

HUMAN RIGHTS LITIGATION IN AFRICA UNDER ATTACK: ANALYSIS OF BACKLASH AGAINST REGIONAL AND SUB-REGIONAL COURTS / Ayyoub Jamali, Martin Faix

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Abstract: *Human rights values, to which international organisations adhere, serve not only as the working premise for achieving their goals but also constitute an inherent part of their legal framework and judicial decisions. Established by States that claim to share a fundamental set of values from the outset and are committed to reflecting these values throughout their activities, the African Union is no exception. The organisation articulated its fundamental principles and values in its founding Treaties, which include, among others, 'respect for democratic principles, human rights, the rule of law, and good governance.' Over time, various preventive, monitoring, and enforcement mechanisms have been developed to realise these human rights objectives in the continent. This progress includes the establishment of the African Commission in 1987 and the creation of the African Court in 1998, as well as the expansion of human rights jurisdiction of sub-regional courts over time. This article delves into the resistance faced by the judicial mechanisms used to enforce human rights in Africa. As demonstrated, in all cases under discussion, a State subject to an adverse ruling of the court responded by questioning its legitimacy and authority, advocating for institutional reforms to weaken the fledgling human rights system on the continent. The article highlights the similarities and differences between all cases, illustrating that the impact of political reaction in the case of the continental African Court and the SADC Tribunal has been much more severe than the ECOWAS and the EACJ court. It is argued that the institutional design of the courts, the scale of the community, relative State power, the subject matter of the judgment, the requirement to obtain consensus to revise the founding treaty of the courts, and the engagement of civil societies played crucial roles in determining the type and outcome of backlash in the cases under discussion.*

Key words: *Human Rights Courts; Resistance; African Court on Human and Peoples' Rights; African Sub-Regional Courts; SADC; ECOWAS; EACJ*

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1. INTRODUCTION

Human rights values to which international organisations adhere have been not only the working premise for achieving their goals but also an inherent part of their legal framework and judicial decisions (Buchanan, 2008; Scheppele, Kochenov and Grabowska-Moroz, 2020). Founded by States, which claim to share a set of fundamental values to begin with, and which they are keen on reflecting throughout their activities, the African Union (AU) is no different. The organisation laid its fundamental principles and values in its founding Treaties,¹ which among others include 'respect for democratic principles, human rights, the rule of law, and good governance'.² Over time, different preventive, monitoring, and enforcement mechanisms have been developed to realise these human rights objectives in the continent. This includes from the establishment of the African Commission on Human and Peoples Rights in 1987 and the creation of the African Court on Human and Peoples Rights (ACTHPR) in 1998 to the expansion of the human rights jurisdiction of subregional courts over time.

However, in the exercise of their jurisdiction over human rights disputes, all these judicial bodies have come under increasing pressure and resistance from member states. At the continental level, the African Court of Human and Peoples Rights (ACTHPR) has faced a new form of backlash where several of its member states decided to partially withdraw from the Court and thus limit its jurisdiction in individual communication (Faix and Jamali, 2022). In South Africa, the Southern African Development Community (the SADC Tribunal or the Tribunal) was *de facto* suspended in the aftermath of its decision on a highly controversial case related to Zimbabwe's land reform program (Nathan, 2013). In East Africa, the Kenyan government sought to eliminate the East African Court of Justice (EACJ) after a decision challenging an election to a subregional legislature, the East African Legislative Assembly (EALA) (Alter, Gathii and Helfer, 2016). A similar trend can be observed in West Africa where the political leaders of Gambia tried to limit the human rights jurisdiction of the Court of the Economic Community of West African States (ECOWAS) following its decision on a case upholding the allegation of torture of a dissident journalist (Alter, Helfer and McAllister, 2013). All these examples illustrate a pattern of resistance against international courts in Africa that threaten to undermine the foundation of the human rights legal system in this continent.

Although the challenges and issues of human rights law enforcement in Africa are a common theme that run through literature and discussed by stakeholders and academics (Cole, 2010; Daly and Wiebusch, 2018; Faix and Jamali, 2022; Murray et al., 2017; Pityana, 2004; Ssenyonjo, 2012; Viljoen, 2018), less scholarly attention has been paid to the comparative study of resistance to those courts in Africa that have jurisdiction on human rights disputes. This contribution, therefore, aims to conduct a comparative study analysing the aforesaid case of resistance to the four African regional and subregional courts and shed light upon the causes and consequences of each case of backlash.

The article draws on empirical, analytical, and descriptive methods. The first substantial part of the study elaborates on the four cases of backlash against the regional and subregional courts highlighting those case-laws which have led to the instigation of backlash against them; section three discusses the similarities and differences across the four cases, arguing that the variation in institutional settings explains why the continental African Court has faced a different form of backlash compared to the

¹ The EU values are enshrined in Article 2 of the Treaty on the European Union whereas the CoE values are listed in Article 3 of its Statute.

² Organisation of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000, art. 4 (m).

subregional ones. It is further argued that the relative State power, the need to obtain consensus to revise the founding treaty of each court, the subject matter of judgements, and the engagement of civil societies explain divergent outcomes of backlash against the subregional courts; section four evaluates the implications of backlash in all four cases for the protection and promotion of human rights in Africa; the last section provides some concluding remarks and it summarises the key findings of this paper.

2. INSTANCES OF BACKLASH AGAINST THE AFRICAN REGIONAL AND SUB-REGIONAL COURTS

2.1 *The Continental African Court*

The ACtHPR was established in terms of Article 1 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (Protocol), adopted in June 1998, in Ouagadougou, Burkina Faso, by the then OAU (Ebobrah, 2011).³ The Protocol came into force on 25 January 2004, and the Court became operational in 2006.⁴

The main controversial feature of the African Court concerns its contentious jurisdiction, where State parties and the African Intergovernmental Organization are the only entities that have standing in the proceedings.⁵ Individuals and non-governmental Organisations (NGOs) can directly appeal to the Court provided that the respondent state made an additional declaration under Article 34(6) of the founding protocol recognizing the Court's competence to receive such complaints.⁶ Although only 33 states have ratified the ACtHPR's Protocol,⁷ there are only eight states that have recognised the ACtHPR's jurisdiction in individual communications. This includes Burkina Faso, Ghana, Gambia, Niger, Guinea, Bissau, Malawi, Mali, and Tunisia.⁸

However, in the exercise of its power in the adjudication of individual complaints, the African Court has faced a new form of backlash from four of its member states who decided to withdraw their declarations under the said article and thus limit its jurisdiction in individual disputes. These decisions were mainly prompted by the Court's attempt to rule on individual petitions alleging violations of human rights by their respective national governments.

2.1.1 Rwanda

Rwanda became a state party to the Founding protocol of the African Court in May 2003. However, it was not until January 2013 that the country made a declaration under Article 34(6) of the Protocol, thus accepting the jurisdiction of the Court to hear cases filed directly by individuals and NGOs against it.⁹

³ *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998, entered into force 25 January 2004)* Art. 1 (Founding Protocol).

⁴ Executive Council Sixteenth Ordinary Session 25 - 29 January 2010 Addis Ababa, Ethiopia Report of the African Court on Human and People's Rights, para. 1.

⁵ Founding Protocol (n 3), art. 5 (1).

⁶ *Ibid.*, art. 5 (3).

⁷ Activity Report of the ACtHPR, Executive Council Forty Second Ordinary Session 16 January - 16 February 2023 Addis Ababa, Ethiopia, Ex.cl/1409(Xlii) (Activity Report 2022), p. 2-3.

⁸ *Ibid.*

⁹ Declarations, African Court on Human and Peoples' Rights. Available at: <https://www.african-court.org/wpafc/declarations/> (accessed on 22.07.2023).

In 2014, the case of *Ingabire v. Rwanda* triggered an unprecedented reaction from the Rwandan government, leading the country to withdraw its declaration under Article 34(6) of the Founding protocol. As a result, the African Court's jurisdiction to receive cases from individuals and NGOs against Rwanda was curtailed. The case was centred on allegations of human rights violations against opposition leader Victoire Ingabire. She was arrested after giving a public speech about reconciliation and ethnic violence at the Genocide Memorial Centre. She was later sentenced to 15 years in prison on charges that included spreading genocide ideology, aiding and abetting terrorism, sectarianism, undermining internal security, and denying the 1994 genocide against the Tutsis.¹⁰ Since the Rwandan Genocide of 1994, the government has implemented new laws to regulate the denial or minimization of the genocide and restrict speeches that could potentially cause ethnic violence (Faix and Jamali, 2022). The Ingabire case posed a significant challenge to the African Court as it involved sensitive and contentious issues, raising questions about how the Court should proceed.

The Rwandan authorities requested to withdraw the country Declaration under Article 34(6) of the Protocol shortly after the Ingabire case was scheduled to be heard by the ACTHPR in March 2016. The government sent a letter verbale to the AU Commission, which reads as follow:

'Consequent to the 1994 genocide against the Tutsi was the most heinous crime since the Holocaust and Rwanda, Africa and the world lost a million people in 100 days;

CONSIDERING that a Genocide convict who is a fugitive from justice has, pursuant to the above-mentioned Declaration, secured a right to be heard by the Honourable Court, ultimately [sic] gaining a platform for reinvention and sanitisation, in the guise of defending the human rights of the Rwandan citizens;

CONSIDERING that the Republic of Rwanda, in making the 22 January 2013 Declaration, never envisaged that the kind of person described above would ever seek and be granted a platform on the basis of the said Declaration;

CONSIDERING that Rwanda has established strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues;

NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court for Human and Peoples Rights to receive cases under Article 5(3) of the Protocol and shall make it afresh after a comprehensive review.¹¹

Furthermore, the Rwandan ambassador to the AU provided a more detailed explanation for the withdrawal. He stated that the Rwandan government realised that the Declaration was being abused by the judges due to the absence of a clear position by the

¹⁰ ACTHPR, *Ingabire v. Rwanda*, application. no. 003/2014, judgment of 24 November 2017, paras. 8, 114.

¹¹ Republic of Rwanda, Withdrawal for Review by the Republic of Rwanda from the Declaration Made 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, Ministry of Foreign Affairs and Cooperation, 000164, 24 February 2016.

Court regarding genocide convicts and fugitives. This realisation prompted the decision to withdraw, as the ambassador: 'That is why we withdrew.'¹²

Rwanda's statements appear to constitute an attack on the independence and legitimacy of the ACTHPR. However, it should be noted that the ability of a genocide fugitive to directly bring a case to the ACTHPR does not necessarily call into question the impartiality or independence of the court. The power and authority of a judicial institution are determined by its statutes and rules, and the ACTHPR protocol and rules do not contain any provisions that limit jurisdiction or admissibility based on the alleged participation of a petitioner in the incitation genocide.¹³ As such, Rwanda's objections to the jurisdiction of the court based on the perceived misuse of the Article 34(6) Declaration appear to be unfounded.

It is notable that the exit of Rwanda from its additional Declaration under Article 34(6) of the Protocol was not only motivated by the individual facts of the Ingabire case, but rather indicative of a larger trend in the socio-political governance of the country. This is supported by the submission of multiple applications against Rwanda by the political opponents of the government, which raised sensitive socio-political questions within the country. The cases of *Victoire Ingabire*, *Kennedy Gihana and others v. Rwanda*,¹⁴ *General Kayumba Nyamwasa and others v. Rwanda*,¹⁵ and *Laurent Munyandlikirwa v. Rwanda*,¹⁶ all touch upon various issues such as passport invalidation, the amendment of the Constitution to remove presidential term limits, and allegations of human rights violations. The decision to withdraw from the Declaration can therefore be seen as an attempt by the government to avoid scrutiny by the ACTHPR on these sensitive socio-political matters (Adjolohoun, 2020; Daly and Wiebusch, 2018; Windridge, 2018).

Notwithstanding the absence of any specific provision in the founding protocol pertaining to the conditions governing withdrawal from the additional Declaration, the ACTHPR expounded on the matter in its ruling on jurisdiction issued on 3 June 2016 in the Ingabire case. The ACTHPR acknowledged the legitimacy of Rwanda's request to withdraw from Article 34(6) of the Protocol but stipulated a one-year notification period before such a withdrawal would take legal effect. Furthermore, the ACTHPR clarified that the withdrawal would not affect any pending applications before the Court.¹⁷

2.1.2 Tanzania

Following Rwanda's withdrawal from the ACTHPR's jurisdiction in individual petitions, some positive developments took place, as several states decided to recognise the Court's jurisdiction in individual petitions. For example, Benin submitted its Declaration instrument around the same time when Rwanda partially exited the Court,¹⁸

¹² Rwanda rejects calls to endorse African rights court. In: The Citizen, published on April 19, 2021. Available at: <https://www.thecitizen.co.tz/news/Rwanda-rejects-calls-to-endorse-African-rights-court/1840340-3292644-b8tduz/index.html> (accessed on 22.06.2023).

¹³ Founding Protocol (n 3), art. 3, 5, and 34(6); Rules 26, 33 and 40 of Court Rules (2010).

¹⁴ ACTHPR, *Kennedy Gihana and others v. Republic of Rwanda*, application no. 017/2015, judgment of 28 November 2019.

¹⁵ ACTHPR, *General Kayumba Nyamwasa and others v. Republic of Rwanda*, application no. 016/2015, *Order on the Request for Interim Measures*, 24 March 2017, para. 3

¹⁶ ACTHPR, *Laurent Munyandlikirwa v. Republic of Rwanda*, application no. 023/2015, Case Summary, paras. 1-2.

¹⁷ ACTHPR, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, application. no. 003/2014, Ruling on Withdrawal of Declaration, 3 June 2016, paras. 51-68.

¹⁸ Declarations, African Court on Human and Peoples' Rights. Available at: <https://www.african-court.org/wpafc/declarations/> (accessed 22.06.2023).

and both Tunisia and Gambia recognised the jurisdiction of ACtHPR under Article 34 (6) of the Protocol in 2017 and 2018, respectively.¹⁹ This recognition of the Court's jurisdiction was crucial for enhancing its legitimacy and authority by allowing it to exercise jurisdiction over more states, thus increasing its caseload and contributing to the development of its jurisprudence.

However, this positive development was short-lived as Tanzania, which had ratified the ACtHPR founding Protocol in 2006 and deposited its Declaration instrument recognizing the jurisdiction of the Court in individual communication in 2010,²⁰ announced in December 2019 that it would withdraw its Declaration instrument concerning the Court's competence in individual petitions. In its withdrawal notice, Tanzania did not provide additional explanation to justify its decision, except a general statement that the Declaration instrument under Article 34 (6) of the Protocol was incompatible with the Constitution of the state.²¹ However, scholars argue that Tanzania's withdrawal decision was prompted by the ACtHPR judgment in the case of *Ally Rajabu and Others v. United Republic of Tanzania*,²² which concerned the issue of the imposition of the death sentence for murder convictions (De Silva, 2019; Faix and Jamali, 2022).

It should be noted that Tanzania's withdrawal from the ACtHPR's jurisdiction in individual petitions can also be attributed to the country's high number of cases filed against it and judgments issued against it by the Court. Tanzania has been the subject of most of the ACtHPR judgments, with the highest number of cases filed by its citizens and NGOs, and the highest number of judgments issued against it. Of the 76 cases finalised by the Court and 176 pending cases, Tanzania is subject to 33 and 105 cases, respectively.²³ Furthermore, the Court held Tanzania responsible for human rights violations in 23 of 26 merit judgments, ordering the country to remedy the violations.²⁴ This high number of cases against Tanzania has fuelled the perception among critics and opponents of ACtHPR that the country was being 'unfairly targeted' (Faix and Jamali, 2022).

Furthermore, Tanzania's withdrawal can also be linked to the rise of populism in the country and the subsequent democratic backsliding (Brandes, 2018; Faix and Jamali, 2022).²⁵ Since the regime change in 2015, Tanzania has been accused of taking a path towards authoritarianism, resulting in erosion of freedoms and crackdowns on human rights activists, free media, and political opponents.²⁶ The government has increased censorship by banning and suspending major newspapers from releasing critical

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² ACtHPR, *Ally Rajabu and Others V. United Republic of Tanzania*, application no. 007/2015, judgment of 28 November 2019.

²³ Contentious Matters, African Court on Human and People's Rights. Available at: <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases> (accessed 22.07.2023).

²⁴ Activity report of the African Court on Human and Peoples' Rights, 1 January – 31 December 2018, EXECUTIVE COUNCIL Thirty-Fourth Ordinary Session 07 - 08 February 2019, Addis Ababa, Ethiopia.

²⁵ Empirical evidence suggests that courts operating in populist environments are often subject to the resistance of populist politicians.

²⁶ Tanzania: Climate of fear, censorship as repression mounts. In: Amnesty International, published on October 28, 2019. Available at: <https://www.amnesty.org/en/latest/news/2019/10/tanzania-climate-of-fear-censorship-as-repression-mounts/> (accessed on 22.07.2023); see Tanzania. In: Freedom House. Available at: <https://freedomhouse.org/country/tanzania/freedom-world/2020> (accessed on 23.07.2023); Oppressive laws come under the spotlight. In: The Citizen, published on October 29, 2019. Available at: <https://www.thecitizen.co.tz/news/1840340-5328760-format-xhtml-10vh11dz/index.html> (accessed on 22.06.2023).

content. The change of government and its subsequent repression of human rights defenders and media explain its decision to restrict the jurisdiction of the Court in individual communications (Faix and Jamali, 2022).

2.1.3 Benin

Benin had initially accepted the ACTHPR's competence to adjudicate cases submitted by individuals and NGOs in February 2016. However, the government announced its decision to withdraw its Declaration in March 2020, citing a series of court judgments against it as the reason for its withdrawal.²⁷

In its notice of withdrawal from the ACTHPR on 24 March 2020, the Benin authorities stated that the decision to withdraw the additional Declaration resulted from excessive interference by the ACTHPR in matters beyond its competence, causing serious disturbances to municipal legal order and economic attractiveness of the member states (Adjolohoun, 2020). Specifically, it referred to the *Kodeih* case in which the ACTHPR ordered Benin to suspend the execution of a domestic order on the seizure of property to recover a bank debt in a commercial dispute between private persons (Adjolohoun, 2020).

In addition, the government spokesperson provided a statement justifying the withdrawal decision arguing that withdrawal was a consequence of observable 'dysfunctions and slippages at the High Court'.²⁸ The spokesperson criticised the ACTHPR's decisions in recent years for 'serious incongruities' and noted how these also led Tanzania and Rwanda to limit the court's jurisdiction in individual petitions (Faix and Jamali, 2022).

Benin's notice of withdrawal from the ACTHPR and subsequent statements from the authorities suggest that the *Kodeih* case was not the sole reason for the government's decision. Another case that prompted the government to abandon its additional Declaration was the case of *Sébastien Ajavon*. In this case, the ACTHPR ordered the government to postpone a communal election until it delivered a merit judgment on the case instituted by Sébastien Ajavon, an exiled political leader who had been sentenced to 20 years of imprisonment for drug trafficking. In response to this order, the Minister and government spokesperson argued that withdrawal was necessary 'in order not to jeopardise the interests of a whole nation and the duty of a government that is responsible for running elections on time'.²⁹

Although it is clear that Benin cited the *Kodeih* and *Ajavon* cases to justify its withdrawal, the underlying reason for this decision may be related to deeper socio-political problems in the country. Between November 2018 and April 2020, Benin received eight unfavourable decisions from the ACTHPR, most of which involved political opposition figures (Adjolohoun, 2020; Faix and Jamali, 2022).

Therefore, Benin's decision to withdraw from the ACTHPR jurisdiction may be seen as a strategy by the authorities to increase impunity and block the investigation of

²⁷ ACTHPR, *Khomi Koutche v. Republic of Benin*, application no. 013/2020; ACTHPR, *XYZ v. Republic of Benin*, application no. 010/2020; ACTHPR, *Ghaby Kodeih and Nabih Kodeih v. Republic of Benin*, application no. 008/2020; ACTHPR, *Ghaby Kodeih v. Republic of Benin*, application no. 006/2020; ACTHPR, *Houngue Eric Noudehouenou v. Republic of Benin*, application no. 004/2020; ACTHPR, *Sébastien Germain Marie Aikoue AJAVON v. Republic of Benin*, application no. 062/2019.

²⁸ Benin withdraws from top African HR protocol. In: APA News, published on April 24, 2020. Available at: <https://www.journalducameroun.com/en/benin-withdraws-from-top-african-hr-protocol/> (accessed on 22.05.2023).

²⁹ *Ibid.*

human rights by an independent judicial body.³⁰ This assumption is supported by the decision of the Benin Constitutional Court, dated 30 April 2020, which held that the provisions of the Supplementary Protocol of the Court of Justice of the Economic Community of West African States (ECOWAS) are not enforceable against Benin, and any actions resulting from its implementation are void.³¹ In practical terms, this implies the withdrawal of Benin from the jurisdiction of the ECOWAS Court of Justice, which is not provided for by the applicable statutes (Faix and Jamali, 2022).

2.1.4 Côte d'Ivoire

The Government of Côte d'Ivoire is the latest state to have curtailed the jurisdiction of ACTHPR with respect to individual petitions, leaving only eight states that allow individuals and NGOs to submit cases directly to the court. In June 2013, Côte d'Ivoire had accepted the jurisdiction of the ACTHPR to receive cases brought by individuals and NGOs. However, in April 2020, the government withdrew from the special declaration, prompting concerns about political motivations.³²

Although Côte d'Ivoire had not previously had a contentious relationship with ACTHPR, its decision to withdraw from the special declaration in April 2020 appears to have been politically motivated. The government's decision was likely prompted by the ACTHPR ruling in the case of *Guillaume Kigbafori Soro and Others v. Côte d'Ivoire*. The judgment called on the state to suspend the arrest warrant for Guillaume Kigbafori Soro and to release dozens of members of his political party on bail.³³

This ruling was met with fervent contempt by the authorities in Côte d'Ivoire, who accused the court of making 'political decisions' that encroach on the country's sovereignty of the country, undermine its legal order, and create genuine legal insecurity (Faix and Jamali, 2022).³⁴ The Ivorian Minister of Communication further criticised the ACTHPR, stating that it was incapable of fulfilling its role and suggesting that the decision to withdraw from the special declaration was a consequence of 'intolerable actions that the African Court has allowed itself in its actions' (Faix and Jamali, 2022).³⁵ As a result, the Ivorian government refused to comply with the provisional order of the African Court, and Soro was subsequently sentenced in absentia to 20 years of imprisonment and five years of deprivation of civil and political rights, thus making him ineligible to run for the subsequent presidential election in October 2020.³⁶

³⁰ *Ibid.*

³¹ Constitutional review of the ECOWAS Court 2005 Supplementary Protocol, the Constitutional Court of Benin, Decision No. 20-434, 30 April 2020.

³² Declarations, African Court on Human and Peoples' Rights. Available at: <https://www.african-court.org/wpafc/declarations/> (accessed 22.06.2023).

³³ ACTHPR, *Guillaume Kigbafori Soro and Others v. Republic of Côte d'Ivoire*, application no. 012/2020, Order for Provisional Measures, 22 April 2020, para. 42.

³⁴ Diplomatie: la Côte d'Ivoire retire la déclaration de compétence à la Cour africaine des droits de l'homme et des peuples, Gouvernement de Côte d'Ivoire. Available at: http://www.gouv.ci/_actualite-article.php?recordID=11086&d=5 (accessed on 23.07.2023); Ivory Coast withdraws from African Human Rights and Peoples Court. In: *Africanews*, published on April 30, 2020. Available at: <https://www.africanews.com/2020/04/30/ivory-coast-withdraws-from-african-human-rights-and-peoples-court/> (accessed on 22.07.2023).

³⁵ Ivory Coast withdraws from African Human Rights and Peoples Court. In: *Africanews*, published on April 30, 2020. Available at: <https://www.africanews.com/2020/04/30/ivory-coast-withdraws-from-african-human-rights-and-peoples-court/> (accessed on 22.07.2023).

³⁶ ACTHPR, *Guillaume Kigbafori Soro and Others v. Republic of Côte d'Ivoire*, application no. 012/2020, Order for Provisional Measures, 15 September 2020, para. 6; Côte d'Ivoire presidential hopeful Guillaume Soro

The above analysis indicates that the reasons behind the withdrawal of states from the ACTHPR are predominantly anchored in domestic socio-political factors. While Tanzania cited the incompatibility of Article 34(6) with its constitution as the basis for its withdrawal, other states have articulated a more unified rhetoric of resistance, grounded in principles of non-interference and sovereignty. In addition to these factors, a plausible theory that could explain the pattern of withdrawal is the two-tier structure of ACTHPR, which exposes it to vulnerability. This vulnerability affords states the option of partially or fully withdrawing from the Court without incurring significant political or reputational costs. Therefore, it is understandable that states such as Rwanda, Tanzania, Benin, and Côte d'Ivoire have opted to remove themselves from the ACTHPR jurisdiction while remaining within the system and achieving their objectives without significant political or legal implications.

2.2 The SADAC Tribunal

The pre-existing Southern African Development Co-ordination Conference was founded in 1980 to foster the cause of national political and economic liberation in Southern Africa. In 1993, it was transferred to the SADC by the SADC Treaty, with the focus on integration of economic development. The SADC Treaty envisioned the creation of a Tribunal,³⁷ that was officially established in 2005 in Windhoek, Namibia, where it is based.³⁸ Comprising of 15 Southern African states and modelled on the structure of the European Court of Justice, the Tribunal has the competence to hear individual complaints of alleged human rights violation provided that all available domestic remedies have been exhausted, and it is also empowered to issue advisory opinions.³⁹

However, in the exercise of its competence to rule on human rights disputes, it faced with an unprecedented backlash from the Zimbabwean government that eventually led to its *de facto* suspension. On 11 October 2007, Mike Campbell (PVT) Limited, a Zimbabwean-registered company, filed a suit with the Tribunal challenging the expropriation of agricultural land in Zimbabwe by the government of that country. In 2008, the Tribunal delivered a landmark decision and ruled in favour of the applicants by holding that the land redistribution program of Zimbabwe's President Robert Mugabe amounted to the violation of several provisions of the SADC Treaty, including the principle of non-discrimination based on race and the right to access to justice.⁴⁰

Given its colonial history, the Mugabe government met the *Campbell* judgment with contempt and adopted a very clear noncompliance policy. The Minister of State for National Security, Lands, Land Reform and Resettlement stated that the Tribunal was 'daydreaming' because we are not going to reverse the land reform exercise. There is nothing special about the 75 farmers and we will take more farms. It is not discrimination

sentenced to 20 years in jail. In: *CGTN Africa*, published on April 28, 2020. Available at: <https://africa.cgtn.com/2020/04/28/cote-divoire-presidential-hopeful-guillaume-soro-sentenced-to-20-years-in-jail/> (accessed on 23.07.2023).

³⁷ Treaty of the Southern African Development Community (SADC Treaty), art. 16.

³⁸ History and Treaty, Southern African Development Community. In: *SADC*. Available at: <https://www.sadc.int/pages/history-and-treaty> (accessed on 25.06.2023).

³⁹ SADC Treaty, art. 9; The current Member States of SADC Tribunal are Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, 42 South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

⁴⁰ SADC Tribunal, *Campbell and Others v. Zimbabwe (Merits)*, Case No. SADC (T) 2/2007, 28 November 2008, paras. 16-17.

against farmers, but correcting land imbalances'.⁴¹ The then president Mugabe characterised the judgement as 'an exercise in futility' (Nathan, 2013), and he further reacted that 'some farmers went to the SADC Tribunal in Namibia, but that's nonsense, absolute nonsense, no one will follow that ... We have courts here in this country, that can determine the rights of people. Our land issues are not subject to the SADC Tribunal.' (Chinaka, 2009). This was followed by a judgement of the Zimbabwe High Court, which found the Tribunal's finding to be null and void because it was *ultra vires* (Chigara, 2009).

Following unsuccessful attempts to implement the decision, the applicants twice returned to the Tribunal seeking the court to take further action against the Zimbabwean government (Viljoen and Viljoen, 2012). In both cases, the Tribunal established that the Zimbabwean government failed to comply with its decision and therefore referred the case to the Summit for further action.⁴² This triggered a chain of events that culminated in Zimbabwe's submission of a legal opinion challenging and questioning the legality of the SADC Tribunal rulings on the grounds that the Protocol on the Tribunal was never ratified by two thirds of the member states, including Zimbabwe (Alter et al., 2016; Ebrobrah, 2011). Meanwhile, the Zimbabwean government lobbied a number of SADC member states to back its plan to *diminish* the Tribunal. Zimbabwe's legal objection was raised up to be discussed at the 2010 SADC Summit, where a compromise was reached to name an independent consultant to conduct a review of the role, functions, and responsibility and terms of reference of the SADC Tribunal (Alter et al., 2016; Viljoen, 2018). Furthermore, the Zimbabwean government pursued a strategy to block the Summit plan to renew the appointment of judges whose terms were about to expire. It refused to agree for the prolongation of the term of the judges, an act that requires the unanimous agreement of all member states (Viljoen, 2012, p. 501). In the absence of a quorum of 5 judges, the Tribunal could therefore no longer hear new cases, and thus it was *de facto* suspended. Finally, in 2014 some Member States drafted and signed a new protocol limiting the jurisdiction of the Tribunal to only inter-state dispute and providing for the withdrawal of a Member State from the Tribunal on a one-year notice of period.⁴³

2.3 The East African Court of Justice

The EACJ is one of the organs of the East African Community (EAC) established in 2001 by the Treaty to Establish the East African Community (EAC Treaty) to ensure the interpretation and application and compliance of the EAC Treaty.⁴⁴ Comprising of five Member States, it has jurisdiction to hear interstate disputes as well as individual complaints where the exhaustion of domestic remedies is not a prerequisite to submit a case to the court. The EACJ has also the competence to issue advisory opinions and preliminary rulings on the request of courts.⁴⁵

⁴¹ They are day-dreaming. IOL, published on December 1, 2008. Available at: <https://www.iol.co.za/entertainment/they-are-day-dreaming-427469> (accessed on 24.07.2023).

⁴² SADC Tribunal, *Campbell and Others v. Zimbabwe*, Case No. SADC (T) 3/2009, 5 June 2009; SADC Tribunal, *Fick and Others v. Zimbabwe*, Case No. SADC (T) 1/2010, 16 June 2010; Article 33(1)(a) of the SADC Treaty stipulates that 'sanctions may be imposed against any Member State that persistently fails, without good reason, to fulfil obligations assumed under this Treaty', and by virtue of Article 33(2) the Summit is empowered to determine and impose sanction on a case-by-case basis.

⁴³ Draft Protocol of the SADC Tribunal, 18 August 2014, art. 50.

⁴⁴ East African Court of Justice. COURT / ABOUT US. Available at: https://www.eacj.org/?page_id=19 (accessed on 23.07.2023).

⁴⁵ East African Court of Justice. Access to Court. Available at: https://www.eacj.org/?page_id=31 (accessed on 24.07.2023).

The most controversial aspect of its jurisdiction concerns human rights disputes. The court does not have an explicit human rights mandate, but it sometimes provides for the extension of its jurisdiction in human rights matters in the future when the member states decide to conclude a protocol to this effect.⁴⁶ Although this protocol has not yet been adopted, the court has already asserted that it has the authority to deal with disputes involving human rights.⁴⁷

However, the case that triggered the backlash against the EACJ was not explicitly related to a human rights dispute. In the case of *Anyang Nyong'o v. Attorney General of Kenya*, the applicants claimed that the decision of the Kenyan government to allocate the seat of judges of the EALA among the national political parties based on their strength at the national parliament constitutes a violation of the provision of the EAC treaty which requires state parties to hold an election to choose judges of the EALA.⁴⁸ The court issued an interim measure that prevented the list of nominees presented by the Kenyan government from taking office until it decided on the merits of the case.⁴⁹

The government official met the ruling with scorn, accusing the court of undermining its national sovereignty (Viljoen and Viljoen, 2012). The government took several channels to respond to the decision. At first, it sought to eliminate the court with the cooperation of two other Member States, but its proposal was not sympathetically received by them.⁵⁰ To avoid an adverse ruling on merit, it then tried to put pressure on its two judges in the court. This tactic also failed as a result (Onoria, 2010).⁵¹

The government then prepared an amendment to the EAC Treaty that brought some changes to the court structure, jurisdiction, and access rule. The amendment split the court into sections, with the first instance division and an appellate division;⁵² it established that the court had no power to review cases for which the 'jurisdiction [is] conferred by the Treaty on organs of Partner States';⁵³ additional grounds were added for the removal of judges, beyond misconduct and infirmity;⁵⁴ and most importantly, a time limit was introduced requiring a case to be submitted to the court within two months from the date of commission or knowledge of the impugned act⁵⁵ The amendment received the support of other Member States, and thus it was adopted and entered into force in March 2007.

Despite the government's attempt to avoid an adverse ruling in the *Nyong'o* case (Onoria, 2010), the court finally delivered a merit judgement confirming its previous position that the selection of judges is in violation of the ECA Treaty and ordered the government to hold an election according to the rules stipulated by Article 51 of the EAC

⁴⁶ Art. 27(2) 1999 EAC Treaty (as amended).

⁴⁷ EACJ, *Katabazi and 21 Others v Secretary General of the East African Community and Another*, Ref. No. 1 of 2007 [2007] EACJ 3, 1 November 2007.

⁴⁸ EACJ, *Anyang Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006, 27 November 2006; EAC Treaty, Art. 50 stipulates that 'the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election'.

⁴⁹ *Ibid.*

⁵⁰ Tanzania and Uganda were the only other member states of the East African Community (EAC) at the time. Rwanda and Burundi did not join the EAC until several years later.

⁵¹ The government threatened its two judges in the court to avoid any adverse ruling on the merits otherwise it would file a suit against them seeking to be removed from their position by accusing them of engaging in corruption, unethical practices and absence of integrity in the performance of their judicial duties in their home country. Refusing to surrender, the government withdrew allegation against one of them, and as to the second one the ECAJ confirmed his impartiality.

⁵² EAC Treaty (revised), Art. 28(2).

⁵³ *Ibid.*, Art. 27(1).

⁵⁴ *Ibid.*, Art. 26(1), 26(2).

⁵⁵ *Ibid.*, Art. 30(2).

Treaty.⁵⁶ Failing to receive support from other Member States to discredit the judgment, the Kenyan government eventually complied with it and thus held an election required by the EAC Treaty.

2.4 The ECOWAS Court of Justice

The ECOWAS Court of Justice was created by the revised Treaty of the ECOWAS. Comprising of 15 states, the mandate of the court is to ensure the observance of law and of the principles of equity and in the interpretation and application of the provisions of the revised Treaty and all other legal instruments adopted by the Community.⁵⁷

Since acquiring jurisdiction over human rights complaints in 2005, the ECOWAS court has issued numerous decisions finding the Member States to be in violation of human rights norms. Individuals are allowed to file a complaint with the court without the need to exhausted domestic remedies. Yet, in the exercise of this mandate, the court experienced resistance from the Gambian government. Among the suits that led to the unprecedented contempt of Gambia was the case of *Manneh* regarding the detention and alleged torture of a dissident journalist for releasing articles critical of the government.⁵⁸ Despite numerous calls, the government refused to cooperate and participate in the proceeding before the ECOWAS court (Viljoen and Viljoen, 2012). In the absence of the government, the court issued a judgment holding Gambia responsible for the violation of several provisions of the Charter and ordering the government to release Manneh from unlawful detention and pay him compensation of US \$100,000.⁵⁹ In response, the Gambian government tried to challenge the basis of the decision by submitting a request to the ECOWAS Commission seeking to revise the ECOWAS protocol, thus limiting the court's human rights jurisdiction and introducing the requirement of exhausting domestic remedies (Alter et al., 2013).

The proposed revision received a series of protests from NGOs and civil societies who filed a motion to the ECOWAS court questioning the legality and legitimacy of the proposed amendment (Viljoen and Viljoen, 2012). They argued that the amendment will undermine the capacity of the court to 'deal effectively with tyrannical governments that violate citizen rights' in a region 'where the judiciary is an arm of the executive'.⁶⁰

Meanwhile, the ECOWAS Council of Ministers appointed a Committee of Legal Experts to seek its advice on the proposed amendment. Experts prepared their recommendation advising the Council to reject the proposal. Following the extensive mobilization and campaign of civil society and the opinion of experts, the Council of Justice Ministers refused to adopt the amendment proposed by Gambia to revise the ECOWAS protocol.

⁵⁶ EACJ, *Anyang Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006, 27 November 2006, p. 36.

⁵⁷ See art. 4 of the 1993 revised ECOWAS Treaty on the principles of ECOWAS; Fifteen nations are currently members of ECOWAS: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone, and Togo.

⁵⁸ ECOWAS Court, *Manneh v. The Gambia* (2008) AHRLR 171 (ECOWAS 2008), para. 5.

⁵⁹ *Ibid.*, paras. 41, 44.

⁶⁰ Four IFEX members, civil society groups fear Gambia proposal will prevent ECOWAS court from ruling in Saidykhan case. In: *IFEX*, published on September 28, 2009. Available at: <https://ifex.org/four-ifex-members-civil-society-groups-fear-gambia-proposal-will-prevent-ecowas-court-from-ruling-in-saidykhan-case/> (accessed on 22.07.2023).

3. DIVERGENT BACKLASH: DIFFERENT OUTCOME

As we have seen, ACTHPR faced different form of backlash compared to the subregional courts. While the former experienced resistance in the form of withdrawal from its special declaration, resistance against subregional courts was pursued through the State's attempt to amend and revise the founding treaty of each respective court. What can explain this different form of resistance against ACTHPR compared to the sub-regional ones? The answer lies largely in the differences between their institutional settings. Although membership in the African Union (AU) does not oblige Member States to accept the jurisdiction of the ACTHPR, membership in the subregional communities requires the State to accept the jurisdiction of sub-regional courts. Additionally, unlike the ACTHPR where direct access for private litigants is allowed upon signing an additional declaration by the respondent state, all three subregional courts provide direct access for individual complaints alleging human rights violations by their national governments. That is said, the special nature of the ACTHPR allows States to have full or partial access to it, and as such Rwanda, Tanzania, Benin, and Côte d'Ivoire curbed the jurisdiction of the Court without losing their membership in neither the ACTHPR nor in the AU. Therefore, this form of backlash was the easiest and least expensive option for these states to exercise resistance and reach their aim of marginalizing and weakening the fledgling continental human rights court. Exercising the same type of resistance to withdraw from the subregional courts was not a legally viable option without losing membership in the community as a whole; something which would otherwise cause a considerable economic and political capital for Zimbabwe, Gambia, and Kenya.

In addition, a simple majority is required to modify the Court's jurisdiction and access rules.⁶¹ In this respect, the scale of the African Court is larger than that of the subregional level where they have a greater geographic proximity, allowing for strategic political and economic closeness. Taking into account the political and cultural diversity across the African continent, reaching an agreement to amend the founding protocol of the ACTHPR would therefore not be a feasible option for Member States to express their resistance against it.

Although it is said that the exercise of backlash against the ACTHPR reached an outcome due to the weakness in the institutional design of the Court, the divergent outcome of backlash against the subregional courts can be explained by different factors. First of all, the subject matter of the cases decided by each subregional court played an important role in determining the outcome of backlash against them. The decision of the ECOWAS court against the Gambian government concerned a flagrant abuse of human rights, torture of a journalist, which no government would publicly endorse. That may be a reason why there was no sympathy for the Gambia proposal to amend the ECOWAS treaty. The EACJ decision against the slate of the Kenyan government concern a dispute over the boundary between community and national law, which could be seen as the court's attempt to intrude into the internal affairs of states that favour opposition groups. This may explain why Tanzania and Uganda finally accepted the Kenyan proposal to revise the EACJ court. The subject matter of the case involving Zimbabwe was by far the most controversial. Many African states struggle with the consequences of postcolonial land policy, which left most fertile lands in the hands of white farmers. This may explain why Mugabe's message was more sympathetically received when he argued that 'if it happens to us, it happens to you next' (Alter et al., 2016). Therefore, the matter of communication in the case of the SADC

⁶¹ Founding protocol (n 3).

Tribunal played an important role in convincing African leaders to support and adopt the amendment that significantly changed the mandate of the Tribunal.

Secondly, different economic and political powers of the states initiated the backlash can also provide explanation for the divergent outcome of backlash against the subregional courts. In East Africa, Kenya is the undisputed economic and political power. In the south, even though Zimbabwe's economy was in decline, its political dominance in the region is largely established due to the influence of its then charismatic leader, President Mugabe who was seen as a champion of anticolonial struggle in Africa. Gambia is a clear outlier among these countries, a small and fragile country with limited economic and political power in West Africa. This as such provides another explanation why the proposal of the Gambian government was easily rejected by the ECOWAS Member States (Alter et al., 2016; Viljoen and Viljoen, 2012), but the backlash against the other two subregional courts was more of a success story.

Furthermore, it has been argued that one of the main reasons for the failure of Gambia's attempt to weaken the ECOWAS court is the participation of civil societies who played a crucial role in determining the fate of backlash through their extensive involvement in official meetings, sending a message to governments that their actions and conducts are being scrutinised – a strategy that could cost a considerable political capital for the national governments (Alter et al., 2016; Viljoen and Viljoen, 2012).

The successful outcome of backlash against the SADC Tribunal is also the result of the ambiguity existing in the SADC Treaty, where it fails to determine what happens when consensus cannot be reached to appoint the judges of the Tribunal. This in fact gave the Zimbabwean government an upper hand in the negotiation with other member states to dictate its position on them when drafting the amendment to the SADC Treaty.

However, the need to obtain consensus to modify the constituent treaty of each subregional court explains why the backlash against the ECOWAS court as well as the initial attempt of Kenya to dismantle the EACJ court did not produce any outcome. In this regard, it should be mentioned that the small scale of the EAC community contributed to the success of Kenya in its subsequent attempt to restructure the EACJ court; a community that consists of only five Member States whose leaders meet regularly and share a more similar vision of 'what defines Africa'.

4. IMPLICATION OF BACKLASH

In all cases under discussion, a state reacted to an adverse ruling of the court by questioning its legitimacy and advocated for institutional reform to weaken the fledgling human rights system. Nevertheless, the impact of the political reaction has thus been much more severe in the case of SADC and the ACTHPR than in the other two subregional courts. Yet, these instances of resistance have a wide range of implications on the authority and development of the African regional and sub-regional courts in general and especially on the protection and promotion of human rights across the continent.

The immediate effect of withdrawal from the ACTHPR is related to its operation. There are only a few states that accepted its jurisdiction in individual communication, and importantly its docket is largely dependent on the cases submitted by the citizens of those states orchestrating the backlash, especially its host state, Tanzania. While Tanzania accounts for 37 of the 76 finalized cases of the Court, and 105 of its 167 pending cases, Rwanda, Benin and Côte d'Ivoire account for 10, 1, 4 of finalized cases

and 6, 11 and 27 of pending cases, respectively.⁶² Depriving the Court from this portion of cases will therefore undermine the endeavour of the Court at large by significantly reducing its caseload, and thus losing its ability to develop its jurisprudence. That is said, the right of petition by individuals is the lifeblood for the effective operation of African Court; something vital for strengthening its authority and expanding its jurisprudence. The same assumption holds true in the case of SADC Tribunal, where it will no longer be able to rule on individual petitions when the amendment will enter into force. It is through this individual petition mechanism that human rights are given a concrete meaning. In the adjudication of individual petitions, human rights norms that may otherwise seem general and abstract are put into practical effect. In the absence of an individual complaint mechanism, the human rights norms will remain illusory, and the Court and Tribunal will be like a *toothless tiger* unable to uphold human rights protection within their respective jurisdictions.

The backlash against the EACJ court has wide-ranging implications, with a particularly notable concern being the imposition of a restrictive two-month time limit for initiating a case with the court. This temporal constraint creates a substantial barrier for individuals, potentially dissuading them from immediately challenging the actions of officials. The underlying issue is the perceived inadequacy of this time frame for the average citizen to pinpoint when a contested act has occurred. The compressed timeline may inadvertently obstruct access to justice, as it may not allow individuals enough time to gather the necessary information and assess the implications of their case (Onoria, 2010).

This limitation also places undue pressure on litigants to make hurried decisions, which can compromise the quality of their case presentations. Consequently, the implementation of such a rigid time frame introduces practical challenges and has the potential to impact the comprehensive examination of alleged wrongdoings, thereby undermining the democratic principle of holding officials accountable for their actions. Moreover, it is essential to recognise that the time limit for submitting an application to the European Court of Human Rights is four months after the final domestic judicial decision in the case, highlighting the importance of a reasonable timeframe for ensuring access to justice and thorough case preparation.⁶³

Moreover, the introduction of additional grounds for the removal of judges, particularly based on allegations of misconduct or impropriety within their home country, not only raises serious concerns but also opens avenues for national governments to exert undue pressure on the judiciary, effectively punishing judges for decisions perceived as unfavourable. This is exactly what Kenya pursued in *Nyong'o* case. In essence, these amendments create a precarious situation in which governments can exploit the judicial system to serve their own interests. By alleging misconduct or impropriety, authorities can initiate investigations into judges, leading to their suspension and subsequent removal from office. This, in turn, allows for the appointment of temporary judges during the suspension period. Regrettably, this newfound power may be abused by governments seeking to replace independent-minded judges with more compliant alternatives who are inclined to safeguard the government's interests in legal proceedings (Onoria, 2010).

⁶² African Court on Human and Peoples' Rights. Available at: <http://www.african-court.org/en/index.php/cases> (accessed on 26.07.2023).

⁶³ Council of Europe: Parliamentary Assembly, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms 2021, 19 January 2013, Doc. 13093.

In the broader context, this not only undermines the independence of the judiciary but also erodes the fundamental principles of a fair and impartial legal system. It introduces a vulnerability in which the rule of law is compromised, and the judiciary becomes susceptible to manipulation by those in power. Such a scenario poses a significant threat to the democratic fabric of a nation, as the judiciary's role as a check on executive power is compromised, and the principles of justice are jeopardised.

The denial of direct access to judicial remedies before the ACtHPR and the SADC Tribunal for African citizens carries potentially catastrophic consequences, and two crucial factors should be considered in this context.

Firstly, a considerable number of African states are widely acknowledged to have a poor record of domestic human rights protection. The continent boasts a diverse range of governmental systems, spanning from democratic states to authoritarian regimes (Repucci, n.d.).⁶⁴ Many nations are grappling with extensive human rights violations arising from persistent civil conflicts, political instability, humanitarian disasters, and so on (Faix and Jamali, 2022).⁶⁴ Democratic backsliding has become a prevalent issue in several African states (Durotoye, 2016; Hess and Aidoo, 2019; Faix and Jamali, 2022). These states rigorously uphold principles of national sovereignty and non-interference (Cole, 2010; Faix and Jamali, 2022).

Secondly, and of utmost importance, the level of judicial independence within the African continent remains notably low (Alter et al., 2016; de Wet, 2016). National courts across the continent frequently face unwarranted interference from the executive, resulting in biased decisions in their favour (Heyl, 2019). In the absence of an independent judiciary, African citizens find it impossible to obtain effective and efficient domestic remedies for alleged human rights violations. This underscores the vital role that regional and subregional courts could play in filling this gap by offering remedies to individuals alleging human rights violations by national authorities.

In the case of the South, citizens from this region would practically lose their ability to seek remedies beyond their national borders, given that none of the SADC member states accepted the jurisdiction of the ACtHPR in individual communication. The interconnected issues of poor domestic human rights protection and low judicial independence highlight the urgent need for accessible regional and sub-regional avenues for citizens to address human rights violations.

5. CONCLUDING REMARKS

This paper investigated the instance of backlash against four regional and subregional courts in Africa that exercise jurisdiction over human rights disputes. In all cases under discussion, a State subject to an adverse ruling of the court responded by questioning its legitimacy and authority and advocated for institutional reforms to weaken the fledgling human rights system in the continent. Nevertheless, the outcome of the backlash has been much more severe in the case of the SADC Tribunal and the African Court than in the other two sub-regional ones. This is largely explained by their differences in institutional settings, relative state power, the subject matter of the cases, participation of civil societies, the need to obtain consensus to modify the constituent treaty of each court, and the silence of the SADC Treaty when consensus cannot be reached to appoint the tribunal judges.

As a response to the backlash, the role of civil societies in determining the fate of backlash in the case of the ECOWAS court should serve as an example for the other

⁶⁴ 47th Activity Report of The African Commission On Human And Peoples' Rights.

courts to repeal any future attack initiated by the Member States. This strategy may also be vital for the ACtHPR to put pressure on the governments to reconsider their decisions of withdrawal from Article 34 (6) of the Founding protocol.

From a legal point of view, the ACtHPR should take a different approach on the withdrawal request of states from its additional declaration. Most of the states decided to withdraw their declarations in the aftermath of the adverse ruling of the Court in a single case. Considering that the Founding Protocol is silent on the issue of denunciation, the additional declaration pursuant to Article 34 (6) emanates from the Protocol which is subject to the law of treaties, and thus for its denunciation or termination, the provisions of Articles 54 and 56 of the Vienna Convention on the Law of Treaties (VCLT) should be applied very strictly. Consequently, denunciation or withdrawal from a treaty is only possible if it is established that the parties intended to allow this, or the ability to do so is implied by the nature of the treaty.⁶⁵ There is no evidence suggesting that the African states intended to include a possibility of denunciation or withdrawal from the founding protocol.

The decision of states to limit the jurisdiction of the ACtHPR in individual communication goes against the principle of *pacta sunt servanda*, which requires the parties to a treaty to perform their obligations in 'good faith'.⁶⁶ This assumption was held by the High Court of Tanzania in its ruling on a case where the legality and legitimacy of the country's participation led to the suspension of the SADC Tribunal by invoking the principle of 'good faith' established under the VCLT and thus held that the member states of the SADC Tribunal are required to fulfil their obligations under the SADC Treaty in good faith.⁶⁷ The African states should act in 'good faith' and therefore may not simply react to an unfavourable decision of ACtHPR by withdrawing their additional declaration, which fundamentally undermines the Court's ability to uphold human rights within its jurisdiction.

Furthermore, in December 2018, the South African Constitutional Court delivered a judgment on a case submitted by private litigants questioning the legality of the country's participation in the decision to abolish the SADC Tribunal. The Constitutional Court reaffirmed the position of the lower court and ruled that the participation of the president in the decision to suspend the SADC Tribunal and his signature of the subsequent SADC Protocol was unconstitutional, unlawful, and irrational (Erasmus, 2019).

In fact, the decisions of the Tanzanian High Court as well the South African Constitutional Court also raise fundamental questions about the legality and legitimacy of the attempt of the SADC Summit to strip the SADC Tribunal of its powers. Furthermore, it is worth mentioning that the new Zimbabwean government has decided to revoke the Mugabe land programme and thus return the land to those farmers who had their land seized under the said scheme.⁶⁸ Taking into account that the

⁶⁵ United Nations (1969). Vienna Convention on the Law of Treaties, published on May 23, 1969. Document symbol: United Nations, Treaty Series, vol. 1155. Available at: <https://www.refworld.org/docid/3ae6b3a10.html> (accessed on 27.07.2023), art. 56.

⁶⁶ *Ibid.*, art. 26.

⁶⁷ Case of Tanganyika Law Society versus Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania. Available at: https://africanlii.org/sites/default/files/Judgment.%20TLS%20vs%20Ministry%20of%20Foreign%20Affairs%20and%20International%20Cooperation%20%26%20AG%2C%20Misc%20Civil%20Cause%20No.%2023%20of%202014_0.pdf (accessed on 22.05.2023).

⁶⁸ Zimbabwe to return land seized from foreign farmers. In: BBC News, published on September 1, 2020. Available at: <https://www.bbc.com/news/world-africa-53988788> (accessed on 22.07.2023).

amendment has not entered into force yet, all these developments can in turn generate some political leverage for civil society when lobbying and pressuring governments for reinstating the SADC Tribunal as a vital judicial player in the southern part of Africa.

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