STATE PARTIES' WITHDRAWAL OF DIRECT ACCESS TO AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: THE NEED TO REINVIGORATE COMPLEMENTARITY

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ABSTRACT

This article analyzes the implications of the recent withdrawals of the declaration under article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on African Charter on Human and Peoples' Rights (African Court Protocol) on the activities of the Court and provides plausible recommendations. It argues that implications of the withdrawals include a decrease in the number of cases reaching the Court, compliance problems with judgments of pending cases, negative effect on the legitimacy of the Court, and more state parties being discouraged from accepting direct access declaration. As a solution to curb the impact of the withdrawals and in general, to improve the effectiveness of the African human rights system, the article suggests that there is a need for the purposive application of the complementarity relationship between the African Commission on Human and Peoples' Rights and the Court. Accordingly, the Commission needs to adopt a duty-based but rebuttable referral approach for cases of non-compliance with its recommendations. It should develop purposive referral practices and refer cases to the Court frequently as this will help solve the challenges that arise from the recent withdrawals.

Keywords*: African Court, African Commission, withdrawal, direct access, complementarity*

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1. INTRODUCTION

Over years, the African human rights system has expanded both in the normative spectrum and institutional arrangements. Setting the African Charter on Human and Peoples' Rights (ACHPR) at its center, it has seen the adoption of several continental human rights instruments.[1] The main human rights treaty-monitoring organs of the African Union (AU) are the African Commission on Human and Peoples' Rights (African Commission or Commission) and the African Court on Human and Peoples' Rights (African Court or Court) and the African Committee of Experts and on the Rights and Welfare of the Child (ACERWC). State parties' compliance with the obligations imposed by the ACHPR is monitored by the African Commission and African Court. The African Commission is a quasi-judicial body established by the ACHPR 'to promote human and peoples' rights and ensure their protection in Africa'.[2] The African Court was established by a Protocol to the ACHPR[3] to complement the protective mandate of the Commission.[4] The African Court, unlike the Commission, is vested with full judicial power.

Article 5 of the Court Protocol stipulates entities that can submit contentious cases to the Court. These are the African Commission, the state party which has lodged a complaint to the Commission, the state party against which the complaint has been lodged at the African Commission, the state party whose citizen is a victim of human rights violation, and African intergovernmental organizations.[5] Relevant non-governmental organizations (NGOs) with

[1]The ACHPR was adopted on 27 June 1981 and entered into force on 21 October 1986. Some of the continental human rights include the African Charter on the Rights and Welfare of the Child; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, better known as the Maputo Protocol, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

[2]Articles 30 and 45 of the ACHPR; V Dankwa 'The Promotional Role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice,* 1986-2000 (2002), Pp.335-352; F Viljoen *International Human Rights Law in Africa* (2012), Pp300-390.

[3] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on African Charter on Human and Peoples' Rights (African Court Protocol), adopted on 10 June 1998 and entered into force on 25 January 2004.

[4] African Court Protocol, Art.2.

[5]African Court Protocol, Art. 5(a)-(e).

observer status before the African Commission and individuals can institute cases before the Court[6] if the state party against which complaint is lodged has agreed to same by making a declaration under article 34(6) of the Court Protocol.[7]

Individuals' and NGOs' direct access to the Court is 'the exception rather than the rule'.[8] The African Commission and the state parties act as the 'gatekeepers' of the Court.[9] State parties do so by not making the declaration under article 34 (6) of the Court Protocol; and the Commission, with the use of its discretionary power to refer cases to the Court. Ever since the adoption of the Court Protocol, as of December 2022, only twelve state parties have made the declaration under article 34(6) and hence allowing individuals and NGOs to directly institute a case before the Court.[10]As of December 2022, on contentious matters, the Court has received 330 applications.[11] Among these applications, roughly 93 percent (306 out of 330) were submitted by individuals, six percent (21 out of 330) by NGOs, and one percent (3 out of 330) by the Commission.[12]

However, state parties have started withdrawing the declaration under Article 34 (6) of the Court Protocol. Rwanda was the first to do so in 2016,[13] followed by Tanzania in 2019.[14] Benin and Cote d'Ivoire followed suit in 2020.[15] As a result, it is only eight state parties that currently allow individuals and NGOs to directly access the Court. The withdrawals amount to cutting the major

[6]African Court Protocol, Art. 5 (3).
[7]African Court Protocol,Art.5 (3); the engagement of NGOs with the Commission is discussed in depth in N Mbelle'The Role of Non-governmental Organizations and National Human Rights Institutions at the African Commission' in Evans & Murray (eds) (n 2) 289-315.
[8]Viljoen, *supra* note 2, P.426.
[9]Ibid.
[10]Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger, Rwanda, Tunisia, and Tanzania are the countries that accepted the competence of the African Court to directly receive cases submit by individuals and NGOs.
[11]African Court 'Applications Received by the Court' https://www.african-court.org/cpmt/statistic <accessed 05 December 2022>.
[12] *Ibid.*
[13]Rwandan Ministry of Justice 'Clarification' (2016) https://minijust.gov.rw/fileadmin /Documents/Photo_News_2016/Clarification2.pdf <accessed 21 May 2020>.
[14]Amnesty International 'United Republic of Tanzania: Withdrawal of Individual Rights to African Court Will Deepen Repression' 11 December 2019 https://www. Amnesty.or.jp /en / news/2019/1211_8489.html <accessed 21 May 2020>.
[15]International Justice Resource Centre 'Benin and Côte d'Ivoire to Withdraw Individual Access to African Court' https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/ <accessed 22 May 2020>.

pipeline that feeds the Court with cases. There is no question that withdrawals of special declarations have effects on the Court in discharging its protective mandate, and on the African human rights system in general.[16] Therefore, it is important to examine the likely impact of the withdrawals on the African Court and most importantly, suggest feasible resolves.

The rest of the article is classified into four sections. The second section explores the historical context surrounding the creation of the Court with the view of having a holistic view of why the African states wanted to establish the Court and how it ended up having its current access design. The third section discusses the likely implications of the withdrawals of the direct access declaration on the Court. This is followed by a section that discusses the need for a purposive application of the complementarity relationship between the Commission and the Court to curb the negative effects the withdrawals may have on the operations of the latter. Finally, a concluding remark is forwarded.

2. HISTORICAL CONTEXT AND PERSPECTIVES ON ACCESS TO THE COURT

The idea of establishing a regional judicial body goes back to the 1961 African Conference on the Rule of Law. The Conference invited the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.[17]

However, the African Charter was adopted in 1981 with a quasi-judicial body, the Commission, instead of a court. One of the reasons the Commission was preferred over a court was that it was compatible with the reconciliatory nature of dispute resolution entrenched in African culture.[18] Further, having a judicial

[16]T David & E Amani 'Another One Bites the Dust: Côte d'Ivoire to End Individual and NGO Access to the African Court' *Blog of the European Journal of International Law* 19 May 2020 https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/ <accessed 11 August 2021>.

[17] International Commission of Jurists, *African Conference on the Rule of Law* (1961), P11.

[18] E Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples' Rights*, Howard Law Journal (1988), Vol.31(4), P650.

body was considered a premature task[19] partly because the principle of non-interference had been the pillar of the Organisation of African Unity (OAU) and states were not ready to give away part of their sovereignty.[20] Moreover, the drafters of the African Charter thought that 'Africa is not ready for a supranational judicial institution at that time'.[21]

In the 1990s, several reasons moved the African states to decide to accept a human rights court. Externally, the end of the Cold War enabled the Western world to redirect development aid to Africa, but with a condition of strong protection for human rights.[22] Internally, the wave of democratization that occurred in many countries created a conducive environment to advance the cause with less resistance.[23] NGOs throughout the continent, particularly those with observer status before the Commission, played a great role in advocating for the establishment of a human rights court.[24] In 1994, the Assembly of Heads of State and Government of the OAU requested its Secretary-General to convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court of Human and Peoples' Rights.[25]

Accordingly, the Cape Town Meeting was held in 1995 and the outcome was the first draft of the Protocol.[26] This was followed by the Nouakchott draft and Addis Ababa draft and finally, the adoption of the African Court Protocol in 1998 in Ouagadougou, Burkina Faso.[27] In all these processes, the Commission and the International Commission of Jurists played a significant role, ranging from meeting facilitation to the provision of legal expertise support.[28]

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[19] Vijoen, *supra* note 2, Pp. 411-412.
[20]G Bekker, *The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States*, Journal of African Law (2007), Vol.51, No.1, Pp.154-155.
[21]FViljoen & L Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights*, American Journal of International Law (2007), Vol.101, No.1, P2.
[22] Bekker, *supra* note 20, P.158.
[23] Vijoen, *supra* note 2, P.412.
[24] Bekker, *supra* note 20, P. 159; Vijoen, *supra* note 2, P.412.
[25]AHG/Res 230 (XXX) (1994).
[26]GJ Naldi & K Magliveras, *The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison,* African Journal of International and Comparative Law (1996), Vol.8, No. 4, P945.
[27] Bakker, *supra* note 20, Pp167-169; Vijoen, *supra* note 2, P. 412-413.
[28] Bekker, *supra* note 20, p. 160.

In general, a single narration cannot explain why African states established the Court. The 1990s wave of democratisation, the global situation of the time, influence from NGOs, and initiatives from the Commission played their share in moving the African states to establish a judicial body. However, it is important to note that it was only by the consent of states, subject to internal and external factors push, that the African human rights court became a reality.

Numerous scholarly works address the African human rights system including the architecture of individuals and NGOs direct access to the Court.[29] However, much is not written concerning the implication of state parties' withdrawals of their special declaration. Similarly, the complementarity relationship between the Commission and the Court, particularly after the revision of the Rules of Procedure (RoP) of the Commission and the Court in 2020, is not yet well researched.[30]

The establishment of the Court is considered as one of the progressive steps taken by African states to strengthen the continental human rights system.[31] However, its creation alone cannot be a guarantee for the agenda of advancing human rights as some have noted that the Court has 'congenital defects' as far as its access design is concerned.[32] Others have highlighted that how courts address human rights violations is directly related to who can access the courts, given that '[a] human rights court is primarily a forum for protecting citizens against the state and other governmental agencies.'[33] In this regard,

[29]OC Okafor *The African Human Rights System, Activist Forces and International Institutions* (2007); KO Kufuor *The African Human Rights System: Origin and Evolution* (2010); VOO Nmehielle *The African Human Rights System: its Laws, Practice, and Institutions* (2001); K Appiagyei-Atua 'Human Rights NGOs and their Role in the Promotion and Protection of Rights in Africa' (2002) 9(3) *International Journal on Minority and Group Rights* 265-289.

[30]The 2020 RoP of the Commission was adopted during its 27th Extra-Ordinary Session held in Banjul from 19 February to 4 March, 2020. The RoP was first adopted in 1988 and revised in 1995 and 2010.

[31]C Heyns, *The African Regional Human Rights System: In Need of Reform?* African Human Rights Law Journal (2001), Vol.1, No.2, P166.

[32]SH Adjolohoun, *A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights*, African Human Rights Law Journal (2020), Vol.20, P 2.

[33]M Mutua, *The African Human Rights Court: A Two-Legged Stool?* Human Rights Quarterly (1999), Vol. 21, No. 2, P355.

the way the individuals' and NGOs' direct access to the Court is designed has attracted heavy criticism over the years.[34]

Some say that the restriction placed by the Court Protocol on the individuals' and NGOs' access is a terrible blow to the standing and reputation of the court.[35] As a human rights court, the importance of the Court depends on whether it 'provides victims of human rights violations with a real and accessible forum to vindicate their basic rights.'[36] Others describe the restriction on direct access as 'a cynical move to diminish what power the Court might have over [s]tates by making it less accessible to those most likely to bring cases.'[37] It is also argued that leaving individuals and NGOs access to the discretion of the state parties to make the special declaration as 'a case of the poacher turned gamekeeper.'[38] This is because individuals are the primary users of human rights courts and states have less or no enticement to allow individuals to access to international forums.[39] Additionally, the restricted access of individuals and NGOs to the Court has to be seen parallel to the relatively unrestricted direct access of the state parties, the Commission, and African intergovernmental organizations.

Following the withdrawals, attempts were made to interrogate the reason behind withdrawals and suggest the way forward.[40] Accordingly, withdrawals were attributed not only to the behaviours of the state parties but also to 'the Court's system design and its practice'.[41] As a solution, it was suggested that the Court has to 'improve the design and practice', be cognisant of the political context in which it operates, and hence 'ensure a sustainable balancing of the various interests involved'.[42]

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[34]D Juma, *Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper?* Essex Human Rights Review (2007), Vol.4, No.2,Pp1-21; M Ssenyonjo 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008-2012' (2013) 2 *International Human Rights Law Review* 17-56.
[35]Mutua, *supra* note 33, P. 355.
[36]Id. P.357.
[37]J Harrington 'The African Court on Human and Peoples' Rights,' in Evans & Murray (eds), *Supra* note 2, P319.
[38]Juma, *supra* note 34. P.3.
[39] Id, p. 5.
[40]Adjolohoun, *supra* note 32, Pp 5-18; (discussion on reasons for withdrawals) & 31-39 (discussion on recommendations).
[41] Id. P.1.
[42] Id. P. 40.

The complementarity scheme in the African human rights system has also been the subject of scholarly inquiries.[43] What is common among these pieces of literature is that all emphasis is placed on the need for constructive complementarity, instead of creating an atmosphere of competition between the Court and the Commission.[44] However, most of these writings have been referring to the 2010 Rules of Procedure (RoP) of the Commission and the Court. The new development in the 2020 RoP is not yet part of broader discussions and hence worthy of scrutiny.

3. IMPLICATIONS OF STATE PARTIES' WITHDRAWALS

This section addresses the likely implications of the withdrawals of the direct access declaration on the Court. This is so crucial because it helps understand why it is necessary to take concrete steps to restore, maintain and sustain the confidence of states in the Court with the view to return the withdrawn states and persuade other states to accept the declaration. Some of the implications are forward-looking in the sense that since it has not been a long time, specifically after the last three withdrawals, drawing empirically supported impacts would be difficult. Yet, implications are supported by facts that have happened so far and their logical inferences as discussed in the following paragraphs.

3.1.LESSENING THE NUMBER OF CASES REACHING THE COURT

The first and immediate impact of the withdrawals is on the number of contentious cases reaching the Court. This can be simply grasped by

[43]See ST Ebobrah , *Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations,* European Journal of International Law (2011), Vol.22, No.3, Pp 663-688; A Rudman, *The Commission as a Party before the Court - Reflections on the Complementarity Arrangement*, Potchefstroom Electronic Law Journal (2016) Vol. 19, Pp 1-29; F Viljoen, *Human Rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness,* South African Journal of International Affairs (2011), Vol.18, No.2, Pp.191-216;N Udombana, Meaningful Complementarity /Cooperation between the African Court and the African Commission, in Comparative Perspectives' Conference Paper, Conference on the First Decade of the Creation of the African Court on Human and Peoples' Rights (2016) https://www.researchgate.net /publication /331330403_Meaningful_Compleme- ntarity Cooperation_Between_the_African_Court_and_the_African_Commission_in_Compa- rative_Perspectives <accessed 11 June 2022>.

[44]Ebobrah, supra note 43, P 688; Rudman, supra note 43, P21; IAB Elsheikh, *The Future Relationship between the African Court and the African Commission*, African Human Rights Law Journal (2002), Vol.2, No.2, P 260.

considering the case history of the Court. The case statistics of the Court as of December 2022 clearly show that much of the work of the Court relied upon the applications submitted by individuals and NGOs. Individuals submitted roughly 93 percent (306 out of 330) and NGOs six percent (21 out of 330) of the applications.[45] What makes it more problematic is that Tanzania, notoriously known for being the respondent receiving the lion's share of the cases, is the second state to withdraw the direct access declaration. At this point, the visible impact of the withdrawals is a significant decrease in the submission of cases. For instance, from 2015 to 2020, the Court received an average of 45 cases with the lowest submission of 33 cases in 2015 and 2018.[46] In 2020 and 2021, cases submitted to the Court drastically decreased to 17 and 7 respectively.

The decrease in case submission is not without its consequences. Although the primary function of international or regional courts is dispute resolution, it goes beyond that since they serve also as the guardians of norms.[47] They do so either through case adjudication or rendering advisory opinions. In that way, international courts build case jurisprudence. In the process of considering cases, not only developing conventional jurisprudence, judicial or quasi-judicial may develop creative ways of protecting rights. In this regard, the Commission has developed the crucial yet criticized 'implied rights' doctrine.[48] The important point is, to develop jurisprudential pillars or innovate progressive ways of guarding rights, first cases must reach the judicial bodies. The lesser the cases, the narrow the opportunity for developing vast and rigorously tested jurisprudence. Usually, courts develop jurisprudence by referring to their previous judgments.[49] Therefore, the decrease in case submission that is likely to happen following the direct access withdrawals

[45]African Court, Applications Received by the Court, https://www.african-court.org /cpmt/statistic <accessed 05 December 2022>.
[46] *Ibid.*
[47]G Zyberi 'The Jurisprudence of the International Court of Justice and International Criminal Courts and Tribunals' in ED Wet & J Kleffner (eds) *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (2014), P398.
[48] *See SERAC v Nigeria,* paras 60-65 where the Commission decided that the right to food is implied in the right to life and the right to health and the right to housing implied in the right to property, the right to health and protection accorded to family in the African Charter.
[49] DM Reilly & S Ordonez, *Effect of the Jurisprudence of the International Court of Justice on National Courts,* New York University Journal of International Law and Politics (1995), Vol.28, Pp. 445-446.

impedes the Court's potential of developing and strengthening its jurisprudence.

Larger membership of a court minimizes the negative outcomes of withdrawals as witnessed by the withdrawal of the United States of America from the International Court of Justice in 1986 having no significant impact on the continuation and authority of the latter.[50] However, withdrawals from the African Court present a different scenario. Thirty states have accepted the jurisdiction of the Court. Nevertheless, throughout the life of the Court, cases were brought before the Court against only two state parties that have ratified the Court Protocol but have not made the direct access declaration (Kenya and Libya). Consequently, the fact that 30 states ratified the Court Protocol to date cannot be a convincing reason to be optimistic about the effective continuation of the Court. So far, the major sources of the case docket of the Court have been the state parties that have made the direct access declaration. Unless more cases are brought against the remaining eight states or cases are referred by the Commission to the Court more frequently in respect of the 25 states that ratified the Court Protocol but have not accepted the direct access scheme, which is not the case so far, withdrawals will continue leading to case reduction.

3.2.COMPLIANCE PROBLEM WITH JUDGMENTS OF PENDING CASES

Several cases are pending against state parties that have withdrawn their direct access declaration. Concerning withdrawal, the Court decided that 'states are free to commit themselves and that they retain discretion to withdraw their commitments.'[51] However, withdrawal has conditions and effects. The Court is of the view that sudden withdrawal without prior notice affects the rightsholders and judicial security. Accordingly, it decided that 'a notice period of one year shall apply to the withdrawal' and the act of the withdrawal shall take effect only after the expiry of that period.[52] Moreover, the Court decided that the withdrawal does not affect cases pending before the Court.[53]

[50] MR Madsen *et al*, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, International Journal of Law in Context (2018), Vol.14, P204.
[51] *Ingabire Victoire Umuhoza v Rwanda* (procedure) (2016) 1 AfCLR 562, para 58.
[52] Ibid, paras 66-67.
[53] Ibid, para 68.

Yet, the important question that one has to ask is the prospect of compliance with the judgments of the cases pending against states that have withdrawn the direct access declaration.

Perhaps, a state with less compliance rate even before the withdrawal is less expected to change that pattern after the withdrawal. Yet, explicitly and implicitly manifested reasons for the withdrawals can give clues to the prospect of compliance with the judgments of the pending cases. For instance, Tanzania, in the notice of withdrawal, stated that '[t]his decision has been reached after the Declaration has been implemented contrary to the reservations submitted by the United Republic of Tanzania when making the Declaration.'[54] The reservations are that direct access can be exercised after all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania'.[55] The reservation on exhaustion of local remedies is unnecessary repetition as it is already made part of the principle of subsidiarity which underlies the African Charter.[56] The reservation of making direct access subject to the Constitution has been criticized for failure to conform to the Court Protocol and is unacceptable as challenging the consistency of the Constitution with the human rights standard is one ground for submitting a case to the Court.[57]

It has been suggested that Tanzania reached 'litigation fatigue' because of litigating more than half of the cases before the Court.[58] Most of these cases involve the right to fair trial resulting in adverse judgments against the Republic like in *Rajabu v Tanzania*, in which the Court ordered Tanzania to remove the mandatory imposition of the death penalty from its Penal Code.[59] The important question then is, will Tanzania comply with judgments of pending cases of which many involve violation of the right to a fair trial? Considering the compliance record of Tanzania, an affirmative answer is less expected.

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[54]African Court, Declarations Entered by Member States, https://www.african-court. Org /en/ index.php/basic-documents/declaration-featured-articles-2 <accessed 25 August 2020>.
[55]Ibid
[56] TheAfrican Charter, Art. 56(5); Viljoen, supra note 2, P332; *Prince Vs. South Africa* (2004) AHRLR 105 (ACHPR 2004), paras 50-52.
[57]Adjolohoun, *supra* note 32, Pp. 8-9.
[58]Id., P.10.
[59]*Ally Rajabu and Others v Tanzania (Reparations)*, Application 007/2015, African Court (28 November 2019), para 171.

Similarly, Rwanda, in its withdrawal notice, complained thata Genocide convict who is a fugitive from justice has, pursuant to the above-mentioned Declaration, secured the right to be heard by the Honourable Court, ultimately gaining a platform for reinvention.[60]

In 2017, Rwanda informed the registry thatit would no longer participate in proceedings before the Court on the grounds that the process with regard tocases involving Rwanda was not independent; that its outcome was pre-determined.[61]

Moreover, Rwanda clearly stated that 'it will not co-operate with the Court on this and other applications filed against it before the Court.'[62] Therefore, there is a high likelihood that Rwanda, perhaps Benin and Cote d'Ivoire, may not comply with the judgments of the pending cases.

3.3. IMPACT ON THE LEGITIMACY OF THE COURT

Legitimacy is a complex yet important concept applicable to national as well as international institutions including courts.[63] Its definition also varies depending on the context. In relation to international relations legitimacy has been defined asthe normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor's perception of the institution.[64]

Legitimacy refers to 'the quality of a body that leads people to accept its authority.'[65] 'An international court is legitimate when its authority is

[60]Ministry of Foreign Affairs and Co-operation 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' (2016), para 6 https://en.african-court.org/images/Declarations/retrait/Retrait%20rwanda.pdf <accessed 12 October 2020>.
[61]Adjolohoun, *supra* note 32, P.6.
[62] Activity Report of 2019, P20.
[63]N Grossman, The Normative Legitimacy of International Courts, *Temple LawReview* (2013), Vol.86, P65. See HR Fabri *et al* (eds.) *International Judicial Legitimacy: New Voices and Approaches* (2020); N Grossman *et al* (eds.) *Legitimacy and International Courts* (2018).
[64]I Hurd, Legitimacy and Authority in International Politics, *International Organization* (1999), Vol.53, No.2*,* P381.
[65]D Ritleng 'The Independence and Legitimacy of the European Court of Justice' in D Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (2016) 83.

perceived as justified.'[66] In the context of international law, equally applicable to ICs, legitimacy has, at least, two basic dimensions namely normative (procedural) legitimacy and sociological (substantive) legitimacy.[67] Normative legitimacy, also known as legal legitimacy, refers to the underlying legal foundation of the authority of a law or an institution, in this case, a court.[68] Normative legitimacy is relatively easy to identify because states show acceptance mostly through the ratification of a treaty establishing a court or by joining an organisation that requires adjudication of disputes by a specific court.[69] The relative ease is partly because the demarcation of the areas over which a court can exercise authority is in principle set out in advance to the disputes. However, this does not mean that normative legitimacy is outside the realm of contestations. States' objection to the jurisdiction of courts, particularly, on subject matter jurisdiction is an indication that normative legitimacy can be the subject of heated debates.

Sociological legitimacy, sometimes referred to as popular legitimacy, on the other hand, is broader, and itlooks to whether "therelevant public regards" a regime, institution, or decision as "justified,"that is, whether "particular claims to authority deserverespect or obedience for reasons not restricted to self-interest."[70]Sociological legitimacy has a subjectivity element whether it applies to national or international courts or political institutions.[71] Hence, it is not easy to measure it in empirical terms. However, it is observable from the behaviours of the constituent members or stakeholders as it encompasses the range of perceptions of those affected by the existence and operation of a given institution.

The normative legitimacy of the Court is less likely to be affected than the sociological legitimacy by the withdrawals because state parties that have

[66]NGrossman, *Legitimacy and International Adjudicative Bodies*, George Washington International Law Review (2009), Vol.41, P122.
[67]H Takemura,*Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court*, Amsterdam Law Forum(2012), Vol.4, No.2, P5.
[68] *Ibid*; D Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, American Journal of International law (1999), Vol.93, No.3, Pp.600-602.
[69] Grossman, *supra* note 66, P.116.
[70] Id., P.117; RH Fallon, *Legitimacy and the Constitution*, Harvard Law Review (2005), Vol. 118, No.6, P1795.
[71]Y Lupu 'International Judicial Legitimacy: Lessons from National Courts' (2013) 14 *Theoretical Inquiries* 442.

withdrawn the direct access did not withdraw from the Court Protocol. Nonetheless, the close consideration of the reasons for withdrawals indicates that there were complains that the Court acted outside its mandated authority. For instance, Benin had such complain.[72]The dissatisfaction by Benin is related to the *Ghaby Kodeih v Benin* case,[73] in which the Court ordered Benin to suspend a judgment of a domestic court dealing with a private party dispute. Benin considered the case a commercial matter and hence fell outside the Court's jurisdiction. It is also related to the *Ajavon v Benin* caseinvolving an order to suspend the execution of a 20-year prison sentence for drug trafficking, perceived by Benin as an *ultra vires* order that breached its sovereignty.[74]It is important to note that although the validity of these complaints matters a lot, from the legitimacy point of view, the crucial point is the perception of Benin toward the Court.

Legitimacy is also closely linked to due process elements such as transparency, impartiality, and independence.[75] States are less likely to question the legitimacy of courts that follow established procedural guarantees. Failure to stick to due process principles can attract resistance as the age-old adage says 'justice must not only be done but must be seen to be done.' In this regard, the complaint of Rwanda that 'the process with regard to cases involving Rwanda was not independent; that its outcome was pre-determined[76] is relevant because there is no reason for Rwanda to deem legitimate a decision that it considers as an output of adjudication lacking independence.

The main point is that, be it normative or sociological legitimacy, the attitude of the states that withdrew the direct access declaration matters. Particularly complaints openly communicated can possibly impact the perception of other states toward the Court.

[72]Adjolohoun, *supra* note 32, P.12, the quotation is translated by Adjolohoun from the French version of withdrawal notice of Benin.
[73]*Ghaby Kodeih Vs. Benin* (provisional measures), Application 006/2020, African Court on Human and Peoples' Rights (28 February 2020).
[74]Adjolohoun, surpa note 32, P.14; *Ajavon v Benin* (merits), para 22.
[75]F Clausen 'In the Name of the European Union, the Member States and/or the European Citizens?' in Fabri *et al* (eds), supra note 221, P262.
[76] Adjolohoun, *supra* note 32, P.6.

3.4 POSSIBLE IMPACT ON OTHER STATE PARTIES

Among the state parties to the Court Protocol, 25 have not made the direct access declaration. Doing so remains within the prerogative of the states save the existence of internal or external pushing and pulling factors. This makes it difficult to give a convincing prediction as to which states would ratify the Court Protocol or withdraw from or make the direct access declaration anytime soon. However, the lack of certainty does not rule out the possibility of forwarding plausible explanations of how the withdrawals may affect the behaviours of other state parties.

States are not immune to the influence of the practices of other states. The theories or models of international human rights cooperation can give a better understanding of interstate interaction and how states shape each other's behaviour. The conventional theories include coercion and normative persuasion.[77]According to the coercion theory, '[g]overnments accept international obligations because they are compelled to do so by great powers, which externalize their ideology.'[78] Persuasion theory proposes that states are committed to human rights regimes 'because they are swayed by the overpowering ideological and normative appeal of the values that underlie them.'[79] The most relevant one in explaining how states influence others behaviour is acculturation theory.[80] In the context of social influence, acculturation refers to the 'process of adopting the beliefs and behavioural patterns of the surrounding culture.'[81] The acculturation theory, therefore, articulates that states' actions and behaviours are amenable to the influence of other states situated in a similar environment.[82]

Going with the logic of acculturation theory, at least, a few things can be said about how withdrawals can influence the actions of other states. For one thing,

[77]A Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, International Organization (2000), Vol. 54, No. 2, P220.
[78]Id, P.221.
[79]Id., P.223.
[80]R Goodman & D Jinks, *How to Influence States: Socialization and International Human Rights Law*, Duke Law Journal (2004), Vol. 54, No. 3, P630.
[81]Goodman & Jinks, *supra* note 83, P.638.
[82]Goodman & Jinks, *supra* note 83, P.630, 638 & 646; R Goodman & D Jinks, *Toward an Institutional Theory of Sovereignty*, Stanford Law Review (2003), Vol. 55, No.5, Pp1757–1765.

withdrawals cannot encourage states to join the Court's regime or accept the direct access declaration. The neutral position, also less persuasive, is to say that the withdrawals do not affect at all the behaviour of the other states. The plausible stand, yet arguable, is that withdrawals may influence the remaining state parties to withdraw their declarations. This position goes hand in hand with the fact that Benin's Minister of Justice cited withdrawals of Rwanda and Tanzania in explaining Benin's decision to withdraw.[83] Further, so far, none of the state parties that have made the declaration reacted to other withdrawals. Condemnation of withdrawals by these state parties would have served as a reaffirmation of their confidence in the Court.

Furthermore, the AU, an intergovernmental organ with the mandate of upholding human rights, has not made any remark about the withdrawals. It is also important to mention the ambivalence of the Executive Council of the AU in supporting compliance. On one occasion, the Council endorsed the recommendation of the Permanent Representatives Committee (PRC) that the Court should not include the name of non-compliant states in its Activity Report and the Court raised this as one of its challenges.[84] On another occasion, the Council requested the Court to undertake an in-depth study on mechanisms and framework of the implementation to enable the Council to effectively monitor the execution of the judgments of the Court.[85] Lack of consistency in the approach of the Executive Council toward compliance adds another dynamic to states' reluctance to comply with the judgments of the Court.

4. UTILISING COMPLEMENTARITY

The preceding section addressed the likelihood of the withdrawals impeding the progress of the Court. However, the question that remains unanswered is how to ensure that cases will reach the Court and the role the Commission can play in this regard. This section, therefore, discusses the need for a purposive application of the complementarity relationship between the Commission and the Court to curb the negative effects the withdrawals may haveon the

[83] Adjolohoun, *supra* note 32, P.12.
[84] Activity Report of 2018, para 51.
[85] Decision on the Consideration of the 2018 Activity Report of the African Court, Adopted by the Executive Council During its 33rd Ordinary Session (28 – 29 June 2018) Doc EX.CL/1057 (XXXII).

operations of the latter. The premise of this section is that purposive complementarity between the Commission and the Court would enhance the effectiveness of the African human rights system.

4.1. THE CONTEXT OF COMPLEMENTARITY

The mandate of the Court is to complement and reinforce the protective mandate of the Commission.[86] Although the Court Protocol does not detail what complementarity entails, some commentators have noted that it is meant to encourage each institution to focus on its strengths to support the overall effectiveness of the system.[87] Others have deconstructed complementarity and identified three interrelated and interdependent objectives, namely functional (enhancing the effectiveness of the African human rights system), relational (relating two institutions 'under a system of shared jurisdictional competence and collective enforcement'), and normative (realizing norms envisaged under the African human rights system).[88]

With the recent withdrawals of declarations under article 34(6), and given that some 85 percent of cases were coming from the countries that withdrew these declarations, complementarity is called for more than ever before to curb a decline in the number of cases submitted to the Court.[89] Besides, 'developing an effective human rights system requires time, practice and a commitment by its bodies to regard each other as mutually responsible for promoting and protecting human rights'.[90] Accordingly, complementarity has to be understood not only as the Court supporting the Commission but also the other way round, as viewing the two institutions as striving in a synergetic relationship to achieve the same objective, that of ensuring respect and protecting human rights on the continent. In moving forward, if the Court has to work on some of the factors that contributed to withdrawals, be it the quality of legal reasoning (related to Benin's withdrawal) or concerns related to exhaustion of local remedies (related to Tanzania's withdrawal) or

[86]African Court Protocol, *Supra* note 3, Preamble, para 7 & Art.2.
[87]Ebobrah, *supra* note 43, P.666.
[88]D Juma , Complementarity between the African Commission and the African Court in Pan African Lawyers Union *Guide to the Complementarity within the African Human Rights System* (2014), P8.
[89]African Court, *supra* note n 47; Adjolohoun, *supra* note 32, P.2.
[90]AE Dulitzky, *The Relationship between the African Commission and the African Court: Lessons from the Inter-American System*, Interights Bulletin (2005), Vol. 15, P11.

reparation orders, it has to be given the chance to resolve the problems through adjudicating cases. To do so, it is necessary to ensure that cases are submitted to the Court. Direct access of individuals and NGOs is impeded by the very existence of the article 34(6) requirements[91] and which has recently been exacerbated by the withdrawals. Other entities that can directly access the Court (state parties andAfrican intergovernmental organisations) have less incentive to submit cases.[92] Thus, indirect access is the most plausible option available to address the present predicament.

The Commission's low referral record can be attributed to 'a lack of referral criteria, deficiencies in accurately establishing (non-) implementation, and uncertainty about the Commission's role, know-how and experience in presenting such cases before the Court.'[93] Nevertheless, the situation the Court found itself in because of the withdrawals points to the need to change the practice of low referral. It is time for the Commission to rethink its stand and act proactively to mitigate the effects of the withdrawal and enhance the effectiveness of the African human rights system because 'a shifting world order can give rise to new institutions or force existing ones to transform to meet current challenges.'[94] In 2020, the Court and the Commission have adopted their respective revised RoP. Whether this would bring a new chapter to the engagement of the two bodies is discussed below.

4.2. PRACTICE, CHALLENGES, AND NEW DEVELOPMENTS

Case referral is at the center of the complementarity relationship between the Commission and the Court. Under the 2010 RoP of the Commission, there were four instances where the Commission can refer cases to the Court. The first one was when the Commission considered that a state has 'not complied or is unwilling to comply with its recommendations'[95] within the specified time, in principle 180 days[96] but subject to a month extension.[97] Through this

[91]F.Viljoen, *Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples Rights*, International and Comparative Law Quarterly (2018), Vol. 67, P70.
[92]Juma, *supra* note 34, P.16.
[93]Viljoen, *supra* note 91, P.97.
[94] P Engstrom & C Hillebrecht, *Institutional Change and the Inter-American Human Rights System,* International Journal of Human Rights (2018), Vol. 22, No. 9, P1114.
[95] The 2010 Commission's RoP, Rule 118 (1).
[96] The 2010 Commission's RoP, Rule 112 (2).
[97]The 2010 Commission's RoP, Rule 113 (2).

avenue, the recommendations of the Commission could be changed to binding judgments if the Court agrees with the findings of the Commission. During the period that the 2010 Rules were operational, the Commission did not use this route on any occasion.

The second referral option under the 2010 Rules dealt with instances when states fail to comply with the provisional measures of the Commission[98] mostly before the latter would consider the merits of the case.[99] Under this provision, the Commission referred two cases in which the Court also ordered its provisional measures.[100]

The third scenario is cases that constitute serious or massive violations of human rights in the view of the Commission.[101] The Commission mentioned this avenue in referring *Ogiek* case to the Court.[102]Some have argued that this avenue could be construed as 'allowing referral of a 'case' based on *evidentiary material that does not form part of a 'communication*', to differentiate Rule 118 (3) from 118 (4).[103] This is a convincing line of interpretation and is a purposive design to distinguish Rule 118(3) from 118(4). However, others have opposed it arguing that to make any referral, a complaint has to come to the Court first.[104]

The last referral route under the 2010 Rules was more flexible, allowing the Commission to 'seize the Court at any stage of the examination of a communication if it deems necessary.'[105] The case first referred to the Court, *African Commission v Libya*[106] is argued to fall within this avenue.[107] This broad formulation emphasizes that case referral is within the discretion of the Commission. Therefore, the effectiveness of the Court in complementing the protective mandate of the Commission, particularly concerning case referrals, depends largely on the willingness of the Commission to trigger the Court's jurisdiction.

[98]The 2010 Commission's RoP, Rule 118 (2).
[99]Viljoen, *supra* note 91, P. 80.
[100]*African Commission Vs. Libya* (provisional measures) (2013) 1 AfCLR 145.
[101]The 2010 Commission's RoP, Rule 118 (3).
[102]*Ogiek* (merits), paras 53 &72.
[103]Viljoen, *supra* note 91, P. 81.
[104] Rudman, *supra* note 43, P. 17.
[105] The 2010 Commission's RoP, Rule 118 (4).
[106]*African Commission v. Libya* (provisional measures) (2011) 1 AfCLR 17.
[107]Viljoen, *supra* note 91, P.83.

The 2020 Commission's RoP does not follow the case referral categorization of the 2010 RoP. The 2020 RoP only stipulate that the Commission may, before deciding on the admissibility of a communication, refer it to the Court.[108] Whether this can be a beneficial development is questionable. However, as of now, one cannot conclude whether this change yields a positive impact because 'institutional change is a *process* but not necessarily progress'[109] and the same is true for procedural changes. Although Rule 130(1) governs referral of all types of communications the focus here is on individual communications. Rule 130 (1) limits referrals only to communications before the Commission. Put another way, the Commission cannot refer to the Court situations of serious or massive violations of human rights without first receiving a communication.

Further, the caveat '*before deciding on the admissibility*' appears that the Commission can refer cases only prior to the determination of the admissibility of a case. However, this should not be construed as ruling out the possibility of referrals in case of non-compliance with the recommendation and provisional measures of the Commission as these are implied in the complementary relationship between the Commission and the Court. The mere fact that they are not highlighted in the 2020 RoP cannot take away what is inherently possible under article 5 of the Court Protocol. Arguing otherwise would amount to severely restricting the Commission's access to the Court which is already granted by the Court Protocol. A narrow interpretation of the Commission's access to the Court defeats the whole purpose of complementarity and goes against the spirit of the Protocol, particularly Article 5. Accordingly, referrals that were stipulated under 118(1) and (2) of the 2010 RoP need to remain operative under the 2020 RoP, perhaps, with frequent usage. On the other hand, referrals without considering the admissibility of a case must be used in exceptional circumstances, for example, where the respondent state has continuous records of non-compliance with the recommendation of the Commission.[110] Otherwise, it rescinds the relevance of the direct access declaration and may discourage states from making the declaration. This should not be construed to discourage the Commission from referring cases to the Court. Rather it is to say the

[108] The 2020 Commission's RoP, Rule 130 (1).
[109] Engstrom & Hillebrecht, *supra* note 94, P.1112.
[110] Rudman, *supra* note 43, P.18.

Commission needs to have justifiable reasons to refer cases to the Court especially when a referral is made before deciding on admissibility.

On the other hand, the Commission's reluctance in referring cases to the Court has also been attributed to the agitation that the Court may conduct what is commonly known asa *de novo* review that is, a full reconsideration of the facts, admissibility, merits, and remedies of the referred cases.[111] The 2020 Court's RoP stipulates that in 'considering a case in which the Commission has made a determination' the Court 'may review the decision of the Commission.'[112] The mere existence of the Court's power to review the Commission's decision might not be a problem but its application can either promote or undercut complementarity. Reconsidering admissibility may undermine the cooperation between the Commission and the Court, particularly, if the Court rules inadmissible what the Commission already decided admissible.[113] Reversing the admissibility decision of the Commission is unproductive unless there is a strong reason to do so, for example, if there is a basic fact disregarded by the Commission. Concerning the review of merit, the Court has to be at liberty to inquire into the facts, reasoning, and decision of the Commission.[114]

Another concern is the lack of a set of criteria for selecting the types of cases that have to be referred to the Court. Thus, uncertainties surrounding the complementarity between the Court and the Commission, which some refer to as vague [115] and require clarification[116] at the early years of the Court persist under the 2020 Commission's RoP. The Commission directed its Secretariat to research and proposes criteria for the referral of cases to the Court.[117] However, any progress has not come out so far. Hence, it is imperative to consider the practice of the Inter-American human rights system and suggestions others have made in this regard. Doing so would generate succour in fostering complementarity under the new RoP of the Court and the

[111]Viljoen, *supra* note 91, P.78.
[112] The 2020 Court's RoP, Rule 36 (5).
[113] Viljoen, *supra* note 91, P.79.
[114] *Ibid.*
[115]NJ Udombana, *Towards the African Court on Human and Peoples' Rights: Better Later Than Never*, Yale Human Rights and Development Law Journal (2000), Vol.3, No 1, P97.
[116]VOO Nmehielle, *Towards an African Court of Human Rights: Structuring and the Court* Annual Survey of International and Comparative Law (2000), Vol.6, No.1, P46.
[117]Final Communique of the 49th Ordinary Session of the African Commission (2011), para 37.

Commission which in turn would strengthen the effectiveness of the African human rights system.

4.3 LESSONS FROM THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American human rights system has a dual institutional arrangement, but with a different setting when it comes to case referrals. All individual petitions alleging a violation of the American Convention on Human Rights (ACHR) start in the Inter-American Commission on Human Rights (IACHR).[118] If the IACHR decides that there is a violation of a right, it prepares a preliminary report with recommendations, including the deadline for compliance, and transmits it to the state.[119] If the IACHR considers that the state has not complied with its recommendations, it 'shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.'[120] Thus, the referral of non-compliance case is framed in the language of duties. However, the referral duty of the IACHR is a rebuttable presumption and the IACHR may decide not to refer a case to the IACtHR by considering factors such as the position of the petitioner, the nature and seriousness of the violation, the need to develop or clarify the case-law of the system, and the future effect of the decision within the legal systems states.[121] The IACHR can refer cases to the IACtHR only against states that have accepted the jurisdiction of the IACtHR.[122] The IACtHR asserted that referral decisions 'solely and autonomously' belong to the IACHR and 'cannot be subject to a preliminary objection.'[123]

The Commission should, similar to the IACHR, adopt a duty-based but rebuttable approach, at least concerning referrals of non-compliance with its recommendation for three reasons. First, the Commission considers that the

[118]The ACHR, Art. 44; L Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?* Washington University Global Studies Law Review (2010), Vol.9, No.4, P652.
[119] The IACHR's RoP as adopted in 2009 and modified in 2011, Art. 44 (2).
[120] The IACHR's RoP as adopted in 2009 and modified in 2011, Art. 45 (1).
[121]The IACHR's RoP as adopted in 2009 and modified in 2011, Art. 45 (2).
[122]The IACHR's RoP as adopted in 2009 and modified in 2011, Art. 45 (2); The ACHR, Art. 62.
[123]*Gomes Lund et al ("Guerrilha do Araguaia") v Brazil*, IACtHR (preliminary objections, merits, reparations, and costs), 24 November 2010 C No 219, para 27.

level of compliance with its recommendation is low[124] and some have suggested referrals to the Court as one means of curbing the problem.[125] Second, it helps in dealing with the challenges the Court is likely to face because of the recent withdrawals (short-term goal). Third, it improves the complementarity relationship between the Commission and the Court (long-term goal). In other scenarios, the Commission can decide on referrals considering factors such as the prospect of success,[126] and reasons for and extent of non-compliance,[127] 'the extent to which there may be a factual dispute (to be resolved by the Court)'.[128] The consent of the complainant is already recognised as a requirement of referrals.[129] It is difficult to prescribe hard and fast referral criteria given that each communication presents a distinct scenario. Nonetheless, gradually, the Commission needs to develop a purposive referral practice with the view of enhancing the effectiveness of the African human rights system and working in collaboration with the Court, rather than in a spirit of competition.

Another aspect is the role of the IACHR and the victim before the IACtHR. The IACHR is represented by its designated delegates.[130] Victims are entitled to submit their brief containing pleadings, motions, and evidence autonomously and also act autonomously throughout the proceedings.[131] This arrangement provides greater agency to victims, preserves the neutrality of the IACHR and reduce its workload.[132] Such a robust recognition of victims' role is the result of the IACHR's and the IACtHR's RoP revision in 2009 which also 'make the Inter-American human rights system more efficient and transparent.'[133]

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[124]47th Activity Report of the Commission; https://www.achpr.org/activityreports /viewall ? id =51 <accessed 13 October 2020>.
[125]C. Okoloise, *Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights,* African Human Rights Law Journal (2018), Vol.18, P56.
[126]D Padilla, *An African Human Rights Court: Reflections from the Perspective of the Inter-American System,* African Human Rights Law Journal (2002), Vol. 2, P191.
[127]Viljoen, *supra* note 91, P.76.
[128] *Ibid*.
[129] The 2020 Commission's RoP, Rule 130 (2).
[130] The IACtHR's RoP as revised in 2009, Art. 24 .
[131] The IACtHR's RoP as revised in 2009, Art. 25.
[132] Shaver, *supra* note 118, P.655.
[133]JM Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights (2013), P19.

Unlike the IACtHR, victims do not act autonomously in the proceeding before the African Court. However, the Court can hear the individual or NGO that initiated the communication before the Commission.[134] Thus, the Court has to adopt the practice of the IACtHR and enhance the victim's role in its proceedings. Doing so has two advantages. One, it contributes to the humanisation of the African human rights system.[135] Second, it preserves the impartiality of the Commission.

The Commission becomes the applicant before the Court[136] and it can include experts in its legal team[137] which in turn would contribute to enhancing the quality of the Court's legal reasoning. The Court can also invite *amicus curiae* (any person or institution) 'to express an opinion or submit a report to it on any specific point'[138] that is also another channel to bring a new perspective into the Court proceeding and gradually help in developing sound jurisprudence.

5. CONCLUSIONS AND RECOMMENDATIONS

The general aim of this article is to analyze the implications of the recent withdrawals of the declaration under article 34 (6) of the Court Protocol on the activities of the African Court and provide plausible recommendations to guide the Court through its current crisis towards sustained effectiveness in the future. It demonstrates that the architecture of individuals' and NGOs' direct access to the Court significantly impacted the number of cases submitted to the Court. This, in turn, will continue to affect the extent to which the Court champions human rights on the continent. Further, it was shown that the Commission has been hesitant in referring cases to the Court and hence, in this regard, there is unutilised potential to enhance the co-operation between the two bodies and to increase the effectiveness of the African human rights system.

The critical concern that the Court has to handle wisely and systematically is the impact of the state parties' withdrawals of direct access declarations. The implications of the withdrawals include a decrease in the number of cases

[134] The 2020 Court's RoP, Rule 36 (3).
[135] Viljoen, supra note 91, P88.
[136] The 2020 Commission's RoP, Rule 130 (3).
[137] The 2020 Commission's RoP, Rule 36 (2).
[138] The 2020 Commission's RoP, Rule 55(2).

reaching the Court, compliance problems with judgments of pending cases, negative effect on the legitimacy of the Court, and more state parties being discouraged from accepting direct access declaration. Thus, it is imperative for the Court to take calculated steps to get back the confidence of the withdrawn states and dissuade more states from withdrawing their declarations. The Court can rebuild confidence by not repeating the shortcomings it witnessed so far in the adjudication of pending and future cases. At the same time, it is necessary to make sure that cases are submitted to the Court. The indirect access is the right avenue to do so as the direct access is decreasing following the withdrawals. Consequently, there is a need for the purposive application of the complementarity relationship between the Commission and the Court to inhibit the adverse consequences that may result from withdrawals. Not to refer cases to the Court is at odds with purposive complementarity. It is working together not competing for hegemony that enables both to contribute their part in the effort of ensuring the continent in which human rights are respected and protected.

To improve the complementarity relationship between the Commission and the Court and enhance the effectiveness of the African human rights system, the Commission needs to adopt a duty-based but rebuttable referral approach for cases of non-compliance with its recommendations. In other instances, the Commission should refer cases to the Court frequently as this will help solve the challenges that arise from the recent withdrawals. Needless to say, the Commission should develop purposive referral practices.

In a nutshell, in the efforts of improving the African human rights system, the primary consideration should be given to the interests of the rights-holders because the ultimate purpose of institutions is serving humanity, not the other way around.

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