

**TANZANIA'S 'WITHDRAWAL' FROM THE AFRICAN COURT AND ITS EFFECTS
ON THE ENFORCEMENT OF HUMAN RIGHTS****Vicent Mtavangu*****Agripina Mbilinyi*******Abstract***

Tanzania is one of the African Union (AU) Member States committed to protecting human rights at the international, regional and municipal levels. In 2010 Tanzania deposited a declaration to permit individuals and NGOs to directly sue the Government. The declaration was made under Article 34(6) of the Protocol establishing the African Court on Human and Peoples' Rights. Nonetheless, in 2019 the country withdrew the declaration deposited in 2010 based on discontent with how the African Court admitted cases instituted by Tanzanian individuals and NGOs. The effect of such a withdrawal of the declaration is that individuals and NGOs do not have direct access before the African Court; hence limiting the preferment of human and peoples' rights, especially when domestic mechanisms of safeguarding them fail. Further, the revocation is viewed as a retrograde step towards the advancement of the rule of law, human rights and Government accountability. Thus, this paper examines the reasons and effects of Tanzania's decision to withdraw her declaration deposited under Article 34(6) of the Protocol.

Keywords: *The African Charter, Human and Peoples' Rights, the African Court, the African Commission.*

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1. INTRODUCTION

The United Republic of Tanzania is an active member of the African Charter on Human and Peoples' Rights, 1981 (the African Charter).¹ On 9 March 2010, she deposited a declaration that conferred the right to individuals and Non-Governmental Organisations (NGOs) with observer status at the African Commission on Human and Peoples' Rights (the African Commission) to directly file cases before the African Court on Human and Peoples' Rights (the African Court). This declaration was made under Article 34(6) of the Protocol Establishing the African Court on Human and Peoples' Rights, 1998, (the Protocol).² However, on 21 November 2019, Tanzania filed an instrument at the African Union (AU) to withdraw the said declaration.³

The withdrawal of declaration means that the freedom that was enjoyed for almost a decade by Tanzanian individuals and NGOs to directly sue their Government in the African Court is currently curtailed. Thus, the violation of human and peoples' rights made by the Tanzanian Government and its functionaries can be referred before the African Court by using alternative avenues, such as the African Commission. The liberty to institute cases directly at the African Court enabled Tanzania to take a lead among other African States, which are Member States of the Protocol by having the highest number of cases instituted in the Court.⁴

Tanzania's resolution to withdraw her declaration has been criticised by most human rights activists internationally and municipally.⁵ It is described by some authors as a wrong move and

¹ OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58(1982). It was adopted on 27 June 1981 and became operative on 21 October 1986. Tanzania signed the African Charter on 31 May 1982 and ratified it on 18 February 1984.

² The Protocol was adopted on 10 June 1998 and entered into force on 25 January 2004. Tanzania ratified this Protocol on 7 February 2006.

³ <https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf> accessed 19 April 2022. It has to be noted from the outset that Tanzania is still a Member State of the Protocol. Thus, she has not withdrawn from the African Court; rather has withdrawn her declaration only as stipulated under Article 34(6) of the Protocol.

⁴ <<https://www.african-court.org/cpmt.statistic>> accessed 2 March 2022 and Luke Anami, 'Tanzania in the Spotlight or 'withdrawal' from Arusha-based human rights court' *The East African* (06 November 2021) <<https://www.theeastafrican.co.ke/tea/news/east-africa/tanzania-withdrawal-from-arusha-based-human-rights-court-3609834#:~:text=Tanzania%20has%20come%20under%20continental,directly%20access%20the%20African%20Court>> accessed 13 April 2022.

⁵ See, for instance, Amnesty International, 'Tanzania Withdrawal of Individual Rights to African Court will Deepen Repression' <<https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/>> accessed 1 March 2022.

blow for the Tanzanians as well as the African continent in general.⁶ It is further argued to be a retrogressive step towards the flourishing of human rights and rule of law in the country.⁷ The fear is that such a withdrawal may deepen repression in the country since her judicial system is confronted with several issues that limit free access to justice.⁸ Cost and impartiality are some of the issues discouraging Tanzanians to access judicial bodies. The withdrawal decision is further argued to have an impact on the accountability of the Government.⁹

This paper examines the reasons and effects of Tanzania's withdrawal of her declaration about individuals and NGOs direct access to the African Court. The paper consists of six parts: After an introduction in part one, part two presents the methodology used. Part three discusses the African human rights system particularly the African Charter and the Protocol vis-à-vis the African Court. Part four presents the Tanzanian Status in the African Court and reasons for the withdrawal of the declaration. Part five appraises the effects of such withdrawal in relationship with the protection and enforcement of human and peoples' rights and part six concludes the paper.

2. METHODOLOGY

This paper adopted a documentary review methodology. It involved the in-depth collection of written materials and documentary analysis of the secondary data from textbooks, journal articles, international conventions, declarations, relevant cases and website materials. As such, desk or library research was the main tool for collecting secondary data. The authors reviewed various writings that specifically focused on Tanzania's decision to withdraw her declaration at the African Court and its effects on the promotion and protection of human and peoples' rights. Since Tanzania is not the first country to withdraw her declaration, the authors visited a variety of written materials and websites from other African countries that also did the same in order to compare the withdrawal reasons and effects caused by such a move.

⁶ Anami (n 4).

⁷ *ibid.*

⁸ Amnesty International (n 5).

⁹ *ibid.*

3. THE AFRICAN HUMAN RIGHTS REGIME

The African human rights regime refers to the regional system of norms and institutions for enforcing human and peoples' rights.¹⁰ The main institutions that constitute the African regional human rights system include the African Commission,¹¹ the African Court¹² and the African Committee of Experts on the Rights and Welfare of Child.¹³ These bodies are complemented by other specific instruments, by the works of the African Union (AU) institutions and by various international and national laws.¹⁴

Instruments that supplement the above institutions comprise the African Charter, the Protocol, the African Charter on Rights and Welfare of the Child,¹⁵ the Convention Governing the Specific Aspects of Refugee Problems in Africa¹⁶ and the Protocol on the African Charter on the Rights of Women in Africa.¹⁷ Despite numerous legal instruments and institutional frameworks, human and peoples' rights continue to be violated in various African countries. This is partly exacerbated by the lack of capacity of African human rights institutions and the low level of commitment to the implementation of legal instruments.¹⁸ The next part of the article examines the African Charter and the Protocol. These are instruments that provide the foundation for the functioning of the African human and peoples' rights institutions.

3.1 The African Charter

The Banjul or African Charter is the main instrument that protects human and peoples' rights in the continent. On the one hand, the African Charter enshrines numerous rights and freedoms of individuals; whereas on the other hand, it contains both personal and States' duties. Examples of

¹⁰ Ingange-wa-Ingange, 'The African Human Rights System: Challenges and Prospects' Ph.D Thesis, University of South Africa 2010)15.

¹¹ Established by Article 30 of the African Charter. It was inaugurated in November 1987.

¹² Established by Article 1 of the Protocol. It delivered its first judgment on 15 December 2009.

¹³ Formed in 2001 and started to operate in 2003. The Committee derives its powers from Articles 32-46 of the African Charter.

¹⁴ Kofi Kufuor, *The African Human Rights System: Origin and Evaluation* (Palgrave MacMillan 2010) 34.

¹⁵ OAU Doc. CAB/LEG/24.9/49 (1990). It was adopted on 1 July 1990 and entered into force on 29 November 1999.

¹⁶ The Convention was adopted in Addis Ababa in September 1969. It came into force on 26 November 1974.

¹⁷ Adopted in Maputo on 1 July 2003 and came into force on 25 November 2005. Tanzania ratified this Protocol on 3 March 2007.

¹⁸ International Federation for Human Rights, 'Practical Guide: the African Court on Human and Peoples' Rights: Towards the African Court of Justice and Human Rights' <https://www.fidh.org/IMG/pdf/african_court_guide.pdf> accessed 10 April 2022.

rights and freedoms reflected in the African Charter comprise the right to life and personal integrity,¹⁹ the right to liberty and personal security,²⁰ freedom of association,²¹ the right to work,²² the right to economic, social and cultural development²³ and the right to a general satisfactory environment.²⁴ The realisation of the rights and freedoms goes hand in hand with personal duties. For example, to protect the dignity of other humankind,²⁵ not to compromise with the security of the State²⁶ and to preserve as well as strengthen positive African values and moral welfare of a given community.²⁷

Member States, *inter alia*, are obliged by the African Charter to enact laws so as to give effect the human and peoples' rights.²⁸ In sum, Member States are duty-bound to respect all freedoms and human rights ennobled in the African Charter, among others, through promotion, education and publication.²⁹ The human rights reflected in the African Charter are referred to as 'human and peoples' rights'. The concept of human and peoples' rights is a unique feature that differentiates the African Charter from other regional human rights treaties.³⁰ It is this exclusive characteristic of the African Charter that reflects the standards of African societies, in which a person is not regarded as an inaccessible and intangible individual, but considered to be a central associate of a community.³¹ In fact, the African Charter's provisions on the obligation to individual and peoples' rights reiterate the indivisibility and interdependent feature of fundamental human rights.³²

The notion of 'human and peoples' rights' is not defined in the African Charter. Nevertheless, Ouguergouz argues that peoples' rights can be defined by making indirect reference to the

¹⁹ African Charter, Article 4.

²⁰ *ibid* Article 6.

²¹ *ibid* Article 10.

²² *ibid* Article 15.

²³ *ibid* Article 22.

²⁴ *ibid* Article 24.

²⁵ *ibid* Article 28.

²⁶ *ibid* Article 29(3).

²⁷ *ibid* Article 29(7).

²⁸ *ibid* Article 1.

²⁹ *ibid* Article 25.

³⁰ Evans Malcolm and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd edn, Cambridge University Press 2008) 49-75.

³¹ Richard N Kiwanuka 'The Meaning of "Peoples" in the African Charter of Human and Peoples' Rights (1988) 82 *American Journal of International Law* 80.

³² Malcolm and Murray (n 30).

African Charter through interpretation.³³ This is done by construing other rights which are contained within it. All in all, the non-appearance of an express definition of ‘human and peoples’ rights in the African Charter is the *lacuna*, which needs to be filled to have a single and clear meaning of the phrase as applies to the African human rights administration.

However, the African Commission has defined the term ‘peoples’ rights’ in various cases. For example, in *DRC v. Burundi, Rwanda and Uganda*,³⁴ the African Commission used synonymously the expression ‘Congolese peoples’ rights’ and ‘the rights of the people of Congo’. Thus, the expression stood to mean everybody inside a State.³⁵ The expression can also infer separate minority groups, which may include linguistic, religious, ethnic and physiognomies constituting persons that are typically residents of the identical State.³⁶ As such, all people who belong to these groups are protected by the African Charter under this category of rights.

In *Mauritania* case,³⁷ which was about matters of slavery and demarcation of black Mauritians, the African Commission interpreted the expression ‘peoples’ as it appears in the African Charter to mean a specific cluster of the people within the borders of a State. Although the African Commission has several times defined the term ‘peoples’ rights’, there are variations in meaning from one case to another. Thus, the Commission is required to adopt one definition which will be referred to when the matter concerning ‘peoples’ rights’ arises.

Apart from interpretation, the African Commission as a creature of the African Charter has other functions such as formulating rules and principles related to fundamental freedoms as well as human and peoples’ rights.³⁸ To achieve its goals, the African Commission has also the function of liaison with other international and African institutions, such as the African Court.³⁹

³³ Fatsah Ouguergouz, *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy*, (Njihof 2003) 205.

³⁴ Communication 227/1999.

³⁵ Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2007) 37.

³⁶ Viljoen (n 35).

³⁷ 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interfricaine des Droits de l’Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l’Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, 161–191].

³⁸ African Charter Article 30 and 45(1)(b).

³⁹ *ibid* Article 45(1)(c).

The African Charter also provides seven mandatory criteria to be observed by the complainants for the admissibility of cases before the African Commission and the African Court.⁴⁰ These criteria include indication of author in the petition, compatibility of complaint with the Constitutive Act of the AU or Charter,⁴¹ the complaint not to be in a disparaging language and the communication not to base exclusively on news from the media.⁴² Other criteria include exhaustion of local remedies,⁴³ submission of the complaint at a reasonable time⁴⁴ and the matter should not have been settled under other international procedures. The African Charter is complemented by the Protocol. It is this Protocol that explicitly established the African Court to safeguard and enforce human and peoples' rights entrenched in the African Charter. The discussion on the Protocol is provided below:

3.2 The Protocol on Establishment of the African Court on Human and Peoples' Rights

The African Court is established under Article 1 of the Protocol. The Protocol was meant to establish the African Court to supplement and strengthen the protective role of human and peoples' rights of the African Commission.⁴⁵ This is because the latter institution does not have a judicial mandate, rather it provides recommendations. The Protocol further provides the jurisdiction, organisation, accessibility, composition and functions of the African Court. As per the Protocol, the African Court has jurisdiction to entertain all cases and disputes related to the interpretation of the African Charter, the Protocol and other international human rights treaties relevant to the Member States concerned.⁴⁶

The Protocol mandates the African Court to hear complaints on human and peoples' rights from, the African Commission, a State Party complained to the African Commission, a State Party that

⁴⁰ *ibid* Article 56 and Article 6(2) of the Protocol.

⁴¹ See also *Hadjali Mohamed v Algeria* App. No.13/88, Af. Comm. H.P.R (Apr, 27, 1994), Para. 2 and Frank David Omary v Tanzania App. No. 001/2012.

⁴² See also *Jawara v Gambia* App. No.147/95-149/96, Af. Comm. H.P.R (May, 11, 2000), Paras. 24-6.

⁴³ See also *Tanganyika Law Society and the Legal and Human Rights Center & Reverend Christopher Mtikila v The United Republic of Tanzania* Consolidated Applications 009/2011 and 011/2011 Para 82 and *Peter Joseph Chacha v the United Republic of Tanzania* App. No.003/2012.

⁴⁴ See also *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples' Rights v Burkina Faso*, The Preliminary Objections' ruling was delivered on 21 June 2013.

⁴⁵ Article 2 of the Protocol. See also Christof Heyns and Magnus Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*. (2nd edn Pretoria University Law Press 2006)35.

⁴⁶ The Protocol, Article 3(1).

has been complained of, a State Party whose citizen is a victim of human rights violations and African intergovernmental organisations.⁴⁷ NGOs with observer status before the African Commission and natural persons may directly file complaints at the African Court only when their State complies with Article 34(6) of the Protocol.⁴⁸ This Article states that:

At the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive any petition 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 a declaration.⁴⁹

The above provision provides a relatively easy way for direct submission of complaints at the Court rather than using the African Commission, the State Party or an intergovernmental organisation. The acceptability of complaints filed according to Article 34(6) of the Protocol has to meet conditions stipulated in Article 56 of the African Charter as discussed above. The weakness of Article 34(6) of the Protocol is that it does not provide procedures for withdrawing the deposited declaration.

As noted earlier, in 2010 the United Republic of Tanzania made a declaration as per Article 34(6) of the Protocol accepting the competence of the African Court to accept complaints from individuals and NGOs. Almost a decade later, Tanzania decided to withdraw the aforementioned declaration as discussed below.

4. TANZANIAN STATUS IN THE AFRICAN COURT AND REASONS FOR WITHDRAWING THE DECLARATION

The United Republic of Tanzania is among the African States that accepted a triple stratum of instruments namely, the African Charter, the Protocol and the declaration. In her declaration, Tanzania indicated expressly that:

The Court may entitle Non-Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it in accordance with Article 34(6) of the aforementioned Protocol. However, without prejudice to article

⁴⁷ibid Article 5(1).

⁴⁸ibid Article 5(3).

⁴⁹ Article 5(3) of the Protocol permits individuals and NGOs with observer status before the African Commission to file cases directly at the African Court as per Article 34(6).

5(3) of the aforementioned Protocol, such entitlement should only be granted to such NGOs and individuals once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania.⁵⁰

Since the deposit of the declaration, Tanzania has been actively involved with the African Court. This is indicated, among others, by the willingness of the Government to host the headquarters of the African Court in one of its big cities, Arusha, which is located in the northern part of the country. Moreover, the current President of the African Court is a Tanzanian.⁵¹

Depositing of the declaration made Tanzania lead by having the highest number of cases instituted and adjudicated by the African Court. The statistics appearing on the website of the African Court indicate that in the year 2022, the country had a total of 156 cases including those that were already determined.⁵² It is further documented that up to September 2017 there were 78 pending cases at the African Court's registry originating from Tanzania.⁵³ Moreover, it is on record that by September 2019 Tanzania had 28 decisions out of all 70 verdicts determined by the African Court.⁵⁴ This means that 40 per cent of the decisions were from Tanzania.⁵⁵ All these data point out that Tanzania leads by far other Member States to the Protocol in using the African Court as an international enforcement mechanism of human and peoples' rights. Therefore, the above data is a clear indication that Tanzania holds a central and leading role in the African Court, unlike other Member States of the Protocol.

Despite such a role in the African Court, in 2019 Tanzania decided to withdraw her declaration. The revocation took effect a year later, *viz.*, 22 November 2020. Using the precedent from

⁵⁰ <https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Declaration_Tanzania.pdf> accessed 19 May 2023.

⁵¹ The incumbent President of the African Court is Judge Iman Aboud. A few years ago the retired Chief Justice of the United Republic of Tanzania, the late Augustino Ramadhan also served as the Judge of the same Court.

⁵² <<https://www.african-court.org/cpmt.statistic>> accessed 2 March 2022. See also Anami (n 4).

⁵³ Ally Possy, 'It is better that ten guilty persons escape than one innocent suffer': the African Court on Human and Peoples' Rights and Fair Trials in Tanzania, (2017) 1 African Human Rights Yearbook 311-336, 314 <<http://doi.org/10.29053/2523-1367/2017/v1n1a15>> accessed 23 March 2022.

⁵⁴ *ibid.*

⁵⁵ Anuradha Mittal, 'Tanzania's Withdraw from the African Court on Human and Peoples Rights: A Wrong Move for the Country and for the Continent' <<https://www.oaklandinstitute.org/tanzanias-withdrawal-african-court-human-peoples-rights-wrong-move>> accessed 01 March 2022. This probably is an indication that there is a gigantic curtailment of human rights by the Tanzanian Government and its functionaries. Additionally, it prints a picture that the administration of justice in the country is ineffective.

Rwanda's withdrawal in *Ingabire Victoire Umuhoza v Republic of Rwanda*,⁵⁶ the African Court emphasised that Tanzania's withdrawal had no effect on the pending cases as well as those that were filed twelve months before the formal withdrawal.⁵⁷ By so doing, Tanzania joined the other three countries, Rwanda, Benin and Cote d'Ivoire that earlier made the same decision. These are countries with the highest number of cases before the African Court.⁵⁸ These four countries have made their withdrawal decisions just within a span of four years, *viz.*, from 2016 to 2020. Tanzania's withdrawal of the declaration means that currently there are only eight countries in Africa that allow natural persons and NGOs to access the African Court directly.

Although each country had different reason(s) for her withdrawal, dissatisfaction with how the African Court implemented Article 34(6) in admitting cases against the Governments from individuals and NGOs appears to be the underlying claim that compelled Tanzania to withdraw her declaration. This paper further subscribes to Mutangi's assertion that the general cause for such withdrawal is the tension in the application of municipal and international laws rather than trumping State Sovereignty.⁵⁹

Nevertheless, the main ground for such revocation, as stated in the notice of the withdrawal was that the African Court implemented the declaration contrary to the reservations made by Tanzania during the time of making the declaration.⁶⁰ As noted above in the deposited declaration, Tanzania made two reservations: exhaustion of all domestic legal remedies and compliance with the Constitution. None or partial compliance with these reservations was alleged to be among the reasons for the withdrawal of the declaration. This shows that the implementation of Article 34(6) by the Court is at fault. Delineating on the above reason, the then Attorney General of Tanzania reiterated that exhaustion of local remedies was not complied

⁵⁶ (2014) 1 AfCLR 540.

⁵⁷ *Andrew Ambrose Cheusi v United Republic of Tanzania*, Application No. 004/2015 delivered on 26 June 2020, paras 36-39; *Rajab Yusuph v United Republic of Tanzania*, Application No. 036/2017 ruling of 24 March 2022.

⁵⁸ As per the statistical data appearing on the website of the Court, the United Republic of Tanzania has a total number of 156 applications, Benin has 43 applications, Code D'Ivoire has 40 applications and Rwanda has 16 applications. See <<https://www.african-court.org/cpmt.statistic>> accessed 2 May 2023.

⁵⁹ Tarisai Mutangi, 'African Court Coalition Discussions: States Withdrawal from Article 34(6) of the African Court Protocol, Coalition for an Effective African Court on Human and Peoples' Rights' (Official Bulletin Volume 1 May 2020)3.

⁶⁰ The withdrawal notice may be accessed at <https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf> accessed on 5 March 2022.

with by the African Court when implementing the said Article.⁶¹ In particular, the AG stated that:-

Tanzanians have been rushing to file petitions with the court even if their claims have already been heard and dismissed by all judicial levels within the country from primary, district, regional and the High Court, right up to the apex Court of Appeal... sometimes they just skip the whole process and go straight to the African Court. All of this tends to ignore Tanzania's own judicial process which constitutionally is not legal. This means that the African Court unfairly interferes with Tanzania's sovereign constitution... If the court wants Tanzania to reinstate the article, then it should abide by the country's Constitution which honours the judicial proceedings for which a claimant is allowed to follow and not otherwise.⁶²

The reason that even cases that have already been heard and dismissed by all Tanzanian courts are filed at the African Court seems to be untenable. This is because it undermines the whole concept of the presence of international judicial bodies, such as the African Court. Whoever is aggrieved by the decisions of his superior national courts has room to access the international court provided he has the *locus standi* under the instrument establishing the court in question.

Further, the assertion that NGOs and individual Tanzanians instituted directly their complaints without adhering to the whole process is also unreceptive. As noted earlier in this paper, exhaustion of the local remedies is among the mandatory requirement before the admissibility of complaints in the African Court. In fact, several cases from Tanzania have been declared inadmissible for not exhausting local remedies.⁶³ As not earlier, it is mandatory for all cases, including those from Tanzania, to meet the criteria related to the exhaustion of local remedies before they are admitted by the African Court.

⁶¹ Emmanuel Onyango, 'Respect Our Judicial, Sovereign Boundaries, Tells Arusha Based African Court, *the East African* (6 January 2021 <<https://www.theeastafrican.co.ke/tea/news/east-africa/respect-judicial-sovereign-boundaries-tanzania-tells-court-3248976>> accessed 15 April 2022.

⁶² *ibid.*

⁶³ See, for instance, *Peter Joseph Chacha v Tanzania*, Application 003/2012 Judgment (admissibility), 28 March 2014 (2014) 1 AfCLR 398 and *Frank David Omary and Others v Tanzania*, Application no. 001/2012 Ruling (admissibility), 28 March 2014 (2014) 1 AfCLR 358.

The interference by the African Court with the sovereignty of the Tanzanian Constitution, as noted in the above Government's statement is another allegation for the withdrawal of the declaration. It is not clear how the decisions of the African Court about Tanzania have interfered with the supremacy of the latter's Constitution. However, one is inclined to believe that the decisions in *Ally Rajabu and Others v Republic of Tanzania*⁶⁴ and *Tanganyika Law Society, Legal and Human Rights Centre and Christopher R Mtikila (joinder) v Tanzania*⁶⁵ prompted the Government's statement mentioned above. In *Rajabu's* case, the African Court recommended the country to abolish the death penalty which has been entrenched in the Constitution and Penal Code for many years. This is argued to be the case that triggered the Tanzanian Government to withdraw her declaration.⁶⁶ It is because it was decided shortly before the Government initiated the withdrawal process.

The main issue in *Mtikila's case* was the prohibition of independent candidates to contest posts of President, Member of Parliament and Council. This matter was conclusively determined by the Court of Appeal of Tanzania in the *Honourable Attorney General v Reverend Christopher Mtikila*⁶⁷ whereby the Court categorically ruled that such a matter was not legal but rather a political issue to be determined by the Parliament and not the court of law. Conversely, the African Court found that Tanzania infringed various provisions of the African Charter providing for non-discrimination, the right to equality and the right to freedom of association.⁶⁸ Both the death penalty and independent candidates are subjects that in one way or the other, touch the Constitution of the United Republic of Tanzania.

Against that backdrop, it can be argued at this juncture that the African Court as an international enforcement body has jurisdiction to interpret constitutional provisions of all Member States to the Protocol with the view of examining whether they comply with the African Charter and several other global human rights treaties.⁶⁹ In a situation where some of the constitutional

⁶⁴ 2016(1) AfCLR 590.

⁶⁵ 2011(1) AfCLR 32.

⁶⁶ Anami (n 4).

⁶⁷ Civil Appeal No. 45 of 2009.

⁶⁸ *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34.

⁶⁹ Article 3(1) of the Protocol.

entrenchments contravene those instruments, the African Court has the obligation of compelling the State in question to amend her Constitution. By so doing the African Court will not be interfering with the sovereignty of the Constitution of a given State.

As noted earlier, the alarming number of cases instituted against the Tanzanian Government might be the central reason that triggered the country to withdraw her declaration.⁷⁰ Moreover, most of the judgments of the African Courts against Tanzania were entered in favour of the complainants, that is, individuals or NGOs.⁷¹ This explains why the withdrawal move is argued to be politically motivated to silence individuals and NGOs after sequences of successful cases instituted counter to the Government.⁷²

Appraisal of the cases from Tanzania instituted at the African Court shows that they were grounded on the lack of the right to a fair trial within the country.⁷³ It is documented, for example, that up to September 2017, 78 cases originating from Tanzania related to the violation of the right to a fair trial were still pending at the African Court's registry.⁷⁴ This indicates that the right to a fair trial is one of the hottest issues in Tanzania. To put it rightly: 'The large number of fair trial cases against Tanzania before the African Court is a reflection of the extent to which fair trial rights are overlooked in the country by those involved in the administration of criminal justice'.⁷⁵

⁷⁰ Kariuki Muigua, 'African Court of Justice and Human Rights: Emerging Jurisprudence, June 2020' <<http://kmco.co.ke/wp-content/uploads/2020/06/African-Court-on-Human-and-Peoples-Rights-Emerging-Jurisprudence-Kariuki-Muigua-June-2020.pdf>> accessed 21 March 2022.

⁷¹ See, for instance, *Peter Joseph Chacha v United Republic of Tanzania*, Application No. NO.003/2012, *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34 and *Ally Rajabu and Others v Republic of Tanzania* 2016(1) AfCLR 590.

⁷² International Law Blog, 'What Comes after Withdrawing from the African Court of Human and Peoples Rights? Filling the Gaps to Bring Human Rights-based Claims against Tanzania' <<https://internationallaw.blog/2020/06/01/what-comes-after-withdrawing-the-african-court-of-human-and-peoples-rights-filling-the-gaps-to-bring-human-rights-based-claims-against-tanzania>> accessed 19 March 2022.

⁷³ Examples of the cases include *Mohamed Abubakari v Tanzania (Merits)* (2016)1 AfCLR 599, *Alex Thomas v Tanzania*, *Jonas v Tanzania*, Application 11/2015, *Nganyi v Tanzania*, Application 6/2013 and *Onyachi v Tanzania*, Application 3/2015.

⁷⁴ *Posy* (n 53) 314.

⁷⁵ *ibid.*

In one of the cases, the African Court ruled that failure by the Tanzanian Government to provide the suspects with free legal assistance denies him/her the right to a fair trial.⁷⁶ In essence, the right to a fair trial as a fundamental human right does not only manifest the rule of law; but, it is also among the significant tenets of democracy.⁷⁷ This right is meticulously enshrined in the African Charter, under Article 7, which highlights, among others, the right to be tried within a required time by a neutral court judicial body. Additionally, the right is reflected in many international instruments governing human rights.⁷⁸

Deprivation of the right to a fair trial affects greatly several other human and peoples' rights.⁷⁹ These comprise, for example, the right to life,⁸⁰ right to respect the dignity inherent in a human being⁸¹ and the right to liberty and security of the person.⁸² The importance of this right cannot be understated. As such, denying individuals and NGOs to direct file at the African Court cases of this nature puts in limbo the enforcement of numerous rights. Not only that but also it promotes the continuous violation of those rights. More effects of the withdrawal of the declaration are discussed in the following part.

5 EFFECTS OF WITHDRAWAL OF THE DECLARATION

Based on the discussion above, the African Court appeared to be the effective enforcement institution and refuge for most individual Tanzanians and NGOs about international enforcement of the right to a fair trial as well as other human and peoples' rights. The pertinent question at this juncture is, where will the cases alleging curtailment of human and peoples' rights, *eg*, the right to a fair trial will be swiftly instituted internationally where individuals and NGOs have exhausted the local remedies?

The reason is that, for the period of its existence, the African Court has been a shelter for Tanzanians and those persons who failed to find redress in their domestic courts. Most of the

⁷⁶ *Andrew Ambrose Cheusi v United Republic of Tanzania*, Application No. 004/2015 delivered on 26 June 2020.

⁷⁷ *Possy* (n 53) 312.

⁷⁸ These instruments are like the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights, 1966.

⁷⁹ *Possy* (n 53) 313.

⁸⁰ African Charter Article 4.

⁸¹ *ibid* Article 5.

⁸² *ibid* Article 6.

time, the municipal courts exercised unfairness because of the arbitrary executive arm that sometimes interferes with the independence of the judiciary.

After the withdrawal of the declaration, it means that, the number of persons who can access the African Court has been limited. The African Commission, Member States to the Protocol, which is complaining or complained, State parties whose citizen has been affected by the violation of human rights, and African intergovernmental organisations are only dully mandated to access the African Court.⁸³ This denotes that a Tanzanian individual or NGOs will be required to indicate preference of their complaints at the African Court via the African Commission, the Government or intergovernmental organisations such as the East African Community (EAC). As such, procedures to access the African Court by the victims of human and peoples' rights have been lengthened. In this scenario, it is also very difficult for cases that the Government is accused of brutal violation of human and peoples' rights to be referred to the African Court even if an individual or NGO has exhausted the local remedies.

The move by Tanzania is viewed as a retrograde step towards the advancement of rule of law, human rights and Government accountability.⁸⁴ The said decision has also the impact of limiting the preferment of human and peoples' rights, especially when the domestic mechanisms of safeguarding them fail. Consequently, Tanzanians have been subjected to continuous violations of human and peoples' rights because they have no room to directly file their complaints at the African Court. The African Commission, which is another avenue to access the African Court does not have a legal force and is also overwhelmed with a backlog of pending petitions.⁸⁵

Besides, the withdrawal of the declaration undermines the effectiveness of the African human rights system. This is because the African Court has made some achievements in human rights jurisprudence based on the significant number of cases instituted by natural persons and NGOs from Tanzania and other three countries that withdrew their declarations.⁸⁶ The overarching

⁸³ The Protocol Article 5(1).

⁸⁴ Amnesty International (n 5).

⁸⁵ Muigua (n 70).

⁸⁶ *ibid.*

impact is to impair the AU Agenda of 2063 focusing on, among others, improving human rights, democracy and good governance in Africa.⁸⁷

While Tanzania withdrew her declaration, it is not surprising that other members of the AU are still depositing their declarations based on Article 34(6) of the Protocol to make a total number of eight countries.⁸⁸ As hinted earlier, the position of Tanzania in the African Court as the host State and providing the incumbent court's President may make also these countries follow the same withdrawal route. In a long run, the withdrawal move may have severe impacts of weakening the court's authority and enforcement of human and peoples' rights in the respective countries as well as in the African continent in general.⁸⁹

It is self-evident that there are cases from Tanzania that are still pending in the African Court since the withdrawal date.⁹⁰ Furthermore, there are decisions which have been recently delivered by the African Court. The issue is whether the Government of Tanzania will still provide an active role and cooperate fully in prosecuting the pending cases as well as implementing decisions or rulings delivered by the African Court after the withdrawal of the declaration. Lack of such cooperation from the Government may affect the rights of parties who instituted cases and those persons whose judgments were entered in their favour. The reason is that there is no specific legal procedure in the country on how judgments from the African Court may be enforced.⁹¹ Thus, the executive arm of the Tanzanian Government has the discretion to enforce them or not.⁹² Because Tanzania has withdrawn her declaration, there is a high likelihood that the said judgments may remain as a white elephant.

⁸⁷ See Aspiration 3 of the AU Agenda 2063.

⁸⁸ For example, on 03/10/2021 Guinea Bissau handed over in Dar es Salaam –Tanzania to a representative of the Office of the Legal Counsel of the African Union Commission its declaration, whereas on 28 October 2021 the Republic of Niger deposited her Declaration in Addis Ababa- Ethiopia. Other six countries with valid declarations include Malawi, Ghana, Tunisia, Mali, Gambia and Burkina Faso.

⁸⁹ Anami (n 4).

⁹⁰ As per the website of the African Court, <<https://www.african-court.org/cpmt/statistic>> accessed on 19 May 2023, there are 75(48%) Tanzanian cases pending at the Court.

⁹¹ Coalition for an Effective African Court on Human and Peoples' Rights, *Booklet on the Implementation of Decisions of the African Court on Human and Peoples' Rights* (2nd edn 2021)30 and Anami (n 4).

⁹² *ibid.*

Further, since many cases that flooded the African Court were from Tanzania, it is expected that the backlog of cases at the African Court will significantly drop.⁹³ This signifies that the low number of complaints will make the African Court effective in handling the rest of the cases from other countries. Contrariwise, it is argued that ‘without a sufficient number of cases to adjudicate the Court’s authority, legitimacy and the continuing ability to operate could be seriously endangered.’⁹⁴ Since individual complaints constitute a significant percentage of all cases instituted at the African Court, the withdrawal move has a great impact on its capacity and effectiveness in handling violations of human and peoples’ rights.⁹⁵ This explains why sometimes it is argued to be the court for States rather than individuals.⁹⁶

6 CONCLUSION

The central theme of this article was to investigate the reasons and effects of Tanzania’s withdrawal of the declaration permitting individuals and NGOs to directly access the African Court. The declaration was made pursuant to Article 34(6) of the Protocol. For a period of nine years of the existence of the declaration before its withdrawal, Tanzanian individuals and NGOs have experienced unimpeded access before the African Court. As such, there has been an increase in the number of cases filed at the court to safeguard human and peoples’ rights in the country and the African continent in general.

As has been shown in this paper, Tanzania decided to withdraw the declaration, among others, so as to reduce the number of cases instituted at the African Court by individuals and NGOs against the Government’s actions. The withdrawal of the declaration has effects on the promotion and enforcement of human and peoples’ right not only in Tanzania but also in the African- continent. Further, such a withdrawal may increase the resistance of other countries to the implementation of the African Court’s decisions.

⁹³ As per the website of the African Court <<https://www.african-court.org/cpmt/statistic>> accessed on 19 May 2023, out of 347 cases, 156(47%) are from Tanzania. Other States with the highest number of cases are Benin 43(13%), Republic of Cote d’ Ivoire 40(12%), Mali 31(9%), Tunisia 17(5%) and Republic of Rwanda 16(5%).

⁹⁴ Coalition for an Effective African Court on Human and Peoples’ Rights (n 91) 4.

⁹⁵ Muigua (n 70)12.

⁹⁶ Benjamin Jonas, ‘African Court on Human and Peoples Rights: A Court for States or for Adjudicating Individual Human Rights Violations?’ (2021) 31 *Uongozi Journal of Management and Development Dynamics* 1, 1-37.

This paper further noted that, the withdrawal reasons by Tanzania are not plausible in comparison with the effects that face the individual Tanzanians and the continent in general. Therefore, it is high time for the country to reconsider her decision for the benefit not only of her citizen and NGOs but also for the triumph of human and peoples' rights in Africa. The reason is that Tanzania is not only the home to the African Court but also provides its President. Thus, Tanzania should lead by example to the rest of the Member States to the African Charter and the Protocol.

Despite the withdrawal of the declaration, Tanzania is still a Member State of the African Charter and the Protocol that established the African Court. Based on that ground, the Government of Tanzania is not excused from the responsibility to implement the decisions rendered against her despite the withdrawal of the declaration. Further, since the process to instituting cases before the African Court has been prolonged, it is high time for Tanzanian individuals and NGOs to use other avenues established in the African human rights legal regime in enforcing human and peoples' rights.

All in all, the AU assembly is called upon to revisit Article 34(6) of the Protocol to limit the freedom of the States to withdraw their declarations and also encourage more States that have not deposited the same. In so doing, the African Court will meet its mission and vision of addressing issues of violation of human and peoples' rights' against individuals. This is because the underlying objective behind the withdrawal move of the declaration is to limit the applicability of international jurisdiction of the African Court within the States concerned.