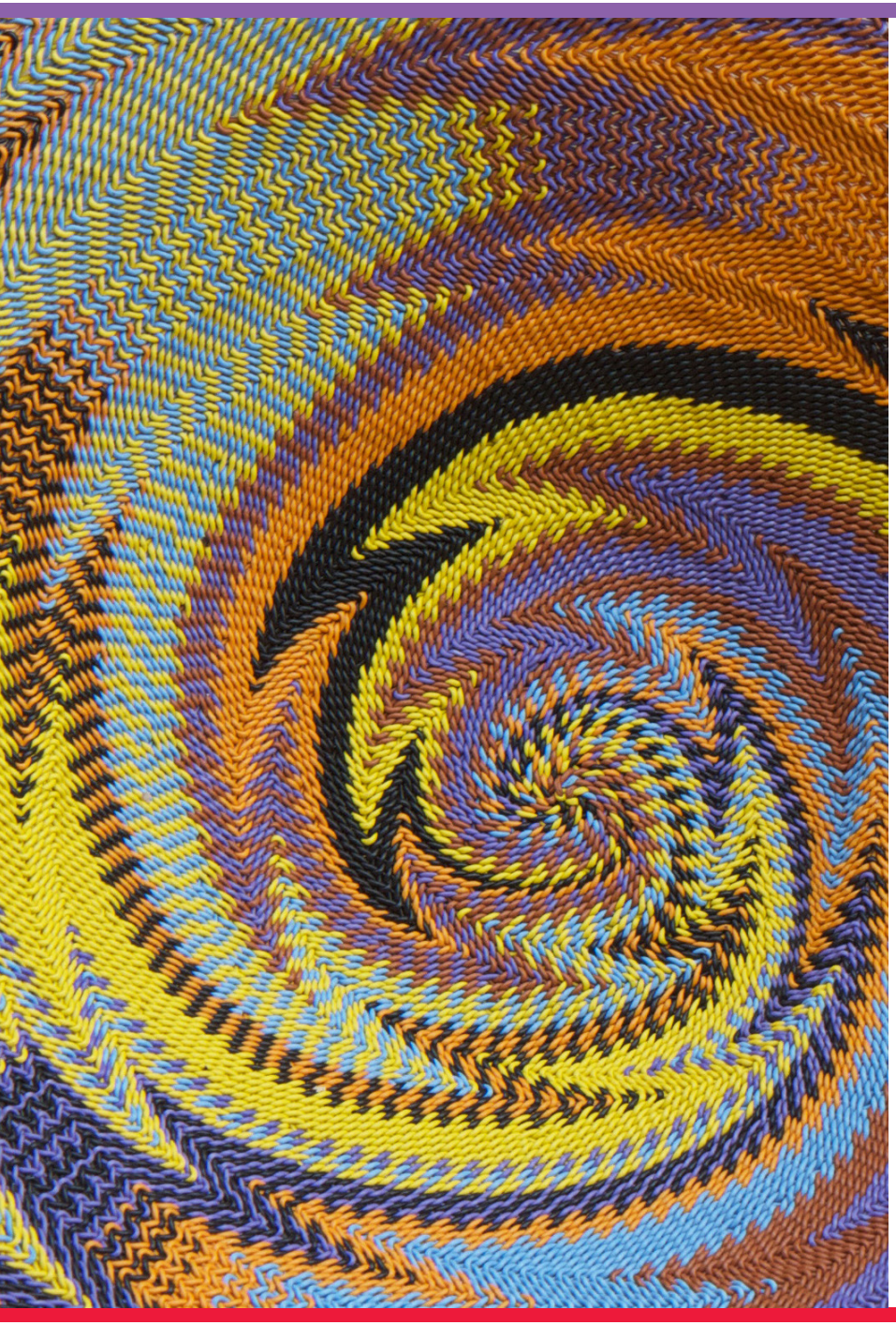

AFRICAN HUMAN RIGHTS POLICY PAPER 2

SUPPORTING THE MANDATE OF THE AFRICAN COURT

Michael Gyan Nyarko
Misha Ariana Plagis

African Human Rights Policy Papers

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Title:
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AFRICAN HUMAN RIGHTS POLICY PAPERS

The *African Human Rights Policy Papers* is a series of concise, thoughtful and accessible papers published by the Centre for Human Rights (Centre) at the Faculty of Law, University of Pretoria. (See www.chr.up.ac.za.) The series runs from 2020. These papers set out key findings on contemporary topics related to human rights, good governance, social justice and democratisation in Africa. In some cases, the topics may extend to the broader range of issues related to the rule of law and international law. The primary aim of the papers is to provide policy guidance to relevant stakeholders and decision makers. Ancillary aims include: supporting advocacy campaigns, spreading knowledge, and sparking public debate on selected issues.

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About the authors of *African Human Rights Policy Paper 2:* Michael Gyan Nyarko is the Manager of the Litigation and Implementation Unit and a Doctoral Researcher at the Centre for Human Rights, University of Pretoria. Dr Misha Ariana Plagis is a Researcher at the Asser Institute, University of Amsterdam, and the Associate Editor of the ACtHPR Monitor. This policy paper is the outcome of a high-level round table held on 3 July 2020, co-organised by the Centre for Human Rights and the Asser Institute.

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This policy paper is the outcome of a high-level round table held on 3 July 2020, co-organised by the Centre for Human Rights, University of Pretoria, and the Asser Institute. During the virtual roundtable, 20 experts on the African Court were consulted for their views on the current challenges facing the African Court in terms of its mandate, as well as potential solutions to these issues. Following the Chatham House Rule, the results are discussed; however, the views expressed here are not attributed to any particular participant or organisation.

BACKGROUND

At the heart of the discussion on supporting the mandate of the African Court on Human and Peoples' Rights (African Court)[1] are the recent withdrawals of the special declarations of three States within six months of each other.[2] The mandate of the African Court has proven to be particularly reliant on cases submitted by individuals and non-governmental organisations (NGOs), and, therefore, the withdrawal of four of the ten States to have ever made such a special declaration is a significant issue for the African Court's work.[3] The virtual round table on 3 July 2020 built on the initiative from the African Court to conduct a survey to help develop its strategic plan for 2021-2025. The aim of the roundtable was to better understand the issues at hand, but also to reflect on what the role of other stakeholders and, in particular, other human rights institutions are in supporting this mandate.

1 The African Court on Human and Peoples' Rights is Africa's premier human rights court and interprets the African Court on Human and Peoples' Rights. More on the Court at: https://en.african-court.org.

2 For a discussion on the latest developments see: N De Silva and M Plagis 'A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court' on *Opinio Juris*, available at: http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court (accessed 2 September 2020); A Koagne Zouapet, "Victim of its commitment … You, passerby, a tear to the proclaimed virtue': Should the epitaph of the African Court on Human and Peoples' Rights be prepared?', on *EJIL:Talk!*, available at: https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared (accessed 2 September 2020); T Davi and E Amani, 'Another One Bites the Dust: Côte d'Ivoire to End Individual and NGO Access to the African Court', on *EJIL:Talk!*, available at https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court (accessed 2 September 2020).

3 For a full overview of States that have made special declarations, and those that have subsequently withdrawn them, see the Court's website at: https://en.african-court.org/index.php/basic-documents/declaration-featured-articles-2 (accessed 2 September 2020).

CONTEXT

The African Court was established in 1998 through the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of and African Court on Human and Peoples' Rights (Protocol).[4] The adoption of the Protocol marked a continuation of the project of establishing human rights institutions for the African Union (formerly Organisation of African Unity). During the negotiations that led to the adoption of the African Charter on Human and Peoples' Rights (African Charter),[5] the possibility of establishing a court to supervise the enforcement of the Charter was discussed, but this was not pursued. In its stead, the African Commission on Human and Peoples' Rights (African Commission) was established as the supervisory body of the African Charter. The African Commission supervises the enforcement of the African Charter through the State reporting mechanism, promotional visits to States, providing general guidance to States through the adoption of interpretative norms such as general comments, guidelines and resolutions (promotional mandate), and by making recommendations to the States through complaints that are submitted to it by States, individuals, and non-governmental organisations alleging human rights violations (protective mandate). In terms of article 2 of the Protocol, the African Court was established to complement the protective mandate of the African Commission and has jurisdiction to adjudicate complaints alleging violations of the African Charter or any other human rights instrument ratified by the State Party.

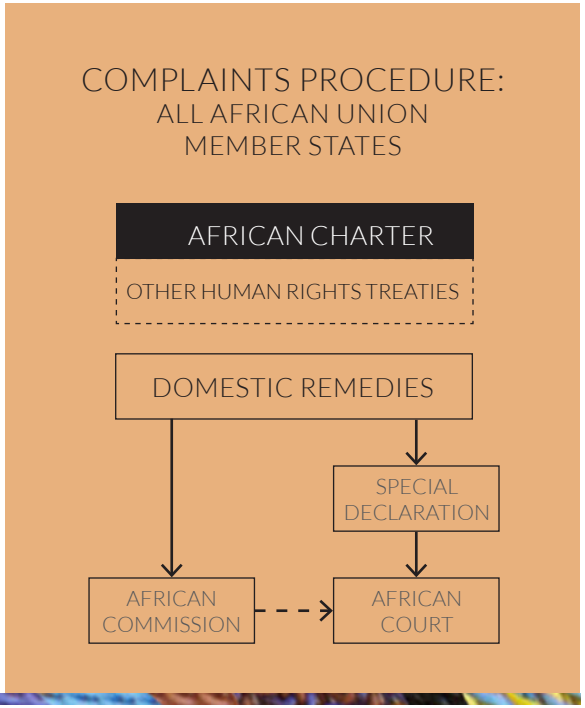
On ratification of the Protocol, according to article 5(1), complaints of human rights violations can be submitted against the State Party by the African Commission, another State Party, and African intergovernmental organisations. Individuals and NGOs, therefore, do not have direct access to the Court unless a State Party makes a further declaration in terms of article 34(6) of the Protocol allowing individuals and NGOs to directly bring cases against it, in accordance with article 5(3) of the Protocol. Article 5(3) provides that:

> The Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.

To this end, article 34(6) provides that:

> At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

To date, only 10 of the 30 State Parties to the Protocol have ever made this declaration. These are Benin, Burkina Faso, Gambia, Ghana, Ivory Coast, Malawi, Mali, Rwanda, Tanzania and Tunisia.

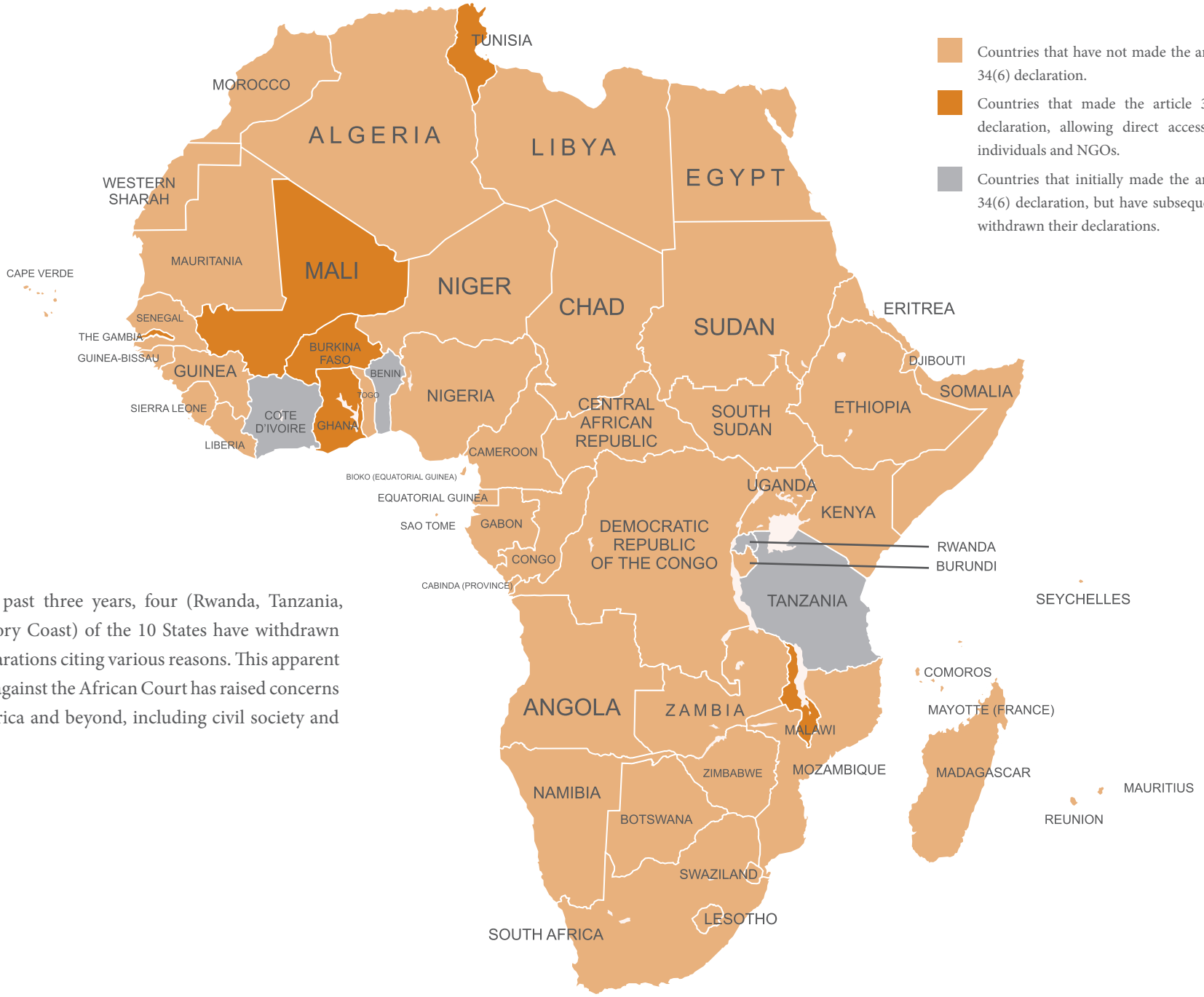


4 Protocol available at https://www.african-court.org/en/images/Basic%20Documents/africancourt-humanrights.pdf (accessed 2 September 2020).

5 African Charter available at https://au.int/en/treaties/african-charter-human-and-peoples-rights (accessed 2 September 2020).


RULES OF COURT

This policy paper is underpinned by the current backlash, which ultimately has an impact on the functioning of the African Court and access to justice for human rights violations in Africa generally.



Over the past three years, four (Rwanda, Tanzania, Benin, Ivory Coast) of the 10 States have withdrawn their declarations citing various reasons. This apparent backlash against the African Court has raised concerns across Africa and beyond, including civil society and academia.

A COURT IN CRISIS?

While participants were in agreement that the State withdrawals at the African Court pose a serious problem, there was no consensus on whether or not to call the situation a 'crisis'. Proponents of the label suggest there are systemic issues within the African Court's design and operation[6] that can be viewed as giving rise to an 'existential crisis'. However, others highlight that we need to move away from a binary understanding of State behaviour of being either in support of or undermining the African Court, and, therefore, that the label of crisis is not particularly useful in this context. From the latter perspective, emphasis was placed on the fact that of the States withdrawing their special declarations none has withdrawn from the jurisdiction of the Court. In addition, some States also emphasised their decision to withdraw their special declarations would be reviewed at a later date. Irrespective of whether or not the situation can be classified as a crisis, there was consensus that the withdrawals could have a negative impact on the legitimacy and authority of the Court, and potentially deter other States from ratifying the Protocol, making a special declaration, or both.

6 For an in-depth discussion on the systemic issues of the operation of the Court see SH Adjolohoun, 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1.

DEFINING THE PROBLEM

Despite a lack of consensus on the labelling of the issue, the participants were in agreement that the withdrawals present a threat to the work of the African Court. However, while the outcome of the problem is clear (States withdrawing their special declarations), the causes of the problem are less clear. Generally speaking, the causes need to be understood from the perspective of a number of different institutions involved: States, the African Court, and the AU.

STATES

States are the ones making the decision to withdraw, and therefore considerable attention has been placed on them. As States are not required to justify withdrawals, the information provided about the underlying reasons for their decision to do so is often unsatisfactory. For instance, Rwanda's reason for withdrawal was that it never envisaged that persons who had been convicted of, or were fugitives of, crimes related to genocide would have access to the Court.[7] Tanzania indicate that 'the Declaration has been implemented contrary to the reservations submitted' when making its declaration.[8] For Benin, its withdrawal was based on a perception that, among others, the decisions of the Court interferes with its domestic legal order, resulting in legal uncertainties.[9] No clear reason was given by Ivory Coast concerning its withdrawal,[10] but subsequent statements from government officials suggest that the withdrawal was premised on concerns related to sovereignty and 'disruption to the [domestic] legal order' resulting in legal uncertainties.[11]

In addition, it is not clear to what extent all statements are made in good faith, and how much is political rhetoric. Nonetheless, recurring themes include the protection of sovereignty, political sensitivities of particular human rights questions, financial cost emanating from certain reparations

7 Rwanda withdrawal declaration, available at https://en.african-court.org/images/Declarations/retrait/Retrait%20rwanda.pdf (accessed 2 September 2020). For comments on Rwanda's withdrawal see MG Nyarko & AO Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 294.

8 Tanzania withdrawal declaration, available at https://en.african-court.org/images/Declarations/retrait/NV%20to%20MS%20-%20Withdrawal%20Tanzania_E.PDF (accessed 2 September 2020).

9 Benin withdrawal declaration, available at https://en.african-court.org/images/Declarations/retrait/Retrait%20du%20benin.pdf (accessed 2 September 2020).

10 Côte d'Ivoire withdrawal declaration, available at https://en.african-court.org/images/Declarations/retrait/retrait%20withdrawal%20Cote%20d'ivoire.pdf (accessed 2 September 2020).

11 See https://www.africanews.com/2020/04/30/ivory-coast-withdraws-from-african-human-rights-and-peoples-court (accessed 2 September 2020).

orders of the African Court, and the fear that NGOs will be instrumentalised by foreign agents. While many of these issues are not particular to the African human rights system, with similar arguments being made to contest judgments in both the Inter-American and European human rights systems, these types of populist argumentations are a cause for concern.[12] In addition, while some States chose to withdraw their special declarations, most other AU Member States have not made special declarations to start with, nor have there been any significant responses or condemnations of these moves by other AU Member States.

COURT

From the perspective of the African Court itself, there are a number of issues that were raised that relate to systemic issues in terms of the African Court's functioning. In particular, the issue of the State's ability to respond to the number of cases brought against it was raised. On occasion, States have made concerted efforts over a number of months, and even years, to bring these concerns to the attention of the African Court. However, these concerns appear to have not resulted in any particular change. There are also a number of strategic concerns that the African Court appears not to have responded to yet, in relation to the timing of judgments made by the Court and the political sensitivities of certain cases.

While the participants did not advocate for the African Court to disengage when an issue is politically sensitive, as these sensitivities often lie at the heart of human rights cases, it was suggested that the African Court needs to pay more attention to the context of the State, for example, with regard to decisions concerning elections. A balancing act that respects the rights of the individual applicant, while giving due deference to the State party could be one way to achieve this. Concerns were also raised about the Court awarding rather large sums of monetary compensation in its orders, which could potentially deter States from participating and hinder their compliance with judgments.

Another issue that came to the fore related to apparent inconsistencies in the jurisprudence of the African Court. Although changes in legal precedent is not unheard of, inconsistencies in the jurisprudence, which are not clearly and explicitly motivated, could pose potential cause for concern for some State parties and deter them from accepting the African Court jurisdiction to hear cases. It was also suggested that the Court should define its position more clearly in respect to domestic remedies, and revisit its approach of exempting applicants from exhausting all 'extraordinary' remedies. Another systemic issue related to the Court that was identified is the absence of appellate remedies at the Court, which sometimes make it difficult for States to accept the decisions of the Court due to the lack of other avenues for contestation.

12 For more on backlash against international courts see 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* 197; 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* 294; J Odermatt 'Patterns of avoidance: political questions before international courts' (2018) 14 *International Journal of Law in Context* 221; X Soley & S Steininger 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights' Patterns of avoidance: political questions before international courts' (2018) 14 *International Journal of Law in Context* 237; A Hofmann 'Resistance against the Court of Justice of the European Union' Patterns of avoidance: political questions before international courts' (2018) 14 *International Journal of Law in Context* 258; S Caserta and P Cebulak 'The limits of international adjudication: authority and resistance of regional economic courts in times of crisis' (2018) 14 *International Journal of Law in Context* 275; KJ Alter, JT Gathii, LR Helfer 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *European Journal of International Law 293.*

AFRICAN UNION

Finally, the response of the AU, or the lack thereof, to the withdrawals is also viewed as part of the problem. While the AU has made concerted efforts over the past couple of years to adopt additional human rights instruments and policy documents,[13] it has not put the same enthusiasm into protecting or supporting the work of its three human rights institutions. In particular, the withdrawals of the special declarations have been met with a deafening silence on the part of the AU. For some, this is related to the structure of the organs of the AU under which the African Court, and the other human rights institutions, fall. For others, this is a problem of political commitment and leadership on human rights at the AU.


African Court on Human and Peoples' Rights
Protecting Human Rights in Africa
HUMAN RIGHTS
Education
Health
Speech
Security
Gender Equality
Movement

POTENTIAL FOR SOLUTIONS

A number of themes arose from the round table as core areas of attention for the African Court, but also for the African Commission on Human and Peoples' Rights (Commission)[14] in the coming years. Most related to the need for better communication and relationships on multiple levels, as well as more concerted efforts in alternatives to adjudication of disputes. Some participants suggested that there is a need for introspection by the Court to examine if some of the reasons advanced by the States can be exploited to improve justice delivery taking into account the principle of subsidiarity, the sensitivity of the issues, the nature of remedies granted, and the context of the dispute.

ENGAGEMENT WITH STATES

The Court's relationship with States needs to be greatly improved. There are a number of avenues through which this could happen, including through its jurisprudence, sensitisation missions, and communication with States outside the context of the State being a Respondent to a case. In addition, the Court could engage States and the AU by attending sessions of the political organs of the AU. In terms of its jurisprudence, the Court stands accused of inadequately justifying some of its positions. This has emerged in a number of the withdrawals of special declarations.

IMPROVING QUALITY OF JUDGEMENTS

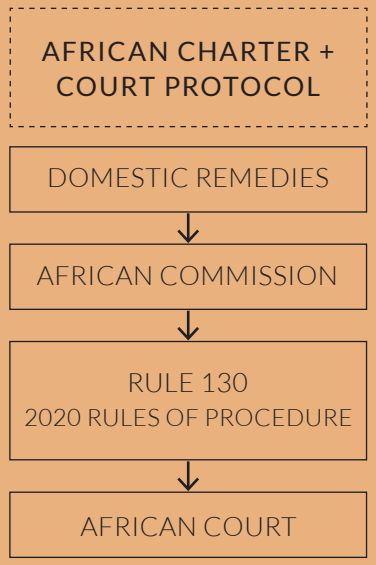
The quality of judgments remains the basis for the credibility, legitimacy, and authority of any court. It is, therefore, imperative that the African Court enhances the quality of its reasoning generally, and especially during a period where its credibility, legitimacy, and authority are being questioned. The Court also needs to identify strategies for reengagement with the States that have withdrawn, especially Tanzania – the host State of the Court. The Chair of the African Union Commission could be involved in this appeal to States.

14 The African Commission, like the African Court, also deals with human rights disputes, among other human rights related activities. More on the Commission at: https://www.achpr.org.

COMPLEMENTARITY WITH THE AFRICAN COMMISSION

The complementarity of the African Court and Commission needs to be enhanced. It was argued that the African Court and Commission could join forces during sensitisation missions. This would be helpful to the promotion of both institutions, but also serve as a way to clarify the relationship between the two institutions, and their different mandates. It is apparent from some of the statements accompanying the withdrawals of the special declarations, and the general lack of special declarations from other AU Member States, that there is often a misunderstanding of the role and mandate of the African Court. Other suggestions were made that the Commission and the Court need to further engage on the challenges that are hampering the Commission from referring cases to the Court, as without special declarations, referrals from the Commission would be one of the main routes through which the Court could receive cases.

STATE PARTIES TO PROTOCOL
INDIRECT ACCESS (30 STATES)



DIRECT ACCESS: ARTICLE 34(6) DECLARATION

1998	Burkina Faso accepts
2008	Malawi accepts
2010	Mali accepts
2011	Tanzania accepts
2011	Ghana accepts
2013	Côte d'Ivoire accepts
2013	Rwanda accepts
2016	Benin accepts
2016	***Rwanda withdraws***
2017	Tunisia accepts
2018	The Gambia accepts
2019	***Tanzania withdraws***
2020	***Côte d'Ivoire withdraws***
2020	***Benin withdraws***

In this regard, the Court must clarify in its Rules of Procedure what role complainants and their representatives can play when the Commission refers cases to the Court, to complement the capacity gap of the Commission to persue cases before the Court. The Commission, for its part, provides in its new Rules of Procedure (2020) that it may be assisted by experts appoint or designate for that purpose in prosecution of cases referred to the Court, which opens an avenue, for instance, for pro bono lawyers (arguably, including the lawyers of the original applicant) or other experts to assist the Commission in presenting cases referred to the Court.[15] There is, however, concern that the Commission's new Rules of Procedure is silent on whether the Commission can refer its decisions or provisional measures to the Court for enforcement as was the case under the 2010 Rules of Procedure. This requires clarification from the Commission.

15 Rule 132(1) of the Rules of Procedure of the African Commission (2020).

AFRICAN COMMISSION CASE REFERRAL RULES	
RULE 118 OF 2010 RULES OF PROCEDURE	**RULE 130** OF 2020 RULES OF PROCEDURE
(1) African Commission considers that the State has not complied or is unwilling to comply with its recommendations in respect of a communication within a specified time	(1) Commission may refer a case to the Court before determining admissibility
(2) A state party has not complied with provisional measures made by the Commission	
(3) Commission makes a decision to submit a case against a state party for serious or massive human rights violations	
(4) Commission may seize the Court at any stage of the examination of a communication if it deems necessary	

CLARIFYING THE ROLE OF THE COURT

The subsidiarity of the African Court also requires clarification. Given that a number of Respondent States have raised objections to the Court having jurisdiction over cases—on the basis that Court was exercising appellate authority over the decisions of national courts—sensitisation missions should, therefore, also aim to clarify the status of the Court vis-à-vis national legal systems.

IMPROVING COMMUNICATION AND DIALOGUE

The communications of the Court require attention on multiple levels. One of the issues that arose is the lack of clear and coherent communication by the African Court when a State withdraws its special declaration. Rather than have a press statement or other form of communication, the Court has opted to report on the situation within its case law. For those who follow the Court's jurisprudence closely, this is not a problem. However, this inhibits the Court from reaching a broader audience. This is a policy area the Court should pay more attention to.[16] Another suggestion was put forward that the African Court should adopt a similar strategy to the Inter-American Court of Human Rights in having more sustained communications with States, outside of the legal process, or thereafter. This is especially important as one of the issues identified was the fact that the multiple layers of the State are required to implement rulings, which can inhibit implementation of African Court judgments. Having more open dialogue with various levels of the State regarding areas such as reparations and remedies, would help ensure that the decisions are implemented, and within the State's means, rather than potentially exacerbating the problem. This potential role of the African Court in facilitating dialogue is envisioned at the pre- and post-judgment stages. The dialogic role suggested for the Court leads to another suggestion related to the need to settle more cases through non-contentious means, such as friendly/amicable settlement as envisaged by article 9 of the Protocol which provides that '[t]he Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter'.

BUILDING COMMUNITY SUPPORT

The Court should build a strategy around its achievements. For example, the Court should consider identifying and approaching States that have successfully implemented judgments of the Court, or States that are receptive of the Court's mandate, to serve as champions of human rights. These States could potentially serve as allies of the Court and make occasional statements in support of the Court's mandate. This role could also extend to those States using diplomatic channels to champion ratification of the Protocol and making the article 34(6) special declarations. Building such a community of States in support of the Court would also help in prompting the AU to make statements when the Court experiences backlash, and in the future, could move towards questions of compliance coming from political organs of the AU. Therefore, while AU organs must adhere to their responsibilities under the Constitutive Act and promote a culture of human rights and the adjudication of human rights disputes—and should not turn a blind eye to States who violate human rights—ultimately such acts require political pressure from States within those political bodies that are willing to push the human rights agenda of the AU forward.

16 It should be noted that following the round table the Court now has a dedicated section of its website that provides information on the withdrawals of special declarations. For details see the Court's website, *op cite* 4.

ENHANCING PARTNERSHIPS

The Court should also look for partners beyond States and the AU. A suggestion was also made that the Court should leverage National Bar Associations as institutions which could play an active role supporting the mandate of the Court. National Bar Associations were recognised as key domestic stakeholders that often hold enough power to push for key policy areas, including the implementation of court decisions and potentially pushing for special declarations to the African Court being made. In addition, the Court should also include national human rights institutions and other stakeholders to help build momentum at the national level.

CONCLUSIONS

There is much work to be done on all fronts. The African Court, African Commission, AU, States, civil society, academia, and other stakeholders all have a role to play in ensuring that the African Court has a future in protecting and enforcing human rights on the continent. Mobilising existing networks of stakeholders will be essential to supporting the African Court in the future, but also to holding it to account. Lessons should be learnt from the experiences of other regional human rights courts, and especially amongst Africa's human rights institutions. The complementarity between the African Court and African Commission must be strengthened, and the subsidiarity of the African Court vis-à-vis national courts needs to be better explained during sensitisation missions. In addition, the AU needs to take a more pro-active role when the authority and jurisdiction of the African Court is challenged. For the AU to promote 'African solutions to African problems' there indeed need to be credible and fully functional African solutions to human rights violations, such as the African Court. Finally, the Court also needs to bear in mind its limitations. As the primary judicial organ of the AU it has power, but it is also hamstrung in political settings. Consequently, the Court needs to be strategic in mobilising and drawing on allies and different actors that can work on its behalf, especially within States, to ensure the continued protection and enforcement of human rights within the AU.

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