The African Court on Human and Peoples' Rights: mapping resistance against a young court

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Abstract

At first glance, it appears that the African Court on Human and Peoples' Rights – the first pan-continental court of the African Union (AU) for human rights protection – epitomises the advances made by international courts in Africa in the past decade. Since its first judgment in 2009, the Court has taken a robust approach to its mandate and its docket is growing apace. However, a closer look at the overall context in which the Court operates reveals that it is susceptible to many of the patterns of resistance that have hampered other international courts in the region, which cut across the development of its authority and impact. This paper analyses the forms and patterns of resistance against the African Court and the actors involved, emphasising the additional difficulties entailed in mapping resistance to a young court compared to long-established courts, such as the European and Inter-American human rights courts.

Keywords: international human rights law; sociology of law; African Union; African Court on Human and Peoples' Rights; backlash against international courts

1. Introduction

This paper examines resistance to the African Court on Human and Peoples' Rights (hereinafter, 'the African Court') based in Arusha, Tanzania, which has been in operation since 2006. Although the African Court is still a young court, it has energetically seized its mandate and has found a raft of rights violations in the limited number of cases before it to date, which has been met with clear resistance and which is likely to generate further resistance given the regional context in which the Court operates.

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In a continent notorious for upholding state sovereignty and the principles of non-interference even in the face of grave human rights violations (Cole, 2010), and where other human rights protection bodies such as the African Commission on Human and Peoples' Rights have struggled to have an impact (Bekker, 2013), resistance to the Court has taken a variety of forms, some of which are dissimilar to those found in other regions. So far, no major or significant forms of resistance, in the form of 'backlash', have occurred in response to the Court's jurisprudence that would fundamentally undermine its functioning. However, other forms of resistance have appeared, such as Rwanda's withdrawal of its declaration permitting individuals and qualified NGOs to petition the Court and early signs of resistance by Tanzania (the host state) in the form of non-compliance with key judgments of the Court. Considering earlier backlash against other regional courts in Africa such as the Southern African Development Community (SADC) tribunal (Alter et al., 2016a), it is possible that, at this point in time, we can identify the beginnings of distinct patterns of resistance that might start out as reactions to a particular judgment or a set of judgments (or even cases pending before the Court) and that may eventually escalate into a more systemic and even transnational critique of the court, resulting in either changes to the system, rendering it defunct by starving it of resources, or even shutting it down entirely.

The introduction to this special issue on resistance against international courts (ICs) sets out a useful framework for analysing the forms and patterns of resistance to such courts, which has become an increasingly common global phenomenon (Madsen et al., 2018). While resistance to the African Court is a theme running through much of the literature on the Court, the varieties, patterns and processes of resistance to the Court have not been systematically studied. The aim of this paper is therefore to map the way in which the Court and its jurisprudence have developed and to analyse the forms and patterns of resistance to the Court generated by its case-law. In doing so, the paper pays attention to the contextual factors that influence the nature, scope and intensity of these processes of resistance.

Applying the theoretical framework concerning resistance to ICs developed by Madsen et al. to the African Court as a case-study provides useful additional insights. Most importantly, it emphasises that charting resistance against a young court can be more difficult than charting resistance against a long-established court, given that what looks like resistance may in fact relate to difficulties in building the Court's de facto authority (Alter et al., 2016b). This poses the question of where and how the two analytical frameworks, related to resistance and authority-building, overlap. Indeed,

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although some reactions against the African Court follow familiar forms and patterns of resistance against IC jurisprudence in other world regions, some of the resistance discussed below is hard to categorise as 'pushback' or 'backlash', but rather reflects attempts to hinder the minimum development of an IC towards becoming an effective institution in the first place. In a sense, this places young courts such as the African Court in an intermediate category lying somewhere between 'paper courts' established by treaty but that never become operational, and long-established ICs that have developed an appreciable level of de facto authority. As such, the term 'young court' here does not denote a rigid conceptual category, but rather a broad rubric for ICs lying in this ill-defined area of the spectrum. Second, the youth of the African Court, and autocratic governance in key states under its purview, affects the configuration and interaction of resistance actors, with national governments and NGOs playing a more central role as sites of resistance, and other actors that are central elsewhere – chiefly national courts and the media – featuring far less prominently.

The paper contains four sections. Section 2 briefly addresses the analytical framework for resistance set out by Madsen, Cebulak and Wiebusch (2018). Section 3 sets out fundamental contextual factors that affect the overall operation of the African Court. Section 4 analyses the African Court's design and development, and how resistance has hindered its development to date. Section 5 addresses the evolution of the Court's case-law to date and discusses resistance to its case-law, focusing on two key respondent states: Tanzania, the Court's host state and subject of six of its twelve merits judgments to date; and Rwanda, which has expressed the strongest negative reaction to the Court's case-law. The conclusion summarises the key insights gleaned from the case-study as a whole.

2. *Forms and patterns of resistance*

This section builds on the analytical framework developed by Madsen, Cebulak and Wiebusch in this issue (2018). We focus here on the categorisation of different forms of resistance, the general approach of studying resistance and the relationship between different actors in producing patterns of resistance.

As discussed by Madsen et al., resistance can take different forms, and the core distinction made here is between 'pushback' and 'backlash'. Pushback is used to denote resistance within the established rules of the game (ordinary critique), with the aim of reverting developments in the jurisprudence of an IC in specific areas of law. By contrast, backlash denotes

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resistance that is not based on acceptance of the rules of the game (extra-ordinary critique), challenges the authority and institutional set-up of an IC and tends to involve collective action by Member States (Madsen et al., 2018).

The organising concept of 'resistance' used in this special issue relates primarily to the process, and not the outcome, of resistance. In contrast to Alter, Gathii and Helfer (2016a), who analyse resistance mostly as something that is successful or unsuccessful, the framework disaggregates backlash and considers it as a process which can lead to an outcome, but which does not necessarily have a discernible impact. This focus on process allows us to analyse dynamics of resistance even where it has no concrete consequences for the Court's case-law or structure.

The framework also makes clear that resistance can proceed according to different patterns depending on the actors involved. As emphasised by Madsen et al., it is important to disaggregate the term 'resistance' by moving from general references to 'Member States' and identifying instead specific governance and civil society actors that play key roles in the different forms of resistance faced by an IC. This is especially the case since resistance at one site can be expressed in different ways, founded on different premises and of varying levels of intensity, but can become mutually reinforcing where a dominant narrative of resistance, or points of consensus, emerge. Resistance can emanate from a single actor (e.g. national government) or, more commonly, a constellation of different actors within the governance system (e.g. courts, political parties) and civil society (NGOs, media, academics). This analysis follows this emphasis on specific actors. However, as the analysis below indicates, resistance to the African Court to date appears to have emanated from smaller constellations of actors, and is affected by the system of governance in different states.

As explained by the Madsen et al., to fully understand the rationale and development of resistance as expressed by these actors, it is crucial to consider the wider context in which the African Court operates, and fundamental contextual factors that influence the emergence and direction of resistance against the African Court. These are addressed in the following section.

3. *The context of resistance against the African Court*

Resistance against the African Court is considerably influenced by a variety of factors relating to the socio-political, historical and institutional context

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in which it operates. Aligned with the model developed by Madsen et al., this section highlights these fundamental contextual factors for understanding such resistance, which are essential to the analysis of the constellation of actors evincing resistance to the African Court in the following sections. In order to better convey the unique context of the African Court, the paper engages in limited comparison with the longer-established European and Inter-American human rights courts.

The most fundamental contextual factor to appreciate when analysing resistance against the African Court is that it operates in a continent where a variety of governance systems exist, ranging from authoritarian states to well-established democracies. Many African states are still faced with massive governance challenges and systematic violations of human rights, relating to ongoing conflict, humanitarian crises, internal displacement of peoples, terrorist attacks, political instability, widespread use of torture and ill-treatment by law-enforcement and security forces, arbitrary arrest and detention, abduction and killing of human rights defenders and political opponents, restrictions on freedom of expression and limitations on access to information.[1] As discussed below in the context of Tanzania, democratic progress in some states has stalled or reversed. Although various states in Europe and Latin America also suffer serious problems, the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) operate in regional contexts where the overwhelming majority of states under their purview are democratic systems (albeit of varying quality). The different socio-political context of the African Court has clear ramifications for the nature and intensity of resistance it faces, as discussed below.

Second, the historical experience of ICs and quasi-judicial bodies with human rights protection mandates in Africa is important. The African Commission on Human and Peoples' Rights (hereinafter 'the African Commission'), created as a stand-alone institution in 1987, is the key pre-existing institution with a pan-continental human rights protection mandate (and which continues to function in tandem with the African Court, as set out below). The Commission from the outset faced serious resistance and found little room to manoeuvre. Although the Commission has alternated between a deferential posture, seen in its focus on 'positive

1 See The Human Rights Situation on the Continent described in the 40th, 41st and 42nd Activity Reports of the African Commission on Human and Peoples' Rights covering the period from December 2015 to May 2017, http://www.achpr.org/activity-reports/ (last accessed 19 February 2018).

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dialogue', and more assertive stances on key issues including the use of secret military trials, and rights to free speech and fair trial (Bekker, 2013), the one thread running through its thirty years of existence is that states have generally refused to implement its recommendations (Murray and Long, 2015).

Alongside this generalised resistance against the authority of the African Commission, other ICs on the continent that have adopted assertive stances on human rights have met with significant resistance. For instance, the tribunal of the fifteen-member SADC, established in 1992, was effectively 'dismantled' in 2012 due to opposition to its judgments challenging expropriation of land from White settlers in Zimbabwe, after a campaign spearheaded by Zimbabwe. Initially suspended, the tribunal returned in 2014 with its jurisdiction reduced to interstate disputes and individual petitions prohibited (Alter et al., 2016a, pp. 306–314). The East African Court of Justice (EACJ) and the ECOWAS Court have also been targets of backlash (spearheaded by Kenya and Gambia, respectively) when they have attempted to address human rights violations and electoral matters, which in the latter case has led to caution regarding expansive interpretation of its mandate (Alter et al., 2016a, p. 300). However, it is important to emphasise that these are all courts of Regional Economic Communities (RECs). It may be easier, for instance, for a national government to organise a campaign of resistance among a smaller group of states against a REC court than against an IC such as the African Court, whose jurisdiction (potentially) extends across the fifty-five Member States of the African Union (AU).

Such backlash also mirrors developments at the national level where, in many states, the authority and independence of domestic courts is regularly challenged. A recent example is the strong political reaction against the Supreme Court of Kenya's annulment of the results of the August 2017 presidential election in which incumbent President Kenyatta had been declared the winner, denounced by the president as a 'judicial coup' (Gebre, 2017). Another example is found in the vocal denunciations of the Constitutional Court of South Africa by ANC party members including former President Zuma.[2] These experiences underscore that, in a region where non-intervention and sovereignty remain central pillars of interstate

2 See the speech by the South African journalist Raymond Louw to the 2012 Rhodes University graduation, Meddling with Constitutional Court Powers a Threat to All (22 April 2012) www.ru.ac.za/media/rhodesuniversity/content/communications documents/Raymond_Louw%20Grad%20Address.pdf (last accessed 19 February 2018).

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relations, and where even domestic judicial authority is resisted in many states, an IC with human rights jurisdiction will likely face significant challenges in achieving acceptance of its authority, especially when addressing highly sensitive questions of law and policy.

Third, it is important to bear in mind the institutional novelty of the African Court. It is the first and only IC in the AU with human rights jurisdiction at the pan-continental level. The Court has been fully operational for only a decade: although its founding Protocol was adopted in 1998, it was not ratified until 2004 and the first judges were not appointed until 2006. The Court still faces a significant 'ratification gap', with twenty-five of the fifty-five AU Member States yet to ratify its founding Protocol. In addition, the Court already faces two processes of institutional reform that may see it either replaced by a 'successor' court with much wider jurisdiction (including international criminal jurisdiction) or its jurisdiction narrowed or altered to render it less effective. These are all discussed below.

In terms of its jurisprudence, the Court issued its first interim judgment in 2009 but did not issue a full merits judgment until 2013. To date, the Court has handed down twelve merits judgments. However, this is a significantly larger number than the five merits judgments issued by the ECtHR[3] and the three merits judgments issued by the IACtHR[4] in their first decade, and, importantly, the African Court has found rights violations in every merits judgment issued, unlike its European and Inter-American counterparts' first-decade jurisprudence. Crucially, as discussed in Section 4, many of the Court's judgments have struck at highly sensitive areas of public policy, the constitutional order and state power, such as the Rwandan government's approach to the 1994 genocide and key aspects of Tanzania's electoral and criminal justice systems. Seen in this light, it is unsurprising that the Court has faced resistance to its case-law to date, discussed below.

The following section briefly describes the Court's structure and evolution since 2006 and how various factors have hindered its development as an effective institution.

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3 Lawless v. Ireland (1979–80) 1 EHRR 1 (1 July 1961); De Becker v. Belgium App. No. 214/56 (27 March 1962); Wemhoff v. Germany App. No. 2122/64 (27 June 168); Neumeister v. Austria (27 June 1968); and 'Belgian linguistics' Case App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (23 July 1968).

4 Velásquez-Rodriguez (Ser. C) No. 4 (29 July 1988); Godínez-Cruz v. Honduras (Ser. C) No. 10 (20 January 1989); and Fairén-Garbi and Solís-Corrales v. Honduras (Ser. C) No. 6 (15 March 1989).

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4. Development of the court: forms and patterns of resistance

This section provides a brief overview of the evolution of the African Court as an institution, focusing not only on its formal or de jure authority (i.e. the legal powers ascribed to the Court by its founding treaty, including the binding nature of its judgments), but also on its de facto authority (i.e. its authority as a sociological reality, which for many courts is often weaker than its formal authority suggests). Building on the framework developed by Alter, Helfer and Madsen, de facto authority ranges across a spectrum from 'narrow authority' to 'public authority', which relates to the kind and number of actors who act on the Court's judgments, and the overall impact of the Court's judgments on litigants, government and other state actors, civil society actors such as NGOs and businesses, and the general public, which may vary from state to state and from time to time (2016b).

Appreciation of the Court's overall institutional and regional setting, its development since 2006 and how its development has been hindered and challenged by various actors is essential to understanding the patterns of resistance against the Court to date and a useful background for discussion of the Court's case-law in the following section. Again, the African Court as a case-study underscores the different nature and forms of resistance against a young court, in contrast to a long-established court.

4.1 Resistance and ambivalence reflected in the Court's design

The decades-long movement towards establishment of the African Court perhaps tells its own story of resistance, or at least ambivalence, to an effective continental IC devoted to human rights protection, as do the structure, powers and access to the Court. Mooted as early as 1961 at a conference of African jurists (Cole, 2010, p. 24), the African Court did not come into being until 2006. Mirroring to some extent the slow institutional evolution of the Inter-American system, where the Court was established thirty years after adoption of the American Declaration of Human Rights of 1948, the African Court was a late arrival, coming twenty-five years after adoption of the African Charter of Human and Peoples' Rights in 1981. Foot-dragging by AU states meant that, although the Court's founding Protocol was adopted in 1998, the slow rate of ratifications meant that it did not come into effect until 2004, and the first judges were not appointed until 2006.

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Given that the Court's formal authority and structure are described in detail in a number of key publications (e.g. Viljoen, 2012; Cole, 2010; FIDH, 2010), here it suffices to set out the basics. The Court's powers are set out in the Additional Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter, 'the founding Protocol'). These powers are broadly similar to those of its counterparts in Europe and the Americas: the Court has contentious jurisdiction, advisory jurisdiction, the power to order relief where a rights violation is found or even provisional measures where necessary. Judgments of the Court are binding: the founding Protocol expressly enjoins states parties to comply (Article 30). However, as discussed below, in practice, enforcement is far from guaranteed and no dedicated body was established by the founding Protocol to monitor enforcement of the Court's judgments. Instead, the Court is required to submit to the Assembly of Heads and Government a report on its work in which it 'shall specify, in particular, the cases in which a State has not complied with the Court's judgment' (Article 31 founding Protocol).

The Executive Council will assist the Assembly by monitoring the execution of the Court's judgments on its behalf (Article 29 founding Protocol).

Access to the Court is limited. States parties, the African Commission and African inter-governmental organisations have standing in contentious cases. Individuals and NGOs may directly petition the Court solely where a state has made an optional declaration recognising such petitions, under Article 34(6) of the founding Protocol. This is a form of via media between the European Court, where access is open to states, individuals, NGOs and groups of individuals, and the Inter-American system, where solely states and the Inter-American Commission on Human Rights have standing (however, NGOs may represent individual petitioners before the Inter-American Commission on Human Rights, and before the Court if the case is referred for judgment). Advisory opinions may be sought from the Court by any AU Member State, the AU or any of its organs, or 'any African organization recognized by the [AU]', although the last category has been restrictively interpreted in the Court's landmark SERAP Advisory Opinion of May 2017, as discussed below.[5]

Regarding structure, the African Court is composed of eleven judges, all serving part time except for the President of the Court, who serves

5 Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP), ACHPR, App. No. 001/2013 (26 May 2017).

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full time. This, and the quorum requirement of seven judges to render judgment, means sessions are intense, tending to last for four weeks, with sittings from 9 a.m. until 7 p.m. in the evening, which presents a limiting factor for the Court's work. All judges are nationals of AU Member States, on the basis of selection criteria similar to the European and Inter-American systems, emphasising high moral character and human rights expertise (Article 11 founding Protocol). Like the Inter-American system, and unlike the European system, each member of the fifty-five-state AU is not represented on the Court: the judges at the time of writing are nationals of Côte d'Ivoire, Kenya, Burundi, Senegal, Tunisia, Uganda, Mozambique, Cameroon, Rwanda, Malawi and Algeria. The founding Protocol does, however, seek to ensure a broadly representative membership reflecting the main regions and legal traditions of Africa and that 'due regard' is given to adequate gender representation in the nomination process (Articles 12 and 14).

The institutional setting of the African court most closely resembles the Inter-American system and the original European system, with a quasi-judicial commission on human rights operating alongside the judicial institution of the Court. The African Court's formal relationship with the Commission, set out in various primary and secondary instruments, envisages it as complementing the Commission's mandate to protect human rights. This is reflected in various aspects, including: the Commission's power to refer, inter alia, cases concerning massive human rights violations and non-compliance with its provisional measures orders to the Court before the case has concluded; and the Court's power to transfer matters to the Commission and to consult it when deciding on issues of admissibility.[6] While the Commission's perceived reluctance to refer cases in the early years was viewed as hindering the Court's development – the Commission referred only two cases to the Court before 2012 (Ssenyonjo, 2013, pp. 51–54) – the relationship between the two organs appears to have improved.

Like the European and Inter-American human rights courts, the African Court's principal role is to act as the definitive interpreter and guardian of the rights guaranteed in a continental human rights treaty: the African Charter. The African Charter is similar in many respects to the American and European human rights conventions. However, some key differences

6 See Article 2 of the Court Protocol, Rule 29 of the Court's Interim Rules of Procedure 2010 and Part IV of the Rules of Procedures of the Commission 2010. To date, four cases have been transferred to the African Commission (Report on the Activities of the African Court on Human and Peoples' Rights (2017), EX.CL/999(XXX), p. 5).

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should be noted, some of which indicate states' reticence regarding human rights protection. Most importantly, rights are guaranteed in less robust language, with many 'clawback clauses' permitting restrictions on rights if they are provided for by the law or guaranteeing exercise of the right 'within the law' or provided that the individual complies with the law: see Article 9 (freedom of expression), Article 11 (freedom of assembly) and Article 12 (freedom of assembly).

That said, two other factors open the door to more expansive adjudication by the Court. First, the Charter also guarantees collective social and economic rights (e.g. the rights to economic, social and cultural development and to a general satisfactory environment in Articles 22 and 24), although it must be emphasised that the Court's establishment was not a concrete possibility when the Charter was adopted. In addition, the African Court's subject matter jurisdiction is more expansive than that of the ECtHR and IACtHR in that it is also empowered to interpret 'any other relevant human rights instruments' that have been ratified by the respondent state (e.g. the International Covenant on Civil and Political Rights (ICCPR)[7] and regional instruments such as the African Charter on Democracy, Elections and Governance and the ECOWAS Democracy Protocol[8]). As pointed out by Madsen, Cebulak and Wiebusch, such institutional factors concerning subject matter jurisdiction can be influential in the context of possible pushback and backlash against the Court. Although the jurisdiction of the Court is formally restricted to a human rights mandate, the Court's power to consider other relevant human rights instruments, and the wide or narrow interpretation it gives to the understanding of what counts as a 'human rights' instrument, evidently has the potential to expand the extent of its jurisdiction, as discussed in the analysis of the Court's jurisprudence, discussed below.

7 See e.g. App. 009/2011 and 011/2011 Mtikila et al. v. Tanzania (14 June 2013).

8 See e.g. App. 001/2014 Actions Pour La Protection des Droits de l'Homme (APDH) v. The Republic of Côte d'Ivoire (18 November 2016), paragraph 65. The full title of the 'ECOWAS Democracy Protocol' is Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001).

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4.2 Resistance hampering the Court's development: key actors

The Court's overall development has been hampered by a variety of factors, some of which are evidence of clear resistance to the Court, while others reflect a more ambiguous picture that may indicate resistance or simply the Court's low visibility among key audiences (e.g. national courts). Reflecting the focus in the framework developed by Madsen, Cebulak and Wiebusch (2018) on an actor constellation comprising Member States, the rest of this section analyses the various forms of resistance to the African Court, centred on (1) national governments, which represent and shape the Member State's overall relationship with the Court; (2) national courts as core actors in the legal system, in their role as 'gatekeepers' for the penetration of IC jurisprudence in national law; and (3) NGOs, which are key civil society actors. This helps to provide context for more detailed discussion of resistance against the Court's case-law, discussed in Section 5.

4.2.1 National governments

The positions taken by national governments, as primary actors in resistance patterns against the African Court, evince a significant level of resistance to the Court's authority, which takes a variety of forms.

The first and most basic form of resistance concerns refusal to ratify the Court's founding Protocol. To date, thirty of the AU's fifty-five Member States have accepted the jurisdiction of the Court by ratifying the Protocol. The Court and other AU institutions have raised serious concerns about this 'ratification gap' – the low level of ratification has repeatedly been raised in each activity report of the Court and at the level of the AU Executive Council, for instance. Many states have also declined to make the special declaration required to permit petitions by individuals and recognised NGOs to the Court. To date, only nine of the thirty existing Member States have made this declaration,[9] although others have undertaken to make the declaration soon (e.g. Guinea Bissau, following a visit by the African Court in August 2017).[10] As regional human rights adjudication

9 The Member States who have made this special declaration are: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda (* withdrawal), Tanzania and Tunisia.

10 President of Republic of Guinea Bissau Pledges to Ratify African Court Protocol, ACtHPR website (16 August 2017), http://bit.ly/2yKdsS1 (last accessed 19 February 2018).

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experience has demonstrated, interstate complaints tend to be rare. Individual petitions are, in this sense, the lifeblood of an effective institution and vital to an IC's development of a significant corpus of jurisprudence.

Member States also delayed in nominating judges to the Court after its founding Protocol was ratified in 2004. The initial plan to elect judges to the African Court in July 2004 failed, as too few candidates had been nominated (Amnesty International, 2016), and it was not until July 2006 that the first eleven judges were sworn in before a summit meeting of African leaders in the Gambian capital, Banjul. In addition, Member States have not provided adequate funding and resources to the Court to date. As indicated above, ten of the eleven judges work part time in the Court and the Court pursues its work with a rather small staff. The Court currently draws some of its funding from the AU as well as other international donors (e.g. the EU, GIZ and Macarthur Foundation). This inadequacy of the Court's material and human resources has systematically been raised in its annual activity reports.

The above forms of resistance might be seen as hindering development of the Court's authority in general through the withholding of meaningful political, institutional, moral and material support. A separate form of resistance is found in targeted reactions to the Court's development of its case-law, which is discussed in the following section.

Finally, existing instruments geared towards institutional reform have cast a shadow over the African Court. The Malabo Protocol adopted in 2014, if ratified, would merge the Court with the AU's (as yet not established) Court of Justice to create an African Court of Justice and Human Rights, and expand the new court's remit to international criminal jurisdiction. While the Protocol has not yet secured any of the fifteen ratifications necessary to enter into force, two recent developments may drive an increase in ratification rates: the Kenyan government's announcement that it will ratify the instrument before 25 March 2018 (Musau, 2018) and the AU's announcement urging Member States to withdraw from the International Criminal Court (ICC).[11] This possibility has left the Court in a position of institutional insecurity. It cannot be certain that it will remain in its current form in the near future, which affects its ability to build itself as an institution. As Nmehielle noted in 2014, the AU appears quite serious about the Protocol but adequate thought has not been given to its implications and the prospect that it could 'suffer from neglect, lack

11 AU Assembly, Decision on the International Criminal Court, AU Doc. Assembly/AU/Dec. 622 (xxviii) (31 January 2017).

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of political and practical commitment from member states, and lack of the adequate resources required to make it effective', especially in the context of the meagre resources provided to African Court since its establishment (Nmehielle, 2014, p. 41).

4.2.2 National courts

As the framework set out by Madsen, Cebulak and Wiebusch emphasises, the attitudes of national courts towards an IC are highly significant, and it may be said that they are the most consequential actors beyond national governments. Clear instances of domestic courts actively resisting the European and Inter-American human rights courts have been charted, such as the Russian Constitutional Court recent decision that the state can refuse to comply with judgments handed down by the ECtHR in certain cases (Mälksoo, 2016) or the Costa Rican Supreme Court's insistence that it has the final say concerning constitutional meaning (Sandoval and Veçoso, 2017). Further, as Madsen, Cebulak and Wiebusch argue, resistance can be passive:

> 'National courts and institutions can simply ignore relevant judgements of ICs or relevant provi-sions of international or regional law. Even though this might happen for a host of different rea-sons, including lack of knowledge of international and regional law, its systemic occurrence can be qualified as a form of resistance.' (Madsen et al., 2018, pp. 5–28)

Again, a systemic tendency of national courts to ignore an IC's case-law is much easier to qualify as resistance in the case of a long-established IC compared to a young IC. In the context of the African Court, it is not yet possible to say that national courts have resisted the Court, in the form of 'pushback' or 'backlash'. It appears more accurate to say that, at present, the relationship between national courts and the African Court is underdeveloped, for a variety of reasons.

First, unlike Europe, where incorporation of the ECHR into domestic law has become universal (although with varying levels of intensity and supremacy), references to the African Charter in domestic constitutions is rare (examples include the constitutions of Angola, Guinea and Benin). In addition, unlike the strong and region-wide domestic judicial practice of referring to international human rights law, in both Latin America and Europe, the highest domestic courts across AU Member States refer relatively rarely to international law. Although common-law courts appear to

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show a greater openness than courts in civil-law systems (e.g. Chad, Senegal), even within the common-law category, there is wide diversity: for instance, the courts of Ghana and Botswana have made use of international law in adjudication, while Zambian courts tend to avoid it (Killander and Adjolohoun, 2010). Of most relevance here, domestic courts tend not to refer to the jurisprudence of the African Court (or other ICs in the AU). As one scholar has observed (Dinokopila, 2017, p. 236), despite increasing reference to the decisions of the African Commission by national courts, there is

> 'little evidence of the use of the jurisprudence of other regional and sub-regional courts or bodies such as the African Court and the African Children's Committee. This is perhaps owing to the fact Africa's supranational courts and tribunals, apart from the African Commission, are relatively young compared to their European counterparts.'

The growing tendency of national courts to cite African Commission's recommendations suggests that a lack of reference to African Court jurisprudence might not reflect resistance, but a lack of familiarity, although there are clearly insufficient data to draw any clear conclusions and the reasons may differ from state to state and even between different courts in the same state. There is also recent evidence that counsel at the domestic level are starting to cite African Court case-law, as seen in a February 2017 High Court of Kenya judgment holding the law on criminal defamation to be unconstitutional, which noted the petitioner's reference to the African Court's judgment on criminal defamation in Konaté v. Burkina Faso (discussed in Section 5).[12]

4.2.3 NGOs

NGOs have been essential in developing the African human rights system through, for instance, raising public awareness, assisting the African Commission through information gathering and parallel monitoring of rights violations, and submitting petitions to the Commission (Mbelle, 2009). NGOs have also played a major role in the establishment and operationalisation of the African Court. Almost every Court instrument was heavily influenced by NGO input or even had an NGO as lead drafter: the found-

12 Jacqueline Okuta & another v. Attorney General & 2 others [2017] eKLR, at p. 3.

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ing Protocol (International Commission of Jurists); the Protocol intending to merge the African courts of justice and human rights (Coalition for an Effective African Court on Human and Peoples' Rights'); and the Malabo Protocol to extend the Court's jurisdiction to international crimes (Pan African Lawyers Union) (Viljoen, 2012; Kane and Motala, 2009; Amnesty International, 2016). In addition, 'concerted advocacy efforts of the African Court Coalition' prevented the possibility, at one point, that the Court would not be operationalised while another protocol to merge the African courts of justice and human rights was being discussed (Kane and Motala, 2009, p. 418). NGOs are also key litigants before the Court, as seen in the Mtikila, APDH and Jonas cases, discussed below, and have regularly intervened as amicus curiae in cases before the Court.

These various roles have given NGOs significant influence in shaping the jurisprudence of the African Court. However, the relationship between NGOs and the Court has been strained by two important factors. First, as discussed above, NGOs can only have access to the Court once the respective state has made a special declaration. But, even when the declaration has been made, direct access is strictly limited to NGOs with observer status before the African Commission. Although, as of May 2017, the number of NGOs with observer status stood at 511, this number is spread across fifty-five Member States and includes various international NGOs based outside the continent.

The second factor that has impeded the relationship between NGOs and the Court has been its restrictive interpretation of the rules concerning standing when requesting an advisory opinion. This has excluded many NGOs (including those with observer status before the Commission) from access to the Court and has led to the Court's refusal to deal with various NGO requests for Advisory Opinions on matters including the Women's Rights Protocol in relation to marriage registration[13] and the meaning of 'serious and massive violations of human and peoples' rights' as mentioned in the African Charter.[14] It is worth noting, in this connection, that a number of Member States, including Ethiopia, Nigeria and Côte

13 See Advisory Opinion – The Centre for Human Rights, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre, Zimbabwe Women Lawyers Association, No. 001/2016 (28 September 2017).

14 See Advisory Opinion – Rencontre Africain pour la défense des droits de l'homme, No. 002/2014 (28 September 2017).

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d'Ivoire,[15] had expressed concern that a more liberal interpretation would permit NGOs to circumvent the Article 34(6) declaration requirement and 'target states' through the Court's advisory proceedings, as Ivorian representatives put it.[16] These concerns again reveal the hesitance from states about an effective role for NGOs in the continental judicial system.

As a consequence, while NGOs are engaging to a certain extent with the African Court, the Court does not provide an avenue for a large number of human rights and civil liberties NGOs across Africa to challenge rights violations. This may have two effects: first, NGOs may be less motivated to defend the Court against attacks from other actors (in a context where many NGOs must choose their battles with state actors carefully); and, second, NGOs excluded from direct access at present may come to support institutional reform that installs a 'successor' court, which may be viewed as a new opportunity to gain direct access.

5 Development of the Court's case-law

Understanding of the Court's case-law is key to appreciating the processes of resistance to date from national governments and other actors, but also how the Court has used its case-law to mitigate design flaws hampering its effectiveness and to expand its mandate. This section starts with a brief overview of the Court's jurisprudence, and then moves to analysis of the resistance sparked by its case-law, with a specific focus on two states: Tanzania and Rwanda.

5.1 Overview of the Court's case-law

That the Court has experienced resistance to its judgments is unsurprising. From the outset, the Court has grappled with difficult issues. The Court's first judgment in 2009 concerned an individual application aimed at halting prosecution of Chad's exiled dictator, Hissène Habré, in Senegal, which the Court deemed to be inadmissible on the basis that Senegal

15 Advisory Opinion, SERAP (2017), paragraphs 28–29; Advisory Opinion, The Centre for Human Rights, University of Pretoria (CHR) and the Coalition of African Lesbians (CAL) (2017), paragraphs 32–45.

16 Advisory Opinion, The Centre for Human Rights, University of Pretoria (CHR) and the Coalition of African Lesbians (CAL), paragraph 44.

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had not made the special declaration required to permit individual and NGO petitions.[17] The Court's second judgment in 2011 revealed an audacious institution: requested by the Commission to make provisional orders to protect civilians in the context of the uprising against the Gaddafi regime in Libya, the Court ordered Libya to 'refrain from any action that would result in loss of life or violation of physical integrity of persons' and to report to the Court within fifteen days on the measures taken to implement the order.[18] The order was ignored by the respondent, which offered no reasons or engagement due to the crisis in the state.[19] This summary focuses mainly on the twelve merits judgments issued to date. In its first merits judgment, issued in June 2013 in Mtikila v. Tanzania,[20] the Court unanimously found the ban on independent electoral candidacies in Tanzania's national Constitution to constitute a violation of the African Charter. In March and December 2014, the Court found two violations of the Charter in cases against Burkina Faso. In Zongo v. Burkina Faso,[21] the Court found the state in violation of rights to judicial protection and free speech for failing to investigate and prosecute the killers of a journalist and his companions in 1998. In Konaté v. Burkina Faso,[22] the Court unanimously ruled a twelve-month sentence of imprisonment for criminal defamation imposed on the applicant journalist in 2012 (for having accused a public prosecutor of corruption) to be a violation of the Charter right to freedom of expression. In Thomas v. Tanzania,[23] Onyango v. Tanzania[24] and Abubakari v. Tanzania,[25] decided in 2015 and 2016, the Court found the state in violation of the right to a fair trial in Article 7 of the African Charter in each case.

In June 2016, the Court delivered its first merits judgment in a case brought by the African Commission. In the Saif Al-Islam Gaddafi[26] case, the Court found the secret detention and criminal proceedings against the second son of former Libyan President Gaddafi in violation of Articles 6

17 Yogogombaye v. Senegal ACHPR App. No. 001/2008 (15 December 2009).
18 African Commission on Human and Peoples' Rights v. Libya, Order for Provisional Measures, ACHPR, App. No. 004/ 2011 (25 March 2011), para. 25.
19 See Polymenopoulou (2012, pp. 767–775).
20 ACHPR, App. 009/2011 and 011/2011 (14 June 2013).
21 ACHPR, App. No. 013/2011 (28 March 2014).
22 ACHPR, App. No. 004/2013 (5 December 2014).
23 ACHPR, App. No. 005/2013 (20 November 2015).
24 ACHPR, App. No. 006/2013 (18 March 2016).
25 ACHPR, App. No. 007/2013 (3 June 2016).
26 African Commission on Human and Peoples' Rights v. Libya, ACHPR, App. No. 002/2013 (03 June 2016).

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(right to personal liberty, security and protection from arbitrary arrest) and 7 (right to fair trial). Later that year, the Court delivered another strong judgment on an electoral matter, ruling in APDH v. Côte d'Ivoire[27] that a new law on the Electoral Commission violated both the right to equal protection of the law in Article 3(2) of the African Charter on Human and Peoples' Rights and Article 10(3) of the African Charter on Democracy, Elections and Governance for placing opposition electoral candidates at a disadvantage by packing the body with representatives of the president, government ministers and the president of the National Assembly (parliament).

2017 saw the flow of judgments speed up and the pattern of expansive decision-making in sensitive policy areas continue. In the landmark Ogiek[28] case against Kenya in May 2017 – referred to the Court by the Commission on the basis that it concerned serious and massive rights violations – the Court held that the Kenyan government had violated no fewer than seven articles of the African Charter, including collective rights, in a far-reaching dispute concerning the ancestral lands of the Ogiek community. Building on, and largely agreeing with, previous African Commission decisions in similar cases, the Court found violations of the rights to non-discrimination (Article 2), culture (Article 17 (2) and (3)), religion (Article 8), property (Article 14), natural resources (Article 21) and development (Article 22). The judgment has been interpreted as recognising, in practical terms, a right to land, a right to food and, potentially, a right to free prior and informed consent regarding state interference with ancestral lands (Roesch, 2017).

In late 2017, the Court issued three further merits decisions. In Jonas v. Tanzania[29] and Onyachi v. Tanzania,[30] the Court again found the state in violation of the rights to, respectively, fair trial (Article 7 of the African Charter) and liberty (Article 6). Adding to its previous judgments in the Thomas, Abubakari and Onyango cases, the Court's case-law has developed a pattern of sustained criticism of the deficiencies its host state's criminal justice system, concerning free legal aid, timely issuance of trial judgments, organisation of identification parades and appropriate consideration of defences forwarded by the defendant (Possi, 2017; Windridge, 2017).

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27 ACHPR, App. No. 001/2014 (18 November 2016).
28 African Commission on Human and Peoples' Rights v. Kenya, ACHPR, App. No. 006/2012 (26 May 2017).
29 ACHPR, App. No. 011/2015 (28 September 2015).
30 ACHPR, App. No. 003/2015 (28 September 2017).

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These were closely followed by the November 2017 judgment in Ingabire v. Rwanda,[31] which concerned a fifteen-year sentence of imprisonment imposed on the applicant, Victoire Ingabire, leader of the unregistered opposition FDU Inkingi party, for crimes including spreading genocide ideology, complicity in acts of terrorism, sectarianism and terrorism in order to undermine the authority of the state. The applicant had been arrested after publicly speaking at the Genocide Memorial Centre on reconciliation and ethnic violence. In its judgment, the Court found Rwanda in violation of the free-speech rights in the African Charter (Article 9(2)) and the ICCPR (Article 19) and rights to an adequate defence under Article 7 of the African Charter. In the Court's view, although the law against minimising the genocide has a legitimate purpose and does not in itself breach the Charter or other rights, the state's action constituted a disproportionate and unnecessary restriction on Ingabire's free-speech rights, as the applicant's speech had not minimised the 1994 genocide. As the Ingabire case was pending, and underscoring the political and historical sensitivity of the case, Rwanda announced its intention to withdraw its special declaration permitting individuals to directly petition the Court, as discussed below.

The Court's judgments are notable for more than the number of violations found. For instance, through its case-law, the Court has mitigated some of the starker deficiencies of the African Charter (compared to the American and European human rights conventions). Most notably, beginning with its first merits judgment in Mtikila, the Court has softened the impact of so-called 'clawback clauses' in the African Charter through recourse to proportionality analysis – effectively establishing a 'restriction on restrictions'. The Court has also clearly stated its power to order damages and order investigations where necessary. The Court has interpreted treaties including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Democracy, Elections and Good Governance, as well as recognised the democracy Charter as a justiciable human rights instrument, which has amplified the Court's capacity to address sensitive electoral and governance issues in respondent states.

The African Court's website lists 100 cases pending before the Court, which suggests that its case-law is set to expand significantly in the coming years, although, as discussed below, eighty of these applications concern Tanzania.

31 ACHPR, App. No. 003/2014 (24 November 2017).

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5.2 Resistance against the Court's case-law

It is clear from the above that the Court has energetically seized its mandate and has not shied away from finding violations of the African Charter and other human rights treaties, even where cases have struck at highly sensitive legal, political and social questions at the domestic level. Despite having issued its first merits judgment a mere five years ago, the Court has already engendered resistance from Member States, which has taken a variety of forms. Some states have resisted Court proceedings, through overly late filing of responses. This resulted in the Court either extending its deadlines for submission of briefs or accepting late submissions 'in the interest of justice'.[32] This forgiving stance may be explained by the Court's eagerness not to frustrate states over rigorous proceduralism, especially when it is still developing its authority. In the Saif Al-Islam Gaddafi case, Libya blatantly failed to comply with the Court's orders for provisional measures and refused to participate in the proceedings, which led to the Court's first judgment in default. This is not to say that the level of co-operation with the Court is uniform. Burkina Faso, for example, largely complied with the Court's order in the Zongo case to pay compensation to the victim's family and to reopen an investigation into the death of a Burkinabé journalist in 1998.

Due to spatial constraints, this section focuses on clear resistance to the Court's decisions in two states: Tanzania, which is both the Court's host state and the subject of six of its twelve merits judgments to date; and Rwanda, which has had the strongest negative reaction to the Court's case-law to date. In line with the analytical framework set out by Madsen, Cebulak and Wiebusch, the analysis seeks to identify specific actors engaged in resistance, rather than analysing Member States as monolithic entities, and to appreciate the wider context in which such resistance has occurred.

5.2.1 Tanzania

The relationship between a human rights IC and its host state is not always easy. For example, it is not unusual for the IC to receive more complaints against its host state than other states under its purview (e.g. petitions against France to the ECtHR). However, while both the ECtHR and

32 See APDH v. Côte D'Ivoire (2016), paragraphs 26, 31.

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IACtHR developed for years without having to issue a merits judgment in a contentious case against their respective host states, the African Court has already issued six judgments against Tanzania, including its first merits judgment.

In its first landmark Mtikila judgment, the Court unanimously found the constitutional and legislative bans on independent candidacy in elections to constitute violations of freedom of association and the right to participate in public and governmental affairs, and a violation of the non-discrimination provisions of the Charter (by a 7–2 majority). In doing so, the Court expressly held that a provision of the Tanzanian Constitution contravened the African Charter and ordered the state to take all 'constitutional, legislative and all other necessary measures within a reasonable time' to remedy the violations found' (paragraph 126.3). The Court was unmoved by the state's argument that local remedies had not been exhausted due to a constitutional reform process – initiated while the issue was before the Tanzanian courts – that would leave the question of independent candidacies to the Tanzanian people. The state was also unsuccessful in its secondary arguments on the merits, based on the social needs, historical reality of a one-party state, security concerns, federal structure of the state and the need to avoid tribalism in the political system, which would require 'a gradual construction of a pluralist democracy in unity' (paragraphs 119, 51).

Interestingly, the applicants before the African Court included two NGOs – the Tanganyika Law Society and the Human Rights Centre – and an individual – Reverend Christopher Mtikila – the latter having already challenged the ban on independent candidates twice before the domestic courts in a decades-long campaign to open up the political system. While the African Court's judgment marked an expansive approach to its mandate, the NGOs had urged the Court to go even further, by adjudicating on whether the state had 'violated the rule of law by initiating a constitutional review process to settle an issue pending before the courts of Tanzania' (paragraph 4) – an argument the Court declined to address.

Although Tanzania had engaged fully with the Court during the entire process (unlike other states before the Court, such as Libya), at the reparations stage of the proceedings, the Court expressed concern at the government's continued position that the judgment was incorrect, on the basis that the law in Tanzania prohibited independent candidates from running for election (Windridge, 2015). The government has continued to refuse to comply with the judgment or to report to the Court on any measures it has taken to implement the judgment: the section on implementation of the Court's judgments in its mid-term activity report for 2017 indicates

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that, while the Tanzanian government has published the judgment on an official government website and a summary in its Official Gazette and a daily newspaper with wide circulation, the government has not taken any constitutional, legislative or other measures required to remedy the violations found (Mid-Term Activity Report, 2017, p. 12).

Tanzania's reaction to the other four judgments against it suggests a broader stance of non-compliance. While implementation of the Thomas and Abubakari judgments has been delayed by the state's requests for interpretations of the judgments (provided in late 2017), the state has provided no report to the Court on implementation of the Court's decision in the Onyango case (Mid-Term Activity Report, 2017, pp. 15–16). Beyond the claims that the African Court's judgments are wrong, it is hard to find any more detailed position on the Court articulated by government actors. The pattern of resistance, if there is one, is of stubborn refusal by the government to abide by the Court's judgments or engage with its orders. As one scholar put it in an analysis of the Court's fair trial judgments against Tanzania:

> 'As of June 2017, there is yet to be any compliance by Tanzania to the decisions rendered by the African Court. As if that is not worrying enough, Tanzania has also in no uncertain terms reported that it is unable to implement some of the orders on provisional measure [sic] pronounced by the Court [ordering stays on application of the death penalty]. If the Court would condone noncompliance at this early stage, the African Court risks losing its relevance, and, thus, also its legitimacy.' (Possi, 2017, p. 335)

Nevertheless, alongside such resistance, there is a growing tendency for individuals and NGOs to petition the Court (Tanzania has made the special declaration allowing such petitions): of the 100 pending cases listed on the Court's website that are again heavily weighted towards the host state, eighty are against Tanzania – the remainder are Rwanda (twelve, although seven relate to the same applicant), Mali (four), Benin (one), Côte d'Ivoire (one) and Ghana (one). NGOs have also called on the government to take concrete action to implement the Court's judgments, such as the Legal and Human Rights Centre (LHRC) and the Tanzania Civil Society Consortium on Election Observation (TACCEO), which has urged the government to undertake 'necessary reforms' to abide by the Mtikila judg-

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ment.[33] As such, the constellation of actors involved in resistance to the Court is largely reduced to a binary opposition between the government and NGOs.

The resistance of the Tanzanian government to the African Court's judgments has been clear, but has not led to any broader campaign to withdraw from the Court or to seek reform of its jurisdiction to render it less effective, which is possibly due to civil society support for the institution, but which may also relate to its delicate relationship with Court as its host state. It is also important to acknowledge that the government has not evinced uniform opposition to the Court: in 2015, for instance, outgoing Prime Minister Mizengo Pinda expressed support for the Court at the second African Judicial Dialogue (hosted by the Court in Arusha), urging Tanzanians to capitalise on the presence of the Court in the state and praising the Mtikila case as an example of how rights could be vindicated.[34] However, the preponderance of Tanzanian cases in the Court's docket raises the prospect that, should the contumacy of the Tanzanian government remain uniform, this will affect the majority of the Court's jurisprudence and could lead to an institutional crisis equivalent to a backlash crisis.

5.2.2 Rwanda

By contrast, the Court's judgment in Ingabire v. Rwanda has prompted a serious, vocal and concrete reaction from the government of Rwanda (the central actor, for reasons discussed below), which has taken a number of forms. The case essentially posed the question of the extent to which the African Court could adjudicate on how the Rwandan state treats those it views as perpetrators of, or complicit in, the genocide of 1994. The issue could hardly be more contentious. Since the genocide of 1994, in which more than 800,000 Tutsis and moderate Hutus were killed by Hutu extremists, the government has enacted a raft of legislation aimed not only at addressing denial or minimisation of the genocide, but to quell speech

33 See Legal and Human Rights Centre (LHRC) & Tanzania Civil Society Consortium for Election Observation (TACCEO), Report on the United Republic of Tanzania General Elections of 2015 (March 2016), p. 42. https://www.humanrights.or.tz/assets/attachments/1504100983.pdf (last accessed 19 February 2018).

34 See 'Pinda Urges Tanzanians to Capitalise on African Rights Court', Africatime.com. http://en.africatime.com/tanzanie/articles/pinda-urges-%20tanzanians-capitalise-african-rights-court (last accessed 19 February 2018).

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more generally that may inflame ethnic tensions. Since Paul Kagame's election as president (by parliament) in 2000, governance has focused on economic progress, with an increasing tendency to stamp out dissent and, specifically, discussion of the genocide that departs from the official account (Reyntjens, 2013). In the government's view, the Ingabire case appeared to raise the prospect that the lid it has carefully maintained on what it perceives as a potential powder keg could be tampered with by the African Court.

The government did not wait for the Court's decision before it took action. On 24 February 2016, days before the hearing before the Court on 4 March 2016, the Rwandan government announced its intention to withdraw its acceptance of direct individual applications to the Court, which it had deposited in June 2013. The government's note verbale communicating its decision set out its concerns in four terse paragraphs:

> 'CONSIDERING the 1994 genocide against the Tutsi was the most heinous crime since the Holocaust and Rwanda, Africa and the world lost a million people in a hundred days;
> CONSIDERING that a Genocide convict who is a fugitive from justice has, pursuant to the above-mentioned Declaration, secured a right to be heard by the Honourable Court, ultimately [sic] gaining a platform for re-invention and sanitization, in the guise of defending the human rights of the Rwandan citizens;
> CONSIDERING that the Republic of Rwanda, in making the 22nd January 2013 Declaration never envisaged that the kind of person described above would ever seek and be granted a platform on the basis of the said Declaration;
> CONSIDERING that Rwanda has set up strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues;
> NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court on Human and Peoples' Rights to receive cases under article 5(3) of the Protocol and shall make it afresh after a comprehensive review.'[35]

35 Centre for Human Rights University of Pretoria (2016) 'Report: Rwanda's Withdrawal of Its Acceptance of Direct Individual Access to the African Human Rights Court' (22 March) http://bit.ly/2nS61kp (last accessed 19 February 2018).

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The Rwandan government essentially contended that the African Court was being manipulated by perpetrators of the 1994 genocide, who have since fled Rwanda, to advance their interests. In response to concerns voiced by the African Commission at the AU summit in July 2016, Rwanda's ambassador to the AU laid out the reasons for withdrawal in even starker terms: 'We quickly realised that it is being abused by the judges on absence of a clear position of the court vis-à-vis genocide convicts and fugitives, and that is why we withdrew.'[36] At the same time, the ambassador insisted that Rwanda remains a strong supporter of the Court.

Initially, despite using the language of 'withdrawal' in its communication, the Rwandan government suggested that it merely wished to have all cases against Rwanda suspended to facilitate a review by the government of how access by NGOs and individuals was being used, and sought to be heard on this matter by the Court, while arguing that any decision on the withdrawal was for the AU Commission and not the Court.[37] However, no government representative appeared at the hearing of the Ingabire case, and the idea of suspension was dropped in later communications. Although the Court subsequently avoided other highly sensitive cases against Rwanda – notably a petition seeking interim measures against the 2015 referendum that permitted Kagame to run for re-election, on the basis that it had been 'overtaken by events'[38] – the Rwandan government in October 2017 confirmed that the withdrawal would not be rescinded (Ageno, 2017).

The withdrawal decision, as such, presents a curious case of resistance. From one angle, it can look like pushback, given that it is focused on disagreement with a specific case before the Court. However, examined in detail – and considering that the government's reaction pre-empted the judgment in the case – the decision more closely resembles a form of backlash. Backlash may be perceived insofar as partial withdrawal from the Court's jurisdiction carried not only the express charge of illegitimate use of the Court, but also an implicit attack on the Court's legitimacy overall (notwithstanding diplomatic statements indicating continuing commitment to the Court).

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36 See Rwanda Rejects Calls to Endorse African Rights Court, The Citizen (13 July 2016) http://www.thecitizen.co.tz/News/Rwanda-rejects-calls-to-endorse-African-rights-court/1840340-3292644-1hos0yz/index.html (last accessed 19 February 2018).

37 App. No. 004/2013, Ingabire v. Rwanda, Ruling on Jurisdiction (3 June 2016), paragraphs 36–38.

38 App. No. 016/2015, Nyamwasa and Others v. Rwanda, Order on request for interim measures (24 March 2017).

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To some extent, the hybrid nature of this instance of resistance relates to the sui generis nature of access to the Court, where full access is dependent on an additional declaration by the state. In the European system, for instance, actors disagreeing with the ECtHR have broadly three options: disagreement with the Court's case-law (which can be expressed through a variety of channels), the difficult and work-intensive option of marshalling consensus for institutional change, or the 'nuclear option' of full withdrawal (which would have much wider ramifications for that state's membership of the Council of Europe, and of the EU where applicable). 'Rwexit', as Rwanda's special declaration withdrawal has been called, has demonstrated that the institutional structure of the African Court more easily lends itself to forms of resistance that have lower political, reputational and organisational costs for the state, while achieving the goal of neutering the Court's impact on the state. As Rwanda emphasised in its note verbale, it was not leaving the Court, and only seven other states (at the time) had made the special declaration to extend access.

That said, the declaration of withdrawal has not ended the prospect of further conflict between the Rwandan government and the African Court. In its ruling on the withdrawal, the Court agreed that such a withdrawal was valid (based, inter alia, on rules governing recognition of jurisdiction and the principle of state sovereignty), but emphasised that all cases taken pursuant to the special declaration, before its withdrawal, would still be heard by the Court. This included a one-year period before the withdrawal became effective, on 1 March 2017. As the Court observed at paragraph 62, a sudden withdrawal without prior notice 'has the potential to weaken the protection regime provided for in the Charter'. This approach, though entirely understandable on its own merits, clearly has the potential to raise further serious tensions between the Court and the Rwandan government given the nature of key pending cases against the state.

For instance, one of the pending applications against Rwanda relates to the ousting of the executive committee of a leading human rights NGO, the Rwandan League for the Promotion and Defense of Human Rights (LIPRODHOR), allegedly to silence its vocal criticism of the government.[39] The application at paragraph 17 not only requests the Court, among other things, to publicly condemn intimidation against independent human rights defenders and recognise the importance of their work and to reform domestic legislation restricting NGOs' activities. It also asks the Court to order the state to take 'immediate and all necessary steps to

39 ACHPR, App. No. 023/2015 Laurent Munyandilikirwa v. Republic of Rwanda.

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strengthening independence of the judiciary', 'to initiate a broader legal reform process with the purpose of creating an enabling environment for civil society in the country' and 'to take all other necessary steps to redress the alleged human rights violations'. Depending on how the Court approaches the case, this could easily become an additional flash-point for criticism of the Court by the Rwandan government.

An important point should be made here, which returns to one of the fundamental contextual factors discussed in Section 3, namely the wide variety of governance systems in states that have acceded to the African Court's jurisdiction. Although assessments of which states are democratic or not are perennially contested, Rwanda under President Kagame has long been considered by leading indices to be an authoritarian regime (Freedom House, 2018; Economist Intelligence Unit (EIU), 2017, p. 33). Indeed, the government's response to the Ingabire judgment must be viewed in the context of significant repression of domestic critics: as Freedom House noted in 2016, President Kagame 'has efficiently closed the space for political opposition or critical viewpoints' (2016, p. 11), including suppression of NGOs through onerous registration procedures (Amnesty International, 2017). International NGOs such as Human Rights Watch have documented intensifying repression since the August 2017 presidential elections, through arrests, torture, forced disappearance and intimidation of political opponents, and intimidation of and interference with the media (Human Rights Watch, 2018; Amnesty International, 2017).

A broader insight can also be made with regard to the resistance framework set out by Madsen, Cebulak and Wiebusch. In democratic states, different sites of authority operate with considerable independence, and significant resistance tends to depend on a sufficient level of consensus emerging among multiple actors. In authoritarian regimes, by contrast, one can expect the national government to take the leading role in resistance against an IC and – depending on the extent to which they have been 'captured' by the government – national courts and the media might be considered as 'national government' actors rather than separate actors in the constellation of resistance actors. As the Rwexit experience indicates, such governance systems also permit rapid reactions against an IC, which differs starkly from the slow building of a broad-based 'resistance consensus' seen in states such as the UK, which itself resonated with resistance actors in states including the Netherlands and Russia.

Moreover, civil society actors, especially human rights NGOs, tend to be more active and numerous in a democratic regime than an authoritarian regime, with the result that their role in resistance processes will be

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affected by the nature of the state in which they operate. As the Rwandan context demonstrates, autocratic government can leave little space for any discussion of human rights issues, which limits any open discussion (whether negative or positive) of the African Court. NGO criticism of Rwexit has largely come from transnational coalitions of African NGOs and global NGOs (e.g. African Court coalition, Amnesty International), with limited involvement of Rwandan organisations (such as the Association rwandaise pour la Défense des droits de la personne et des libertés publiques (ADL) and the Ligue des Droits de la Personne dans la région des Grands Lacs (LDGL)).[40] In addition, Rwandan human rights scholars have not appeared to criticise the withdrawal. Some scholars, such as Innocent Musonera, Head of Public Law at the University of Rwanda, have defended the government's action in the press, in terms closely aligned with the government position:

> 'Rwanda's concerns are genuine. You have Genocide convicts who have not showed up to serve their sentences and Genocide suspects or other criminal suspects who are fugitives and they are given a platform to bring up new cases that have nothing to do with their criminal charges.' (Kwibuka, 2017)

This contrasts with the Tanzanian context, discussed above, where various NGOs have shown support for the Court and called on the government to implement its rulings. That said, Tanzania has also been criticised for significant democratic backsliding in recent years. Freedom House's report for 2017 noted that the government of President Magufuli 'has stepped up repression of dissent, detaining opposition politicians, shuttering media outlets, and arresting citizens for posting critical views on social media' (Freedom House, 2018, p. 18). This clearly has the capacity to affect how the state, and civil society actors, will relate to the Court in the near future, and may be a significant explanatory factor for the state's inaction regarding implementation of judgments to date.

The position of the Rwandan government towards the Court has recently increased in importance, and comes into play in an emerging process

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40 'Joint Civil Society Statement on Rwanda's Withdrawal of Its Article 34(6) Declaration from the Protocol on the African Court on Human and Peoples' Rights' (17 March 2016) http://rfkhumanrights.org/news/news/leading-african-and-international- rights-groups-criticize-rwanda-restricting-access-african-human-rights-court-march-17-2016-today-rob-ert-f-kennedy-human-rights- joined-group-40-leading-african-and-international-human-rights-organization/ (last accessed 20 February 2018).

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of potential institutional reform of the Court that may also become a vector for weakening of the Court. In particular, the AU has mandated President Kagame (who is chairperson of the AU for 2018) to lead a committee charged with examining institutional reform options for the AU, including reviewing and clarifying the roles of its courts (Kagame, 2017). Considering that the Rwandan government has already signalled resistance to the Court through the withdrawal of its special declaration in 2016, this reform process raises concerns. Although no concrete proposals have been made at the time of writing, and this process cannot be described as a clear form of backlash, the Kagame recommendations could mirror the Inter-American context, where resistance to the human rights Commission and Court by neo-Bolivarian states such as Venezuela, Bolivia and Ecuador has led to (as yet unsuccessful) proposals to reform the Commission that would significantly weaken the operation of both organs.[41]

Even if such reform comes to nothing, the precedent alone set by Rwanda as the first state to withdraw its special declaration may have made this option more politically acceptable to some states than it previously appeared, and may have also rendered full withdrawal more palatable.

6 *Conclusion*

As suggested in the introduction to this piece, the African Court as a case-study of resistance against ICs offers a number of key insights. It suggests that understanding resistance against a young court requires a form of double analysis, employing analytical frameworks for understanding both resistance and authority-building. So far in the African context, resistance has remained at the level of pushback, in the sense that it generally emanated from single states without collective ambition to engage in institutional reform as a reaction to the Court's case-law. However, this case-study underscores that institutional structure has path-dependent effects and can shape the form in which resistance is expressed. In particular, the two-tier nature of access to the Court, requiring a specific state declaration to expand access to individuals and qualified NGOs, provides an additional avenue for resistance by states, whether by refusing to make the declaration (as two-thirds of the current thirty states have done) or,

41 OAS Concludes Formal Inter-American Human Rights "Strengthening" Process, but Dialogue Continues on Contentious Reforms, International Justice Resource Center (24 March 2013) http://bit.ly/2BLdNWA (last accessed 20 February 2018).

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in the Rwexit scenario, withdrawing the declaration in retaliation to judgments against the state. The African Court case-study also highlights the importance of the overall political context in which an IC functions: resistance emanating from authoritarian regimes can differ from resistance emanating from more democratic regimes (although all exist on a spectrum, and this is not to say that resistance strategies from authoritarian and democratic states will necessarily differ). Resistance can come about more swiftly and national governments tend to take on a more central role in authoritarian states than in the slow consensus-building required within democratic states. Overall, the single most important form of resistance to a young court is the strategy of ignoring the court by not allowing it to exercise the full de jure authority and jurisdiction accorded to it by its founding treaty. Patterns of resistance in the African Court context also appear to involve smaller constellations of actors, with national courts and the media in particular playing little role in resistance against the Court to date. Specific reasons for resistance can be difficult to discern, as seen in the terseness and taciturnity of the Tanzanian government, or can hinge on one central issue, as seen in the Rwandan context. With most analyses of the Court's case-law focusing on description and discrete legal areas rather than the broad picture, this analysis highlights the need for further work in understanding the specific audi-ences, resistance constellations and dynamics of resistance in the African context.

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My iCourts experience

I first heard of iCourts in late 2015, in the latter stages of my PhD at the University of Edinburgh, from Prof. Stephen Tierney. From the first description of the Centre's work, and looking at the Centre's research profile, I knew I had to apply for a visit. Conducting doctoral research focused on both national constitutional courts and international human rights courts as democracy-builders in post-authoritarian states, I was centrally focused on Brazil and the Inter-American Court of Human Rights. In Edinburgh I was surrounded by expertise on the European judicial space, and working in an intellectually rich setting, including my role as Associate Director of the Edinburgh Centre for Constitutional Law. Yet, I still lacked an intellectual community and network focused on international courts in all of their variety worldwide.

iCourts was, from my first day, that home I needed. After tramping through snowy Copenhagen on a cold Monday morning in late January 2016 – and getting lost along the way – I found a warm and welcoming community, ready-made, the moment I entered the old iCourts facility on Studiestræde. Originally accepted for a 3-month stay, from 23 January until 23 April 2016, I ended up staying an additional 4 months, only finally departing on 19 August.

My time at iCourts enriched my academic career, and my life, in so many ways. On the academic side, the Centre was the perfect place to transition from doctoral researcher to fully-fledged scholar. The combination of an intellectually stimulating and open environment, encompassing such a diversity of disciplinary backgrounds, research interests, and methodologies, challenged me and spurred me to be even more ambitious in my own research. Weekly seminars and morning meetings made for a lively atmosphere of exchange and connection, and I also had the good luck to share offices with scholars such as Barrie Sander and Juanan Mayoral, with every chat a mixture of laughs and learning.

I made some landmark career steps at the Centre. I finished my book *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, submitted to Cambridge University Press in July 2016, as well as a working paper on 'Human Rights Courts, Democratisation and Social Justice'. iCourts ended up spurring a host of publications in the subsequent years, including articles and book chapters on relationships between apex courts in Brazil and South Africa with international human rights courts, back-

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lash against the African Court on Human and Peoples' Rights (with Micha Wiebusch), an entry on national courts and the Inter-American Court for the *Max Planck Encyclopedia on Constitutional Law* (MPECCoL), and a book chapter on cross-border judicial dialogue in Latin America and Africa in the forthcoming *Cambridge Handbook on Comparative Law*.

My time at iCourts also greatly expanded my horizons as a consultant. Directly after my time at the Centre I worked in Turkey managing a large Council of Europe project to draft and implement a Code of Ethics for judges and prosecutors, in light of European standards – leaving early for Australia and recommending closure of the project due to the fraught macro-political climate of growing authoritarianism. In late 2017 I won a consultant contract to design an African Judicial Network for the African Court on Human and Peoples' Rights, to link the Court with international courts and apex national courts across the African Union. It is now being implemented.

Once you've become part of the iCourts family, you remain part of it. Collaborations include: panels at the annual conference of the International Society of Public Law (ICON-S) in Berlin in 2016 (organised by Pola Cebulak and Micha Wiebusch) and hosted by iCourts in 2017; time in Rio de Janeiro in January 2018 as part of the Denmark-Brazil Network on Regional and Constitutional Structures in Tension (RCST); returning to Copenhagen in May 2019 for the iCourts conference on 'The Power of International Courts'; and working on the AfCite project with Misha Plagis, focused on national court citations of the African Court on Human and Peoples' Rights.

Yet, for all the important academic and career advances, the most positive legacy of my time at iCourts is the friendships that I made – too many to enumerate here! It is easy to forget that I was only in Copenhagen for seven months. Just thinking of iCourts brings a flood of memories: it is too hard to pick just one. Lunch-time debates and Friday drinks. Biting into my first Fastelavnsboller and getting covered in icing sugar. Cycling to work on bright summer mornings. Mikael's dry sense of humour. Consoling the one British student at the iCourts Summer School on the morning the Brexit vote was announced.

Sitting here in Melbourne, almost five years after I first arrived at iCourts, I am so grateful that I got to spend time in Copenhagen. As Deputy Director of the School of Government at the University of Melbourne I am now more acutely aware of just how much goes into fostering academic excellence and creating a vibrant and long-lasting community. The Centre is a testament to Mikael Rask Madsen's vision for a genuine-

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ly international and interdisciplinary network of scholars and shared purpose, and his creativity in making it happen. Takker, Mikael!

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