2 The ultimate withdrawal: A critical analysis of the jurisprudence of the African Court on Human and Peoples' Rights

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Abstract:

This chapter originates from the idea that the involvement of individuals before the African Court on Human and Peoples' Rights (African Court or Court) is vital to its ability to adequately fulfil its protective human rights mandate. Currently, 99 per cent of cases submitted to the Court have been submitted by individuals or non-governmental organisations (NGOs) with observer status before the African Commission on Human and Peoples' Rights. Thus, the African Court relies on individuals and NGOs to file cases before it to fulfil its mandate and develop its jurisprudence. From this perspective, the withdrawal, to date, by four states of their declarations under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol), disabling direct access of individuals and NGOs to the African Court, is problematic as without cases the Court's authority, legitimacy and ability to operate is at risk.

For the African Court to continue to exist meaningfully and make an impact where domestic systems have failed, it is essential to prevent further withdrawals and encourage more states to make declarations under article 34(6) of the Court Protocol. In this regard, the contribution of this chapter is in its exploration of 'why' some states have reacted in such an extreme way to the authority of the African Court. As discussed and substantiated throughout this chapter, states arguably act on different motivations regarding their withdrawals, both legal and political. The aim of this chapter, however, is not to justify or discredit these withdrawals but rather to contribute to the existing and ongoing analysis of what may have triggered them.

As such, this chapter presents the different ways that states resist the authority of supranational human rights courts, such as the African Court, to contextualise the 'why' behind the withdrawals and characterise them as different types of 'reactions' for further discussion. It further presents an analysis of the jurisprudence of the African Court from a procedural perspective to pinpoint decisions that may assist in explaining the withdrawals. Together, this analysis is key to offering insight into what, if anything, could be done differently to avoid further withdrawals.

1 Introduction

This chapter originates from the idea that the involvement of individuals before the African Court on Human and Peoples' Rights (African Court or Court) is vital to its ability to adequately fulfil its protective human rights mandate. Currently, 99 per cent of cases submitted to the Court have been submitted by individuals or non-governmental organisations (NGOs) with observer status before the African Commission on Human and Peoples' Rights (African Commission or Commission).[1] Thus, the African Court relies on individuals and NGOs to file cases before it to fulfil its mandate and develop its jurisprudence.

From this perspective, the withdrawal to date by four states of their declarations under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol), disabling direct access of individuals and NGOs to the African Court, is problematic.[2] As argued

1 African Court 'ACtHPR cases' https://www.african-court.org/cpmt/statistic (accessed 27 July 2023).

2 The four states that have withdrawn are Rwanda (2016), Tanzania (2019), Benin (2020) and Côte d'Ivoire (2020); African Court 'Declarations' https://www.african-court.org/wpafc/declarations/ (accessed 27 July 2023). To limit the scope of this chapter, the analysis is focused on two of these states, namely the withdrawals of Tanzania and Benin. The African Court has confirmed a state's right to withdraw its declaration

by Cirimwami, 'without a sufficient number of cases to adjudicate the Court's authority, legitimacy and continuing ability to operate could be seriously endangered'.[3]

For the African Court to continue to exist meaningfully and to make an impact where domestic systems have failed, it is essential to prevent further withdrawals and to encourage more states to make declarations under article 34(6) of the Court Protocol. In this regard, the contribution of this chapter is in its exploration of 'why' some states have reacted in such an extreme way to the authority of the African Court.

As discussed, and substantiated throughout this chapter, states arguably act on different motivations regarding their withdrawals, both legal and political. The aim of this chapter, however, is not to justify or discredit these withdrawals but rather to contribute to the existing and ongoing analysis of what may have triggered them.[4]

As such, this chapter's objective is twofold: First, to flesh out the different ways that states resist the authority of supranational human rights courts, such as the African Court, to contextualise the 'why' behind the withdrawals and characterise them as different types of 'reactions' for further discussion. In *Ingabire*,[5] the African Court held that Rwanda's withdrawal from article 34(6) was valid based on 'rules governing declarations of recognition of jurisdiction as well as the international law principle of state sovereignty'.[6] However, relying merely on these considerations as justification for 'why' states withdraw is arguably an oversimplification of a complex situation.[7] Secondly, the Court's jurisprudence will be analysed from a procedural perspective to pinpoint decisions that may assist in explaining the withdrawals. Together, this

under art 34(6) in *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165 as well as *Adelakoun v Republic of Benin* [2021] AfCHPR 39.

3 African Court on Human and Peoples' Rights 'A publication of the coalition for an effective African Court on Human and Peoples' (2020) 1 *ACC Publication* available at https://www.african-court.org/wpafc/wp-content/uploads/2020/11/ACC-Publication_Volume-1_2020_ENG.pdf (accessed 12 June 2023).

4 See eg, SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* at 10.

5 *Ingabire v Rwanda* (jurisdiction) (2016) 1 AfCLR 562.

6 *Ingabire* (n 5) paras 53-59.

7 The analysis in this chapter draws reference to the work of Madsen et al, particularly as it relates to the different types of state resistance to international courts. See discussion in sec 2.

analysis is key to offering insight into what, if anything, could be done differently to avoid further withdrawals.[8]

With this in mind, this chapter adopts the following structure: Section 2 discusses the relevant theoretical framework.[9] Thereafter, sections 3 and 4 provide an in-depth analysis of the withdrawals of Tanzania and Benin. However, since this chapter is not an empirical study, an in-depth discussion on the withdrawals of Rwanda and Côte d'Ivoire is not necessary. Furthermore, Rwanda's withdrawal has been extensively covered in academia. Regarding Côte d'Ivoire, the African Court only received two applications against the state during the period between filing their declaration in terms of the Optional Jurisdictional Clause and withdrawing therefrom.[10] As such, there are limited sources available to gain alternative insight into the reasons for Côte d'Ivoire's decision to withdraw.[11] Section 5 concludes the chapter and suggests alternative practices.

2 Resisting the authority of the African Court

To understand the unilateral act of withdrawal from the jurisdiction of the African Court, it is, as a point of departure, important to appreciate the source of the Court's authority in enforcing relevant international human rights instruments. Generally, there are two categories of authority in this regard. The first is the African Court's formal or *de jure* authority, that is, the legal powers ascribed to the institution by its founding treaty.[12] The

8 It should be noted that the withdrawal of acceptance of the jurisdiction of international human rights courts has not only been effected on the African continent. See eg the withdrawal of the declaration consenting to the optional clause concerning the recognition of the contentious jurisdiction of the Inter-American Court of Human Rights (Inter-American Court) by Peru in relation to the case of *Ivcher Brontein v Peru* IHRL 1457 (IACHR 2001). It is outside the scope of this article to discuss in any detail the possible comparative notions of the withdrawal mechanism. As such, case law from the Inter-American Court will only be briefly referenced with specific points in dispute.

9 The analytical framework discussed in this chapter was first introduced in MR Madsen, P Cebulak & M Wiebusch 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* at 197-220. This was applied to the African Court in T Daly & M Wiebusch 'The African Court on Human and Peoples' Rights: mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* at 294-313. This chapter attempts to add to the discussion presented by Daly & Wiebusch (n 9) by applying their theories to address further contextual considerations and by presenting a discussion on the circumstances surrounding the withdrawal of Benin.

10 Adjolohoun (n 4) 17.

11 For a detailed discussion on Côte d'Ivoire's withdrawal, see Adjolohoun (n 4) 16-18.

12 Daly & Wiebusch (n 9) 10.

second is the African Court's *de facto* authority which, in general terms, as described by Daly et al:

> [R]elates to the kind and number of actors who act on the Court's judgments, and the overall impact of the Court's judgments on litigants, government and the other State actors such as the NGOs and businesses, and the general public, which may vary from state to state and from time to time.[13]

The *de jure* authority of the African Court is derived from the Court Protocol. In terms of article 3(1), the Court's jurisdiction extends to 'all cases and disputes submitted to it concerning the interpretation and application of the [African Charter], [the Court Protocol] and any other relevant human rights instrument ratified by the States concerned'. Furthermore, in terms of article 4, the Court has the authority to deliver advisory opinions upon request from an African Union (AU) member state, the AU, any of its organs or any organisation recognised by the AU.[14] The *de jure* authority of the Court also relates to its power to deliver enforceable decisions. To that end, article 27(1) of the Court Protocol provides that the Court may make orders to remedy a human rights violation in instances where such a violation is found. It further has the power to make provisional orders in cases of 'extreme gravity and urgency, and when necessary to avoid irreparable harm to persons' in terms of article 27(2) of the Court Protocol. In terms of article 30, state parties undertake to comply with the judgment of the Court in which they are a party within the time stipulated by the Court and guarantee its execution. As such, the African Court can make binding decisions where it deems fit, and states that have ratified the Protocol accept the *de jure* authority of the Court to make these decisions.

Against the backdrop of this broad understanding of the authority of the African Court, it is possible to identify two essential forms of resistance: one that 'seeks to reverse developments within a system', while the other 'ultimately gives up on that system'.[15] These forms of resistance can, using the arguments of Madsen et al be divided into two categories, labelled: *ordinary resistance* or *pushback* and *extraordinary resistance* or *backlash*.[16]

13 As above.

14 In addition, as set out in arts 9 and 28 of the Court Protocol and rules 26 and 67 of the Final Rules of Court 2020, the Court also has the mandate to promote an amicable settlement, to interpret a judgment rendered by itself and to review its own judgment in light of new evidence in conformity.

15 Madsen et al (n 9) 202.

16 As above.

Pushback occurs 'within the playing field of the international court' in the sense that the resisting state generally accepts the authority of the institution but reacts to specific judgments or developments of law and attempts to overturn that development to return to the *status quo*.[17] In the international system, this form of resistance is not uncommon. As noted, it is often a necessary dynamic of international legal systems.[18] After all, the law would remain stagnant if there were no such criticism.[19] It is, however, crucial to acknowledge that in the case of *pushback*, the *de facto* authority of the Court is not challenged.[20] The following sub-sections, 2.1 and 2.2, discuss the different forms of pushback experienced by the African Court, while sub-section 2.3 further elaborates on the concept of *backlash* and contextualises this by referring to the termination of the Southern African Development Community (SADC) Tribunal.

2.1 Pushback against the constitution of the African Court

The African Court's first experience of *pushback* against its *de jure a*uthority arose even before it was officially constituted. The establishment of the African Court was realised after extensive external pressure from international human rights NGOs and European states over the course of nearly 20 years.[21] After this pressure, the process of establishing the African Court was set in motion by the AU adopting the Court Protocol in 1998. However, it was not until 2004 that a sufficient number of ratifications had been deposited for the Protocol to enter into force, and it was not until 2006 that the first 11 judges of the African Court were appointed.[22] The eight years that passed between the adoption of the Court Protocol and the establishment of the Court, arguably, shows the ambivalence of some AU member states towards the African Court. In commenting on the protracted process of establishing the Court, Faix et al suggest that

17 Madsen et al (n 9) 202.

18 As above.

19 P Bourdieu 'The force of law: toward a sociology of the judicial field' (1987) 38 *Hastings Law Journal* at 821. Bourdieu describes the practical meaning of the law as being determined in the confrontation between different bodies moved by divergent interests. As such, the law is, in general, beholden to conflicts and disagreements flowing from the field.

20 Madsen et al (n 9) 202.

21 M Faix & A Jamali 'Is the African Court on Human and Peoples' Rights in an existential crisis?' (2022) 40 *Netherlands Quarterly of Human Rights* at 61.

22 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and (accessed 10 April 2023).

'[t]he decades-long movement towards the establishment of the African Court reflects one of the first forms of resistance against it'.[23]

2.2 Low-level of compliance with the judgments and orders of the African Court

Throughout its existence, the African Court has struggled with state party compliance with its orders and judgments. Reporting to the AU Executive Council at its 38th Ordinary session in February 2021 over the 2020 cycle (2020 Activity Report), the Court acknowledged that one of the major challenges it faces is the perceived lack of cooperation from member states, especially with the low level of compliance with its decisions.[24] At that point, the African Court had rendered over 100 judgments and orders.[25] However, only Burkina Faso fully complied with the judgments[26] of the Court, while Tanzania partially complied with some of the judgments and orders against it.[27]

Furthermore, in February 2021, Côte d'Ivoire filed a compliance report in relation to the Court's judgment in *APDH*.[28] However, the applicants in *APDH* disputed the facts of this report, indicating that although the law relating to the composition of the electoral management body had

23 Faix & Jamali (n 21).

24 Activity Report of the African Court on Human and Peoples' Rights, Executive Council Thirty-Eight Ordinary Session Videoconference 3-4 February 2021 Addis Ababa, Ethiopia EX.CL/1258(XXXVIII) para 37.

25 As above.

26 See *Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258 as well as *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346. In both instances, the respondent state fully complied with the African Court's judgment.

27 See Faix & Jamali (n 21). Also, when analysing the African Court on Human and Peoples' Rights Activity Report of the African Court on Human and Peoples' Rights 1 January-31 December 2021' (2022) EX.CL/1323(XL) Annex II, it is evident that Tanzania partially complied with some judgments but has not complied with some judgments at all. In *Abubakari v Tanzania* (reparations) (2019) 3 AfCLR 334, Tanzania reported to the court that various orders were complied with, such as passing the Legal Aid Act of 2017 in accordance with the judgment and requested an interpretation from the African Court on the remedy of the violations which was provided by the Court on 28 September 2018. However, Tanzania had not filed any report on the implementation of reparations despite the time to do so having elapsed on 5 July 2020. The cases of *Thomas v Tanzania* (interpretation) (2017) 2 AfCLR 126 and *Nganyi v Tanzania* (reparations) (2019) 3 AfCLR 308 follow the same trend of partial compliance. Tanzania has also been guilty of complete non-compliance, which can be seen in cases such as *Paulo v Tanzania* (merits) (2018) 2 AfCLR 446; *Evarist v Tanzania* (merits) (2018) 2 AfCLR 402; *Guehi v Tanzania* (merits and reparations) (2018) 2 AfCLR 477 and *Rashidi v Tanzania* (merits and reparations) (2019) 3 AfCLR 13, to name a few.

28 See *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) AHRLR 668 (ACHPR 2016).

been revised to include more non-governmental members, it had, in its opinion, not sufficiently addressed the issue of impartiality of the electoral commission, which was one of the core issues in the application.[29] In addition, Benin, Libya and Rwanda had, at this point, not complied at all with the judgments and orders rendered against them.[30]

Reporting to the AU Executive Council at its 40th Ordinary session in January/February 2022 over the 2021 cycle (2021 Activity Report), the Court once again stressed the lack of compliance as a major challenge, indicating that '[a]s at July 2021, only 7% of judgments had been fully complied with 18% partially complied and 75% non-compliance'.[31] In addition, in its 2021 Activity Report, the Court reiterated its statement in the 2020 Activity Report that some states had continuously and openly stated before the AU Executive Council that they would not comply with the Court's decisions.[32] Such statements are arguably a clear violation of article 30 of the Court Protocol, which stipulates that 'parties to the … Protocol undertake to comply with the judgement in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.

As evidenced in the 2020 and 2021 Activity Reports, a low level of compliance or non-compliance with the judgments of the African Court and open defiance of its authority before the AU Executive Council are forms of *pushback* against the *de jure* authority of the Court.[33] While it is too early to establish a systemic problem of non-compliance, which would classify it as a form of *backlash*, Faix and Jamali opine that 'the overall lack of compliance with the decisions of the African Court is undeniable and constitutes a form of *pushback* that challenges its development and authority'.[34] Moreover, undermining the Court's *de jure* authority through repeated non-compliance will ultimately speak to the status of the Court's *de facto* authority. The fact that non-compliance with African Court judgments is so rife can be viewed as an indication that the African Court's *de facto* authority is under threat.

29 See Activity Report (n 27) para 30.

30 Activity Report (n 27) para 37.

31 Activity Report (n 27) para 72.

32 As above. Article 30 of the Court Protocol holds that '[t]he States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.

33 C Rickard 'African Court's existence threatened by lack of cooperation from AU states' 25 March 2021 https://africanlii.org/article/20210325/african-court's-existence-threatened-lack-cooperation-au-states (accessed 3 June 2023).

34 Faix & Jamali (n 21) 61.

2.3 Termination as the ultimate backlash – the fate of the SADC Tribunal

As briefly introduced in the introduction to section 2, *backlash*, as the other form of resistance, occurs when the contents of the law are challenged with the Court's *de facto* authority, aiming to substantially transform the targeted court or terminate it. This is described as when 'the critique is no longer being played out within the playing field of the game – instead it is seeking to change the rules of the game'.[35] Arguably, the most glaring example of *backlash* is the termination of the SADC Tribunal in 2011.

In 2008, the SADC Tribunal heard the matter of *Campbell*,[36] which kickstarted a swift and intense negative response by SADC member states towards the Tribunal's existence. *Campbell* concerned the validity of an amendment to the Zimbabwean Constitution in 2005 pertaining to agricultural land acquired for resettlement.[37] The new section immediately vested identified land with the Zimbabwean government and effectively entitled the government to expropriate any land which it identified through the so-called 'acquiring authority' without compensation.[38] Furthermore, the amendment provided that a person having any right or interest in the identified land could 'not apply to a court to challenge the acquisition of the land by the State, and no court [would] entertain any such challenge'. The relevant section introduced by the amendment, section 16B(3)(*a*), was arguably the crux of the *Campbell* case, as it directly violates the rule of law. As held by the SADC Tribunal:

> It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation.[39]

The SADC Tribunal took issue with section 16B(3)(*a*) based on articles 4 and 6(1) of the SADC Treaty, which provides that SADC members are to 'respect the foundational principles, which include the sovereign

35 Madsen et al (n 9) 203.

36 *Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

37 Seventeenth Amendment of the Constitution of the Republic of Zimbabwe, which inserted sec 16B 'Agricultural land acquired for resettlement and other purposes'.

38 For further reading, please see sec 16B of the Seventeenth Amendment of the Constitution of the Republic of Zimbabwe, 2005, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/72087/90494/F1340885370/ZWE72087.pdf (accessed 3 June 2023).

39 *Campbell* (n 36) 26.

equality of all members, human rights democracy and the rule of law' and 'refrain from taking any measures likely to jeopardise the sustenance of its principles, objectives, and implementation of the Treaty provisions' respectively. Based on these provisions, the SADC Tribunal held that SADC member states, including Zimbabwe, were under a legal obligation to respect, protect and promote the twin foundations of the rule of law.[40] Because section 16B(3) ousted the jurisdiction of the Zimbabwean courts with regard to land expropriated in terms of section 16B(2), those affected by the expropriation effectively had no access to recourse and were deprived of their rights without having their case heard by an independent court or tribunal. As such, the SADC Tribunal unanimously found that the land reform programme undertaken by the government of Zimbabwe violated the applicant's right of access to justice and, therefore, the rule of law.[41]

Based on the violations found, the Tribunal ordered Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants and to guarantee that no action was taken to evict the applicants from or interfere with the peaceful residence on, and, of the applicant's farms.[42] Despite the SADC Tribunal's decision, the government of Zimbabwe continued with its land expropriation programme and launched a campaign to emasculate the SADC Tribunal and nullify its rulings.[43] As noted by Nathan, the Zimbabwean government viewed the Tribunal's decision as 'intolerable interference in the country's domestic affairs'.[44] As such, Zimbabwe did not comply with the orders, which led to the Tribunal referring the failure to comply to the SADC Summit for appropriate action on three different occasions.[45] On all three occasions, the Summit declined to act, arguably showing their support for the Zimbabwean government despite its disregard for the obligations undertaken by all SADC members.[46] However, as argued by Nathan, the Summit's passivity was not enough; Zimbabwe went on to successfully lobby other SADC member states to actively support their stance on the Tribunal.[47]

40 *Campbell* (n 36) 27.

41 *Campbell* (n 36) 4.

42 *Campbell* (n 36) 59.

43 L Nathan 'The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35 *Human Rights Quarterly* at 876.

44 As above.

45 As above.

46 Nathan (n 43) 877.

47 As above.

The cumulative effect of Zimbabwe's actions resulted in the SADC Summit provisionally suspending the SADC Tribunal in 2010, pending a review of the role and functions of the Tribunal.[48] It is outside the scope of this chapter to discuss the details of the review process, and as argued by Naldi et al, '[t]he whole review process appears [in any event] to have been an exercise in futility, with the Summit determined to undo the Tribunal and ignoring all recommendations to the contrary… [t]he outcome was predetermined'.[49] In May 2011, the Summit mandated the Committee of Ministers of Justice to initiate the process aimed at amending the relevant SADC legal instruments.[50] It resolved not to reappoint the judges or replace the judges whose terms of office ended by the end of 2011 and to prolong the suspension of the Tribunal receiving new cases or hearing existing ones until the new SADC Tribunal Protocol had been approved.[51] The suspension of the SADC Tribunal paints a worrying picture of the possible effects of state resistance to international courts. As such, it is imperative that further resistance to the African Court is limited so that a similar fate can be avoided.[52]

2.4 Article 34(6) withdrawals – pushback or backlash?

When the recent article 34(6) withdrawals are considered, it may, at face value, seem like a form of *pushback* in that the states, arguably, accept the African Court's authority but simply resist a specific development in its case law. The African Court's authority is accepted by the withdrawing states in that they are resisting an aspect of the Court's jurisdiction that

48 G Naldi & K Magliveras 'The new SADC tribunal: Or the emasculation of an international tribunal' (2016) 63 *Netherlands International Law Review* at 138.

49 As above.

50 As above.

51 As above.

52 It should be borne in mind, however, that there have been domestic repercussions for the actions of the heads of state in the SADC Tribunal's suspension. In this regard, see *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC), where the South African Constitutional Court found that the president's participation in the decision-making process, his decision to suspend the SADC Tribunal and his signature of the 2014 SADC Protocol was unconstitutional, unlawful and irrational and ordered that his signature be withdrawn. Also see *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania* [2013] AfCHPR 8 (14 June 2013), where the suspension of the operations of the SADC Tribunal and failure or refusal to appoint judges was held to be contrary to the clear Treaty provisions, inimical to the rule of law as a foundational principle inherent to the legitimacy of the Community, and expressly entrenched in the SADC Treaty. The High Court of Tanzania further held that, pending the reopening of the suspended SADC Tribunal, the High Court has inherent powers to entertain all adjudicative disputes between individual and legal persons against the Tanzanian Government in matters arising out of the SADC Treaty.

is, its jurisdiction *ratione personae* relating to individuals and NGOs, while remaining a party to the Court, albeit to a more limited extent. This is further supported by the fact that a specific case, or tipping point, can be pointed to as the reason for withdrawal in each instance of withdrawal. This is further elaborated on under sections 3 and 4 below, referring to Tanzania and Benin, respectively.

However, when scrutinised, as is further done below, this resistance more closely resembles a form of *backlash.* As suggested by Daly et al, the 'partial withdrawal from the Court's jurisdiction carried not only the express charge of illegitimate use of the Court but also an implicit attack on the Court's legitimacy overall'.[53] It is argued that the attack on the Court's legitimacy can be seen in both instances of withdrawal as it restricts the most important stream of cases to the African Court. Without the involvement of individuals in the submission of applications, the African Court would effectively receive no cases to adjudicate, resulting in it losing its legitimacy as a human rights protector. The withdrawals are thus a form of *backlash,* given the severe risk they pose to the Court's authority as a regional human rights court on the continent and the message it sends to human rights defenders nationally and regionally. Therefore, withdrawals from article 34(6) pose a serious risk to the future operation of the African Court. As such, it is important to analyse the possible reasons for the withdrawals further to establish possible avenues for avoiding such withdrawals.

3 Tanzania's withdrawal

As background to the discussion on Tanzania's withdrawal below, it is important to note the 2022 Report on 'The Global Expansion of Authoritarian Rule', where Freedom House concluded that Tanzania had experienced the fourth largest decline in freedom over the last decade.[54] Taking into consideration that background, Faix et al. argue that '[t]he change of government in Tanzania and its subsequent crackdown on human rights defenders and media explain its decision to restrict the jurisdiction of the Court in individual communications'.[55]

A further reason put forward for Tanzania's withdrawal is 'litigation fatigue'.[56] At the time of withdrawal, Tanzania had been the respondent

53 Daly & Wiebusch (n 9) 27.

54 Freedom House *Freedom in the world 2022: The global expansion of authoritarian rule* (2022) 16.

55 Faix & Jamali (n 21) 67; see also Daly & Wiebusch (n 9) 30.

56 Adjolohoun (n 4) 10.

in 138 of the total 255 applications submitted to the African Court.[57] In relation to the judgments against it, Tanzania had to implement over 60 administrative, legislative, judicial, and pecuniary orders and had to pay upwards of US$106 000 in damages.[58] However, to fully appreciate Tanzania's withdrawal, there is far more context and many more legal issues to be acknowledged and analysed.

3.1 The 'fake reservation'

On 21 November 2019, Tanzania became the second state to withdraw its declaration under article 34(6). According to the notice posted in this regard, Tanzania withdrew its declaration because it perceived that it 'ha[d] been implemented contrary to the reservations submitted by the United Republic of Tanzania when making its decision'.[59] In terms of Tanzania's declaration and what it referred to as a 'reservation', it stated that 'the Court may entitle NGOs with observer status and individuals to submit an application directly to the African Court on condition that such individuals and NGOs have exhausted all domestic legal remedies in adherence to the Constitution of Tanzania'.[60]

The 'reservation' referred to by Tanzania raises a number of questions. First, the rule that an applicant must exhaust local remedies before approaching an international forum is part and parcel of the admissibility criteria before most regional and international human rights courts and quasi-judicial bodies.[61] Under article 6(2) of the Court Protocol, referring to article 56(5) of the African Charter, all available, effective, and sufficient remedies must be exhausted before the Court can be approached.[62] Furthermore, the Court has specified that the victims or their representative must be able to pursue the remedies in question without impediment, that the remedies must offer prospects of success, and that the victims must be able to redress the complaint.[63] Thus, as

57 ACtHPR cases (n 1).

58 Adjolohoun (n 4) 10.

59 African Court Withdrawals: Tanzania https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf (accessed 20 March 2023).

60 As above.

61 See also L Chenwi 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* at 374-398.

62 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 31; *APDH* (n 28) para 93.

63 *Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (2013) 1 AfCLR 197 para 88.

submitted by Tanzania, the 'reservation' argument arguably carried little weight.

Second, to expand on this argument, if the Vienna Convention on the Law of Treaties (VCLT) is considered, the timing of the reservation can be called into question. According to article 2(1)(d), a reservation means:

> [A] unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Therefore, a state may only make a reservation when signing, ratifying, accepting, approving or acceding to a treaty. This is further confirmed in article 19 of the VCLT.[64] Tanzania signed the Court Protocol in 1998 and ratified it in 2006. In both instances, no reservation was deposited with regard to the Protocol.[65]

However, if it is accepted that a reservation was duly made, contrary to the argument presented above, the 'reservation' argument could, in the alternative, be considered invalid from the perspective of the validity test contained in article 19 of the VCLT. It provides three instances in which case a reservation is deemed invalid, namely: (1) when the treaty prohibits the reservation, (2) when the treaty provides that only specified reservations which do not include the reservation in question may be made, and (3) if the reservation is not invalid in terms of (1) and (2), the reservation is incompatible with the object and purpose of the treaty. The Court Protocol does not contain any provisions regarding reservations made to it, and (1) and (2) are, therefore, not applicable. Thus, the only relevant provision in this regard refers to the 'object and purpose', in this case, referring to the object and purpose of the Court Protocol.

The object and purpose discussion relating to Tanzania's reservation can be divided into two parts. The first part pertains to the assertion that individuals and NGOs may only approach the African Court after exhausting all domestic remedies, as addressed above. At face value, this arguably does not offend the object and purpose of the Court Protocol, as this is contained in article 6(2) of the Court Protocol with further reference

64 Article 19 (Formulation of reservations) of the VCLT provides that '[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation …'.

65 African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5.

to article 56(5) of the African Charter. However, Adjolohoun argues that the first part is invalid as it constitutes a 'fake' reservation, as referred to in the sub-heading above, that is, a reservation that is 'superfluous because it provides for an exception that is inherent in the applicable law'.[66]

The second part refers to the requirement added by Tanzania that direct access to individuals and NGOs should only be granted 'in adherence with the Constitution' of Tanzania. Arguably, the second part is invalid as it is not compatible with the object and purpose of the Court Protocol. Again, as argued by Adjolohoun, 'it annihilates the very purpose of the declaration, which is to allow direct individual access to the Court, including challenging the conformity of the Constitution with international law ratified by the concerned state'.[67] The purpose of the Court Protocol is, arguably, to establish the African Court with the objective of promoting and protecting human and peoples' rights in Africa. Limiting the ability of individuals to access the Court more than the Protocol already does is contrary to the object and purpose of the Court Protocol as it limits the Court's ability to uphold its mandate: to protect human rights.

Comparatively, a similar set of facts was presented before the Inter-American Court in *Hilaire*.[68] The Inter-American Court was tasked to determine the validity of a reservation made by Trinidad and Tobago when depositing their instrument of adherence to the American Convention on Human Rights (ACHR), which provided that:

> [T]he Government of the Republic of Trinidad and Tobago, recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights, as stated in [article 62], only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.[69]

In this case, the respondent state argued that the reservation was not in contravention with the object and purpose of the ACHR as it did not deny the exercise of any rights provided for in the ACHR.[70]

66 Adjolohoun (n 4) 8.

67 Adjolohoun (n 4) 9.

68 *Hilaire v Trinidad and Tobago* IHRL 1463 (IACHR 2001).

69 *Hilaire* (n 68) para 43.

70 *Hilaire* (n 68) para 46.

However, the Inter-American Court held that accepting the reservation made by Trinidad and Tobago would lead to a situation in which the state's Constitution would be the first point of reference for the Court, with the *ACHR* rendered a subsidiary parameter.[71] According to the Inter-American Court, this would 'cause a fragmentation of the international legal order for the protection of human rights, … which … render illusory the object and purpose of the [*ACHR*]'.[72] The Court further held that the nature of international obligations arising from human rights treaties have a special character that sets them apart from other treaties in that they do not govern the mutual interests between states.[73] According to the Inter-American Court, the object and purpose of treaties with a human rights mandate is the protection of the basic rights of individuals, and states undertake to submit themselves to a legal order within which they assume various obligations towards all individuals within their jurisdiction.[74] Based on the arguments put forth by the Inter-American Court in *Hilaire,* it is argued that a 'reservation' aiming to limit the scope of the jurisdiction of an international human rights court on the basis of domestic law would be incompatible with the object and purpose of the founding treaty of that international court. This is so as it would go against the object and purpose of that founding treaty to establish such jurisdiction.

Furthermore, article 27 of the VCLT provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Arguably, requiring access to be granted in terms of domestic law falls within the purview of a prohibited justification in terms of article 27. In making a declaration under article 34(6), Tanzania undertook to allow its citizens to access the Court after exhausting domestic remedies. As such, using the Tanzanian Constitution as a reason to prohibit the access of their citizens contravenes article 27.

3.2 The 'court of first instance' or 'appellate court' arguments

Another major point of contention for Tanzania was the assertion that the African Court repeatedly acted as a court of first instance or as an appellate court, which falls outside the jurisdiction of the African Court in terms of the Court Protocol. In *Thomas,*[75] the applicant alleged that there were grave inconsistencies regarding the evidence used by the Tanzanian Court of first instance and the appellate courts, which affected his right

71 *Hilaire* (n 68) para 93.

72 As above.

73 *Hilaire* (n 68) para 94.

74 *Hilaire* (n 68) para 95.

75 *Alex Thomas v Tanzania* (2015) 1 AfCLR 465.

to a fair hearing.[76] Tanzania responded to these allegations by stating that these are matters that are not within the purview of the African Court, as the Tanzanian Court of Appeal is the final court of appeal in this regard and has already adjudicated upon them.[77] However, the African Court rejected these arguments, holding that '[t]hough this Court is not an appellate body with respect to decisions of national courts, this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instrument ratified by the State concerned'.[78] The Court further held that it would examine the inconsistencies at national courts to establish whether appropriate principles and international standards were applied in resolving them.[79] Tanzania effectively echoed the unsuccessful arguments made in *Thomas* in *Onyachi & Njoka*,[80] *Guehi*[81] and *Rutakikirwa*,[82] to name a few.

3.3 The 'disregard of the authority of the apex court' argument

Another area in which Tanzania has taken issue with the African Court's authority is the alleged 'overstepping' of the authority of the domestic apex court on socio-political issues such as the death penalty and nationality.[83]

With regard to the death penalty, Tanzania has consistently affirmed that its sentencing law is valid under international law.[84] As argued by Faix et al., based on the timing of Tanzania's withdrawal notice, their

76 *Alex Thomas* (n 75) para 4.

77 *Alex Thomas* (n 75) para 126.

78 *Alex Thomas* (n 75) para 130.

79 As above. The Court further notes that this approach is consistent with the approach implemented by similar international courts, making special mention to *Baumann v Austria* [2004] ECHR 488 (7 October 2004); *Echaria v Kenya* [2011] ACHPR 89 (5 November 2011); *Marzioni v Argentina* OEA/Ser. UV/11.95 Doc. 7 rev 76; *Garcia Ruiz v Spain* IHRL 3226 (ECHR 1999); *Perez v France* Judgment of 12 February 2004 (Grand Chamber); and *Dufaurans v France* Judgment of 21 March 2000.

80 *Kennedy Owino Onyachi & Charles John Mwanini Njoka v Tanzania* (merits) (2017) 2 AfCLR 65.

81 *Guehi* (n 27).

82 *Rutakikirwa v United Republic of Tanzania* (merits and reparations) [2022] AfCHPR 77 (24 March 2022).

83 Adjolohoun (n 4) 9. See also *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (2018) 2 AfCLR 248, where the African Court ordered Tanzania to provide individuals with judicial remedies in the event of a dispute over their citizenship.

84 Adjolohoun (n 4) 9.

withdrawal was prompted by the African Court's decision in *Rajabu*, which dealt with the validity of Tanzania's death penalty laws.[85]

The *Rajabu* case concerned two applicants who were sentenced to death by the High Court of Tanzania in Arusha in 2011.[86] After their Appeals were dismissed by the Tanzanian Court of Appeal in Criminal Appeals. They had filed an application for review, which was still pending at the time of their application to the African Court.[87] The applicant alleged various violations relating to procedural errors and inconsistencies committed by the local authorities and a violation of their right to life and dignity under the African Charter.[88] *Rajabu* dealt with a serious and politically controversial topic, namely, the validity of the death penalty in terms of article 4 of the African Charter. The African Court confirmed that the imposition of the death penalty may limit the right to life if it conforms to three criteria: it is (1) provided by law, (2) imposed by a competent court, and (3) abides by the principles of due process.[89] Section 197 of the Tanzanian penal code provides that '[a]ny person convicted of murder shall be sentenced to death'. As such, the African Court was satisfied that the death penalty complied with the first two requirements. However, the African Court held that section 197 does not uphold fairness and due process as guaranteed in article 7(1) of the African Charter.[90] As argued by the Court, the mandatory nature of the death penalty, coupled with the fact that those convicted are not permitted to bring mitigating evidence to possibly avoid such a sentence, renders section 197 unfair and arbitrary.[91] Furthermore, it strips the trial judge of any discretion in this regard, not allowing them to consider important contextual factors when deciding on the applicability of the death sentence in any given case.[92] As such, the African Court found section 197 of the Tanzanian penal code to violate article 4 of the African Charter and thus invalid, ordering Tanzania to take all necessary measures to remove the mandatory imposition of the death penalty from its penal code within one year of receiving judgment.[93] Tanzania is yet to submit a report regarding its compliance with the

85 *Rajabus v United Republic of Tanzania* (merits and reparations) (2019) 3 AfCLR 539. See further Faix & Jamali (n 21) 66.

86 *Ally Rajabu* (n 85) para 4.

87 *Ally Rajabu* (n 85) para 5.

88 *Ally Rajabu* (n 85) para 6.

89 *Ally Rajabu* (n 85) para 104.

90 *Ally Rajabu* (n 85) para 111.

91 *Ally Rajabu* (n 85) paras 109-112.

92 *Ally Rajabu* (n 85) para 109.

93 *Ally Rajabu* (n 85) paras 114 & 171 xv.

Rajabu judgment.[94] Furthermore, shortly after the judgment, the Attorney General of Tanzania stated that the government was unhappy about the judgment and that 'Tanzania is governed by laws, the Constitution of the United Republic of Tanzania taking the lead'.[95]

While *Rajabu* is not the only or direct cause for the withdrawal, it may have just been the straw that broke the camel's back as the judgment was one of many in which the African Court ordered the Tanzanian government to amend domestic laws to comply with its international obligations.[96] On 11 March 2022, the Deputy Minister for Foreign Affairs and East African Cooperation of Tanzania stated that '[t]he decision [to withdraw its article 34(6) declaration] was arrived at following thorough consultations and discussions for the good of the country's sovereignty and not politically motivated'.[97] Arguably, Tanzania has shown its hesitance towards the African Court's authority for years.[98] The statement from the Deputy Minister merely affirms that it was an issue of protecting state sovereignty.

3.4 The 'bundle of rights' argument

In relation to the protection of state sovereignty and in reference to the admissibility of a case, Tanzania has repeatedly taken issue with the application of the theory of a 'bundle of rights'.[99] This issue is closely related to the exhaustion of local remedies, as referred to in section 3.1 above. As is evidenced in *Thomas*,[100] *Nguza*,[101] *Onyachi & Njoka*[102] and *Guehi*,[103] this theory, as applied by the African Court, entails declaring a case admissible on the sum total of issues raised by the applicant by

94 Activity Report (n 27) at 9.

95 F Kapama 'Tanzania: state unhappy with death penalty ruling' 30 November 2019 https://allafrica.com/stories/201911300077.html (accessed 29 April 2023).

96 See *Tanganyika Law Society and The Legal and Human Rights Law Centre v The United Republic of Tanzania* [2013] AfCHPR 8 (14 June 2013); *Reverend Christopher R Mtikila v The United Republic of Tanzania* (2011) 1 AfCLR 32 (Judgment); and *Rajabu v The United Republic of Tanzania (merits and reparations)* (2019) 3 AfCLR 539.

97 E Qorro 'Tanzania: Dar sets record clear on African Court withdrawal' 11 March 2022 https://allafrica.com/stories/202203110421.html (accessed 29 April 2023).

98 See African Court on Human and Peoples' Rights activity reports for low compliance levels displayed by Tanzania https://www.african-court.org/wpafc/activity-report/ (accessed 29 April 2023).

99 For further discussion, see Adjolohoun (n 4) 28.

100 *Alex Thomas* (n 75) para 60.

101 *Nguza v Tanzania* (merits) (2018) 2 AfCLR 287 para 53.

102 *Onyachi & Njoka* (n 80) para 53.

103 *Guehi* (n 27) para 50.

clustering them together. The argument established by the Court in this regard, strictly in relation to the admissibility of the case, is that although a specific issue brought to the Court by an applicant may not have been raised before domestic courts, as such, courts ought to have known of other, related, issues while attending to the issue that was actually brought before it. Adjolohoun aptly highlights the problematic nature of the bundle of rights approach by pointing out its inherent flaw in that the practice consists of declaring an application admissible on all the issues raised by bundling them together mainly on the grounds that 'domestic courts *ought* to have been aware of other issues while examining only the one issue that was *actually* brought to their purview [emphasis added]'.[104]

This approach by the Court arguably waters down the scope of article 56(5) of the African Charter, which creates subsidiarity between the domestic and supranational judicial systems. In applying this theory, and in light of the way Tanzania has closely guarded its sovereignty before the African Court, it is not surprising that Tanzania took issue with what Adjolohoun refers to as an 'unprincipled' application of the theory of a 'bundle of rights'.[105]

4 Benin's withdrawal

The minister of foreign affairs and cooperation of Benin deposited Benin's withdrawal notice at the AU Commission on 24 March 2020. Much like Tanzania, Benin has been guilty of violating the right to freedom of expression to an egregious extent in recent years. According to Freedom House, Benin experienced the fifth largest decline in political rights and civil liberties in 2021 and the seventh largest decline in freedom over the last decade.[106] Faix et al. argue that Benin's decision to withdraw 'can be seen as a strategy by the authorities to increase impunity and block human rights scrutiny by an independent judicial body'.[107]

4.1 The 'interfering in the municipal legal order' argument

In its withdrawal notice, Benin claimed that the reason for withdrawal was that the African Court implemented the jurisdiction brought about by article 34(6) in a manner that was 'perceived as a licence to interfere with matters that escape its competence causing serious disturbance to

104 Adjolohoun (n 4) 28.

105 As above.

106 Freedom House 'Countries and territories' https://freedomhouse.org/countries/freedom-world/scores (accessed 13 August 2022).

107 Faix & Jamali (n 21) 68.

the municipal legal order and legal uncertainty that is fully detrimental to the necessary economic attractiveness of State Parties'.[108] The notice specifically refers to the judgment on provisional orders in *Kodeih*, describing this order as a regrettable interference and unfortunate intrusion.[109] The order suspended the enforcement of a domestic court judgment for the seizure of property to honour a bank loan in a commercial deal between private persons. However, the *Kodeih* matter was only on provisional measures, as is further discussed in section 4.2 below. When the Court heard the matter on the merits, it found that the matter was inadmissible because the applicants did not exhaust all local remedies.[110] However, the withdrawal notice mentions that the *Kodeih* matter was only 'one of the instances of interference', which suggests that Benin had further reasons for withdrawing.

Between 2018 and 2020, the African Court delivered several critical judgments against Benin. The most important of these is *Ajavon*.[111] The matter concerned Mr Ajavon, a Beninese political figure and businessman who was sentenced to 20 years in prison and fined five million CFA Francs for drug trafficking.[112] Mr Ajavon was sentenced by a newly formed 'Anti-Economic Crimes and Terrorism Court' (CRIET) after he had already been acquitted by the Criminal Chamber of the First Class Court of First Instance on the same facts.[113] In the judgment on provisional measures, the African Court ordered a stay in the execution of the sentence delivered by the CRIET Court, despite the acknowledgement by the African Court that the decisions of the CRIET Court are subject to appeal, according to the Court, there was still a risk that the judgment would be executed, notwithstanding this fact.[114] Based on this, the African Court found that the circumstances of the case were a situation of extreme gravity and presented a risk of irreparable harm to the applicant if the CRIET judgment was executed prior to the Court's decision in the matter pending before it.[115] Benin challenged the African Court's jurisdiction by arguing that the African Court lacked material jurisdiction on the grounds that the violations alleged were political and economic in nature, 'and [were]

108 African Court withdrawals: Benin https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Benin.pdf (accessed 26 July 2023).

109 African Court withdrawals: Benin (n 108).

110 *Ghaby Kodeih v Republic of Benin* (jurisdiction and admissibility) (2020) 4 AfCLR 24 paras 61-70.

111 *Ajavon v Benin* (provisional measures) (2018) 2 AfCLR 470.

112 *Ajavon* (provisional measures) (n 111) 470.

113 *Ajavon v Benin* (reparations) (2019) 3 AfCLR 196 para 8.

114 *Ajavon* (reparations) (n 113) paras 43-44.

115 *Ajavon* (reparations) (n 113) para 45.

in no way related to a fundamental law contained in the Charter, the Protocol or any other relevant human rights instrument'.[116] The African Court rebuked the arguments made by Benin and held, much like it did in *Thomas, Onyachi & Njoka* and *Guehi*, that 'as long as the rights allegedly violated come under the purview of the Charter or any other human rights instrument ratified by the State concerned, the Court will exercise its jurisdiction'.[117] Despite the precedent set by the African Court in this matter, Benin continued with these arguments. In this regard, Adjolohoun aptly suggests that 'Benin's report to the Court already indicated a posture of defiance and hence foretold a looming crisis … [t]he following decisions appeared to have turned the looming crisis into direct confrontation and, finally, into divorce'.[118]

In the *Avajon* merits judgment, the African Court found various violations of Mr Ajavon's human rights. Thus, it ordered Benin to take all necessary measures to annul the judgment delivered by the CRIET Court.[119] Later, the African Court delivered its judgment on reparations in *Avajon* and ordered Benin to pay US$ 66 000 000 in reparations to Mr Avajon.[120] Less than three months after this order, the African Court made the ruling in *Kodeih,* as discussed above, after which Benin submitted its notice of withdrawal.[121]

4.2 Provisional orders: Unreasonable practices?

The specific reference to the *Kodeih* matter in Benin's withdrawal notice raises some important questions relating to the African Court's practices regarding provisional orders. It is beyond question that the ability to issue provisional orders is a valuable tool available to the African Court in its effort to fulfil its mandate of human rights protection on the continent. Provisional orders grant the African Court a protective mechanism for preventing and/or remedying human rights violations in grave or urgent situations.[122] Furthermore, as argued by Juma, provisional orders have the potential to 'provide not only individual justice for specific applicants but also protect populations in situations involving large-scale or gross

116 *Ajavon* (reparations) (n 113) para 31.

117 *Ajavon* (reparations) (n 113) para 42.

118 Adjolohoun (n 4) 14.

119 *Ajavon* (reparations) (n 113) para 292.

120 Adjolohoun (n 4) 15.

121 As above.

122 D Juma 'Provisional measures under the African human rights system: the African Court's order against Lybia' (2012) 30 *Wisconsin International Law Journal* at 346.

violations of international human rights and humanitarian law'.[123] However, the African Court has arguably unjustifiably utilised its provisional orders with a detrimental effect on the state parties involved. As noted by Adjolohoun, '[t]he practice of the African Court in relation to provisional orders raises issues'.[124]

The African Court was first called upon to make a provisional order in *Libya*[125] after the African Commission found gross violations of human rights enshrined in articles 1, 2, 4, 5, 9, 11, 12, 13, and 23 of the African Charter committed by the Great Socialist People's Libyan Arab Jamahiriya (Libya).[126] Essentially, the Court held that it had to decide on whether it had jurisdiction in each case in terms of articles 3 and 5 of the Court Protocol, that is, the material jurisdiction (article 3) and personal jurisdiction (article 5) when deciding on a matter on provisional measures.[127] Furthermore, it was held that the Court need not decide its jurisdiction based on the merits of the case; instead, it would have sufficient jurisdiction if it is satisfied that it has *prima facie* jurisdiction based on the facts of the case.[128]

The practice of international courts merely satisfying *prima facie* jurisdiction is not controversial at face value, as noted by Worster,

> It is well accepted that courts, and even human rights bodies, can issue orders for provisional (or 'interim') measures, including situations of proposed expulsion. The standards for issuing such measures are fairly consistent in looking for *prima facie* jurisdiction over the merits and serious and/or irreversible harm.[129]

However, within the unique context of the African Court, it is argued that following the same practice as other international courts is not to its benefit when state resistance is considered. While the Court determines *prima facie* jurisdiction in provisional orders, it does not consider the *prima facie* admissibility of the matter, resulting in instances where provisional orders are given, only for the case to be deemed inadmissible at the merits stage. Adjolohoun argues that being concerned with the *prima facie* jurisdiction of the matter, but not the admissibility thereof, may result in

123 Juma (n 122) 346.

124 Adjolohoun (n 4) 29.

125 *African Commission on Human and Peoples' Rights v Libya* IHRL 3934 (ACtHPR 2016).

126 Juma (n 122) para 3.

127 Juma (n 122) para 14.

128 Juma (n 122) para 15.

129 W Worster 'Unilateral diplomatic assurances as an alternative to provisional measures' (2016) 15 *Law and Practice of International Courts and Tribunals* at 460.

the Court's provisional order overriding admissibility 'in a way that causes unnecessary and unfair damage to the respondent'.[130] The African Court may issue provisional orders that are both financially and bureaucratically burdensome for the respondent state, only to find that the matter was never admissible when the Court reaches the merits phase.

This scenario is not just hypothetical, as is seen in *Kodeih*. The African Court ordered a stay in execution of a judgment rendered by the First Class Court of Benin, which ordered two Beninese businessmen to demolish a hotel in violation of local building permits.[131] The reasoning behind the African Court's order was that the execution of the radical judgment would cause irreparable harm to the applicants as they invested a large sum of capital and would not be compensated if the judgment was implemented. However, when the matter reached the merits stage, the African Court determined that the applicants could have appealed the matter to the Common Court of Justice and Arbitration, which was deemed to be a local and effective remedy in the circumstances.[132] Accordingly, the Court ruled that the case was inadmissible as the applicants did not exhaust all local remedies, as noted in section 4 1 above.[133] Arguably, it could have been determined that the applicants had not exhausted all local remedies at the provisional order stage with relative ease, resulting in a more effective result for all parties involved. The reason for the African Court applying the *prima facie* approach to jurisdiction but not to admissibility is unclear.[134] Applying the same approach to admissibility, as the Court does to jurisdiction, at the provisional order stage would save time and money for the Court, respondent state, and the applicant.

Another concern arising from the use of provisional orders in this way is that they may be utilised systemically and frequently, which may have such a far-reaching impact that they supersede the impact of the eventual merits decision.[135] An example of this in practice is *Local Elections,*[136] which dealt with alleged irregularities in election rules for the local municipal councillors elections scheduled for 17 May 2020 in Benin.[137] The applicant alleged that he was being excluded from running in the aforementioned elections, which violated various rights contained in International

130 Adjolohoun (n 4) 29.

131 *Kodeih v Benin* (provisional measures) (2020) 4 AfCLR 24 paras 1-6, 34.

132 *Kodeih v Benin* (jurisdiction and admissibility) (2020) 4 AfCLR 18 paras 61-68.

133 *Kodeih* (jurisdiction and admissibility) (n 132) para 70.

134 Adjolohoun (n 4) 29.

135 As above.

136 *Sebastien Germain Marie Aikoue Ajavon v Republic of Benin* (2020) 4 AfCLR 123.

137 *Local Elections* (n 136) para 6.

Treaties.[138] The reason for his exclusion from the elections was that Benin had never stayed the execution of the warrant issued against the applicant, despite the Court's provisional order in *Ajavon*, as discussed under 4 1*;* as such, the applicant had a criminal record that prohibited him from participating in government in terms of Benin's domestic laws.[139] The Court held that, based on the facts presented, there exists a real risk of the applicant being forced to be absent from the 17 May 2020 elections, thus rendering the harm irreparable.[140] As such, the Court ordered the suspension of the elections until the matter has been decided on merits.[141]

Compliance with the provisional order in *Ajavon – Local Elections* would undoubtedly require a substantial financial and administrative contribution from Benin. It is thus not surprising that days after the order, the Minister of Communication stated that '[s]afeguarding the rights of a Beninese national cannot outweigh the normal functioning of our institutions and the application of the provisional order 'would be a miracle'.[142] The order to suspend the elections came exactly one month before the elections were scheduled to take place. Arguably, the African Court acted unreasonably in this regard, regardless of the fact that the African Court eventually found various violations committed by Benin in the merits judgment delivered on 4 December 2020.[143] The extreme burden placed on Benin in this regard only cemented its position in withdrawing its article 34(6) declaration. As argued by Adjolohoun, the approach by the Court is 'counter-productive in the framework of international human rights adjudication involving sovereign states'.[144]

5 Conclusion

As noted under section 2.4, the withdrawals from the Court's personal jurisdiction are of serious concern for the continued operation of

138 *Local Elections* (n 136) para 4. The applicant alleged violations of the African Charter, arts 3,4,5,6,7(1)(c), 10, 11, 13, 15, and 26; the African Charter on Democracy, arts 2(2), 3(2), 4(1), 10(2), 23(5) and 32(8); art 25 of the International Covenant on Civil and Political Rights; and the International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3, art 22.

139 *Local Elections* (n 136) paras 66-67.

140 *Local Elections* (n 136) para 68.

141 *Local Elections* (n 136) para 69 & VII (4).

142 V Agué 'CADHP: Le Bénin retire le droit de saisine directe aux citoyens et Ong' 23 April 2020 https://ortb.bj/politique/le-benin-ne-permet-plus-a-ses-citoyens-de-saisir-directement-la-cour-africaine-des-droits-de-lhomme/ (accessed 1 August 2023).

143 *Ajavon v Republic of Benin* (merits) (2019) 3 AfCLR 130 para 369 vi-xix.

144 Adjolohoun (n 4) 29.

the African Court. The limitation of the most important stream of applications will negatively affect the African Court's ability to adequately fulfil its mandate as a human rights protector. Given the serious risk these withdrawals pose to the legitimacy of the African Court, from the victim's perspective, it is clearly a form of backlash. In this regard, there are two possible outcomes: the development of the law and the institution or no such developments.[145] As such, the *backlash* could limit the institution's powers, either procedurally or substantially, or it could lead to the international court having diminished authority or no authority.[146] While both Tanzania and Benin are still parties to the Court Protocol and subject to the African Court's jurisdiction if a case is submitted outside the ambit of article 34(6), the adverse effect of a lack of cases is detrimental to the African Court's authority. It is too early to establish the long-term effects for the African Court in a general sense; however, it is clear that the ability of the Court to protect victims of human rights violations in Tanzania and Benin has been severely limited.

The socio-political circumstances of both states are also cause for concern. The identifiable pattern seen in each instance is indicative of a move towards authoritarianism. Authoritarian states tend to disregard international obligations and resist the authority of supranational judicial organs.[147] This trend can be noticed in the withdrawing states' reluctance to be held accountable by the African Court.

Some reasons discerned in the article are of no fault of the Court, such as the so-called reservation made by Tanzania, the 'disregard of the authority of the apex court' argument perpetuated by Tanzania and the 'interfering of the municipal legal order' argument perpetuated by Benin. Arguably, the withdrawing states are more interested in protecting their state sovereignty in these instances than in complying with their international obligations concerning the African Court.

However, it is also clear that the African Court can improve on some of its practices to make the article 34(6) declaration more appealing to states that have yet to make it and to convince withdrawing states to reconsider their decision. In this regard, it is imperative that the African Court reconsider its application of the 'bundle of rights' approach with regard to admissibility. The African Court should only consider issues

145 Madsen et al (n 9) 206.

146 Madsen et al (n 9) 207.

147 O Chyzh 'Can you trust a dictator: A strategic model of authoritarian regimes' signing and compliance with international treaties' (2014) 31 *Conflict Management and Peace Science* at 5.

that have actually been considered and addressed by domestic courts in order for an issue to be deemed admissible for the Court to adjudicate thereon. Furthermore, the African Court should reconsider its approach to its *prima facie* considerations in the provisional order stage of a case. The admissibility of the case should also be considered *prima facie* to avoid what happened in the *Kodeih* matter. Considering the *prima facie* admissibility of a case would arguably result in a more just process and save time and money for both the applicants and respondents.

Table of abbreviations

ACHR	American Convention on Human Rights
AU	African Union
CRIET	Anti-Economic Crimes and Terrorism Court
NGO	Non-governmental organisations
SADC	Southern African Development Community
VCLT	Vienna Convention on the Law of Treaties

Literature

Adjolohoun SH 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1-40

African Court on Human and Peoples' Rights 'A publication of the coalition for an effective African Court on Human and Peoples' Rights' (2020) 1 *ACC Publication* https://www.african-court.org/wpafc/wp-content/uploads/2020/11/ACC-Publication_Volume-1_2020_ENG.pdf

African Court on Human and Peoples' Rights 'ACtHPR cases' https://www.african-court.org/cpmt/statistic

African Court on Human and Peoples' Rights 'Declarations' https://www.african-court.org/wpafc/declarations/

African Court on Human and Peoples' Rights activity reports for low compliance levels displayed by Tanzania https://www.african-court.org/wpafc/activity-report/

African Court Withdrawals: Benin https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Benin.pdf

African Court Withdrawals: Tanzania https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf

Agué v 'CADHP: Le Bénin retire le droit de saisine directe aux citoyens et Ong' 23 April 2020 https://ortb.bj/politique/le-benin-ne-permet-plus-a-ses-citoyens-de-saisir-directement-la-cour-africaine-des-droits-de-lhomme/

Bourdieu P 'The force of law: toward a sociology of the judicial field' (1987) 38 *Hastings Law Journal* 805-853

Chenwi L 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374-398

Chyzh O 'Can you trust a dictator: A strategic model of authoritarian regimes' signing and compliance with international treaties' (2014) 31 *Conflict Management and Peace Science* 3-27

Daly T & Wiebusch M 'The African Court on Human and Peoples' Rights: mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* 294-313

Faix M & Jamali A 'Is the African Court on Human and Peoples' Rights in an existential crisis?' (2022) 40 *Netherlands Quarterly of Human Rights* 56-74

Freedom House 'Countries and territories' https://freedomhouse.org/countries/freedom-world/scores

Freedom House *Freedom in the world 2022: The global expansion of authoritarian rule* (2022)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and-peoples-rughts

Juma D 'Provisional measures under the African human rights system: the African Court's order against Libya' (Libya) (2012) 30 *Wisconsin International Law Journal* 344-373

Kapama F 'Tanzania: state unhappy with death penalty ruling' 30 November 2019

Madsen MR, Cebulak P & Wiebusch M 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* 197-220

Naldi G & Magliveras K 'The new SADC tribunal: or the emasculation of an international tribunal' (2016) 63 *Netherlands International Law* Review 133-159

Nathan L 'The disbanding of the SADC Tribunal: a cautionary tale' (2013) 35 *Human Rights Quarterly* 870-892

Qorro E 'Tanzania: Dar sets record clear on African Court withdrawal' 11 March 2022 https://allafrica.com/stories/202203110421.html.

Rickard C 'African Court's existence threatened by lack of cooperation from AU states' 25 March 2021 https://africanlii.org/article/20210325/african-court's-existence-threatened-lack-cooperation-au-states

Worster W 'Unilateral diplomatic assurances as an alternative to provisional measures' (2016) 15 *Law and Practice of International Courts and Tribunals* 445-471

International, Regional and Other Rights Instruments

Activity Report of the African Court on Human and Peoples' Rights, Executive Council Thirty-Eight Ordinary Session Videoconference 3-4 February 2021 Addis Ababa, Ethiopia EX.CL/1258(XXXVIII)

African Charter on Democracy Adopted by the eighth ordinary session of the Assembly, held in Addis Ababa, Ethiopia, on 30 January 2007

African Court on Human and Peoples Rights 'Activity Report of the African Court on Human and Peoples' Rights 1 January-31 December 2021' (2022) EX.CL/1323(XL) Annex II

International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5

Treaty of the Southern Africa Development Community (adopted 17 August 1992, entered into force 30 September 1993)

Seventeenth Amendment of the Constitution of the Republic of Zimbabwe, 2005, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/72087/90494/F1340885370/ZWE72087.pdf

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Cases

Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) AHRLR 668 (ACHPR 2016)

Adelakoun v Republic of Benin [2021] AfCHPR 39

African Commission on Human and Peoples' Rights v Libya IHRL 3934 (ACtHPR 2016)

Ajavon v Benin (provisional measures) (2018) 2 AfCLR 470

Ajavon v Benin (reparations) (2019) 3 AfCLR 196

Ajavon v Republic of Benin (merits) (2019) 3 AfCLR 130

Anudo Ochieng Anudo v United Republic of Tanzania (merits) (2018) 2 AfCLR 248

Baumann v Austria [2004] ECHR 488 (7 October 2004)

Dufaurans v France Judgment of 21 March 2000

Echaria v Kenya [2011] ACHPR 89 (5 November 2011)

Evarist v Tanzania (merits) (2018) 2 AfCLR 402

Garcia Ruiz v Spain IHRL 3226 (ECHR 1999)

Ghaby Kodeih v Republic of Benin (jurisdiction and admissibility) (2020) 4 AfCLR 24

Guehi v Tanzania (merits and reparations) (2018) 2 AfCLR 477

Hilaire v Trinidad and Tobago IHRL 1463 (IACHR 2001)

Ivcher Brontein v Peru IHRL 1457 (IACHR 2001)

Jawara v The Gambia (2000) AHRLR 107 (ACHPR 2000)

Kennedy Owino Onyachi & Charles John Mwanini Njoka v Tanzania (merits) (2017) 2 AfCLR 65

Kodeih v Benin (jurisdiction and admissibility) (2020) 4 AfCLR 18

Kodeih v Benin (provisional measures) (2020) 4 AfCLR 24

Law Society of South Africa v President of the Republic of South Africa 2019 (3) SA 30 (CC)

Lohé Issa Konaté v Burkina Faso (reparations) (2016) 1 AfCLR 346

Marzioni v Argentina OEA/Ser. UV/11.95 Doc. 7 rev 76

Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008)

Nguza v Tanzania (merits) (2018) 2 AfCLR 287

Norbert Zongo v Burkina Faso (reparations) (2015) 1 AfCLR 258

Paulo v Tanzania (merits) (2018) 2 AfCLR 446

Perez v France Judgment of 12 February 2004 (Grand Chamber)

Rajabu v The United Republic of Tanzania (merits and reparations) (2019) 3 AfCLR 53

Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13

Reverend Christopher R Mtikila v The United Republic of Tanzania (2011) 1 AfCLR 32 (judgment)

Rutakikirwa v United Republic of Tanzania (merits and reparations) [2022] AfCHPR 77 (24 March 2022)

Sebastien Germain Marie Aikoue Ajavon v Republic of Benin (2020) 4 AfCLR 123

Tanganyika Law Society and The Legal and Human Rights Law Centre v The United Republic of Tanzania [2013] AfCHPR 8 (14 June 2013)

Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania [2013] AfCHPR 8 (14 June 2013)

Thomas v Tanzania (interpretation) (2017) 2 AfCLR 126

Umuhoza v Rwanda (merits) (2017) 2 AfCLR 165

Zongo v Burkina Faso (2013) 1 AfCLR 19*Ingabire v Rwanda* (jurisdiction) (2016) 1 AfCLR 562

Nganyi v Tanzania (reparations) (2019) 3 AfCLR 308