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The folly of asking states to voluntarily submit to a higher power without coercion: A commentary on article 34(6) of the African Court Protocol through the lens of realpolitik

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Summary: *Article 34(6) of the Protocol Establishing the African Court on Human and Peoples' Rights requires states to make an optional declaration before individuals and NGOs may access the Court directly. Two decades after the Court became operational, only a small minority of African states have ever accepted this jurisdiction, and several have since withdrawn it. Relying on a realpolitik analysis of state behaviour, this article argues that the system is fundamentally flawed because it rests on the assumption that states will voluntarily submit to an external power capable of constraining their political authority. The article shows that African states are structurally hostile to externalised judicial accountability and maintain entrenched systems of power consolidation that resist supranational enforcement. Human rights form an apex normative order that challenges political monopoly, while regional judicial bodies threaten executive discretion through binding*

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adjudication. Accordingly, reluctance and withdrawal under article 34(6) are rational defensive choices. The article concludes that expecting voluntary subordination of state power is politically naive. To sustain the African Court's authority, structural reform must replace voluntarism with mechanisms of obligation, incentive or coercion.

Key words: *African Court; article 34(6); realpolitik; state sovereignty; human rights enforcement; power consolidation*

1 Introduction

In the quest to enforce human rights in Africa, article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights (African Court Protocol), which requires acceptance by state parties to the Protocol of the competence of the Court to receive cases from individuals and non-governmental organisations (NGOs), stands as a paradoxical design choice.¹ The paradox arises from the fact that individuals and NGOs, the fundamental users of the Court, are not automatically entitled to lodge a matter against a state party to the Protocol before the African Court on Human and Peoples' Rights (African Court). Article 34(6) requires each state party to accept the Court's competence to receive cases from individuals and NGOs,² effectively making accountability an opt-in regime by sovereigns who would themselves be held to account.³ In theory, this is respect for state sovereignty⁴ while, in practice, it is a folly: Few states ever opened this avenue, and several have subsequently withdrawn

1 D Juma 'Access to the African Court on Human and Peoples' Rights: A case of the poacher turned gamekeeper?' (2007) 4 *Essex Human Rights Review* 2, 3.

2 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted in 1998 and entered into force in 2004) art 34(6) (African Court Protocol); Centre for Human Rights 'Centre for Human Rights expresses concern about the withdrawal of direct individual access to the African Court by Benin and Côte d'Ivoire' 5 May 2020, <https://www.chr.up.ac.za/press-statements/2073-centre-for-human-rights-expresses-concern-about-the-withdrawal-of-direct-individual-access-to-the-african-court-by-benin-and-cote-d-ivoire> (accessed 4 November 2025).

3 SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1, 18-19; R Makumbe & J Ochom 'Optional justice: The African Court's relationship with human rights protection in Africa' *Justice in Conflict* (web blog) 3 August 2020, <https://justiceinconflict.org/2020/08/03/optional-justice-the-african-courts-relationship-with-human-rights-protection-in-africa/> (accessed 16 May 2026).

4 JE Núñez 'State sovereignty: Concept and conceptions' (2024) 37 *International Journal for the Semiotics of Law* 2131, 2135.

their initial acceptance,⁵ when faced with inconvenient judgments.⁶ Optional acceptance of supranational jurisdiction is not unique to the African system. The early European and Inter-American human rights systems also relied on forms of optional or tiered jurisdiction before evolving towards stronger and more automatic mechanisms of access.⁷ The European human rights system abolished its commission and optional acceptance of the Court's jurisdiction, replacing them with a permanent court having automatic jurisdiction and direct individual access.⁸ By contrast, the Inter-American Commission on Human Rights was retained as a filtering institution. However, reforms to the Commission's Rules of Procedure gradually strengthened access to the Inter-American Court. Most notably, the Commission's 2001 Rules of Procedure introduced what has been described as a reversible presumption of referral:⁹ Where a state had accepted the Court's jurisdiction and failed to comply with the Commission's recommendations, the Commission is expected to refer the case to the Court unless an absolute majority of its members adopted a reasoned decision not to do so. This reform substantially reduced the discretionary gatekeeping role of the Commission and increased the likelihood that victims would obtain judicial review before the Court. The difficulty in the African context, therefore, is not voluntarism *per se*, but the assumption that states would maintain such commitments indefinitely despite the political costs associated with direct individual litigation and adverse judgments.¹⁰ This article argues that expecting states to voluntarily submit to a higher judicial authority without any coercion ignores the hard logic of power¹¹ and self-interest, a perspective aptly captured by *realpolitik*.

- 5 D de Klerk & A Rudman 'The ultimate withdrawal: A critical analysis of the jurisprudence of the African Court on Human and Peoples' Rights' in A Fuentes & A Rudman (eds) *Human rights adjudication in Africa: Challenges and opportunities within the African Union and sub-regional human rights systems* (2023) 39.
- 6 DR de Klerk 'The legitimacy of the African Court on Human and Peoples' Rights after the withdrawal of Rwanda, Tanzania, Benin, and Côte d'Ivoire from 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' LLM thesis, Stellenbosch University, 2023 128; International Commission of Jurists 'Withdrawal of states from African Court: A blow to access to justice in the region' 1 May 2020, <https://www.icj.org/withdrawal-of-states-from-african-court-a-blow-to-access-to-justice-in-the-region/> (accessed 5 July 2025).
- 7 A Huneeus & MR Madsen 'Between universalism and regional law and politics: A comparative history of the American, European and African human rights systems' (2018) 16 *International Journal of Constitutional Law* 136, 140-141, 146-147.
- 8 Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (1994) ETS 155 art 1; see also European Convention on Human Rights (adopted 4 November 1950 and entered into force 3 September 1953) art 34.
- 9 Rules of Procedure of the Inter-American Commission on Human Rights (2001, as amended 2013) art 45(1).
- 10 Huneeus & Madsen (n 7) 142.
- 11 H Morgenthau *Politics among nations: The struggle for power and peace* (1973) 13.

One of the long-standing presumptions of sovereignty, according to Henkin,¹² is that nations would typically only obey when it serves their own interests and that international law cannot really be implemented against unwilling states.¹³ Larking¹⁴ also contends that because governments are unwilling to allow outside criticism of how they treat their own citizens, there is an inherent tension between the preservation of human rights and the sovereign prerogatives of the contemporary state.¹⁵ In regional human rights regimes, where governments insist on having the last say on the scope of their legal liability,¹⁶ this tension is most apparent. The experience of international and regional human rights institutions further demonstrates that states frequently construct institutions in ways that preserve political discretion while projecting a commitment to human rights.¹⁷ Jones, in his analysis of the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights, argues that regional human rights institutions are often deliberately designed to avoid becoming genuine constraints on state sovereignty.¹⁸ Their mandates, procedures and enforcement powers are negotiated in ways that prioritise political control, consensus and state autonomy over accountability.

This design reflects what Bassiouni describes as the persistent tension of *realpolitik* in international justice.¹⁹ According to Bassiouni, states often invoke justice, human rights and accountability rhetorically, but retreat when these values threaten their political interests or expose state officials to scrutiny.²⁰ *Realpolitik*, therefore, explains why states are willing to ratify human rights treaties in principle, while simultaneously creating procedural barriers, opt-in

12 L Henkin 'Human rights and state "sovereignty"' (1995) 25 *Georgia Journal of International and Comparative Law* 31, 32.

13 As above.

14 E Larking 'Human rights and the principle of sovereignty: A dangerous conflict at the heart of the nation state?' (2004) 10 *Australian Journal of Human Rights* 15, 18-19.

15 As above.

16 R Grote 'Current issues and common challenges for the protection of human rights in Europe, the Americas and Africa' in A von Bogdandy and others (eds) *The impact of the Inter-American human rights system: Transformations on the ground* (2024) 76, 76-77.

17 EM Hafner-Burton, ED Mansfield & JCW Pevehouse 'Human rights institutions, sovereignty costs and democratisation' (2013) 45 *British Journal of Political Science* 1, 5; S Cardenas 'Human rights and the state' in N Roy (ed) *Oxford research encyclopedia of international studies* (2017) 1.

18 WJ Jones 'Sovereignty over rights? Realism and regime theory analysis of the ASEAN Intergovernmental Commission on Human Rights' (2025) 1 *Asia-Pacific Journal on Human Rights and the Law* 1, 1-4.

19 MC Bassiouni 'Searching for justice in the world of *realpolitik*' (2000) 12 *Pace International Law Review* 213, 224.

20 Bassiouni (n 19) 229.

clauses, and withdrawal mechanisms that minimise the actual risks of enforcement.²¹

The recent spate of withdrawals from article 34(6) declarations, and broader resistance to compliance (by Rwanda, Tanzania, Benin, Côte d'Ivoire and Tunisia), illustrates that governments will not cede authority or tolerate external constraints unless compelled or persuaded by countervailing power dynamics.²² Using a realist lens, and drawing on African examples, this article examines why the voluntarist approach of article 34(6) was doomed to undercut the African Court's effectiveness, and how the system might be rethought to realign power and accountability. Following this introductory part, the second part sets out the analytical framework of *realpolitik*, explaining how the logic of power, national interest and executive self-preservation shapes state behaviour in international law and why states are reluctant to submit voluntarily to external judicial authority without credible enforcement mechanisms. The third part looks at human rights and the threat to political monopoly, and discusses human rights as a constraint on state power and judicial enforcement as an existential threat to executives. Part 4 applies this framework to the African human rights system, examining article 34(6) of the African Court Protocol as a design flaw of voluntarism and demonstrating how the voluntarist jurisdictional model has enabled resistance, withdrawals and backlash by several African states. The final part reflects on the implications of this pattern of state behaviour, and considers possible reforms aimed at strengthening accountability and aligning the incentives of states with the effective enforcement of human rights within the African Court system.

2 Realpolitik as a framework for understanding state behaviour

2.1 A brief historical introduction to *realpolitik*

International law often operates on the assumption of good faith²³ compliance, that states will honour their commitments and accept limits on their freedom out of enlightened self-interest.²⁴ This

²¹ As above.

²² De Klerk & Rudman (n 5) 39.

²³ S Reinhold 'Good faith in international law' (2013) 2 *University College London Journal of Law and Jurisprudence* 40, 48.

²⁴ HR Basaran 'The principle of good faith in international law' (2021) 51 *Hong Kong Law Journal* 597, 600; J Crawford & I Brownlie *Brownlie's principles of public international law* (2019) 215.

assumption is reflected in the United Nations (UN) Charter,²⁵ which requires member states to 'fulfil in good faith the obligations assumed by them', and in the Vienna Convention on the Law of Treaties (VCLT), which affirms that treaties must be performed in good faith under the principle of *pacta sunt servanda*.²⁶ According to Driggers, realpolitik is a policy posture that gives preference to expression of power and pragmatic action over moral considerations.²⁷ The author further likens 'realpolitik' to realism and 'Machiavellianism'.²⁸ Adams defines realpolitik as a practical and pragmatic approach to politics, particularly foreign policy, in which decisions are guided primarily by the realities of power, national interest and existing political conditions, rather than by moral ideals or ideological principles.²⁹ This approach often requires flexibility in alliances and policies, allowing statesmen to set aside ideological commitments to maintain or improve their country's strategic position within the balance of power.³⁰ Historically, the concept emerged in nineteenth-century Germany and was most famously articulated by the political writer Ludwig von Rochau, who argued that successful political action must be grounded in a sober assessment of existing social and political forces rather than abstract ideals.³¹ A 'realpolitiker,' therefore, is a statesman who bases political action on the practical needs and conditions of the state, contrasting with idealist politicians who prioritise normative or ideological visions without sufficient regard for the realities of power and circumstance.³²

The development of realpolitik was later closely associated with Otto von Bismarck and the unification of Germany.³³ Bismarck's statecraft demonstrated that alliances, diplomacy and even ideological flexibility could be used instrumentally to strengthen the state.³⁴ This logic is visible throughout the international legal order. As Henkin notes, one of the traditional assumptions of sovereignty

25 Art 2(2) Charter of the United Nations (1945).

26 Art 26 Vienna Convention on the Law of Treaties (1969).

27 ST Driggers 'Unearthing the method of Realpolitik' (2021) 23 *International Studies Review* 218, 219-220.

28 As above.

29 ARC Humphreys 'Realpolitik' in MT Gibbons and others (eds) *The encyclopedia of political thought* (2014) 1.

30 As above.

31 J Bew *Realpolitik: A history* (2016) 65.

32 HC Emery 'What is realpolitik?' (1915) 25 *International Journal of Ethics* 448, 451.

33 O Pflanze 'Bismarck's realpolitik' (1958) 20 *The Review of Politics* 492, 495; H Holborn 'Bismarck's Realpolitik' (1960) 21 *Journal of the History of Ideas* 84, 95; BC Rathbun 'The rarity of Realpolitik: What Bismarck's rationality reveals about international politics' (2018) 43 *International Security* 7, 8; HC Emery (n 32) 455.

34 M Saaida 'Realpolitik: The pragmatic approach to politics' Paper, Al-Istiqlal University 1, 6, https://www.researchgate.net/profile/Mohammed-Saaida/publication/375086477_Realpolitik_The_Pragmatic_Approach_to_Politics/links/65401c010426ef6369eba19e/Realpolitik-The-Pragmatic-Approach-to-Politics.pdf (accessed 29 May 2026).

is that international law is ultimately based on state consent and that states comply with international obligations only when it serves their national interest.³⁵ Similarly, Larking argues that the nation state remains deeply invested in preserving the impermeability of its borders and the autonomy of its constitutional system.³⁶ This helps explain why states often create human rights institutions with weak enforcement mandates. The ASEAN Intergovernmental Commission on Human Rights, for example, was deliberately designed around consensus decision making, dialogue and respect for sovereignty, while avoiding strong enforcement or adjudicatory powers.³⁷ This reflects the fact that states seek to appear committed to human rights while ensuring that regional bodies cannot meaningfully constrain domestic political authority.³⁸ Bassiouni observes that international justice frequently operates 'under the shadow of realpolitik', because powerful states selectively support accountability mechanisms only when doing so does not conflict with their strategic interests.³⁹ Çiçek argues that Western states have displayed strong support for Ukraine because of its strategic significance in countering Russian influence, while responses to Gaza have been shaped by different political calculations, revealing how humanitarian concerns are often subordinated to geopolitical interests.⁴⁰

Contextually, 'realpolitik' is defined from a human rights perspective as a practical understanding of state behaviour in which states do not necessarily reject human rights principles, but they engage with them selectively, accepting obligations only when these do not threaten their political authority, institutional autonomy or domestic power structures.⁴¹ This article does not employ realpolitik in a strict Bismarckian sense, as if all states always act only through coercion, domination, or raw power. If that were the case, the post-1945 growth of international human rights courts would be difficult to explain. It accepts that states may create and join international human rights courts for strategic, institutional, or democratic reasons.

Realpolitik is not the only possible explanation for international human rights courts. Liberal and institutionalist accounts suggest that states may accept supranational adjudication as a means of consolidating democratic institutions, enhancing the credibility

35 Henkin (n 12) 34-35.

36 Larking (n 14) 18-20.

37 Jones (n 18) 6-7.

38 Jones (n 18) 1-4.

39 Bassiouni (n 19) 224.

40 AE Çiçek 'The return of Realpolitik and the geopolitical currents of human rights: A comparative reflection within the United Nations' (2025) 1 *Journal of Humanity, Peace and Justice* 96, 103-104.

41 Humphreys (n 29) 1-2; Grote (n 16) 76-77.

of domestic commitments, and protecting those commitments against future political reversal.⁴² Moravcsik further argues that post-war European human rights regimes were supported especially by new democracies seeking to protect democratic gains against future authoritarian reversal.⁴³ This qualified realpolitik framing is appropriate because the article is not concerned with whether international human rights courts can exist, but with why voluntary access to them becomes fragile once adjudication threatens politically sensitive state interests. Moravcsik demonstrates that states may support human rights regimes for institutional reasons, especially where new democracies seek to 'lock in' democratic gains against future authoritarian reversal.⁴⁴ However, article 34(6) presents a different problem. This article is not primarily concerned with the reason why states create human rights courts, but with why states that once accepted direct access later resist, withdraw from or recalibrate that access when judicial accountability affects executive discretion, electoral control or regime-sensitive litigation. The article, therefore, adopts a qualified realpolitik approach: It accepts that international human rights courts are possible, but argues that voluntary supranational adjudication becomes unstable when it threatens politically sensitive state interests.

2.2 Core assumptions of realpolitik in international law

In this view, the first assumption of this doctrine is that the behaviour of states is shaped by calculations of power, survival and strategic advantage, with international law and institutions functioning largely as instruments that states employ when they serve national interests.⁴⁵ Contemporary realist scholarship similarly emphasises that realism is best understood as an intellectual tradition highlighting the constraints imposed by national egoism and the structural conditions of international anarchy, which shape how states interpret legal obligations and institutional commitments.⁴⁶

A second core assumption underlying realpolitik is that states tend to resist external constraints that threaten their sovereignty or political autonomy, particularly when international institutions challenge domestic political authority. International courts, while formally designed to adjudicate legal disputes, operate within a political environment in which states retain significant control over

42 A Moravcsik 'The origins of human rights regimes: Democratic delegation in post-war Europe' (2000) 54 *International Organization* 217, 228-229.

43 Moravcsik (n 42) 220-221.

44 Moravcsik (n 42) 220.

45 Morgenthau (n 11) 14.

46 J Donnelly *Realism and international relations* (2000) 6-9.

institutional authority. Empirical studies of international courts reveal that governments frequently react against perceived judicial overreach by limiting jurisdiction, resisting implementation of judgments or withdrawing from legal commitments altogether.⁴⁷ This dynamic has been particularly visible within regional human rights regimes in Africa, where resistance by governments has taken the form of institutional backlash or withdrawal from judicial mechanisms when adverse rulings threaten domestic political interests.⁴⁸

A third assumption of the *realpolitik* doctrine is that states comply with international law primarily when compliance aligns with their interests or when the costs of violation outweigh the benefits of defection. Rationalist scholarship in international law argues that compliance is often the product of strategic calculations rather than intrinsic commitment to legal norms. States design international agreements and dispute resolution mechanisms in ways that preserve flexibility and allow them to withdraw or resist enforcement when legal obligations become politically costly.⁴⁹ Similarly, research on treaty exit and institutional design demonstrates that international agreements frequently include withdrawal clauses precisely because states seek to maintain the ability to recalibrate commitments when national interests change.⁵⁰

Realpolitik offers a more cynical but often more accurate lens. States, especially their ruling regimes, act to preserve their power and interests first and foremost, and legal or moral imperatives are effective only to the extent that they align with those interests or are backed by enforcement. As one commentary notes, in the African context, the option of making an article 34(6) declaration has effectively made human rights accountability an 'elective matter' subject to political expediency.⁵¹ This discretion was born from the 'pervasive fear of embarrassment' that African leaders had a fear that individuals and NGOs would expose them in a supranational forum.⁵² Such fears reflect classical realist instincts: Governments jealously guard their sovereignty and public image and will not expose themselves to external judgment unless they perceive a net benefit or compulsion.

47 EA Posner & JC Yoo 'Judicial independence in international tribunals' (2005) 93 *California Law Review* 1, 14-20.

48 SA Ravn, MA Plagis & MR Madsen 'International courts and sovereignty politics: Design, shielding, and reprisal at the African Court' (2025) 38 *Leiden Journal of International Law* 597, 602.

49 A Thompson 'The rational enforcement of international law: Solving the sanctioners' dilemma' (2009) 1 *International Theory* 307, 309-312.

50 LR Helfer 'Exiting treaties' (2005) 91 *Virginia Law Review* 1579, 1585.

51 Makumbe & Ochom (n 3).

52 As above.

Power in the realpolitik view is zero-sum. Accepting the authority of a higher court inherently diminishes a regime's unilateral control over outcomes, which few leaders will countenance without pressure. Realpolitik reminds us that 'power concedes nothing without a demand'.⁵³ In Africa's post-colonial history, states have been particularly protective of sovereignty, The African Union (AU) was explicitly founded on the principle of non-interference in the internal affairs of member states.⁵⁴ Even under the AU's more progressive normative framework, the willingness of states to be bound by supranational norms hinges on calculations of advantage and coercion (such as the incentive of AU membership or fear of sanction in cases of unconstitutional changes of government).⁵⁵ In the human rights sphere, however, effective coercive levers are weak.⁵⁶ Unlike in trade or security regimes, there are no material sanctions for breaching human rights obligations; compliance relies on political will, peer reputation and, sometimes, donor pressure.⁵⁷

The logic of power also explains why many African governments have been wary of empowering international courts.⁵⁸ The African Court has faced scepticism from powerful states, though in a quieter way by simply failing to ratify the Court's Protocol,⁵⁹ or refusing to make the article 34(6) declaration.⁶⁰ Realpolitik predicts that states with poor human rights records or authoritarian tendencies will be the least likely to submit to an international court's jurisdiction, since they have the most to lose from an independent review of their conduct. Conversely, states that do make the leap of granting direct access tend to be those confident that they can withstand scrutiny or that are desirous of projecting a commitment to justice.

53 F Douglass 'If there is no struggle, there is no progress' in PS Foner & RJ Branham (eds) *Lift every voice: African American oratory 1787-1900* (1998) 308, 310.

54 Constitutive Act of the African Union (adopted 11 July 2000) art 4(g), https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf (accessed 2 December 2025)

55 Constitutive Act of the African Union (n 54) arts 23(2) & 30; Núñez (n 4) 2150.

56 Amnesty International 'Africa: Regional human rights bodies struggle to uphold rights amid political headwinds' 21 October 2020, <https://www.amnesty.org/en/latest/press-release/2020/10/africa-regional-human-rights-bodies-struggle-to-uphold-rights-amid-political-headwinds/> (accessed 2 December 2025).

57 As above.

58 R del Rivero, JA Del & AC Sánchez 'African human rights system in crisis? Causes and effects of the withdrawal of the declarations that allow individuals and NGOs to submit communications to the African Court on Human and Peoples' Rights' (2024) 9 *Derecho global. Estudios sobre derecho y justicia* 191, 198.

59 SB Nxumalo 'A culture of non-compliance? A challenge to the African Commission and African Court' *African Law Matters* (web blog) 9 June 2022, <https://www.africanlawmatters.com/blog/a-culture-of-non-compliance-a-challenge-to-the-african-commission-and-african-court/> (accessed 1 October 2025).

60 C d'Orsi 'Are African states willing to ratify and commit to human rights treaties? The example of the Maputo Protocol' (2021) Special Issue *Revue québécoise de droit international* 159, 170.

Resistance to the African Court is not merely episodic or reactive, but structurally embedded in the Court's design.⁶¹ Ravn, Plagis and Madsen conceptualise this dynamic as a form of 'sovereignty politics', whereby states calibrate, shield or retaliate against international courts through legal design choices and jurisdictional manoeuvres rather than outright denunciation.⁶² This framework is particularly illuminating for understanding article 34(6), which functions as a built-in sovereignty safeguard allowing states to modulate exposure to supranational accountability without abandoning the African human rights system altogether.

3 Human rights and the threat to political monopoly

3.1 Human rights as an apex constraint on state power

Domestic power in many African states has often been concentrated in a dominant executive, a political monopoly in which presidents or ruling parties wield near-hegemonic authority.⁶³ Human rights norms represent an 'apex constraint' on this monopoly; they are supreme principles that even the highest authorities are supposed to obey.⁶⁴ In constitutional democracies, rights and the rule of law function to check and balance the monopoly of power.⁶⁵ At the international level, human rights treaties and courts seek to impose similar constraints on sovereigns.

The African human rights system, epitomised by the African Charter on Human and Peoples' Rights (African Charter) and its supervisory bodies, aims to hold states to universal standards of dignity, freedom and justice.⁶⁶ In effect, it tells even the most powerful President that certain lines may not be crossed, prisoners

61 MR Madsen, P Cebulak & M Wiebusch 'Backlash against international courts: Explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* 197, 202.

62 Ravn and others (n 48) 599.

63 GK Kieh 'The "hegemonic presidency" in African politics' (2018) 9 *African Social Science Review* 36, 37.

64 Núñez (n 4) 2142; JO Ambani 'Navigating past the "dualist doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 31.

65 M Hildebrandt 'Law, democracy, and the rule of law' in M Hildebrandt *Law for computer scientists and other folk* (2020) 31.

66 Preamble to the African Charter on Human and Peoples' Rights (1986); see also the mandate of the African Commission on Human and Peoples' Rights under arts 45 and 55 of the African Charter; and the mandate of the African Court on Human and Peoples' Rights.

must receive fair trials,⁶⁷ opposition voices may not be silenced with impunity,⁶⁸ vulnerable groups must be protected, and so forth. To leaders who have maintained their rule through patronage, coercion or manipulating legal processes, such norms strike at the very tactics that ensure their political survival.⁶⁹ Human rights are thus seen as a direct challenge to the monopoly of power: a set of rules above the state, constraining how the state can treat its citizens.

African governments have often acknowledged on paper that human rights are essential. The African Charter itself was a collective commitment to principles of good governance and respect for the individual. However, in practice, many regimes treat human rights compliance as optional or subordinate to political expediency. This is evident in the way in which states implement (or fail to implement) decisions of human rights bodies.⁷⁰ It is also evident in their cautious approach to empowering those bodies in the first place by withdrawing access.⁷¹ The African Commission on Human and Peoples' Rights (African Commission), established in 1987, had a protective mandate but its decisions are not binding; states could thus afford to engage with it without fear of concrete consequences. The creation of the African Court in 1998 introduced, for the first time in Africa, a judicial body whose judgments legally bind states.⁷² This represented a potential apex enforcement mechanism for human rights norms, as the Court could issue orders against governments and require compliance.

Human rights, when coupled with judicial enforcement, threaten what one might call the 'political monopoly' of Africa's dominant executive regimes. They empower citizens and civil society to challenge the state on legal grounds, shifting some authority from executive fiat to judicial decision making. In doing so, they diminish

67 NJ Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 299, 301.

68 YE Ayalew 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 315, 323-341.

69 J Biegon 'State implementation and compliance with the human rights decisions of the East African Court of Justice' (2021) *De Jure Law Journal* 404, 427.

70 African Court on Human and Peoples' Rights '2024 Status report on implementation of decisions delivered by the African Court' (11 November 2024) 3-4, 15, https://www.african-court.org/wpafc/wp-content/uploads/2025/04/Status-of-Implementation-of-Decisions-of-African-Court-Popular-Report-2024_11.11.2024.pdf (accessed 1 October 2025).

71 Adjolohoun (n 3) 2.

72 Art 30 African Court Protocol (n 2); Southern Africa Litigation Centre and others 'Statement condemning Tanzania's withdrawal of individuals' access to the African Court' 6 December 2019, <https://www.southernafricalitigationcentre.org/statement-condemning-tanzanias-withdrawal-of-individuals-access-to-the-african-court/> (accessed 25 May 2025).

the absolute control of the executive over outcomes. For example, if a President jails a political opponent on trumped-up charges, a national court under executive sway would be no obstacle, but an international human rights court might order that opponent's release or a retrial, thereby overruling the President's will. Similarly, if a government discriminates against a minority or passes draconian laws, a human rights tribunal could invalidate those actions, thus checking legislative and executive power.

In African states where the separation of powers is weak, the regional human rights court becomes the highest available check on abuse of power, effectively an external constitutional court of sorts. It is thus viewed by many leaders not as a partner in good governance, but as an intruder in domestic affairs. This mentality has been openly reflected in states' rhetoric when reacting to the African Court's decisions.⁷³ Governments have complained that the Court's rulings 'undermine sovereignty' or meddle in internal legal matters.⁷⁴ Such statements betray the underlying sentiment that human rights enforcement is tolerable only so long as it does not actually constrain the monopoly of political discretion. The moment it does, the moment it bites, it ceases to be seen as a benign or noble endeavour, and is re-characterised as an illegitimate constraint imposed by a 'higher power' (in this case, a judicial power above the state).

In short, human rights norms constitute a fundamental constraint on how states exercise their monopoly of power. Where that monopoly is jealously guarded (as it is by many African executives), one can expect resistance to any process that gives those norms teeth. The next part explores how the African Court's power to issue binding judgments turned human rights from principle into practice, and why this provoked executives to view the Court as an existential threat.

3.2 Judicial enforcement as an existential threat to executives

The African Court was established to enforce the rights enshrined in the African Charter and other instruments.⁷⁵ Unlike the African Commission, the Court can issue binding judgments and orders

73 African Court: 'Status of the article 34(6) declaration', https://www.african-court.org/wpafc/declarations/?utm_source=chatgpt.com (accessed 29 January 2026).

74 International Commission of Jurists (n 6) para 2.

75 This refers to other human rights instruments signed, adopted and ratified by the state party, which could include the African Women's Protocol, the African Charter on the Rights and Welfare of the Child, the Convention on the Rights

with which states are legally obliged to comply.⁷⁶ For heads of state and government elites, this transforms human rights from abstract commitments into concrete legal threats. This distinction is crucial. It means that once litigation reaches the Court, human rights are no longer merely aspirational norms or diplomatic language. They become enforceable legal claims capable of producing concrete consequences for governments. This dynamic is captured well by the framework of sovereignty politics developed by Ravn, Plagis and Madsen, who distinguish between sovereignty by design, sovereignty as shielding and sovereignty as reprisal.⁷⁷ Their framework helps explain why resistance to the African Court should not be seen as accidental or episodic. Article 34(6) itself reflects sovereignty by design; it allows states to decide whether individuals and NGOs may access the Court at all. Once politically sensitive litigation emerges, states then resort to sovereignty as shielding by narrowing their exposure, or sovereignty as reprisal by withdrawing their declaration in response to adverse or threatening proceedings. Between 2016 and 2025, this pattern became increasingly visible as five states withdrew their declarations, namely, Rwanda, Tanzania, Benin, Côte d'Ivoire and Tunisia.⁷⁸

3.2.1 *Rwanda*

Rwanda was the first state to withdraw its article 34(6) declaration, and the circumstances of its withdrawal remain one of the clearest illustrations of executive threat perception. The withdrawal occurred at the very moment when the African Court was preparing to hear oral arguments in *Ingabire Victoire Umuhoza v Rwanda*.⁷⁹ Victoire Ingabire, a prominent opposition figure, had petitioned the Court after her conviction on charges linked to state security and 'genocide ideology'. Rwanda's Minister of Justice defended the withdrawal by claiming that individuals were 'exploiting' the Court to 'reinvent'

of Persons with Disabilities (CRPD), the African Disability Protocol and other international instruments as duly ratified by the state.

76 Art 30 African Court Protocol (n 2); F Viljoen 'Embedding regional human rights in adverse times: The judgments of the African Court on Human and Peoples' Rights as interpretive precedents for national actors' (2025) 25 *African Human Rights Law Journal* 1082, 1093.

77 Ravn and others (n 48) 599.

78 O Windridge 'Assessing Rwexit: The impact and implications of Rwanda's withdrawal of its article 34(6) declaration before the African Court on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 243-247 (Rwanda's withdrawal declaration); *Ingabire Victoire Umuhoza v Rwanda* Application 3/2014 Ruling (Jurisdiction), 3 June 2016 (2016) 1 AfCLR 540 para 68.

79 *Ingabire Victoire Umuhoza v Rwanda* Judgment (Merits), 24 November 2017 (2017) 2 AfCLR 165, <https://www.african-court.org/cpmt/storage/app/uploads/public/5fa/a76/468/5faa7646871e5498448857.pdf> (accessed 20 November 2025).

themselves and that convicted genocide fugitives were using it as a platform for political rehabilitation.⁸⁰ Formally, the withdrawal was framed as a protection of the integrity of Rwanda's post-genocide order. Substantively, however, it signalled something more basic: The government was unwilling to tolerate external judicial scrutiny of a politically charged domestic prosecution.

The later evidence confirms that the withdrawal was not an abstract doctrinal objection to international adjudication, but a reaction to politically threatening litigation. Rwanda transmitted its instrument of withdrawal on 29 February 2016, it was received by the AU on 3 March 2016, and oral argument in *Ingabire* was due almost immediately thereafter.⁸¹ *Ingabire* had alleged violations of fair trial guarantees and related rights.⁸² The Justice Minister's statement made it clear that the declaration was being 'withdrawn for review' because it was allegedly being abused by persons the state regarded as genocidaires.⁸³ Although the government denied that the withdrawal was linked to *Ingabire*'s pending case,⁸⁴ the timing strongly suggested otherwise, which is why scholars later described the episode as 'Rwexit'.⁸⁵ The African Court ultimately held in its jurisdiction ruling that the withdrawal would only take effect after 12 months, thereby preserving its competence over pending proceedings.⁸⁶ Yet, even though the Court later found certain violations, Rwanda achieved its broader strategic goal: After the notice period had expired, no new individual or NGO applications could be brought against it. This was sovereignty as reprisal in action.⁸⁷

3.2.2 *Tanzania*

Tanzania followed a different but related path. Unlike Rwanda, Tanzania had been one of the most active participants in the African

80 Human Rights Watch 'Rwanda: Withdrawal of individual access to African Court' 11 March 2016, <https://www.hrw.org/news/2016/03/11/dispatches-rwanda-turns-clock-back-access-justice> (accessed 20 November 2025).

81 As above.

82 As above.

83 As above.

84 As above.

85 Windridge (n 78) 248; see also Rwanda's withdrawal declaration (n 78).

86 *Ingabire Victoire Umuhoza v Rwanda* (n 78) (Jurisdiction) paras 65-67; African Defenders (the Pan-African Human Rights Defenders Network) 'Press statement on Tanzania's withdrawal from the declaration allowing citizens and civil society organisations to directly file complaints to the African Court on Human and Peoples' Rights' 5 December 2019, <https://africandefenders.org/press-statement-on-tanzanias-withdrawal-from-the-declaration-allowing-citizens-and-civil-society-organisations-to-directly-file-complaints-to-the-african-court-on-human-and-peoples-r/> (accessed 5 December 2025).

87 Ravn and others (n 48) 606-607.

Court system. It hosted the Court in Arusha and, for nearly a decade, its citizens used the article 34(6) route extensively. As a result, Tanzania accumulated more cases and more findings of violations than any other state.⁸⁸ According to the 2024 status report on implementation, Tanzania had 124 finalised cases and 59 violations found against it, both the highest on the Court's record.⁸⁹ These cases were not trivial. Many concerned serious structural issues within Tanzania's criminal justice and political systems, including prolonged detention, denial of appeal rights, electoral participation and capital punishment. In *Ally Rajabu & Others v Tanzania*,⁹⁰ for example, the Court ordered the state to abolish the mandatory death penalty within one year.⁹¹ That order struck directly at the state's criminal law framework and symbolised a deeper problem for the executive: The Court was no longer simply criticising isolated misconduct, but requiring structural legal reform.

Tanzania's withdrawal in November 2019 must be read against that background. The government formally notified its withdrawal through a notice signed by the Foreign Minister.⁹² It suggested that the Court was being used contrary to Tanzania's reservations, alluding in part to concerns around exhaustion of local remedies.⁹³ Yet, that explanation was unconvincing, not least because the exhaustion of local remedies was already a recognised admissibility requirement before the Court.⁹⁴ The more plausible reading is political. Under President John Magufuli, Tanzania experienced increasing democratic regression and reduced tolerance for dissent. Against that backdrop, repeated African Court judgments became politically costly. The more the Court vindicated claims by prisoners, activists and litigants challenging state action, the more it appeared to chip away at executive control. Scholars and advocates observed that Tanzania's mounting frustration with the Court culminated in withdrawal, despite the irony that the host state of the Court was now denying its own citizens direct access to that very institution.⁹⁵ Tanzania's case, therefore, shows how accumulation matters. The existential threat was not one single judgment, but the cumulative

88 African Court on Human and Peoples' Rights (n 70) 10.

89 As above.

90 *Rajabu & Others v Tanzania* (Merits and Reparations) (2019) 3 AfCLR 539 para 109.

91 United Republic of Tanzania Notice of withdrawal of the declaration made under article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights 14 November 2019, https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf (accessed 5 December 2025).

92 As above.

93 As above; *Ingabire Victoire Umuhoza v Rwanda* (n 78) (Jurisdiction) paras 65-67.

94 As above.

95 Southern Africa Litigation Centre and others (n 72) para 3.

effect of repeated judicial interventions exposing systemic rights violations and imposing reform obligations.

3.2.3 Côte d'Ivoire

Côte d'Ivoire presents perhaps the clearest example of a direct collision between supranational adjudication and electoral politics. Its withdrawal was triggered by a provisional measures order issued by the African Court on 22 April 2020 in *Guillaume Kigbafori Soro*.⁹⁶ Guillaume Soro, a major political figure and officially declared candidate for the October 2020 presidential election, challenged criminal proceedings brought against him and other applicants. They argued that arrest warrants, detentions and related prosecutorial measures violated their rights under the African Charter and the International Covenant on Civil and Political Rights (ICCPR).⁹⁷ The Court ordered the suspension of the arrest and detention warrants pending final determination.⁹⁸ For the Ouattara administration, this was not merely a judicial inconvenience. It was an intervention into an ongoing political contest involving a high-profile rival. Within days, Côte d'Ivoire notified the AU that it was withdrawing its article 34(6) declaration.⁹⁹

The official rhetoric of the Ivorian government laid bare the perceived threat. It denounced the Court's 'serious and intolerable actions' and accused it of undermining sovereignty and disrupting the domestic legal order.¹⁰⁰ Human rights observers immediately expressed concern about the withdrawal and its implications for access to justice.¹⁰¹ Meanwhile, rather than comply with the provisional measures, the authorities proceeded to try Soro *in absentia* and sentence him to 20 years' imprisonment, effectively excluding him

96 T Davi & É Amani 'Another one bites the dust: Côte d'Ivoire to end individual and NGO access to the African Court' *EJIL: Talk!* (web blog) 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 15 March 2026).

97 *Guillaume Kigbafori Soro & Others v Côte d'Ivoire* Application 12/2020, African Court on Human and Peoples' Rights (Summary) paras 3-9, <https://www.african-court.org/cpmt/storage/app/uploads/public/68a/c4d/c4a/68ac4dc4a02f2409650016.pdf>; Centre for Human Rights (n 2).

98 *Guillaume Kigbafori Soro & Others v Côte d'Ivoire* (Provisional Measures) 15 September 2020 (2020) 4 AfCLR 516.

99 Republic of Côte d'Ivoire Letter notifying withdrawal of the declaration made under article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights 28 April 2020, <https://www.african-court.org/afchpr/wp-content/uploads/2020/10/withdrawal-Cote-divoire.pdf> (accessed 25 March 2026).

100 International Commission of Jurists (n 6) para 9.

101 *Guillaume Kigbafori Soro* (n 97) (Summary) paras 3-9; Centre for Human Rights (n 2).

from the electoral contest.¹⁰² The sequence could hardly be clearer: Once the Court's authority interfered with executive management of a politically sensitive prosecution, the response was to neutralise future access. The issue was not the abstract legitimacy of the Court, but the practical danger it posed when it shielded an opposition figure against state action.

3.2.4 *Benin*

Benin's withdrawal, also in 2020, similarly illustrates how executives react when the Court intrudes into matters they regard as within domestic control. One of the flashpoints was *Ghaby Kodeih v Benin*, in which a businessman challenged a domestic judicial decision and alleged violations of fair trial and property rights.¹⁰³ On 28 February 2020, the Court ordered provisional measures requiring the suspension of the transfer of the disputed land title and preventing dispossession of the applicant pending final determination.¹⁰⁴ In response, Benin accused the Court of overreach.¹⁰⁵ Its withdrawal notice argued that the Court was interfering beyond its competence, causing serious disruption of the national legal order, generating legal uncertainty, and even affecting Benin's economic attractiveness.¹⁰⁶

That justification is revealing. It shows how executives may recast judicial accountability as a threat not only to sovereignty in the strict legal sense, but also to governance, investment and economic stability. In other words, once a binding human rights court intrudes into politically sensitive or economically salient disputes, it may be portrayed as destabilising the state itself. This is part of what makes judicial enforcement appear existential: The executive reframes legal scrutiny as systemic disruption, thereby justifying retreat from the Court's jurisdiction.

102 Centre for Human Rights (n 2) paras 1-4.

103 *Kodeih v Benin* (Admissibility) (2021) 5 AfCLR 492 paras 11-12.

104 As above.

105 Ministry of Foreign Affairs and Cooperation of the Republic of Benin Letter 216/MAEC/AM/SP-C to the Chairperson of the African Union Commission, 24 March 2020 1-2, <https://www.african-court.org/afchpr/wp-content/uploads/2020/10/Withdrawal-Benin.pdf> (accessed 16 May 2026).

106 As above.

3.2.5 Tunisia

Tunisia became the fifth state to withdraw during this cycle of backlash.¹⁰⁷ Having deposited its declaration on 2 June 2017,¹⁰⁸ Tunisia had opened the Court to individuals and qualifying NGOs.¹⁰⁹ Yet, on 7 March 2025, it notified the AU of its withdrawal.¹¹⁰ Unlike Rwanda or Côte d'Ivoire, Tunisia's withdrawal was not tied to one single iconic case. Rather, it followed a series of judicial interventions in politically sensitive areas, including judicial independence in *Zorgati v Tunisia*;¹¹¹ constitutional governance in *Belguith v Tunisia*;¹¹² and provisional measures concerning detained political figures in *Ghannouchi & Others v Tunisia*.¹¹³ Civil society and international human rights organisations quickly situated the withdrawal within a broader domestic context of democratic backsliding, shrinking civic space and weakening internal accountability mechanisms.¹¹⁴

The Court's subsequent practice in *Al-Assad Milad v Tunisia* confirmed, consistently with earlier case law, that withdrawal of the declaration does not retroactively extinguish proceedings

107 African Court Coalition 'Tunisia withdraws Article 34(6) Declaration limiting direct access for individuals and NGOs to the African Court' *The African Court Coalition* (web blog) 24 March 2025, <https://africancourtcoalition.org/tunisia-withdraws-article-346-declaration-limiting-direct-access-for-individuals-ngos-to-the-african-court/> (accessed 29 January 2026).

108 Republic of Tunisia Declaration under article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights 2 June 2017, https://www.african-court.org/afchpr/wp-content/uploads/2020/10/27156_Declaration-By-Tunisia_2017060707274900.pdf (accessed 8 April 2026).

109 These are NGOs with observer status before the African Commission; Human Rights Watch 'Tunisia's withdrawal of individuals' and NGOs' access to the African Court marks a serious setback for human rights accountability' 27 March 2025 (noting deposit of art 34(6) declaration on 2 June 2017), <https://www.hrw.org/news/2025/03/27/tunisias-withdrawal-individuals-and-ngos-access-african-court-marks-serious-setback?utm> (accessed 29 January 2026).

110 Republic of Tunisia Notification of withdrawal of the declaration made under article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights 7 March 2025, https://www.chr.up.ac.za/images/centrenews/2025/files/Tunisia_withdraw_declaration.pdf (accessed 8 April 2026).

111 *Samia Zorgati v Tunisia* Application 16/2021(Merits and Reparation) African Court on Human and Peoples' Rights, Judgment of 13 November 2024, <https://www.african-court.org/cpmt/storage/app/uploads/public/675/31a/203/67531a2039c93445669283.pdf> (accessed 8 April 2026).

112 *Ibrahim Ben Mohamed Ben Ibrahim Belguith v Tunisia* Application 17/2021(Merits and Reparation) African Court on Human and Peoples' Rights, Judgment of 22 September 2022, <https://www.african-court.org/cpmt/storage/app/uploads/public/633/48f/dcc/63348fdcc9449943680203.pdf>. (accessed 8 April 2026).

113 *Moadh Kheriji Ghannouchi & Others v Tunisia* Application 4/2023, African Court on Human and Peoples' Rights, Ruling (Provisional Measures) 3 October 2024, <https://africanlii.org/fr/akn/aa-au/judgment/achpr/2024/2/eng@2024-10-03> (accessed 8 April 2026).

114 International Commission of Jurists (n 6) para 1; Human Rights Watch (n 109); Amnesty International 'Tunisia's withdrawal of individuals' and NGOs' access to the African Court' 27 March 2025, <https://www.amnesty.org/en/documents/mde30/9191/2025/en/> (accessed 29 January 2026).

already lodged before the Court.¹¹⁵ Even so, Tunisia's move fits squarely within the established pattern identified by commentators: Where direct access becomes politically inconvenient, executives reassert sovereignty by narrowing jurisdiction rather than accepting supranational contestation.¹¹⁶ The legal form may differ from country to country, but the political logic remains constant.

Taken together, these examples reveal a stark and recurring pattern. Between 2016 and 31 December 2025, five states withdrew their acceptance of individual jurisdiction, reducing the number of states permitting such access from 12 to seven.¹¹⁷ Each withdrawal followed a moment in which the Court attempted to do precisely what it was created to do: to hold governments accountable in a meaningful, legally consequential manner.¹¹⁸ That is why these withdrawals matter. They are not random administrative acts. They are evidence that once the Court's judgments begin to carry real political cost, executives often prefer to alter the jurisdictional rules rather than submit to independent review.

The broader lesson is that judicial enforcement becomes 'existential' not because courts overthrow governments, but because they disrupt executive monopoly over politically sensitive decisions. The African Court's judgments are binding in law, yet the Court possesses no police force and depends ultimately on state compliance.¹¹⁹ Where executives view compliance as more dangerous than defiance, defiance frequently wins. That reality confirms the *realpolitik* insight at the heart of this article: States will tolerate supranational judicial oversight only so long as it does not threaten the essentials of their

115 African Court on Human and Peoples' Rights *Al-Assad Milad v Tunisia* (Order/Decision, 26 June 2025) (recording that on 7 March 2025 Tunisia filed an instrument withdrawing its art 34(6) declaration and addressing effects in pending litigation), https://www.african-court.org/cpmt/storage/app/uploads/public/685/d3c/a50/685d3ca5004df125455014.pdf?utm_source=chatgpt.com (accessed 29 January 2026).

116 N de Silva & M Amadi 'Renewed state backlash against the African Court: Tunisia is the fifth state to withdraw individual and NGO access' *EJIL: Talk!* (web blog) 23 May 2025, <https://www.ejiltalk.org/renewed-state-backlash-against-the-african-court-tunisia-is-the-fifth-state-to-withdraw-individual-and-ngo-access/> (accessed 29 January 2026).

117 The countries that withdrew are Tanzania, Rwanda, Benin, Côte d'Ivoire and Tunisia; African Court: Declaration; see African Court on Human and Peoples' Rights 'Declarations', [https://www.african-court.org/afchpr/declarations-2/#:~:text=Home%20Declarations,02%20Nov%202021;Republic%20of%20Tunisia%20\(n%20110\);Coalition%20for%20an%20Effective%20African%20Court%20on%20Human%20and%20Peoples'%20Rights%20\(African%20Court%20Coalition\)%20'African%20Court%20Coalition%20discussions%20States'%20withdrawals%20from%20article%2034\(6\)%20of%20the%20African%20Court%20Protocol'%20Official%20Bulletin%20vol%201%20\(25%20November%202020\),https://www.african-court.org/wpa/cf/african-court-coalition-discussions-states-withdrawals-from-article-346-of-the-african-court-protocol/](https://www.african-court.org/afchpr/declarations-2/#:~:text=Home%20Declarations,02%20Nov%202021;Republic%20of%20Tunisia%20(n%20110);Coalition%20for%20an%20Effective%20African%20Court%20on%20Human%20and%20Peoples'%20Rights%20(African%20Court%20Coalition)%20'African%20Court%20Coalition%20discussions%20States'%20withdrawals%20from%20article%2034(6)%20of%20the%20African%20Court%20Protocol'%20Official%20Bulletin%20vol%201%20(25%20November%202020),https://www.african-court.org/wpa/cf/african-court-coalition-discussions-states-withdrawals-from-article-346-of-the-african-court-protocol/) (accessed 29 January 2026).

118 Del Rivero and others (n 58) 93-194, 200-203.

119 De Klerk (n 6) 127-128.

power, interests or political survival. Once that threshold is crossed, withdrawal becomes a rational strategy of self-preservation. By making access optional and reversible, article 34(6) built that escape into the system itself.

4 Article 34(6) as a design flaw of voluntarism

Article 34(6) of the African Court Protocol is a short provision with momentous implications. It reads, in relevant part:¹²⁰

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

In effect, even after ratifying the Court's Protocol,¹²¹ a state must opt into direct cases by NGOs and individuals. The weakness of article 34(6) should not be understood as a criticism of optional jurisdiction. As mentioned earlier, optional or tiered access also existed in the early European and Inter-American human rights systems, where individual petition and compulsory jurisdiction developed gradually rather than automatically. The African problem, therefore, is more specific. Unlike the European system, where optional access was progressively transformed into a more consolidated and compulsory model, article 34(6) has remained a reversible sovereignty safeguard. In a context of weak enforcement, limited political pressure for compliance, and recurrent executive resistance to supranational review, this reversibility has enabled states to retreat from direct access when judicial accountability becomes politically costly.

4.1 Optional jurisdiction and selective participation

The first problem with article 34(6) is that it makes direct access to the African Court optional. Out of the 55 member states of the AU, at peak, no more than 12 states¹²² had made the article 34(6) declaration (Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania, Tunisia,¹²³ Niger and Guinea Bissau). This meant that many African citizens never had the option of accessing their continental court directly. The African Court

¹²⁰ Art 34(6) African Court Protocol (n 2).

¹²¹ Ratification allows state-to-state cases and Commission referrals.

¹²² African Court 'Status of the Article 34(6) Declaration', <https://www.african-court.org/afchpr/declarations-2/> (accessed 29 January 2026).

¹²³ African Court Coalition (n 107).

aspired to be a ‘truly continental’¹²⁴ human rights forum but, as one scholar noted, ‘its wings have been clipped’ by the limited access and triple-layered ratification requirements.¹²⁵ Indeed, even among the states that ratified the Protocol (34 as of 2020),¹²⁶ more than one-third accepted individual jurisdiction. This patchwork approach undermines the idea of a uniform standard of justice. Justice becomes geographically contingent – an African in Ghana could petition the Court, but an African in Kenya or Zimbabwe could not.

The African Court, when first faced with Rwanda’s sudden withdrawal, ruled that while withdrawal is possible, it takes 12 months¹²⁷ to take effect and does not affect pending cases (analogising to article 56(2) of the Vienna Convention on the Law of Treaties and practice¹²⁸ in other human rights systems).¹²⁹ However, the key point is that the system’s design offered no permanence to a state’s acceptance of jurisdiction. In contrast to the European Court of Human Rights, where acceptance of individual petition became compulsory for all member states (and withdrawal requires leaving the entire Convention), the African Court system handed states a release valve. The existence of this release option virtually invites misuse: Whenever the pressure of accountability becomes uncomfortable, a state can deploy that option to relieve the pressure exactly as we have seen. The framers of the Protocol did not build a robust safeguard against opportunistic withdrawal. Instead, article 34(6) left direct individual access dependent on a separate declaration, a design feature added late in the drafting process and one that, in practice, has enabled states to retreat from judicial scrutiny when accountability pressures intensified.¹³⁰ The initial drafters, operating in the late 1990s, perhaps did not envision a scenario where five states would withdraw in quick succession.

Paradoxically, article 34(6) not only made initial jurisdiction optional, but its reversibility has undermined efforts to enforce judgments¹³¹ even for states that have not withdrawn. The ever-present possibility that a government could withdraw if pushed too hard may incentivise the Court to tread carefully, pulling punches to avoid provoking exits. Academic analysis suggests that withdrawals operate as political signals to the African Court, since states may use

124 Windridge (n 78) 244-245.

125 Adjolohoun (n 3) 4-5.

126 International Commission of Jurists (n 6).

127 *Ingabire Victoire Umuhoya* (n 78).

128 See art 127 of the Rome Statute which governs the voluntary withdrawal of a state party from the International Criminal Court (ICC).

129 African Defenders (n 86).

130 Adjolohoun (n 3) 18.

131 African Court on Human and Peoples’ Rights (n 70) 11.

withdrawal to shield themselves from politically sensitive judgments and to pressure the Court over decisions perceived as intrusive or overreaching.¹³²

4.2 Why voluntarism encourages opportunism and withdrawal

It is futile to rely on states' benevolence or noble intentions to ensure compliance with human rights oversight. Article 34(6) was grounded in an expectation that states would voluntarily opt in to a regime of legal accountability because they sought the associated prestige of being human rights-friendly. What the withdrawals and resistance show is that, for many states, that initial goodwill is shallow and easily overturned by realpolitik considerations. In other words, as soon as the African court seriously challenges the state's conduct, any pretence of benevolent compliance evaporates in favour of self-interest. Several key points underscore this futility.

The assumption that states would remain committed to their article 34(6) declarations out of respect for legal obligations proved optimistic. Rwanda, Benin and Côte d'Ivoire had each given a binding declaration and benefited from the image of being open to scrutiny. Yet, when faced with cases touching on core political sensitivities, they did not hesitate to break that commitment. The legal niceties – such as the lack of an express withdrawal clause – did not stop them. They simply acted and expected that politics would override law, which it essentially did. In a system with no punitive consequences for withdrawal, the cost-benefit analysis for a state skews toward exit if the Court's demands become too costly.

Realist theory would predict exactly what happened: States will enter into agreements that constrain them only if they judge that either (a) those constraints will not bite,¹³³ or (b) the tangible and intangible rewards for joining outweigh the risk.¹³⁴ Many of the original article 34(6) declarations were made by states during moments of democratic openness or under reformist leaders. However, political winds change. The pattern of evasion withdrawal after adverse rulings is not an anomaly but rather a predictable outcome given the option to withdraw. As one analysis noted, 'withdrawals of the

¹³² Ravn and others (n 48) 607-609.

¹³³ OA Hathaway 'The cost of commitment' (2003) 55 *Stanford Law Review* 1821, 1834-1838; JP Trachtman 'Who cares about international human rights?' (2012) 44 *New York University Journal of International Law and Politics* 851, 864-867.

¹³⁴ JM Grieco 'Anarchy and the limits of cooperation: A realist critique of the newest liberal institutionalism' (1988) 42 *International Organization* 485, 495.

declaration ... resulted from decisions of the Court on important and contentious domestic issues'.¹³⁵

It should be noted that not every African government is hostile to compliance; some have genuinely tried to execute the Court's judgments.¹³⁶ However, the contentious, high-stakes cases, those involving political prisoners,¹³⁷ the removal of the mandatory death sentence from national laws,¹³⁸ electoral outcomes,¹³⁹ systemic reforms¹⁴⁰ are exactly where compliance tends to falter. These are the cases where a regime's vital interests are on the line. Without some form of coercion or strong incentive, compliance in such cases is the exception, not the norm. The African Court has no direct coercive power, and the AU has not shown an appetite to exert political or economic leverage for human rights enforcement.

Ultimately, expecting 'benevolent compliance', that is, expecting states to sacrifice their narrow interests for the greater good of human rights enforcement, has proven a losing bet in the African Court context.¹⁴¹ Compliance has occurred when it either coincided with state interests or when the issue was minor enough not to threaten those interests,¹⁴² but on the major issues, states have chosen non-compliance or withdrawal. This does not imply that the African human rights system is doomed; it means that it must be redesigned or recalibrated to account for power realities. It must create conditions where compliance aligns with, or is compelled by, interests beyond the unilateral control of the state.

The next and final substantive part considers how the system might be reimaged to achieve that alignment by introducing a degree of coercion or incentive that is presently lacking, thereby fostering a more stable relationship between state power and accountability. As the saying goes in governance circles, 'sunshine is

¹³⁵ Adjolohoun (n 3) 1.

¹³⁶ African Court on Human and Peoples' Rights (n 70) 3, 8-9, 17; Burkina Faso remains the only state to have fully implemented the decisions of the African Court, while several other states, including Benin, Côte d'Ivoire, Kenya, Libya, Malawi, Mali, Rwanda, Tanzania and Tunisia have only partially implemented or failed to fully implement the Court's judgments.

¹³⁷ *Umuhoza v Rwanda* (Merits) (n 79).

¹³⁸ *Rajabu & Others v Tanzania* (n 90) para 24.

¹³⁹ *Jebra Kambole v United Tanzania* (Judgment) 15 July 2020 (2020) 4 AfCLR 460; *Ajavon v Benin* (Judgment) 4 December 2020 (2020) 4 AfCLR 133.

¹⁴⁰ *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (Merits) (2016) 1 AfCLR 668.

¹⁴¹ F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 63, 95-97.

¹⁴² C Heyns 'The African regional human rights system: The African Charter' (2003) 108 *Penn State Law Review* 679, 700-701.

the best disinfectant', but sunshine works only if there is a mechanism to act on what is revealed. In the case of the African Court, shining a light on violations was not enough; the violators simply drew the curtains. Rethinking must involve ways to prevent states from so easily escaping the light.

5 Rethinking the system: From voluntarism to obligation

If the *status quo* of voluntary compliance is inadequate, how can the African human rights system be rethought to realign power and accountability? The challenge is to design an architecture in which states find it harder to evade oversight and where their incentives favour compliance rather than withdrawal. This is no easy task. It essentially means finding ways to either raise the cost of non-compliance/non-participation or raise the benefits of compliance/participation (or both). Various reforms and ideas have been advanced by African scholars and civil society, recognising that the current model needs adjustment. In the subsequent paragraphs, I outline several approaches and recommendations for realignment.

The most direct and the most ambitious fix to article 34(6) is to eliminate the optional declaration requirement altogether. In an ideal scenario, the African Court's jurisdiction would be automatic in relation to all state parties to the Court Protocol for individual and NGO cases (as is effectively the case in the European system since Protocol 11 to the European Convention on Human Rights).¹⁴³ This could be achieved by creating a protocol to amend the Court's Protocol, approved by states. Admittedly, convincing states that have jealously guarded this opt-in privilege to relinquish it will be difficult. However, some momentum could come from states that have consistently supported the Court. For instance, the Centre for Human Rights has urged countries such as South Africa (which, during its AU Chairmanship, had the opportunity to lead by example) to not only make the declaration, but spearhead efforts to halt the pattern of withdrawals and bolster the Court's effectiveness.¹⁴⁴ If enough influential states champion an amendment that mandates

¹⁴³ Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS 155, opened for signature 11 May 1994, art 1.

¹⁴⁴ According to Frans Viljoen, then director of the Centre for Human Rights: 'We in particular urge South Africa, during this year of its AU Presidency, to take a lead in stemming the tide that risks undermining the effectiveness of the African Court as a landmark of justice and human rights, accountability and the rule of law on our continent. Now is the time for South Africa to take bold actions to bolster this crucial AU institution,' cited from Centre for Human Rights (n 2) 4-5.

jurisdiction (or even a new protocol that replaces the current one with a mandatory system),¹⁴⁵ laggards might feel pressured to accept it. The AU could also make depositing the declaration a condition for certain leadership roles or benefits.¹⁴⁶ For example, only states that have accepted the Court's full jurisdiction could be eligible to host AU legal organs or to have nationals elected to positions in the Court or Commission. Such linkage could encourage broader adherence by attaching prestige or influence on compliance.

Another way in which to circumvent the article 34(6) conundrum is to maximise the use of the African Commission to bring cases to the Court on behalf of victims from non-declaration states. The African Commission has automatic standing before the Court for all state parties to the Protocol.¹⁴⁷ To date, only three cases have been referred: *African Commission on Human and Peoples' Rights v Libya*;¹⁴⁸ *African Commission on Human and Peoples' Rights v Libya*;¹⁴⁹ and *African Commission on Human and Peoples' Rights v Kenya*.¹⁵⁰ This small number supports the view that the referral power has been exercised very selectively, even though it remains the most obvious available pathway for victims in states that have not made an article 34(6) declaration. The Commission's current practice is underutilising its referral power, leaving victims in many countries with 'nowhere to go'¹⁵¹ if their state has not made a declaration. The 2025 Joint Guidelines on the Submission and Transfer of Cases between the African Commission and the African Court¹⁵² reaffirm the African Commission's authority to submit cases to the Court and seek to streamline procedures, clarify representation, and enhance coordination between the two bodies. However, the Guidelines remain largely procedural and do not impose clear criteria or obligations on the Commission to actively refer cases in situations

145 GM Wachira 'African Court on Human and Peoples' Rights: Ten years on and still no justice' Minority Rights Group International, Reports and briefings 2008 13-15, <https://minorityrights.org/resources/african-court-on-human-and-peoples-rights-ten-years-on-and-still-no-justice/> (accessed 3 June 2026).

146 African Union Executive Council Decision on the Activity Report of the African Court on Human and Peoples' Rights EX.CL/Dec.529(XVI) (2010) para 11.

147 Art 5(1)(a) African Court Protocol.

148 *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17.

149 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153.

150 *African Commission on Human and Peoples' Rights v Kenya* (Provisional Measures) (2013) 1 AfCLR 193.

151 M Killander & AK Abebe 'Human rights developments in the African Union during 2010 and 2011: Recent developments' (2012) 12 *African Human Rights Law Journal* 199-215.

152 African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights *Guidelines on Submission and Transfer of Cases* (3 June 2025), <https://achpr.au.int/sites/default/files/files/2025-10/enguidelines-submission-and-transfer-cases-achpr-afchprfinal.pdf> (accessed 19 May 2026).

where victims lack direct access to the Court. Therefore, there is a need to strengthen the Guidelines further by encouraging a more proactive and systematic use of the African Commission's referral power, particularly in the case of serious or systemic human rights violations.

Ensuring that compliance follows once the Court issues a judgment is another aspect of realignment. Currently, compliance relies on states' willingness, sometimes nudged by the AU's General Assembly.¹⁵³ One idea is to give the African Court (or the AU's relevant sub-committee) more teeth in monitoring and publicising non-compliance. For instance, an annual 'compliance report' could be issued by the AU, listing which states have judgments pending and which have implemented them. Non-compliant states could then face suspension of certain AU privileges, for instance, speaking slots, or eligibility to host AU meetings until they show progress on implementation. While this might be optimistic given AU's consensus-based, non-punitive culture, it is not without precedent: The AU has sanction frameworks for unconstitutional changes of government. Systematic non-compliance with the Court undermines the AU's own human rights objectives. Framing it as a serious breach could justify analogous measures. Additionally, external partners (such as the European Union (EU), which funds many African Court activities) can lend support by linking cooperation benefits to respect for the Court. If, say, the EU or UN agencies condition certain aid or participation in programmes on having a functional relationship with the African Court, that creates an external incentive to comply.¹⁵⁴

This part argues that the core route out of the conundrum is to make individual and NGO access to the African Court automatic by removing the voluntary state declaration. The AU in 2014 adopted the Malabo Protocol,¹⁵⁵ which merges the African Court with a new African Court of Justice and Human Rights (ACJHR)¹⁵⁶ and even adds a criminal chamber.¹⁵⁷ This Malabo Protocol, however, has not entered

153 Arts 29(2) & 31 African Court; see also VO Ayeni 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 22.

154 The AU-EU human rights dialogue joint Communiqué, https://www.eeas.europa.eu/node/35072_en (accessed 15 January 2026).

155 Protocol on the Statute of the African Court of Justice and Human Rights (2008).

156 As above; art 2 of the Malabo Protocol provides that '[t]he African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, are hereby merged into a single Court and established as 'The African Court of Justice and Human Rights'.

157 Art 16 Protocol on the Statute of the African Court of Justice and Human Rights (n 155).

into force (as of April 2026) and has garnered few ratifications. Importantly, the Malabo Court Protocol does not eliminate individual or NGO access to the Court. Rather, it formally preserves such access, as individuals and accredited NGOs are listed among entities eligible to submit cases.¹⁵⁸ However, this access remains conditional and subject to state consent, effectively replicating the restrictive approach of the existing system. In this sense, while the Malabo Court Protocol does not abolish direct access, it does little to expand or meaningfully improve it in practice. Unlike the 1998 Protocol, the Malabo Protocol does not contain an equivalent to article 34(6) requiring a special declaration by states for individual and NGO access. While individuals and NGOs are formally listed among entities entitled to submit cases, the absence of a clear access mechanism creates uncertainty as to the extent to which such access would be effective in practice. The trade-off might be to include more stringent admissibility criteria or political controls to appease states. A possible comparative model is the European filtering mechanism introduced by Protocol 14.¹⁵⁹ A mandatory system with a filter might be more acceptable than an optional system with none. Of course, this comes with its own risks, but creative institutional design could balance access and state concerns. The key point is that any future reform should not repeat the article 34(6) voluntary flaw. To the contrary, it should embed individual access as an inherent part of the system, otherwise we risk codifying the retreat we have seen.

The Court needs to minimise the withdrawal of states by exercising a degree of jurisprudential restraint in politically explosive matters, not by abdicating its duty, but by carefully explaining its reasoning in terms that address states' concerns and by giving states reasonable time and guidance to implement judgments. The perception of fairness can affect whether a state sees a judgment as something it can live with or something it must escape. This admittedly is more in the Court's hands than the states', but it contributes to the overall equation of incentives. If states see the Court as an objective, procedurally fair arbiter (rather than, say, an activist bench rewriting domestic law without basis), they might be less prone to extreme reactions. In the long run, as more decisions become implemented and perhaps produce visible improvements in human rights conditions, it could foster a virtuous cycle where even sceptical states acknowledge the Court's value. This is similar to what happened in

158 Art 30(f) Protocol on the Statute of the African Court of Justice and Human Rights (n 155).

159 P. Egli 'Protocol No 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a more effective control mechanism?' (2013) 17 *Journal of Transnational Law and Policy* 1, 12-13, 27-30.

Europe, where initial state resistance in the 1950s to 1960s gave way to acceptance as the European Court built up a reputation and the human rights culture took root domestically.¹⁶⁰ Madsen explains that during the first 10 to 15 years, the European Commission and Court were not very progressive, partly because of diplomatic caution and uncertainty about the reach of the institution.¹⁶¹ Africa's political context is different, but over decades such a shift is not impossible.

6 Conclusion

Article 34(6) of the African Court Protocol was the product of political compromise. It reflected the hope that states would voluntarily accept judicial scrutiny by allowing individuals and NGOs direct access to the Court. However, the experience of the Court over the past two decades shows that this expectation was overly optimistic. States have generally accepted oversight only so long as it does not seriously threaten their political interests, control or legitimacy. Once the Court's judgments became politically costly, many governments resisted, ignored decisions, or withdrew altogether. This pattern confirms a basic realpolitik insight: Power rarely restrains itself voluntarily. Governments are unlikely to remain bound by a system that exposes them to legal liability unless there are strong incentives for compliance or meaningful consequences for defiance. The withdrawals from article 34(6) demonstrate that a system based mainly on voluntary participation is fragile and vulnerable to political backlash. Yet, this does not mean that the African Court is beyond saving. Rather, it highlights the need for institutional reform. Future reforms could include removing the optional nature of direct access, strengthening enforcement and follow-up mechanisms, increasing peer pressure through the AU, and fostering a stronger culture of compliance among states. Such reforms would help ensure that respecting judgments becomes politically easier than resisting them. There are also reasons for cautious optimism. Civil society, academics and regional organisations have increasingly criticised state withdrawals and defended the Court's importance. There is growing recognition that weakening the Court undermines Africa's broader goals of human rights, justice and the rule of law. All in all, the African Court's experience teaches that accountability systems cannot depend solely on goodwill. Effective human rights protection

¹⁶⁰ MR Madsen 'From Cold War instrument to supreme European Court: The European Court of Human Rights at the crossroads of international and national law and politics' (2007) 32 *Law and Social Inquiry* 137, 151-154.

¹⁶¹ As above.

requires structures that make compliance the rational choice and make defiance politically costly.