidence presented in Kobedi's defence, and the denial of farewells before executions.[41] These conducts, according to the complaint, violated articles 2, 3, 4, 5 and 7 of the African Charter.[42]

The Commission, however, found Botswana responsible for only one of these claims, namely, failing to notify the family or legal representatives of the pending execution, which was deemed a violation of article 5.[43] This decision echoed the Commission's prior stance in *Bosch*, where it emphasised the importance of a humane approach to executions, including granting condemned individuals time with family and access to spiritual support.[44] The remaining claims, including one that challenged 'hanging' as cruel, inhuman or degrading punishment, were not deemed violations.

In terms of remedy, the Commission issued three explicit recommendations to Botswana:[45] first, to align with the resolution urging states to envisage a moratorium on the death penalty; second, to abolish capital punishment; and, third, to submit a compliance report (as part of its periodic report). The first and the third recommendations were also issued in *Bosch*, despite no

40 *Spilg* (n 8) para 9.
41 *Spilg* (n 8) paras 4-9.
42 *Spilg* (n 8) para 6.
43 *Spilg* (n 8) para 177.
44 *Bosch* (n 3) para 41.
45 *Spilg* (n 8) para 9.

violations having been found.[46] Implicitly, the Commission also suggests banning executions without prior notice, deeming it cruel and inhumane punishment.[47]

3.2.2 Interights & Ditshwanelo v Botswana

The *Interights* case was brought in 2006 on behalf of Ping, who was sentenced to death for murder.[48] The complainant argued violations of the African Charter on several grounds: first, that the death penalty violates the right to life; second, that Botswana's system of appointed (*pro deo*) counsel in capital cases uses inexperienced and unqualified lawyers, leading to arbitrary decisions on the death penalty; third, that mandatory capital punishment without considering mitigating circumstances is arbitrary; fourth, that failing to notify the victim's family and legal counsel before execution, and that the subsequent denial of handing the body to the family for burial violated the African Charter; and, finally, that using hanging as an execution method constitutes cruel and inhuman punishment.[49] The Commission found violations of the Charter, but solely on the last two grounds. It emphasised that the use of 'hanging' as an execution method, and the secrecy surrounding the process of execution, which deprived the victim's family and lawyers of final farewells, amounted to cruel and inhuman treatment.[50] This ruling is landmark because it differs from *Spilg* above, where 'hanging' was deemed not to violate article 5 unless its application to a specific individual was shown to be cruel, inhuman or degrading.[51]

The Commission issued four explicit recommendations to Botswana:[52] first, to review its laws aimed at compensating the victim's family; second, to impose a moratorium on the death penalty; third, to take steps toward the abolition of the death penalty; and, fourth, to submit a report within 180 days detailing measures taken to implement these recommendations. Implicit recommendations, such as banning 'hanging' due to its cruelty, and ensuring pre-execution notice and family visits, could also be implied from the Commission's findings.

46 *Bosch* (n 3) para 52.
47 *Spilg* (n 8) para 177.
48 *Interights* (n 9) para 2.
49 *Interights* (n 9) paras 6, 39, 57-59, 67-68 & 87-96.
50 *Interights* (n 9) paras 87-96.
51 As above.
52 *Interights* (n 9) para 99.

3.2.3 Modise v Botswana

The *Modise* case, a prominent case on 'citizenship erasure', addresses state persecution of a political figure through citizenship revocation.[53] It involved a political figure named John Modise. Born in South Africa to Botswanan parents, Modise grew up in Botswana and lived as a citizen without citizenship issues for years. [54] However, in 1978, shortly after establishing and leading an opposition party, he was declared a non-citizen without the opportunity to contest the decision, and deported to South Africa.[55] Despite multiple attempts to re-enter Botswana, Modise failed each time.[56] This forced him to stay in the 'homeland' of Bophuthatswana for eight years, 'and then for additional time in "No Man's Land"'.[57] Eventually, he was permitted to re-enter Botswana on humanitarian grounds but was granted temporary residence, renewable every three months at the discretion of the authorities.[58]

In its decision in 2000, the African Commission held Botswana responsible for multiple breaches of the African Charter. Botswana was found culpable for depriving Modise of his nationality and deporting him four times, thereby subjecting him to personal anguish and indignity in violation of article 5 of the Charter.[59] The Commission also found violations of the right to political participation (article 13) due to the denial of citizenship and deportations resulting from his political activity; the right to property (article 14) due to Botswana's confiscation of his belongings; the right to family life (article 18) due to disruption caused by his deportations; the right to equal protection (article 3(2)) and the right to recognition of one's legal status (article 5) due to the unjustified denial of his citizenship; and the right to freedom of movement (article 12) due to his incessant deportations and their resulting hardships.[60]

To redress these violations, the Commission urged Botswana to compensate Modise and grant him citizenship by descent. It, however, did not require Botswana to report on steps taken to implement these recommendations.

53 B Manby 'Citizenship erasure: The arbitrary retroactive non-recognition of citizenships' in The Institute on Statelessness and Inclusion *The world's stateless: Deprivation of nationality* (2020) 197.
54 *Modise* (n 10) para 89.
55 *Modise* (n 10) para 3.
56 *Modise* (n 10) paras 4-5.
57 *Modise* (n 10) para 92.
58 As above.
59 *Modise* (n 10) para 92.
60 *Modise* (n 10) paras 89-97.

3.2.4 Good v Botswana

The *Good* case dealt with the deportation in 2005 of Mr Good, an Australian national and former political science professor at the University of Botswana. His deportation followed a declaration by the country's President labelling him a 'prohibited immigrant' after he co-authored an article criticising presidential succession in Botswana.[61] This declaration was made without providing reasons to Mr Good or giving him an opportunity to contest it.[62] His expulsion was carried out with less than three days' notice, depriving him of time to arrange for the care of his minor daughter.[63] Pursuant to the Botswana Immigration Act, such declarations are not subject to judicial review, and Mr Good's petition to domestic courts proved futile.[64]

The Commission, in its first decision that looked at academic freedom in detail, held Botswana responsible for violating the victim's right to a fair trial, due to the lack of opportunity for Mr Good to be heard regarding his expulsion;[65] the right to access information, as he was denied knowledge of the reasons for his expulsion;[66] the right to freedom of expression, since he was expelled for expressing his views;[67] protection from arbitrary expulsion under article 12(4), as the expulsion was not justified by legitimate reasons and he was not given a chance to contest the decision; [68] the protection to family life under article 18, due to the hasty manner in which the expulsion was carried out without allowing Mr Good to make arrangements for the care of his minor daughter;[69] the right to equality and non-discrimination, because he was expelled for his political views;[70] and general state obligations under article 1 of the Charter, due to the violations listed above.[71]

In light of these violations, the Commission issued two recommendations.[72] It urged Botswana to pay adequate compensation to Mr Good for the losses and costs incurred because of the violations, including lost remuneration and benefits due to his expulsion, and legal costs incurred during litigation in domestic

61 *Good* (n 11) paras 3-4, 119 & 126.
62 *Good* (n 11) paras 4, 124-126, 160-180 & 213.
63 As above.
64 *Good* (n 11) paras 179-180.
65 *Good* (n 11) paras 160-180.
66 *Good* (n 11) para 195.
67 *Good* (n 11) para 200.
68 *Good* (n 11) paras 201-208.
69 *Good* (n 11) paras 209-215.
70 *Good* (n 11) paras 216-225.
71 *Good* (n 11) para 241.
72 *Good* (n 11) para 244.

courts and before the Commission. It also urged Botswana to ensure that the provisions of the Botswana Immigration Act and its practices conform to international human rights standards, particularly the African Charter. As in the *Modise* case above, the Commission did not require Botswana to report on steps taken to implement these recommendations.

3.3 Kenya

The African Commission made three decisions on merit against Kenya: one on persecution for criticising the government, and two on human rights violations against peoples, including issues related to eviction from land and discriminatory practices. The details of each case, including findings and recommendations, are discussed below.

3.3.1 Ouko v Kenya

The *Ouko* case involved human rights violations against Mr Ouko, a former Kenyan student union leader, who was arbitrarily arrested, detained in inhumane conditions, and forced into exile for criticising the government, particularly regarding the lack of justice in his uncle's murder.[73] Fearing further persecution, he fled Kenya to Uganda and then to the Democratic Republic of the Congo (DRC), where he was kidnapped and forced to work for rebels.[74] In his complaint to the Commission, Mr Ouko alleged violations of his rights to dignity, liberty, expression, association and movement.[75]

In its 2000 decision, the African Commission found Kenya in violation of nearly all of Mr Ouko's alleged rights, including liberty, freedom of expression, association and freedom of movement.[76] Despite these findings, the Commission stopped short of issuing strong recommendations, merely urging Kenya to facilitate Mr Ouko's return if he chose to do so.[77] The Commission, as in *Modise* and *Good* above, also did not require Kenya to submit a report on the implementation.

73 *Ouko* (n 12) paras 1-11.
74 As above.
75 *Ouko* (n 12) paras 20-31.
76 As above.
77 As above.

3.3.2 Centre for Minority Rights Development & Others v Kenya

The African Commission's decision in *Endorois* marked a landmark recognition of the Endorois community as 'indigenous' and held Kenya responsible for violating their rights under the African Charter.[78] This included the dispossession of their ancestral land, disrupting their special connection to the land, and impacting their livelihoods. For centuries, the Endorois community thrived in Kenya's Lake Bogoria region, practising traditional pastoralism and relying on the land for sustenance, cultural rites and religious practices.[79] However, in 1973 Kenya designated the area as protected without adequately consulting the Endorois community, leading to their forced relocations to unsuitable land.[80] This relocation devastated their livestock and livelihoods, while restricting access to Lake Bogoria disrupted their cultural and religious practices.[81] In response to these measures, which significantly disrupted their way of life and cultural practices, the Endorois community challenged the Kenyan government's actions in a domestic court without success.[82]

In 2003 they submitted, through their representatives, a complaint to the African Commission, alleging violations of their rights under the African Charter.[83] The Commission in 2009 ruled in favour of the Endorois community, finding Kenya guilty of breaching the African Charter, specifically their property rights (article 14); rights to development (article 22); rights to free disposition of natural resources (article 21); and rights to practise religion and culture (articles 8 and 17), alongside the general obligation under article 1.[84]

The Commission issued seven recommendations to Kenya to address these violations.[85] Five recommendations focused on remedial actions: recognising the Endorois community's ownership rights over their ancestral land and restoring it; ensuring unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and grazing; compensating for their losses; ensuring benefits from royalties and employment opportunities within the game reserve; and registering the Endorois Welfare Committee. The remaining two recommendations instructed Kenya to engage in dialogue with the community for implementing these recommendations and to submit

78 *Endorois* (n 13) paras 162 & 298.
79 *Endorois* (n 13) paras 1-21.
80 *Endorois* (n 13) paras 1-21 & 281.
81 As above.
82 As above. See *William Yatich Sitetalia & Others v Baringo County Council & Others* Civil Case 183 of 2000, High Court.
83 *Endorois* (n 13) para 23.
84 *Endorois* (n 13) para 298.
85 *Endorois* (n 13) paras 298(a)-(g).

a report on the implementation progress within three months from the decision notification.

3.3.3 The Nubian Community in Kenya v Kenya

The *Nubian* case involved human rights violations against the Nubia community of Kenya, descendants of Sudanese brought as soldiers over a century ago during the British colonial era.[86] The Nubian community, residing in Kibera, now part of Nairobi, faced discrimination and human rights violations due to their identity and origin, even after Kenya had gained independence.[87] They were denied land titles to the land on which they had lived for a century, including Kibera, resulting in forced evictions and threats of eviction.[88] They also faced difficulties acquiring identity cards and even birth certificates.[89]

Two non-governmental organisations (NGOs), Open Society Justice Initiative (OSJI) and the Institute for Human Rights and Development in Africa (IHRDA), submitted complaints to address these issues. In 2006 a complaint was submitted to the African Commission on behalf of the Nubian community and, in 2009, another was submitted to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on behalf of Nubian children,[90] alleging violations of the African Charter and the African Charter on the Rights and Welfare of the Child (African Children's Charter) respectively.

Although first submitted to the African Commission, the African Children's Committee issued its decision earlier in 2011, likely due to a lighter case load, marking its first merit decision. The African Children's Committee held Kenya responsible for violating different provisions of the African Children's Charter.[91] In 2015 the Commission also found Kenya in violation of articles 2, 3, 5, 12, 13, 14, 15, 16, 17(1) and 18 of the African Charter.[92] The Commission recommended that Kenya establish 'objective, transparent, and non-discriminatory' criteria for determining citizenship, recognise Nubian land rights over Kibera, and ensure evictions comply with human

86 *Nubian* (n 14) paras 2-6.
87 As above.
88 *Nubian* (n 14) paras 84-88.
89 *Nubian* (n 14) paras 5, 65-70 & 116.
90 *IHRDA & Another v Kenya* (2011) AHRLR 181(ACERWC) (*Children of Nubian Descent*).
91 These are arts 6(2), (3) and (4), art 3, arts 14(2)(b), (c) and (g), and art 11(3). See *Children of Nubian Descent* (n 90) para 69.
92 *Nubian* (n 14) para 171.

rights standards.[93] It also requested progress reports from Kenya within six months from the decision's notification.[94]

3.4 Ethiopia

The two merit decisions of the African Commission against Ethiopia – *Dergue Officials*, concerning the fair trial rights of former Dergue regime officials, and *Equality Now*, concerning the rights of a girl subjected to repeated sexual violence – are discussed in this part.

3.4.1 Haregewoin Gabre-Selassie and IHRDA v Ethiopia

This complaint was filed to the African Commission in 2004 on behalf of former Ethiopian officials who were detained after the fall of Mengistu's regime in 1991, alleging violations of the African Charter, particularly the right to fair trial.[95] After examining submissions from both parties, the Commission rendered its decision in 2011, declaring Ethiopia responsible for violating articles 7(1)(b) and (d), as well as articles 1 and 2 of the African Charter.[96] The Commission ruled that the establishment of the special prosecutor's office, with the explicit purpose of recording 'brutal offences', violated the presumption of innocence by assuming guilt.[97] It also found that the extended pre-trial detentions amounted to *de facto* punishment before guilt was established, and violated the right to fair trial. To address these violations, the Commission recommended Ethiopia to pay adequate compensation to the victims and to submit an implementation report within three months of being notified of the decision.[98]

3.4.2 Equality Now and EWLA v Ethiopia

The *Equality Now* case concerned a 13 year-old girl who was kidnapped and subjected to sexual violence on two separate occasions, as part of a harmful traditional practice (HTP) in the country. Initially, Mr Jemma (the main suspect), with assistance from his accomplices, abducted and raped the victim.[99] The crime was reported to the police, who rescued her and arrested Jemma and his accomplices.[100] However, despite evidence showing the commission

93 As above.
94 As above.
95 *Dergue Officials* (n 15) paras 1-19.
96 *Dergue Officials* (n 15) paras 180 & 240.
97 *Dergue Officials* (n 15) paras 186 & 187-239.
98 *Dergue Officials* (n 15) para 240.
99 *Equality Now* (n 16) para 2.
100 As above.

of the crime, the suspects, including Jemma, were released on bail,[101] after which Jemma kidnapped the victim again, held her captive in his brother's house for several days, and coerced her into signing a marriage contract.[102] A month later, the victim escaped and reported the incident, leading to the re-arrest of the suspects.[103] They were convicted by a lower court, but the High Court overturned the decision and acquitted them, noting that 'the act was consensual'.[104] Further attempts to obtain justice for the victim were unsuccessful.[105] This led EWLA and Equality Now to bring the case before the African Commission in 2007.[106]

The Commission in its 2015 decision held Ethiopia responsible for failing to prevent the violence against the victim and for not ensuring justice, finding it in violation of articles 3, 4, 5, 6 and 18(3) of the African Charter.[107] It, however, did not find a violation of the non-discrimination principle under article 2, as it rigidly adhered to the criticised male comparator standard established in *Egyptian Initiative*.[108]

To remedy the violations, the Commission requested Ethiopia to pay the victim compensation worth US $150 000 for moral damages; to adopt and implement escalated measures to specifically deal with marriage by abduction and rape; monitor such instances; and diligently prosecute and sanction offenders.[109] Ethiopia was also requested to continue training judicial officers on specific human rights themes including on handling cases of violence against women.[110] The Commission further urged Ethiopia to report within 180 days the measures adopted to implement the recommendations and to include in its next periodic report yearly statistics on the prevalence of marriages by abduction and rape, cases of successful prosecutions, and challenges faced, if any.[111]

Having introduced the decisions and their recommendations against the three states, the article now turns to its core objective: assessing the implementation status of these decisions.

101 *Equality Now* (n 16) paras 3-4.
102 As above.
103 As above.
104 *Equality Now* (n 16) para 5.
105 *Equality Now* (n 16) paras 7-9.
106 As above.
107 *Equality Now* (n 16) para 160.
108 *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2011) AHRLR 90 (ACHPR 2011) paras 129-138 (*Egyptian Initiative*).
109 *Equality Now* (n 16) para 160.
110 As above.
111 As above.

4 Status of implementation

4.1 Nature of recommendations

This part undertakes an examination of the degree to which the Commission's recommendations in the discussed decisions have been implemented. Before delving into the implementation status, it is important to underline the nature of these recommendations, as the type of remedy can influence compliance, non-compliance, and the extent or progress of compliance by the countries. This aligns with the discussion in part 2 above, which highlights how the nature of recommendations affects their implementation, including the length of time compliance practically demands. For instance, recommendations such as paying compensation are generally believed to be straightforward and are seen as both more likely to be implemented and quicker to implement than those requiring policy or legislative changes or shifts in public attitude.[112] Similarly, recommendations that demand minimal or no resources and are specific are often seen as more likely to be implemented and to be implemented sooner than those that require substantial resources.[113] Furthermore, those that cause less disruption to existing systems, including societal norms, are thought to be more likely to be implemented and to be carried out sooner than those that cause significant disruption.[114] However, this should be approached with caution, as other factors, such as regime type, effectiveness of follow-up measures, the role of various actors, including government agencies, civil society organisations, intergovernmental organisations, and other relevant stakeholders, the level of public knowledge and awareness of the decision, the visibility of the body rendering the decision, and prevailing political and social context, may also influence compliance, making it difficult to reach a definitive conclusion.[115]

The nature of recommendations made to the three states, as discussed above, can generally be categorised into four broad

112 V Fikfak 'Compliance and compensation: Money as a currency of human rights' in Murray & Long (n 5) 98-100; D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American American courts for human rights' (2010) 6 *Journal of International Law and International Relations* 35; Sowe & Bizimana (n 5) 97.

113 Viljoen & Louw (n 6) 12-31; Murray & Long (n 5) 22; TM Antkowiak 'An emerging mandate for international court: Victim-centred remedies and restorative justice' (2011) 47 *Stanford Journal of International Law* 312-314.

114 Viljoen & Louw (n 6) 12-31.

115 Murray & Long (n 4); Murray & Long (n 17) 3-12; Sowe & Bizimana (n 5) 84-88; Viljoen & Louw (n 6) 6.

categories: legislative and policy measures, compensation, administrative measures and compliance reports. Legislative and policy measures require significant time and effort as they involve changes in policy or legislation.[116] All three countries have received such recommendations.

The second category involves payment of compensation. Botswana was directed to pay compensation in all but one merit decision (*Spilg, Modise* and *Good*). Kenya was also advised to compensate the Endorois community for their losses (*Endorois*). Ethiopia was instructed to pay compensation in both decisions (*Dergue Officials* and *Equality Now*). However, the only case where the compensation amount was specified is *Equality Now*. In other cases, including those against Botswana and Kenya, compensation amounts were not specified. The presence or absence of a specific amount is noted as a possible factor that may affect implementation,[117] and whether this plays out in the selected cases will be examined.

The third category consists of administrative measures, which vary in their resource requirements, complexity and implementation time. Some recommendations may involve routine administrative tasks that are relatively easy to implement, while others require more resources and present greater challenges. It is suggested that 'states are more likely to comply with remedies that require them to take some administrative action than with those that press them to amend legislation or compensate victims'.[118] In the cases assessed in this article, recommendations, such as avoiding secrecy during execution of capital punishment (*Spilg* and *Interights*), granting citizenship by descent (*Modise*), registering the Endorois Welfare Committee, ensuring access to Lake Bogoria and surrounding sites for religious and cultural rites and grazing (*Endorois*),[119] can be regarded as requiring minimal resources. Other recommendations, such as ensuring compliance with human rights standards during evictions (*Nubian*) and facilitating safe returns of the victim to his country (*Ouko*), require moderate resources but are presumably manageable. However, the implementation of some recommendations may involve significant resources and time, such as taking measures

116 Viljoen & Louw (n 6) 21. The Commission itself acknowledged the challenge of quickly changing laws and practices in its decision against Sudan, suggesting it be done gradually; *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 83.
117 Viljoen & Louw (n 6) 22-23.
118 As above.
119 This might also require legislative action, such as repealing laws that restrict the Endorois community's access to the game reserve.

against marriage by abduction and rape (*Equality Now*), as it also requires shifts in public attitudes.

Lastly, all the three countries are also required to submit implementation reports. These reporting requirements generally demand minimal resources.

The following subparts will explore the measures taken by each country in response to these recommendations.

4.2 Botswana

Botswana's implementation status is evaluated across two themes: capital punishment (*Interights* and *Spilg*) and citizenship/immigration (*Modise* and *Good*).

4.2.1 Recommendations regarding capital punishment

The African Commission's recommendations in decisions made on complaints concerning capital punishment can be categorised into four groups for structured discussion due to their overlap.

First, Botswana was urged to declare an official moratorium on all executions and, eventually, to work towards completely abolishing capital punishment. Compliance with this recommendation requires legislative or policy measures, but Botswana has taken no steps to implement it, even though more than 20 years have passed since this recommendation was first issued in *Bosch* in 2003 and reiterated in *Spilg* in 2011 and *Interights* in 2015. Despite international pressure, Botswana retains capital punishment for certain crimes, including murder and treason,[120] and remains the sole country in Southern Africa to continue executing individuals,[121] with routine executions occurring since its independence in 1966.[122] For example, one execution took place in 2016, two in 2018, one in 2019, three in 2020, and three in 2021.[123] Botswana's non-compliance status with this recommendation can generally be attributed to its subscription

120 Ditshwanelo and others 'Stakeholder report for the United Nations Universal Periodic Review' (2022) para 2.

121 International Federation for Human Rights (IFHR) 'Botswana continues with cruel and regressive execution' 19 February 2018, https://www.fidh.org/en/issues/death-penalty/botswana-continues-with-cruel-and-regressive-execution (accessed 12 August 2024).

122 As above.

123 Amnesty International 'Death sentences and executions 2016' (2017) 35; Amnesty International 'Death sentences and executions 2018' (2019) 39; Amnesty International 'Death sentences and executions 2019' (2020) 44; Amnesty International 'Death sentences and executions 2020' (2021) 47;

to the alleged benefits of death penalty, as propagated in theoretical debates by the retentionist camp. However, the specific explanations within the country context, often cited by the government as justification for its non-compliance, include widespread public support for capital punishment, partly rooted in over a century of its use, and the perception that rising crime in neighbouring South Africa is linked to its abolitionist stance.[124] This suggests that a decision's alignment with public opinion may influence its implementability. However, this remains inconclusive, as Botswana has also failed to implement decisions that do not require shifts in public attitudes, as discussed in the next subparts.

Second, if Botswana persists with capital punishment, it has been implicitly urged to allow condemned individuals to have final moments with their closest family members (*Spilg* and *Interights*) and not to use 'hanging' as a method of execution (*Interights*). Providing advance notice before executions requires only political will, as it poses no substantial burden on the country, whereas discontinuing the use of 'hanging' as a method of execution necessitates legislative change since this method is currently sanctioned by Botswana's Criminal Code. However, Botswana has ignored these recommendations, failing to ban or replace 'hanging' as a method of execution during amendments to its Criminal Code, such as in 2018,[125] and continues to execute individuals in secrecy without informing families. For instance, in 2018 Joseph Poni was executed by 'hanging' without prior notice to his relatives and lawyers,[126] followed by Seabelo Mabiletsa and Matshidiso Tshid in 2020,[127] and Wedu Mosalagae and Kutlo Setima in 2021,[128] all of whom were executed by 'hanging'.

Amnesty International 'Death sentences and executions 2021' (23 May 2022) 51.

124 E Macharia-Mokobi 'The death penalty in Botswana: Time for a re-think?' 67, https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Mokobi.pdf (accessed 10 September 2024); KB Tshosa 'The death penalty in Botswana in the light of international law: The case for abolition' 6, https://www.biicl.org/files/2216_tshosa_death_penalty_botswana.pdf (accessed 13 August 2024).

125 Penal Code (Amendment) Act 21 of 2018.

126 IFHR (n 121); Amnesty International reports (n 123).

127 'Botswana executes two convicted murderers' *Eye Witness News* 28 March 2020, https://ewn.co.za/2020/03/28/botswana-executes-two-convicted-murderers?fbclid=IwAR1_Ey4ClzQQ7Nx1ZsBae1id2eVG_oP_xnVqOeRWeHW7hRllJ8S1qioysyg (accessed 11 August 2024).

128 'Botswana hangs two men who murdered women, drawing mixed reaction on social media' IOL 8 February 2021, https://www.iol.co.za/news/africa/botswana-hangs-two-men-who-murdered-women-drawing-mixed-reaction-on-social-media-e00e19f9-93e9-59d5-bd0d-153cb0039cc1 (accessed 27 September 2024).

This defiance demonstrates Botswana's lack of political will to honour the African Commission's rulings. Unfortunately, this defiance has not prompted significant actions from the Commission. For example, while it condemned Poni's execution in 2018, it did not even reference these rulings against Botswana on the same issue, missing an opportunity to remind the country of its obligations and signal that its defiance was being noted.[129]

Third, Botswana was urged to revise its laws to compensate Oteng Ping's family for his inhuman execution by 'hanging' without a final farewell with his family, as deemed under article 5 of the Charter (*Interights*). Implementation of this recommendation requires legislative measures to establish a legal basis for compensating the victim's family and future victims' families in similar cases. However, Botswana has neither revised its laws to enable such compensation nor provided evidence of compensation to the victim's family. Given Botswana's ongoing practices such as using 'hanging' for executions and denying farewell opportunities, the likelihood of implementing this recommendation seems low.

Lastly, Botswana has been urged to submit compliance reports. In two of the decisions (*Spilg* and *Bosch*) Botswana was expected to report on implementation as part of its periodic report. Since the Commission's 2003 decision in *Bosch*, Botswana has submitted two periodic reports, but only one has been submitted since the 2015 decision in *Spilg*. The first report, covering 1986 to 2007 and presented in 2010, was expected to include information about the status of *Bosch*. However, it neither included any discussion about this decision nor addressed the recommendation to 'take measures to comply with the resolution urging states to envisage a moratorium on the death penalty', and instead discussed the continued imposition of the death penalty for serious crimes.[130] The second report, submitted in 2015 and covering 2011 to 2015, was also expected to address both *Bosch* and *Spilg*, particularly for the latter case, which fell within the temporal scope of the report. However, it made no mention of these decisions. Nevertheless, the report included a brief discussion on capital punishment, which provides insight into the implementation status of these decisions, with Botswana stating it is 'yet to make a determination as to whether it retains, places a moratorium, or abolishes the death penalty'.[131] In the third case

129 O Windridge 'Two times too many: Botswana and the death penalty' *EJIL Talk* 30 March 2018, https://www.ejiltalk.org/two-times-too-many-botswana-and-the-death-penalty/ (accessed 30 October 2024).
130 Botswana: 1st periodic report, 1986-2007 34-37.
131 Botswana: 2nd & 3rd periodic report, 2011-2015 20.

(*Interights*), Botswana was urged to submit a stand-alone report on the implementation within six months, but it never complied.

In summary, Botswana has wholly defied the Commission's recommendations regarding capital punishment, which renders its status with respect to these decisions as 'non-compliance'. While the failure to comply with the request to adopt an abolitionist approach may be attributed to prevailing public support for retention, its continued disregard for other recommendations, including the secret execution of death row inmates despite the Commission's condemnation, underscores a deeper lack of political will to meet its human rights obligations under the African Charter. The Commission also appears to have done little in terms of following up. For example, in its two Concluding Observations on Botswana's periodic reports, one from May 2010 and another from July 2019, the Commission did not explicitly address its decisions or call out Botswana for its defiance in complying. Instead, it merely reiterated some of the recommendations from these decisions.[132]

4.2.2 Recommendations regarding citizenship and immigration

This subpart examines the status of the African Commission's recommendations in *Good* and *Modise*.

The *Good* case exemplifies a gross lack of political will and failure by states to uphold the Commission's recommendations. In this case, the recommendations were twofold: first, to adequately compensate the victim and, second, to revise Botswana's Immigration Act of 1966 to align some of its provisions with the country's human rights obligations. However, Botswana has not complied with either recommendation, even though nearly 15 years have passed since the Commission's decision. Botswana's refusal to compensate the victim was immediate and unambiguous. The Minister of Foreign Affairs of Botswana at that time explicitly stated that the government would not provide compensation, arguing that the Commission lacked authority to issue binding orders.[133] 'We are not going to follow on

132 Concluding Observations and recommendations on the 2nd and 3rd combined periodic report of Botswana on the implementation of the African Charter (Concluding Observations 2019) paras 41 & 62, https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-botswana-2nd-3rd-periodic-rep (accessed 30 October 20240); Concluding Observations and recommendations on the initial periodic report of the Republic of Botswana (Concluding Observations 2010) paras 26, 36 & 57, https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-botswana-1st-periodic-report-196 (accessed 30 October 2024).

133 Southern Africa Litigation Centre 'Botswana defies African Commission ruling 16 August 2010, https://www.southernafricalitigationcentre.org/press-release-

the recommendation made by the Commission. It does not give orders, and it is not a court. We are not going to listen to them. We will not compensate Mr Good.'

Botswana's outright rejection, despite its relatively better democratic credentials on the continent, shocked many. The Botswana Law Society called this rejection 'regrettable',[134] and the Southern Africa Litigation Centre expressed surprise, given Botswana's reputation for good governance and commitment to the rule of law.[135] This refusal also prompted the Commission to bring Botswana's non-compliance to the attention of the Executive Council of the AU.[136] However, regardless of any actions the AU may have taken, the recommendations remain unimplemented. Likewise, Botswana has continued to defy the second recommendation, which called for a revision of its 1966 Immigration Act – specifically the provisions that blocked judicial review of 'prohibited immigrant' designations and prevented the disclosure of the reasons for such decisions. Although Botswana introduced a new Immigration Act in 2011 and made further amendments, the problematic provisions deemed incompatible with human rights standards by the Commission have been retained in nearly the same form.[137]

Turning to *Modise*, the Commission recommended that Botswana grant Modise citizenship by descent and compensate him. Botswana complied with the first request by reinstating the citizenship of Modise and his children, though only after significant confrontation and protracted negotiations, where the role of his advocates (from Interights) was said to be crucial.[138] However, regarding compensation for rights violations, despite several years of negotiations between Modise and his family on one side and the Botswana government on the other, facilitated by Modise's advocates, Modise passed away without receiving the compensation

botswana-defies-african-commission-ruling/ (accessed 23 September 2024).

134 Interights 'Botswana's immigration legislation inconsistent with international human rights law', https://www.interights.org/good/index.html (accessed 24 August 2024).

135 Southern Africa Litigation Centre (n 133).

136 Combined 32nd and 33rd Activity Report of the Africa Commission on Human and Peoples' Rights para 24, https://archives.au.int/handle/123456789/5359 (accessed 23 October 2024).

137 See Immigration Act 3 of 2011 arts 41(1)(c), 41(5) & 48(1) & (2).

138 CA Odinkalu 'Three decades on, the protection of human rights in Africa comes of age?' 31 May 2017, https://blogs.lse.ac.uk/africaatlse/2017/05/31/three-decades-on-the-protection-of-human-rights-in-africa-comes-of-age/ (accessed 30 October 2024). Odinkalu, along with Ibrahima Kane and other advocates, made multiple trips to Botswana to ensure compliance with the recommendation for Modise's citizenship. Open Society Justice Initiative (OSJI) 'From judgment to justice: Implementing international and regional human rights decisions' (2010) 24, 98 & 104; see also Viljoen & Louw (n 6) 11 fn 50.

owed to him. The Commission's failure to specify the amount can be seen as one of the factors contributing to the impasse and, arguably, the non-implementation.[139] The negotiations repeatedly stalled over disputes regarding the sum, with Modise insisting on a higher amount than the Botswana government was willing to pay.[140] The government claimed that it could not provide the requested amount to an opposition politician and instead offered much less, arguing that he might use the reparation funds against the government. Efforts to find a middle ground included a settlement package such as granting Modise land in Lobatse to build a house, giving the standard financial support offered to citizens over the age of 60 (he was 78 at the time of negotiation), and a modest sum for his family's suffering (with the government proposing between 100 000 and 300 000 Pula). However, these proposals were rejected by Modise and his family, and no agreement was reached before his death. This highlights the broader implications of the Commission's omission in specifying the amount or its failure to set clear guidelines, which may have exacerbated the government's reluctance to implement the recommendation. The Botswana government's refusal to meet Modise's demands underscores an underlying political bias, where concerns over potential misuse of compensatory payment overshadowed the obligation to deliver justice. This perhaps suggests that the identity of decision beneficiaries may influence whether states implement the decision.

The *Modise* case exemplifies the complexities and challenges regarding implementation of human rights decisions, including those of the Commission, particularly when political interests interfere with the delivery of justice. It also is a testament for the need for a clear remedial framework to determine the amount of compensation to be awarded to a victim.[141] Likewise, but on a positive note, it highlights the importance of zealous follow up, as demonstrated by Modise's advocates, in ensuring the implementation of recommendations.[142]

Therefore, although the *Modise* case is often cited as an implementation success – partly because the Botswana government agreed in principle to comply with the recommendations and entered into negotiations with Modise – in reality, the recommendation for the payment of compensation was not complied with until the

139 The Botswana government in 2005 expressed difficulty in quantifying the amount to be paid to Mr Modise. See Africa Commission 'Report of the promotional mission to the Republic of Botswana' (2005) 42; Viljoen & Louw (n 6) 22-23; OSJI (n 19) 162 endnote 16.
140 OSJI (n 138) 98.
141 OSJI (n 138) 104; Viljoen & Louw (n 6) 11 fn 50.
142 OSJI (n 138) 104.

victim's death. However, whatever progress was made in this case can be attributed to the restless efforts of Modise's advocates, whose role should be praised and taken as a lesson, as noted above. The Commission also undertook some follow up on the status of the case, although this may not have been adequate. For instance, during its 2005 promotional visit to Botswana, the Commission inquired about the status of implementation and was informed that negotiations were in progress to implement the recommendations.[143] However, since then, there have been no publicly-available follow-ups from the Commission, nor has Botswana provided any updates on the case. Notably, the case was not mentioned in the two periodic reports submitted by Botswana in 2010 and 2015,[144] nor did the Commission address these issues in its Concluding Observations on those reports. It also remains unclear if the Commission's delegation revisited the matter during its promotional mission to Botswana in 2018, as it did in 2005.[145]

4.3 Kenya

The African Commission has issued key recommendations to Kenya, facilitating the safe return of John Ouko, addressing forced evictions faced by the Endorois, and ensuring non-discriminatory citizenship and land rights for the Nubians.

4.3.1 Recommendations regarding safe return for the Ouko *case*

In the 2000 *Ouko* case the African Commission recommended that the Kenyan government facilitate the safe return of John Ouko, a student leader forced into exile after being arbitrarily arrested, detained and tortured.[146] While the Commission's directive to 'facilitate the safe return' was not fully defined, international standards suggest this would involve providing transportation, ensuring security, offering humanitarian aid and supporting reintegration.[147] To comply, the Kenyan government would have needed to expend resources for

143 See Promotional Mission report (n 152).
144 See Botswana: 1st Periodic Report, 1986-2007; Botswana: 2nd & 3rd Periodic Report, 2011-2015.
145 Press statement at the conclusion of the promotion mission of the African Commission on Human and Peoples' Rights to the Republic of Botswana 17 July 2018, https://achpr.au.int/index.php/en/news/press-releases/2018-07-17/press-statement-conclusion-promotion-mission-african-commis (accessed 23 September 2024).
146 *Ouko* (n 12).
147 United States Institute of Peace 'Return and resettlement of refugees and internally displaced populations' (2024), https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/social-well-being/return-and-res (accessed 23 October 2024).

Mr Ouko's safe return, rather than making legislative changes or addressing societal attitudes.

However, there is no evidence that the government took any steps to implement this recommendation. A 2011 report by the Open Society Foundation revealed that more than a decade after the decision, the government had not acted on it.[148] As of 2023, over two decades later, there remains no new information to suggest any progress. Based on the compliance classification espoused by Viljoen and Louw,[149] the implementation status of this decision can thus be categorised as 'non-compliance' until 2011 and as an 'unclear compliance' thereafter, due to the lack of publicly-available updates. The lack of updated information may be attributed to Kenya's failure to provide updates on the implementation of the decision in its periodic reports, partly because the Commission did not urge this in its decision. The Commission has also not made any publicly-known efforts to monitor implementation or addressed the case in its Concluding Observations on Kenya's periodic reports submitted after the decision.[150] The limited availability of information about the decision also makes it impossible for the authors to assess any other factors that might explain its compliance status. For instance, it is unclear whether Kenya's non-participation during the litigation stage contributed to its implementation status.[151]

4.3.2 Recommendations regarding forced evictions for the Endorois *case*

Embracing the decision in words, evading implementation in deeds

The *Endorois* case marked a historic victory for the indigenous Endorois community of Kenya. The Commission found that the Kenyan government had violated the Endorois's rights by evicting them from their ancestral lands in Lake Bogoria, and issued recommendations

148 Open Society Foundation 'Kenya: Justice sector and the rule of law (a review by AfriMAP and the Open Society Initiative for Eastern Africa) (2011) 6, https://www.opensocietyfoundations.org/uploads/38762285-51db-4bac-b8f9-285cf0ef2efc/kenya-justice-law-20110315.pdf (accessed 24 August 2024).

149 Viljoen & Louw (n 6) 5-7.

150 Concluding Observations and recommendations on the 8th to 11th periodic report of the Republic of Kenya (25 February 2016) (Second Concluding Observation Kenya); Concluding Observations and Recommendations – Kenya: initial report, 1992-2006 (30 May 2007) (Initial Concluding Observation Kenya).

151 International Environmental Law Research Centre 'Kenya: Justice sector and the rule of law' (2011) 32, https://www.ielrc.org/Content/a1104.pdf (accessed 23 October 2024).

that included land restitution, compensation and greater community involvement in issues affecting them.[152] Initially, Kenya seemed committed to implementing these recommendations. On 2 February 2010, in Lake Bogoria, the Minister for Lands stated that Kenya had 'no option but to implement the Commission's recommendations',[153] a commitment reaffirmed during the Commission's November 2010 ordinary session, as well as during the Commission's promotional mission to Kenya in March 2010.[154] This optimism was supported by Kenya's adoption of an indigenous-friendly land policy in December 2009 and a new Constitution in August 2010 that were perceived as favourable to indigenous rights and suggested a positive trajectory toward implementation.[155]

However, more than a decade later, Kenya's promises have largely gone unfulfilled. The government's early excuse that it had not received an authenticated copy of the Commission's decision was dismissed as obstructionist.[156] Even after receiving an authenticated copy of the decision, Kenya implemented few meaningful changes.[157] In fact, the government took steps that contradicted the Commission's ruling by passing the 2011 Kenya Wildlife Bill and nominating Lake Bogoria as a United Nations Educational, Scientific and Cultural Organisation (UNESCO) world heritage site, both actions made without regard for the Commission's recommendations.[158] The Wildlife Bill disregarded

152 As above.

153 A Kiprotich 'Will state respect community's land rights?' *The Standard* 22 March 2010, https://www.standardmedia.co.ke/article/2000006073/will-state-respect-communitys-land-rights (accessed 12 August 2024); E Ashamu '*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*: A landmark decision from the African Commission' (2011) 55 *Journal of African Law* 300-311; International Work Group for Indigenous Affairs 'Kenya: Ruling in the *Endorois* case' 8 April 2010, https://web.archive.org/web/20170716074001/http:/www.iwgia.org/news/search-news?news_id=124 (accessed 13 August 2024).

154 F Viljoen 'The African human rights system and domestic enforcement' in M Langford and others (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 379-386. See the Report of the African Commission's Working Group on Indigenous Populations/Communities (the Commission's WGIP): Research and information visit to Kenya, 1-19 March 2010 (2012) 16 (WGIP Mission report 2012).

155 CN Maina Sozi 'Law and its impact on Kenya's indigenous communities' land rights: The opportunities' PHD thesis, University of London, 2019 7; J Cerone '*Endorois Welfare Council v Kenya* (Af Comm'n H & Peoples' R): Introductory note' (2010) 49 *International Legal Materials* 860; Republic of Kenya Ministry of Lands Sessional Paper 3 of 2009 on National Land Policy (August 2009) secs 3.3.1, 3.3.2, 3.4.3.1 & 3.3.4.1, https://www.refworld.org/legal/decreees/natlegbod/2009/en/121327 (accessed 17 August 2024).

156 Viljoen (n 154) 380; G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2011) 111 *African Affairs* 41.

157 As above.

158 Minority Rights Group International (MRGI) 'The *Endorois* decision – Four years on, the Endorois still await action by the government of Kenya' 23 September 2014, https://minorityrights.org/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/ (accessed 16 August 2024).

the decision in two ways: It was passed without consulting the Endorois people, despite the Commission's recommendation for consultation on issues affecting them, and it imposed entrance fees for Lake Bogoria and criminal penalties for activities potentially threatening wildlife, without exceptions for the Endorois's rights to access Lake Bogoria for their religious and cultural practices, which the Commission recommended should be guaranteed.[159] Likewise, the nomination and inclusion of Lake Bogoria on the UNESCO world heritage list in 2011 contradicted the Commission's recommendations by failing to consult the Endorois community and by not including a representative from the community in the proposed stakeholder list for managing the Lake Bogoria Reserve.[160] Perhaps most notably, the nomination document submitted to UNESCO is said to conspicuously omit any mention of the Endorois community,[161] raising questions about whether Kenya remains stuck in a 1970s mindset, even post-Commission ruling. This scandalous process, which undermined the Commission's ruling, faced serious opposition. It included a petition submitted to UNESCO by civil society groups and a resolution from the Commission, both asserting that the designation decision was made without obtaining the free, prior and informed consent of the Endorois people, and was inconsistent with the Commission's recommendations.[162]

These reactions, coupled with other advocacy efforts, led to significant positive developments for indigenous peoples, including the Endorois, concerning the designation process of world heritage sites. For instance, in 2012 the World Conservation Congress adopted a resolution, which stipulates that no world heritage sites should be established in indigenous peoples' territories without their free, prior and informed consent; urges Kenya to involve the Endorois fully in managing the Kenya Lake System World Heritage Site; and to implement the *Endorois* decision.[163] Further,

159 As above.

160 KS Abraham 'Ignoring indigenous peoples' rights: The case of lake Bogoria's designation as a UNESCO world heritage site' in S Disko & H Tugendhat (eds) *World heritage sites and indigenous peoples' rights* (2014) 177, https://www.iwgia.org/images/documents/popular-publications/world-heritage-sites-final-eb.pdf (accessed 14 August 2024).

161 As above.

162 Letter to UNESCO reiterating concerns over the designation of the Lake Bogoria site as a world heritage site without obtaining the FPIC of the Endorois (19 November 2013); Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site ACHPR/Res 197(L) 2011, https://achpr.au.int/en/adopted-resolutions/197-resolution-protection-indigenous-peoples-rights-context (accessed 10 August 2024).

163 S Disko and others 'World heritage sites and indigenous peoples' rights: An introduction' in Disko & Tugendhat (n 160) 29. See the Resolution, https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2012_RES_47_EN.pdf (accessed 14 August 2024).

a memorandum of understanding, which established the Lake Bogoria National Reserve Management Committee, was signed in 2014 between Endorois representatives, Kenya government officials and the Kenyan Commission to UNESCO (Kabarnet Declaration).[164] This memorandum of understanding recognises the Endorois as a community and the EWC as their representative organisation, granting the EWC a seat on the Management Committee.[165]

The next subpart examines the specific measures taken by Kenya to implement the decision and the follow-up actions undertaken by the Commission.

Low cost and piecemeal implementation

Despite reversing its initial commitment, Kenya has taken some steps to implement the recommendations, but these measures are largely cosmetic and tentative, focusing only on 'low-hanging fruits'.[166] It registered Endorois Welfare Council (EWC) as a civil society organisation, and the subsequent signing of the Kabarnet Declaration enabled the EWC's participation in the Lake Bogoria Reserve's Management Committee. Kenya also established a task force to advise on land restitution and compensation for the Endorois community, but this produced no significant results, leaving the decision largely unimplemented. To put it briefly, Kenya's compliance with the Commission's seven recommendations may be summarised as fully compliant with one, partly compliant with three, and non-compliant with the remaining three.

The only fully-implemented recommendation is the registration of EWC. Established in 1985 to advance Endorois land rights and indigenous recognition, the EWC was initially denied registration by the Kenya government at least twice.[167] This denial appeared to be a strategy to negotiate with select Endorois members rather than with organised EWC representation.[168] The Commission's urging led to the EWC's registration, which subsequently enabled it to obtain observer status with the Commission.[169]

164 MRGI (n 158); J Biegon & A Ahmed 'State implementation of regional decisions on the rights of indigenous communities in Kenya' in Biegon (n 17) 35.
165 As above.
166 J Biegon & A Ahmed 'State implementation of regional decisions on the rights of indigenous communities in Kenya' in Biegon (n 17) 34.
167 *Endorois* (n 13) para 74; Lynch (n 169) 32-35.
168 *Endorois* (n 13) para 20; Biegon & Ahmed (n 166) 35.
169 As above.

Turning to the three recommendations that fall into the partial compliance category, as classified by Viljoen and Louw, they involve the payment of royalties, the provision of employment opportunities and access to the reserve, and involvement in decision making. Kenya has partially complied with the recommendation to pay royalties to the Endorois people and to ensure that they benefit from employment opportunities within the Reserve. This recommendation arose from the submission in the complaint that Kenya violated the Endorois people's rights by denying them 25 per cent of tourism revenues from the reserve and failing to provide 85 per cent of employment opportunities, as promised when the government forcibly evicted them from their land.[170] Thus, for full compliance, Kenya was required to ensure that the Endorois people received at least 25 per cent of the tourist revenue and 85 per cent of employment opportunities, as it had promised.

However, Kenya's response to the Commission's recommendation can only be described as partial compliance at best. Although the Commission's recommendation was issued in 2010, sharing of royalties only begun in 2014, four years later.[171] Even after this, the Endorois received only 10 per cent of the annual earnings from the reserve, rather than the promised 25 per cent.[172] Further still, this 10 per cent was calculated based on the net income of the reserve, not the gross income as implied in the Commission's recommendation.[173] Transparency issues and limited access to the reserve's annual audit reports further obscure whether the Endorois community was receiving this 10 per cent share properly.[174] These issues prompted the EWC to advocate full compliance, leading to a 2020 reform that increased the royalty share to 25 per cent. However, this total amount is not fully allocated to the community; instead, it is divided into 15 per cent for community grants and 10 per cent for infrastructure development. This division led the EWC to continue its objections, arguing that the Reserve still retains 75 per cent, which can be used for management and infrastructure development, rather

170 *Endorois* (n 13) para 7.
171 Centre for Minority Rights Development (CEMIRIDE) 'Implement Endorois decision 276/03: Report on the impact of non-implementation of the African Commision's Endorois decision' (2022) 10-12, https://minorityrights.org/resources/implement-endorois-decision-276-03-report-on-the-impact-of-non-implementation-of-the-african-commissions-endorois-decision/#:~:text=This%20report%20demonstrates%20that%20the,and%20a%20life%20of%20destitution (accessed 14 August 2024); B Xanne 'Empowering indigenous voices: Challenges and pathways in the African human rights system' (analysis of the implementation of the *Endorois* and *Ogiek* decisions in Kenya) (2023) 10-12 (on file with authors).
172 CEMIRIDE (n 171).
173 As above.
174 As above.

than cutting 10 per cent from the amount meant for the community in the form of grants.[175] This ongoing objection has not resulted in any changes, and the increase from 10 to 15 per cent for community grants remains unimplemented due to resistance from some county officials. [176]

Regarding employment opportunities, despite the lack of official data, civil society reports reveal poor implementation of the recommendation.[177] For instance, a 2020 shadow report on Kenya's combined twelfth and thirteenth periodic reports to the Commission highlighted that the Endorois community's representation in the Reserve remains minimal, with only 47 employees and three senior staff members, amounting to only 6 per cent of the workforce, despite the government's promise of 85 per cent employment.[178] Likewise, the progress with recommendations to grant unrestricted access to Lake Bogoria and surrounding areas for religious and cultural rites and for grazing their cattle has been criticised as inadequate, with only superficial compliance evident.[179] Their access has been described as '*ad hoc*', 'uncertain' and 'tokenistic'.[180]

Kenya's compliance with the Commission's recommendation to engage and collaborate with the Endorois people in implementing the decision has also been unsatisfactory and can be classified as partial compliance due to some positive steps taken. For example, when Kenya established the task force to implement the Commission's recommendations, it neglected to consult the Endorois community or the EWC, and the task force lacked representation from these groups.[181] Moreover, the task force's terms of reference did not mandate community consultation.[182] This reluctance to engage and collaborate with the Endorois people is further demonstrated by Kenya's failure to attend a workshop organised by the Commission's

175 As above.
176 As above.
177 As above.
178 Alternative report to the Kenyan government's combined 12th to 13th periodic report on the African Charter on Human and Peoples' Rights submitted to the African Commission on Human and Peoples' Rights 71st ordinary session (21 April-13 May 2022) para 67, https://www.forestpeoples.org/sites/default/files/documents/Shadow%20Report%20-%20Kenya%2012th%20%2013th%20Periodic%20Review%20%28OPDP%20%20Others%29.pdf (accessed 13 August 2024).
179 ESCR-Net 'ESCR-Net stands with Endorois and Ogiek communities: Urging justice from the Kenyan government' 2 February 2024, https://www.escr-net.org/news/2024/escr-net-stands-with-endorois-and-ogiek-communities-urging-justice-from-the-kenyan-government/ (accessed 30 October 2024).
180 Biegon & Ahmed (n 166); CEMIRIDE (n 171) 1.
181 Biegon & A Ahmed 'State implementation of regional decisions on the rights of indigenous communities in Kenya' in Biegon (n 17).
182 CEMIRIDE (n 171) 9; Biegon & Ahmed (n 166).

Working Group on Indigenous Populations and EWC on the status of implementation of the decision in 2013.[183] Moreover, the adoption of the Kenya Wild Life Bill and the inclusion of Lake Bogoria on the UNESCO world heritage list in 2011, which occurred without consulting the Endorois community, further illustrate deviations from the Commission's recommendation.

However, this should not be taken to mean that no efforts have been made to engage the community and EWC in decision making. For example, the adoption of the Kabarnet Declaration, which formally recognises the Endorois as a community and the EWC as their representative organisation in managing Lake Bogoria, represents a notable advancement in granting the Endorois community greater agency over their affairs.[184] Furthermore, the development of the Lake Bogoria National Reserve Management Plan 2019-2029, which involved significant community participation, including that of the EWC, is a positive step.[185] These advancements, while small, could pave the way for the full and effective participation envisioned by the Commission.

Moving on to the remaining three recommendations – two substantive and one procedural – Kenya's implementation status falls under the 'non-compliance' classification within the Viljoen and Louw framework, as it has entirely failed to implement these recommendations. The substantive recommendations involve the restitution of land and payment of compensation. Although a task force was established with a one-year mandate to advise on these issues, its efforts were minimal; it visited the Endorois only once, without proper notice, failed to produce any report, and was not extended beyond its initial term.[186] Furthermore, Kenya's decision to restrict the task force's mandate to a 'feasibility study' could be seen as an indication of its intention not to return the land, using feasibility as a pretext for inaction. Regardless of the intent, by framing it this way, the government implies that if the study finds a 'lack of feasibility' (whether based on legitimate research or potentially manipulated results) it may not implement the recommendations. If this is the case and the land is not restituted, this could strike at the core of the decision, as all the recommended remedies hinge on the

183 R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 846.
184 UNESCO World Heritage Committee 'Convention concerning the protection of the world cultural and natural heritage' 28 June to 8 July 2015 66-67, https://whc.unesco.org/en/conventiontext/ (accessed 30 October 2024).
185 UNESCO World Heritage Committee (n 184) 273.
186 ESCR-Net (n 179).

restitution of the land, and severely impact the Endorois community, for whom their ancestral land is essential for their livelihood, cultural and religious practices.

Kenya also did not comply with the Commission's procedural recommendation, which urged it to report back on the status of the decision's implementation within three months from the date of the decision notification in February 2010.[187] By the time the report was supposed to be sent to the Commission in May 2010, it had taken no measures to implement the decision, let alone submitting a report on the measures it had taken. Kenya also failed to comply with subsequent requests for implementation reports, as evidenced by its non-compliance with the Commission's request after the implementation hearing.[188] However, Kenya included updates on the decision's implementation in its twelfth and thirteenth combined reports, noting that it had complied with the recommendation to register the EWC.[189] Regarding the remaining recommendations, particularly the restitution of land and payment of compensation, Kenya cited resource constraints, competing national priorities, and the complexity of implementation which, it argued, required consideration of other existing laws and policies, as well as environmental, political and security impacts, as reasons for its non-compliance.[190]

Despite Kenya's limited progress in implementing the Commission's recommendations in this case, it stands out from other decisions discussed in this article due to the active monitoring and follow up by different actors, including the African Commission, civil society and the complainant, who have continued to pressure the Kenyan government for compliance. For instance, in stark contrast to its typically lenient approach, the Commission has adopted a stringent stance on the *Endorois* case. It took only a month after its decision for the Commission to dispatch its Working Group on Indigenous Populations to Kenya from 1 to 19 March 2010,[191]

187 MRGI (n 158).
188 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* 150, 160.
189 Kenya combined reports 2021 (n 152) paras 144-146. In contrast, in its 8th to 11th periodic report the Kenyan government provided no information about the implementation of the case. This did not, however, prevent the Commission from raising the issue of implementation in its Concluding Observations on the same combined reports. See Second Concluding Observation Kenya (n 153) paras 24(i), 47(i) & 63(i).
190 Kenya combined reports 2021 (n 152) paras 144-146.
191 See the Report of the African Commission's Working Group on Indigenous Populations/Communities (the Commission's WGIP): Research and information visit to Kenya, 1-19 March 2010 (2012) 16 (WGIP Mission report 2012).

to, among others, assess the situation of indigenous peoples, and the Working Group's mission report stressed the urgency of implementing the *Endorois* decision.[192] This was followed by a 2011 resolution condemning Kenya's nomination of Lake Bogoria as a UNESCO world heritage site, citing insufficient consultation with the Endorois community and underscoring the need for compliance with its decision.[193] The Commission also continued its follow-up measures using other means available at its disposal. For instance, in its Concluding Observations on Kenya's eighth 8 to eleventh periodic report, the Commission urged the government to comply with the decision.[194] The Commission also organised an implementation hearing at its fifty-third ordinary session in April 2013 to discuss progress with both the Kenyan government and the complainants.[195] Following the hearing, it issued a *note verbale* on 29 April 2013, requesting Kenya to submit a detailed roadmap for implementing the recommendations by the fifty-forth ordinary session, but Kenya failed to comply.[196] To further this effort, the Commission, through its Working Group, also organised a workshop in Nairobi, Kenya on 23 September 2013.[197] This workshop aimed to bring together the Kenyan government and other stakeholders, including civil societies, to assess the implementation status, and develop a joint implementation roadmap. However, Kenya did not attend, raising further doubts about its commitment.[198] Kenya's absence from the workshop and its defiance to submit the requested report following the implementation hearing, coupled with the lack of progress on key recommendations, prompted the Commission to adopt Resolution 257 on 5 November 2013, urging the government to promptly implement the decision and submit a report detailing the steps taken.[199] Despite these efforts, key recommendations, including land restitution and compensation, remain unresolved, highlighting a significant gap between Kenya's promises and actual implementation.

192 As above.
193 See ACHPR/Res 197(L) 2011.
194 Second Concluding Observation Kenya (n 153) paras 24(i), 47(i) & 63(i).
195 34th Activity Report of the African Commission 5, https://archives.au.int/handle/123456789/6856 (accessed 13 August 2024).
196 R Murray and others (n 188).
197 As above.
198 As above.
199 African Commission's Resolution Calling on the Republic of Kenya to Implement the Endorois Decision ACHPR/Res 257(LIV)2013 (5 November 2013), https://achpr.au.int/en/adopted-resolutions/257-resolution-calling-republic-kenya-implement-endorois-decision (accessed 12 August 2024).

4.3.3 Recommendations regarding rights to citizenship, land, and freedom from arbitrary evictions for the Nubian community cases

The *Nubian* decisions, one by the African Commission in 2015 and another by the African Children's Committee in 2009, were celebrated as landmark rulings for the Nubian community. Despite these advances, achieving full implementation of the recommendations remains a distant goal.

The African Commission's 2015 decision included three substantive recommendations for Kenya:[200] establishing objective and non-discriminatory citizenship criteria; recognising Nubian land rights over Kibra; and ensuring that evictions comply with human rights standards. Unfortunately, the core recommendation for non-discriminatory citizenship, which was also echoed by the African Children's Committee in *Children of Nubian Descent*, remains unfulfilled. Nubians continue to endure a lengthy and discriminatory vetting process for obtaining national identification cards, crucial for their citizenship recognition. In response, the Nubian Community Council of Elders petitioned the National Assembly in 2021 to address these issues, including the removal of the discriminatory vetting process, but these efforts have not succeeded.[201] As of 2024, the Nubians are the only non-border ethnic community in Kenya that are subject to vetting procedures to obtain a national identification card.[202] There is also little optimism that Kenya will comply with the recommendation in the near future, given that the discriminatory vetting process[203] was legitimised by the Security Laws (Amendments) Act in 2014,[204] five years after facing legal challenges before the Commission and three years after the African Children's Committee declared it discriminatory and recommended its removal. The Security Act not only legalised the vetting process

200 *Nubian* (n 15).

201 See Departmental Committee on Administration and National Security of the National Assembly of the Republic of Kenya 'Report on the public petition 023 of 2021 regarding accessing national identity card by the Nubian Community' November 2021 187-191, http://www.parliament.go.ke/sites/default/files/2021-11/Report%20on%20consideration%20of%20public%20petition%20No.023%20regarding%20accessing%20National%20Identity%20cards%20by%20the%20Nubian%20Community%281%29.pdf (accessed 15 September 2024).

202 F Nasubo & D Ngira ' Citizenship rights: The quest for identification' 10 July 2024, https://citizenshiprightsafrica.org/kenya-citizenship-rights-the-quest-for-identification/ (accessed 11 August 2024).

203 Vetting procedures were established administratively until amendments to the Registration of Persons Act adopted in 2014 provided for 'identification committees … to assist in the authentication of information furnished by a parent or guardian'. See B Manby (study for UNHCR) 'Statelessness and citizenship in the East African Community' (2018) 32, https://citizenshiprightsafrica.org/kenya-citizenship-rights-the-quest-for-identification/ (accessed 11 August 2024).

204 Security Laws Amendment Act 2014 sec 23.

but also intertwined citizenship issuance with counterterrorism measures, a move that could exacerbate xenophobia among ethnic groups subject to vetting, such as the Nubians.[205] The only progress achieved in this regard, if it can be considered such, since the decision is the attempt to ease the process, among others, by including Nubian representatives in the vetting committee.[206]

In terms of the second recommendation, which urged Kenya to recognise Nubian land rights over Kibra, there has been some progress. In 2017 Kenya issued to the Nubian community title deeds for 238 acres of land in Kibra,[207] a fraction of the original 4 197 acres taken when the Kibra military reserve was established in 1902. While this move marks a commendable first step, it is imperative that Kenya pursue full compliance by returning the remaining acres to the community or, if this is not feasible, for example, due to the land being used for investment or development, and its return causing significant disruption, it must at least compensate the evicted members to honour the Commission's ruling and uphold basic standards of justice.

The granted title deeds, despite being limited to only 238 acres of the total 4 197 acres taken, can also be seen as progress toward complying with the third recommendation, which calls on Kenya to ensure that any eviction aligns with human rights standards. These deeds, at least psychologically, alleviate the Nubian community's fear of arbitrary loss of at least the portion of land for which they received the deeds, a fear they endured regarding all their lands until they received title deeds for these portions in 2017. Nevertheless, this must be paired with a tangible reduction in arbitrary evictions. Reports reveal that, even after the Commission's ruling, the Nubian community has continued to face unwarranted evictions.[208] This

205 Open Society Justice Initiative and Institute for Human Rights 'The Nubian Community in Kenya/Kenya – Communication 317/06 Comments under Rule 112 relating to implementation' 17 February 2016 para 11, https://www.justiceinitiative.org/uploads/4079106f-dce4-4e4a-bc1c-00ffbeb099bb/litigation-nubian-adults-rule112-submission-20170512.pdf (accessed 11 August 2024).

206 Kenya National Commission on Human Rights 'Briefing report on the implementation of the African Charter on the Rights and Welfare of the Child' August 2020 9, https://www.knchr.org/Portals/0/KNCHR%20Briefing%20Report%20on%20the%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child%20.pdf (accessed 14 August 2024).

207 UN Human Rights Council 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' 25 April 2018 para 50.

208 US Department of State 'Report on international religious freedom: Kenya' 2 June 2022, https://www.state.gov/reports/2021-report-on-international-religious-freedom/kenya/ (accessed 12 August 2024); A Ochieng 'Kenya: Court – Kenya Railways violated rights of Nubians in Kisumu evictions' *allafrica* 28 August 2021, https://allafrica.com/stories/202108300280.html (accessed 15 August 2024).

problem also affects other communities, such as the Ogiek, who, despite the African Court's 2017 ruling recognising their ancestral land rights and calling for the return of their land and cessation of forced evictions,[209] continue to suffer ongoing evictions, including as recently as in 2023 and 2024.[210]

The Commission's final recommendation required Kenya to report within six months on steps taken to implement the decision, but Kenya failed to do so, and no publicly-available information suggests that it submitted the report later, nor is there any indication that the Commission responded to this failure or addressed the broader lack of implementation. For instance, in its 2016 Concluding Observation on Kenya's combined eighth to eleventh periodic report, the Commission neither mentioned the decision nor reminded Kenya to implement the recommendations thereof. This omission might be because the decision year is outside the temporal scope of Kenya's combined report, but since the Commission released its Concluding Observation in 2016, one year after the decision, and considering Kenya failed to submit a progress report within the required six months, it could have used the opportunity to highlight the issue of implementation. It is hoped that the Commission will address this in its next Concluding Observations on Kenya's combined twelfth to thirteenth periodic report, although Kenya did not include progress about the *Nubian* case in its combined report, unlike the *Endorois* case.

Thus, while Kenya has made progress in implementing the Commission's decision in this case, particularly regarding the recognition of land rights and addressing arbitrary evictions, its status remains in the 'partial compliance' category under Viljoen and Louw's compliance framework, as it has not given complete effect to the recommendations. The status of each recommendation in this case, as discussed above, reiterates the fact that implementation is influenced by an interplay of various factors, which may vary from one instance to another. It reveals, for instance, that resource implications or administrative ease are not always determinative

209 African Court on Human and Peoples' Rights *African Commission on Human and Peoples' Rights v Republic of Kenya* Application 6/2012 Judgment 26 May 2017; African Court on Human and Peoples' Rights *African Commission on Human and Peoples' Rights v Republic of Kenya* Application 6/2012 Judgment on reparations 23 June 2022.

210 Minority Rights Group 'Kenyan government must end illegal evictions of Ogiek in Mau Forest' 4 November 2023, https://minorityrights.org/kenyan-government-must-end-illegal-evictions-of-ogiek-in-mau-forest/ (accessed 16 August 2024); 'Joint statement on forced evictions of indigenous peoples in Kenya' November 2023 5 December 2023, https://www.amnesty.org/en/documents/afr32/7499/2023/en/ (accessed 23 August 2024).

factors in whether to implement a recommendation. In this regard, Kenya's failure to end the discriminatory vetting process for the Nubian community, which entails no resource burden, has been attributed to a lack of political will, rooted largely in deeply-entrenched institutional discrimination, where authorities still view the Nubians as non-Kenyans.[211] This contrasts with its partial compliance with the resource-heavy recommendation requiring recognition of the Nubian land rights. By doing so, Kenya, at least theoretically, commits to relinquishing the resources it previously gained by arbitrarily evicting the Nubian community and transferring their land to state and private developers.

In terms of follow-up, the complainants have engaged in different activities such as organising public dialogues, and submitting implementation status reports.[212] However, the extent to which these efforts have directly contributed to the implementation of the decision remains uncertain. Turning to the Commission itself, as briefly noted above, there are no publicly-available steps it has taken to ensure the implementation of the decision. In this regard, it is worth noting that the African Children's Committee has relatively better monitored the implementation of its ruling in *Children of Nubian Descent*, although whether this led to improved implementation requires further investigation and is beyond the scope of the article. For instance, the Chairperson of the African Children's Committee visited Kenya in 2013 to assess progress and presented its visit report in 2017 during the Committee's twenty-ninth session.[213] Coinciding with or influenced by this report, Kenya submitted its own progress report that year, detailing measures taken to implement the ruling,[214] although this was five years after the decision and missed the six-month deadline set by African Children's Committee Guidelines for Communications.[215] In its Concluding Observation on Kenya's first

211 E Fokala 'Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians' (2021) 54 *De Jure Law Journal* 482.

212 IHRDA 'Fostering implementation of decisions of African regional human rights mechanisms: IHRDA organises public dialogue on implementation of decisions on Kenya Nubian cases' 22 July 2022, https://www.ihrda.org/2022/07/fostering-implementation-of-decisions-of-african-regional-human-rights-mechanisms-ihrda-organises-public-dialogue-on-implementation-of-decisions-on-kenya-nubian-cases/ (accessed 12 August 2024).

213 Fokala (n 211) 487-488.

214 Report of the 29th session of the African Committee of Experts on the Rights and Welfare of the Child 2-9 May 2017, Maseru, Lesotho 16-17, https://national-cases.acerwc.africa/sites/default/files/2022-07/Report_29th_Ordinary_Session_ACERWC_English.pdf (accessed 11 August 2024).

215 Revised Guidelines for the Consideration of Communications of the Committee sec XXII(1)(i), https://www.acerwc.africa/sites/default/files/2022-09/Guidelines%20for%20Consideration%20of%20Communications%20and%20Monitoring%20Implementation%20of%20Decisions.pdf (accessed 11 August 2024).

periodic report, the African Children's Committee also highlighted the issue with regard to the implementation of the decision and urged Kenya to take further action. [216] The decision in *Children of Nubian Descent* was also among those featured in a workshop organised by the African Children's Committee in 2023 on the implementation of its decisions and recommendations with national human rights institutions and civil society actors.[217]

4.4 Ethiopia

Ethiopia failed to comply with the recommendations of the Commissions in both decisions rendered against it on the merits.

4.4.1 Equality Now and *EWLA v Ethiopia*

The Commission issued three recommendations in *Equality Now*, and an evaluation of Ethiopia's adherence to these recommendations reveals near-total non-compliance.

First, Ethiopia was requested to compensate the victim with US $150 000, but this payment remains outstanding.[218] Instead of complying, Ethiopia requested a review of the decision, claiming that an alleged amicable settlement with EWLA (the organisation that initially co-submitted the complaint but was later removed by the victim) had already been reached.[219] This motion for review was misplaced, as it did not present new information warranting a review under the African Commission's Rules of Procedure; the Commission had already considered and rejected this settlement claim before issuing its decision.[220] In 2021 the Commission dismissed Ethiopia's motion for review as unfounded, noting that EWLA no longer was

216 Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Kenyan 1st periodic report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child paras 12, 15(a) & 23, https://www.acerwc.africa/sites/default/files/2022-06/kenya_Concluding_Observation_final.pdf (accessed 14 August 2024).

217 African Children's Committee 'Final report: Workshop on implementation of ACERWC decisions and recommendations: 23-24 February 2023' (March 2023), https://www.acerwc.africa/sites/default/files/2023-04/Final%20Report_EN_Workshop%20on%20Implementation%20of%20ACERWC%20Decisions%20and%20Recommendations-March%2024%202023.pdf (accessed 12 August 2024).

218 H Ashagrey 'The impact of the Maputo Protocol in Ethiopia' in S Mutambasere and others (eds) *The impact of the Maputo Protocol in selected African states* (2023) 108.

219 See the decision of the African Commission on Review, https://achpr.au.int/en/decisions-communications/equality-now-federal-women-lawyers-association-ewla-republic-ethiopia (accessed 12 August 2024).

220 See *Equality Now* (n 16) paras 100-106 & 155-157.

the victim's representative at the time of the purported settlement, which the victim did not accept or agree to.[221] However, three years after the motion for review was rejected and eight years after the original decision, Ethiopia has still not paid the recommended compensation to the victim, who now resides abroad. This issue was raised by Commissioner Litha Musymi-Ogana during a conference on the implementation of Commission decisions organised by the Centre for Human Rights, University of Pretoria, in collaboration with the Commission from 13 to 15 September 2023.[222] The commissioner suggested the creation of a fund to compensate victims by contributing a percentage while awaiting state compliance.[223]

Second, the Commission recommended that Ethiopia adopt and implement measures to combat marriage by abduction and rape, monitor instances, diligently prosecute and sanction offenders, and provide judicial officers with training on specific human rights issues, particularly on handling cases of violence against women. Although Ethiopia has indeed taken various steps including legislative, administrative and judicial measures to address marriage by abduction and rape both before and after the Commission's recommendation, these actions appear to be part of broader national policy initiatives that have been intensified since the early 1990s and continued to be enforced today.[224] These initiatives, supported by both domestic and international actors, have long aimed to eradicate harmful traditional

221 See the decision of the African Commission on Review (n 219).

222 Centre for Human Rights 'Centre for Human Rights holds a conference on implementation and domestic impact of the decisions of the African Commission on Human and Peoples' Rights' 22 September 2023, https://www.chr.up.ac.za/latest-news/3580-centre-for-human-rights-holds-a-conference-on-implementation-and-domestic-impact-of-the-decisions-of-the-african-commission-on-human-and-peoples-rights#:~:text=From%2013%2D15%20September%202023,Human%20and%20Peoples'%20Rights%20(African (accessed 12 August 2024).

223 The authors attended the conference and listened to the presentation by the commissioner.

224 Over the past three decades, Ethiopia has implemented robust measures to tackle the plight of women and girls in the country, grounded in its 1993 Women's Policy and the 1995 FDRE Constitution, although challenges persist. See Federal Democratic Republic of Ethiopia: 7th to 10th periodic reports (2015-2023) paras 8, 34, 45, 53, 56-66, 104, https://achpr.au.int/en/state-reports/ethiopia-7th-10th-periodic-reports-2015-2023 (accessed 10 August 2024); MA Salmot & A Birhanu 'The Ethiopian legal frameworks for the protection of women and girls from gender-based violence' (2021) 2 *PanAfrican Journal of Governance and Development* 82-102; Iris Group 'Child, early, and forced marriage: A political economy analysis of Ethiopia' (2020), https://www.girlsnotbrides.org/documents/1621/Ethiopia_Mini_PEA_Final_Doc.pdf (accessed 11 August 2024); UNICEF 'Child marriage and Ethiopia's productive safety net programme: Analysis of protective pathways in the Amhara region final report' (2020), https://www.unicef.org/innocenti/reports/view-all (accessed 11 August 2024); Ministry of Foreign Affairs of Denmark 'Ethiopia: Supporting women and girls survivors of violence', https://um.dk/en/danida/results/stories/ethiopia-support-to-survivors-of-gender-violence (accessed 11 August 2024); WHO 'WHO Ethiopia and UNFPA Ethiopia launch training on clinical management of rape for first-line service providers' 15 February 2022, https://www.afro.who.int/

practices and violence against women.[225] Thus, in the absence of clear evidence that Ethiopia undertook these measures specifically to comply with the Commission's recommendation, it is plausible that Ethiopia's efforts were more about continuing its pre-existing policy initiatives rather than directly responding to the Commission's recommendation. This interpretation is reinforced by Ethiopia's failure to implement specific recommendations from the Commission in the same case, such as paying compensation to the victim. The apparent alignment between Ethiopia's broader policy measures and the Commission's recommendation might thus be viewed as what Viljoen and Louw describe as 'situational compliance', where the measures taken coincide with the Commission's recommendation but are not motivated by a commitment to comply with the ruling itself.[226] Therefore, while Ethiopia's general policies against harmful traditional practices and violence against women align with the Commission's recommendation, this alignment should not be mistaken for compliance *per se*, as key and specific recommendations, such as compensating the victim, remain unmet.

However, this should not be taken to mean that the story of the victim and the denial of justice at the domestic arena has had no impact. It has, in fact, fuelled the movement against harmful traditional practices and violence against women in the country, contributing to increased awareness and advocacy. Even before the case reached the Commission, the victim's story, along with similar incidents, spurred civil society groups, including EWLA and Equality Now, to pressure the Ethiopian Parliament to address the plight of women and girls in the country through the 2004 Revised Criminal Code of Ethiopia, which banned harmful traditional practices, including marriage by abduction, set the minimum marriageable age at 18 years, eliminated the exception for rape if the rapist marries the victim, and imposed stiffer penalties for rape.[227] Ethiopia also implemented various legislative, administrative, judicial and awareness-creating measures to combat harmful traditional practices and violence against women, including marriage by abduction and rape during the period while the case was pending and after the

countries/ethiopia/news/who-ethiopia-and-unfpa-ethiopia-launch-training-clinical-management-rape-first-line-service (accessed 12 August 2024).

225 As above.

226 Viljoen & Louw (n 6) 5-7.

227 Thomson Reuters Foundation 'Ethiopia to pay $150 000 in landmark case of girl abducted and raped 15 years ago' 10 March 2016, https://news.trust.org/item/20160310084946-lv4fy (accessed 13 August 2024); Equality Now 'Spotlight on: Violence against girls in Ethiopia: Marriage by abduction and rape' 2002, https://www.feminist.com/violence/spot/ethiop.html (accessed 11 August 2024).

Commission's decision.[228] These included training for judges and law enforcement, with support from NGOs and embassies, on handling human rights cases, including violence against women.[229] However, despite these efforts, marriage by abduction and rape and other forms of discriminatory practices against women persist,[230] highlighting the long and winding road to go.

The Commission also urged Ethiopia to submit two types of reports on its progress in implementing the decision. First, it was requested to submit a report within six months detailing the measures taken to implement the decision. However, Ethiopia did not submit this report within the specified time frame or afterwards, nor did it include information about the decision in its combined seventh to tenth periodic report submitted in January 2024.[231] Second, the Commission recommended that Ethiopia include in its next periodic report yearly statistics on marriage by abduction and rape prevalence, successful prosecutions, and any challenges faced. The only periodic report Ethiopia submitted after the Commission's decision is the combined seventh to tenth report in 2024. This report neither mentioned *Equality Now* nor provided the required statistics. Instead, it offered general information on legislative, judicial and other measures taken to address harmful traditional practices and violence against women, including abduction, early marriage and rape, and included some statistics on the percentage of women who have experienced physical violence, sexual violence and female genital mutilation.[232]

To sum up, Ethiopia's response to the Commission's decision in *Equality Now* is characterised by defiance, with the exception of one recommendation, which arguably may fall under Viljoen and Louw's concept of 'situational compliance'. Despite its recognition as a landmark decision, its implementation thus represents yet another instance of failure. This may be attributed to various factors, including a lack of political will but, most critically, the lack of pressure

228 See Federal Democratic Republic of Ethiopia (n 224).
229 Ethiopia's 7th to 10th combined reports (n 224) paras 37 & 45; Ministry of Foreign Affairs of Denmark (n 224); WHO (n 224).
230 Ethiopia's 7th to 10th combined reports (n 224) para 376; TG Getaneh 'Developing case: Abduction of Tsega Belachew in Hawassa by mayor's bodyguard raises allegations of police neglect, suspect's connections, and cultural factors' *GHR* 16 June 2023, https://ghrtv.org/developing-case-abduction-of-tsega-belachew-in-hawassa-by-mayors-bodyguard-raises-allegations-of-police-neglect-suspects-connections-and-cultural-factors/ (accessed 12 August 2024); UNICEF 'Children's rights fighting child marriage in Ethiopia' 28 March 2024, https://www.unicefusa.org/stories/fighting-child-marriage-ethiopia (accessed 11 August 2024).
231 Ethiopia's 7th to 10th combined reports (n 224).
232 Ethiopia's 7th to 10th combined reports (n 224) paras 8, 23, 53, 56-58, 62 & 104.

on Ethiopia to comply with its obligations under the decision. No publicly-known follow-up actions have been taken by the Commission to ensure compliance, nor is there any publicly-available information on steps taken by the complainants. This situation is doubly regrettable: first, because the recommendations remain unimplemented; and, second, because the lack of implementation has not even generated public commentary or reaction, including in academic publications. This contrasts with the cases of Botswana and Kenya, where non-compliance with the Commission's decisions has at least drawn attention and criticism from various corners. Ethiopia's continuous defiance of the Commission's ruling without facing the slightest consequences, even naming and shaming to mention the least, can be further explained by other factors: the low visibility of the Commission and its rulings within Ethiopia; limited engagement of Ethiopia's human rights organisations in the African human rights system and with the Commission; a lack of media awareness or interest in reporting on human rights decisions, including those from the Commission; and a historically-low culture of strategic litigation by Ethiopia's human rights organisations, both domestically and before the Commission, at least until recently.

4.4.2 Haregewoin Gabre-Selassie and *IHRDA v Ethiopia*

Despite this case being ground-breaking as the first African Commission decision against Ethiopia, no steps have been taken to enforce it. The former Dergu officials, whose right to a fair trial was declared violated by the Commission, have not received their compensation. Ethiopia has not paid the compensation and has never submitted the required report on the measures it took to implement the decision, which was supposed to be submitted within three months but remains outstanding even after more than 13 years. Furthermore, Ethiopia did not provide information about the decision or the actions taken in its two combined periodic reports submitted to the Commission afterwards.[233] The Commission also has not conducted any publicly-known monitoring to review the progress. For example, the Commission did not address the implementation status of this decision in the only Concluding Observations and recommendations it issued on Ethiopia's combined fifth to sixth periodic report (2009-2013) after the decision.[234]

233 Ethiopia: 5th and 6th periodic report, 2009- 2013, https://achpr.au.int/en/state-reports/ethiopia-fifth-and-sixth-periodic-report-2009-2013 (accessed 14 August 2024); Ethiopia's 7th to 10th combined reports (n 224).

234 Concluding Observations and recommendations – Ethiopia: 5th and 6th periodic report, 2009-2013, https://achpr.au.int/en/state-reports/concluding-

Several factors might explain Ethiopia's non-compliance with this decision, many of which are those discussed regarding *Equality Now* above. These include the Commission's low profile in the country; a lack of publicity of the decisions;[235] insufficient follow up from the Commission; limited engagement by Ethiopian civil society with the African human rights system; and minimal local media interest in human rights decisions in Ethiopia. In addition, the sensitive nature of *Dergue Officials* provides a specific context that might explain its non-implementation during the tenure of the TPLF-led EPRDF government. This case involved officials from the former Dergue regime, known for its brutality and overthrown by the TPLF-led EPRDF government in 1991 after a prolonged civil war. The TPLF-led EPRDF government, which was itself authoritarian and in power until 2018, oversaw the initial eight years of the decision's implementation. Given the historical enmity between the TPLF-led EPRDF regime and the former Dergue officials, who were charged with serious crimes such as genocide, it is plausible that the TPLF-led EPRDF government's reluctance to pay compensation to the victims was influenced by these historical tensions. Regarding the ongoing non-implementation under the current Abiy administration, which came to power in 2018 and has maintained a similarly autocratic governance style, the broader issues mentioned earlier, such as the visibility of the Commission's rulings within the domestic sphere and deficiencies in follow up, coupled with other possible factors, such as a lack of political will, may account for the sustained non-implementation of the decision. It is also possible, albeit presumptive, that the victims lack interest in pursuing compensation since they were released from prison through a pardon.

Overall, the Commission's decisions in *Equality Now* and *Dergue Officials* have been met with defiance, with Ethiopia facing no significant repercussions – not even naming and shaming – to enforce compliance. Beyond their non-implementation, these decisions have not been leveraged as advocacy tools at the domestic level. This can be attributed, as noted earlier, to general and case-specific factors, such as the sensitive nature of the *Dergue Officials* case, which may have dissuaded local civil society organisations from pushing for its implementation due to fears of potential backlash or any other reasons, possibly including their views on the former officials. What is particularly striking, however, is the absence of publicity and

observations-and-recommendations-ethiopia-fifth-and-sixth-period (accessed 14 August 2024).

235 MG Techane 'The impact of the African Charter and the Maputo Protocol in Ethiopia' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 70.

advocacy around *Equality Now*, particularly among women's rights groups in Ethiopia. The ruling should have been championed as an advocacy tool and a catalyst for increased engagement by Ethiopian human rights organisations in international litigation, including before the African Commission, but that opportunity appears to have been squandered.

5 Conclusion

The article examined the status of implementation of the African Commission's decisions against Botswana, Kenya and Ethiopia. The analysis revealed a troubling pattern of poor adherence across all three states. Botswana displayed almost complete defiance in all decisions made against it, except in *Modise*, where it partially complied by reinstating Modise's citizenship and, consequently, that of his children. Non-adherence included an outright rejection to implement the *Good* decision. It also did not comply with the Commission's calls in its decisions on the death penalty, failing not only to impose a moratorium and eventually abolish death penalty, but also to provide death row inmates and their families advance notice before execution. Furthermore, Botswana disregarded the Commission's condemnation of 'hanging' as an inhumane execution method by continuing to use it in practice and law, despite having the opportunity to amend the Penal Code after the Commission's decision.

In contrast, Kenya demonstrated some progress in two out of the three of the Commission's decisions against it, while the third decision (*Ouko*), according to the latest publicly-available information, was met with complete non-compliance. Its partial compliance included some largely tokenistic measures, such as registering the EWC and making some progress in royalty payments as recommended in *Endorois*. Kenya also partially complied with the recommendation to recognise Nubian land rights by granting them community title deeds for 238 acres in the Kibra neighbourhood, although this acreage was less than the original land the community had. However, Kenya did not implement resource-intensive recommendations, such as compensating the Endorois community, or those requiring ambivalent measures such as restoring their ancestral land – a *sine qua non* for truly vindicating the rights of the Endorois community, whose religion, culture and subsistence are intrinsically tied to their land. Likewise, Kenya did not abolish the discriminatory vetting procedure for granting identity cards, as recommended in the *Nubian* decision.

Turning to Ethiopia, it displayed almost complete non-compliance with the *Equality Now* decision and complete non-compliance in *Dergue Officials*. While Ethiopia did take measures to tackle marriage by abduction and rape, in alignment with one of the recommendations in *Equality Now*, these measures can only be viewed as 'situational compliance'. No other recommendations in *Equality Now* were followed, and none of the recommendations in *Dergue Officials* were complied with.

Different factors may have contributed to the lack of or poor implementation of these decisions. However, the discussions revealed no clear link between the broader human rights records and democratic protections of states and their level of compliance with the Commission's decisions. On the one hand, despite Botswana's relatively strong human rights record and democratic protections, it exhibited complete defiance in four of the five discussed decisions (including *Bosch*), even outrightly rejecting one of the Commission's decisions. This contrasts with Kenya which, despite a lower standing in human rights and democratic protections compared to Botswana, at least partially implemented some of the Commissions' recommendations in *Endorois* and *Nubian*. This suggests that a strong human rights record and democratic protection do not necessarily correlate with higher compliance levels. On the other hand, the finding that Kenya, which has a better human rights record and more democratic protections than Ethiopia, demonstrated partial compliance with Commission's decisions, whereas Ethiopia remains totally defiant, indicates a possible correlation between broader human rights records and democratic protections and the extent of compliance with the Commission's decisions. This disparity demonstrates that while a strong human rights record and democratic protections may influence implementation, they do not automatically guarantee it.

Effective implementation requires the alignment of various factors, with political will being a critical determinant. The discussion in this article also indicates that a lack of political will is a factor behind the implementation of each case, although its manifestation – either explicit or implicit – and the extent of its role may vary, acting independently or in conjunction with other factors, depending on the case and country. For instance, Botswana's lack of political will is evident in its outright rejection of the *Good* decision and its non-compliance with less demanding recommendations, such as providing advance notice to death row inmates and their families before executions – a recommendation that requires no resources or legislative changes to comply with. Furthermore, Botswana's failure

to outlaw the use of 'hanging' as a method of execution, despite having the opportunity to do so during amendments to other provisions of the Penal Code following the Commission's decision, further underscores this issue. Likewise, in Ethiopia, a lack of political will, combined with other variables such as the politically-sensitive nature of the decision and the low visibility of the Commission's decisions domestically, likely contributed to the non-implementation of the recommendation in *Dergue Officials*.

The discussion also revealed that the nature of recommended remedies – whether they require substantial resources, legislative or policy changes, significant alterations to the *status quo*, or shifts in public attitudes or not – may have an impact on implementation. This impact is evident in the *Endorois* decision, where compliance was better for recommendations that did not demand significant resources or major changes, such as registering the EWC and sharing royalties, while there was hesitance with resource-intensive recommendations such as paying compensation to the Endorois community, and land restoration which, it was argued, would significantly alter the *status quo*, including the world heritage status of Lake Bogoria National Reserve. However, the discussion also demonstrated that the simpler and straightforward nature of remedies does not automatically guarantee implementation, as seen in non-implemented compensation payments in *Equality Now*, *Dergue Officials* and *Modise*, and the recommendation to Botswana to give advance notice to death row inmates and their families before execution, which arguably requires no resources and no legislative changes. This suggests that while the nature of recommended remedies matters, many other variables, including political will, influence implementation.

The specificity, or lack thereof, of the recommended remedies, such as the amount of compensation to be paid to victims, may also influence implementation. This issue was evident in *Modise*, where the Commission's failure to specify the compensation amount led to disagreements between the Botswana government and the victim, resulting in non-implementation. Likewise, the Kenyan government has cited difficulties in determining compensation amounts as a reason for delaying compensation to the Endorois community. However, it is worth noting that specificity in recommendations does not also automatically lead to implementation. For instance, in *Equality Now*, even though the Commission specified the amount of compensation, it did not result in implementation. This is another indication that implementation is a complex interplay of various factors, and specificity alone is insufficient to ensure compliance.

The other issue that emerged from the discussion in this article is the inconsistent reaction to non-implementation of the Commission's decisions across different states. While Kenya, despite making some progress and partially complying with the recommendations in two cases, has faced scrutiny for not addressing critical recommendations, and Botswana has been scrutinised for non-compliance, Ethiopia has largely avoided scrutiny and remains off the radar despite its own non-compliance. This discrepancy appears to stem partly from the Commission's uneven follow-up efforts. For example, while the Commission's follow-up actions in *Endorois* – such as raising the status of implementation of the case during consideration of Kenya's combined periodic reports, holding hearings on implementation progress, issuing resolutions about non-compliance, and organising workshops to discuss progress – may or may not have directly led to Kenya's partial compliance, they have at least contributed to the sustained public scrutiny and kept Kenya's non-compliance in the spotlight. Similarly, while less intensive, the Commission's follow up on Botswana included key steps such as referring the *Good* case to the Executive Council of the AU and inquiring about the *Modise* case during a field mission. These efforts, supported by academic articles, NGO reports, and updates from complainants, helped keep the issue of non-implementation in the public eye. However, the Commission has not undertaken publicly-known follow-up actions for the *Equality Now* and *Dergue Officials* cases against Ethiopia. This lack of follow up, combined with limited public awareness of the Commission and its decisions in Ethiopia, minimal involvement of Ethiopian NGOs in the African human rights system, and insufficient engagement by the Ethiopian Human Rights Commission, has allowed Ethiopia to evade repercussions and avoid public scrutiny for its non-compliance. This situation may be seen as a green light for Ethiopia to continue its defiance without facing consequences, potentially discouraging adherence to similar rulings in the future.

Overall, the assessment highlights substantial challenges in translating the Commission's rulings into positive human rights impacts through better national implementation. The authority of the Commission and the effectiveness of the African human rights framework depend on robust efforts to ensure that its recommendations are not only issued but also effectively implemented to safeguard the rights and dignity of individuals across the continent. This requires states to uphold their human rights commitment under the African Charter by complying, among others, with the decisions and recommendations of the African Commission. It is also incumbent upon the Commission to diligently monitor the implementation of its rulings and provide public updates. This

should be the case even when the states concerned show defiance, either explicitly or through their actions, as it keeps these states in the spotlight for failing to comply. However, it is crucial to emphasise that while the primary responsibility for taking measures to comply with human rights obligations arising from the African Charter or the African Commission's rulings lies with the states, and the monitoring role falls to the Commission, implementation is a collective effort that involves not only states and the Commission, but also other entities such as complainants, victims, national human rights institutions, academics, medias and civil societies.