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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

# International courts and sovereignty politics: Design, shielding, and reprisal at the African Court

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**Abstract**
In recent times, several international courts (ICs) have faced resistance from their member states. A recurring narrative used to justify states' backlash against ICs has been that ICs are increasingly overreaching and essentially interfering with states' sovereignty. This article explores what backlash over sovereignty actually entails, highlighting a diverse set of political agendas and strategies. The article first develops an analytical matrix of three forms of sovereignty politics – by design, as a shield and as reprisal – to capture different aspects of sovereignty politics. This framework is then used in an empirical analysis of four African states that, within a four-year time-period, all withdrew their declarations granting direct access to the African Court on Human and Peoples' Rights (Court) for NGOs and individuals from those states. In all cases, sovereignty was claimed as the reason for withdrawal but as we demonstrate, the cases vary. Overall, we find that resistance against the African Court does not necessarily emerge from a challenge to a principled concept of sovereignty, but from sitting governments' narratives of what human rights ought to be, who ought to invoke them, and when. In other words, sovereignty arguments work mainly to safeguard member states from the authority of the African Court where state practices collide with international commitments to human rights. This takes on a distinct rhetorical framing that utilizes and evokes a set of different meanings of sovereignty, for example that the Court is outside its delegated competences or the issue is inside a vague notion of internal affairs. By using these legal-rhetorical strategies, member states seek to avoid having to address directly the challenges being brought against them at the IC.

**Keywords:** African Court on Human and Peoples' Rights; backlash; international courts; resistance; sovereignty

## 1. Introduction

International Courts (ICs) around the world have experienced various forms of pushback and backlash.[1] One example is the African Court on Human and Peoples' Rights (Court) which has faced resistance to its decisions from some African states. In the past decade, Rwanda, Côte d'Ivoire, Benin, and Tanzania have notably withdrawn their special declarations (declarations)[2]

[1]M. R. Madsen, P. Cebulak, and 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.

[2]Withdrawal for Review by the Republic of Rwanda from the Declaration Made Under Art. 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,

granting individuals and NGOs direct access to the African Court under Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights (Protocol).[3] These developments at the Court have received some scholarly attention.[4] One scholar argues that the four withdrawals of Article 34(6) declarations[5] were made to safeguard sovereign control over what was perceived as critical national socio-political issues, as well as a critique of the Court's practices.[6] Another study argues that resistance to ICs, within the broader African context, is driven mainly by authoritarian regimes seeking to reclaim sovereignty.[7] The emphasis on sovereignty is indeed a common explanation across most existing scholarship studying pushback and backlash against African ICs.[8] Nevertheless, few studies dig deeper into what sovereignty claims precisely entail in these contexts. Given that many African states have a well-known history of being protective of domestic sovereignty and upholding the principle of non-interference in the internal affairs of states,[9] there is a need to unpack what we term the 'sovereignty argument' with regard to states' usage of and references to sovereignty as a means of protecting themselves from, and even retaliating against ICs, in this case the African Court.

Building on the burgeoning literature on backlash and resistance against ICs,[10] this article explores the forms and patterns of states' interactions with the African Court based on the sovereignty arguments used against it. Using the empirical case of the withdrawals by Rwanda, Tanzania, Benin, and Côte d'Ivoire of direct individual and NGO access to the Court, we explore

Ministry of Foreign Affairs and Co-operation, Republic of Rwanda, (2016), 24 February 2016; La Correspondance No. 186/MAE/BM/AMP Du 28 Avril 2020, Du Ministre des Affaires Etrangères, Relative Au Retrait De La Déclaration De La Côte D'Ivoire, Faite Conformément Aux Dispositions De L'Article 34 Alinéa 6, Du Protocole Relative À La Cour Africaine Des Droits De L'homme Et Des Peuples (CADHP), Le Ministre Ivoirien des Affaires Étrangères par Intérim, La République de Côte d'Ivoire (2020) (28 April 2020); La Correspondance No. 216C/MAEC/AM/SP-C Notification De Retrait De La Déclaration De Reconnaissance De Compétence, Le Ministère Des Affaires Étrangères Et De La Coopération, République du Bénin (2020) (24 March 2020); 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, The United Republic of Tanzania (2019) (14 November 2019), Dodoma.

[3]1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art. 34(6) of the Protocol provides that 'at the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Art. 5(3) of this Protocol. The Court shall not receive any petition under Art. 5(3) involving a State Party which has not made such a declaration'.

[4]H. Courtney, *Saving the International Justice Regime: Beyond Backlash against International Courts* (2021); P. Brett and L. E. Gissel, *Africa and the Backlash Against International Courts* (2020); M. Faix and A. Jamali, 'Is the African Court on Human and Peoples' Rights in an Existential Crisis?', (2022) 40 *Netherlands Quarterly of Human Rights* 56; S. H. Adjolohoun, 'A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights', (2020) *African Human Rights Law Journal* 40; T. G. Daly and M. Wiebusch, 'The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court', (2018) 14 *International Journal of Law in* Context 294.

[5]Rwanda withdrew its special declaration in 2016, Tanzania withdrew its special declaration in 2019 with both Benin and Côte d'Ivoire withdrawing theirs in 2020.

[6]See Adjolohoun, *supra* note 4.

[7]See Brett and Gissel, *supra* note 4.

[8]K. J. Alter, J. T. Gathii and L. R. Helfer, 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences', (2016) 27 *European Journal of International Law* 293, at 306.

[9]A. Anghie, 'Africa, Sovereignty and International Law', *allAfrica*, 2012, ; E. O. A. EI-Obaid and K. Appiagyei-Atua, 'Human Rights in Africa – A New Perspective on Linking the Past to the Present', (1996) 41 *McGill Law Journal*. 819, at 827; W. Brown, 'Sovereignty Matters: Africa, Donors, and the Aid Relationship', (2013) 112 *African Affairs* 262.

[10]E. Voeten, 'Populism and Backlashes against International Courts', (2020) 18 *Perspectives on Politics* 407; W. Sandholtz, Y. Bei and K. Caldwell, 'Backlash and International Human Rights Courts', in A. Brysk and M. Stohl (eds.), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (2018), 159; see Madsen, Cebulak and Wiebusch, *supra* note 1; K. J. Alter and M. R. Madsen, 'Beyond Backlash: The Consequences of Adjudicating Mega-Politics, The International Adjudication of Mega-Politics', (2021) 84 *Law and Contemporary Problems* 219; see Alter, Gathii and Helfer, *supra* note 8.

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how the sovereignty arguments employed by states may cover a diverse set of political agendas and strategies.[11] The literature on the international judicialization of megapolitics suggests that sovereignty might be a stated reason in itself for a state to oppose an IC. Nonetheless, it is often claimed in conjunction with other issues, which are considered to be fundamental to a state.[12] Different forms of critiques are found in the language of the withdrawal notices of the four countries studied here. In short, Rwanda withdrew its declaration as a critique of the political opposition's use of the Court.[13] Tanzania in its withdrawal directed its critique at the jurisprudence of the Court and how the Court exercised its jurisdiction.[14] Similarly, Benin criticized the way the Court exercised its jurisdiction over a matter they deemed was outside its competences.[15] Côte d'Ivoire, by contrast, emphasized that the jurisprudence of the Court had not only undermined its sovereignty, but also the rule of law by causing legal uncertainty.[16]

We explore these different situations using an analytical matrix of three forms of sovereignty politics,[17] which we theorize based on the withdrawals from the Court. The three forms of sovereignty politics developed are: (i) *sovereignty by design* referring to how states as part of the diplomatic negotiation of ICs can *ex ante* introduce institutional safeguards of national sovereignty through institutional design, for example by introducing legal opt-ins to the direct access provisions for individuals and NGOs or by limiting jurisdiction; (ii) *sovereignty as shielding*, referring to the situation where sovereignty politics are used to shield states from the effects of ICs by, for example, claiming that a court has overreached or is being too intrusive; and (iii) *sovereignty as reprisal*, referring to situation in which sovereignty arguments are used as a means for changing or reorganizing an IC, even closing it down. It is a form of sovereignty politics that can seek to both limit and shield states from the effects of ICs by *ex post* (re)engineering an IC and its power.

Using this analytical matrix, we explore the processes of resistance against the African Court by the four member states under scrutiny in order to more precisely understand what is at stake when sovereignty is claimed in these different forms. Overall, we find that resistance against the Court does not necessarily emerge from a challenge to a principled concept of sovereignty, but from sitting governments' narratives of what human rights ought to be, who ought to invoke them, and when. In other words, sovereignty arguments work mainly to safeguard member states from the authority of the Court where state practices collide with international commitments to human rights. This takes on a distinct rhetorical framing that utilizes and evokes different meanings of sovereignty. For example, contested issues are often framed as being outside the delegated competences of the Court or inside a vague notion of internal affairs. This is further articulated as the Court either overreaching or being too intrusive. While the first idea evokes the idea of international legal sovereignty, the latter refers to a Westphalian notion of sovereignty in terms of the exclusive control of a domestic sphere. The uses of the different forms of sovereignty politics, notably between sovereignty as shielding and reprisal, generally correspond to how threatened national executive powers view the challenges arising from litigation at the Court.

To explore the three forms of sovereignty politics, the article adopts the broader methodological framework of Madsen, Cebulak, and Wiebusch, which explains the patterns and forms of resistance to ICs by looking at their specific regional and national contexts.[18] This

[11]T. Gammeltoft-Hansen and R. Adler-Nissen *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (2008).

[12]K. J. Alter and M. R. Madsen, 'The International Adjudication of Megapolitics', (2021) 84 *Law and Contemporary* Problems 1.

[13]See Withdrawal Notice Rwanda, *supra* note 2.

[14]See Withdrawal Notice Tanzania, *supra* note 2.

[15]See Withdrawal Notice Bénin, *supra* note 2.

[16]See Withdrawal Notice Côte d'Ivoire, *supra* note 2.

[17]The term 'sovereignty politics' and 'sovereignty arguments' are used interchangeably throughout this article.

[18]See Madsen, Cebulak and Wiebusch, *supra* note 1.

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framework, which has a general application to ICs, serves as a roadmap for tracing the legal, social, and political processes of resistance to ICs, highlighting the major contextual factors of ICs and the constellation of actors involved in these processes.[19] Applying this framework specifically to the African Court, we examine its specific context and history with the aim of offering a nuanced understanding of the meaning and application of sovereignty as exemplified in the contestation faced by the Court. We further break down the processes of critique of the Court by focussing on the context surrounding the withdrawals,[20] and tracing the forms and patterns of resistance of the four states against the Court to ascertain the legal and political arguments underlying it.

Empirically, our analysis relies on two primary sources: the withdrawal notices, and the case-law at the African Court prior to the withdrawals. In addition, we use media reported interviews with political elites. The analysis is guided by the types of sovereignty politics identified, the similarities and differences among the types of these critiques found across the withdrawals of all four states, as well as how these reflect the politics and political context of resistance against the Court. Thus, rather than accepting the motives of states as unitary, we use empirical data from the decisions of the Court and media reported interviews with political elites, to map out potential catalysts for resistance independently from the official reasons put forward by the four states themselves, while also taking the latter into account. This enables us to look beyond the official state narratives and ascertain how various concerns at the national level within each of the states have escalated to the Court, and potentially influenced actions towards the Court. It is important to note that in doing so, we adopt two limitations. First, despite the framework accounting for both the covert and overt forms of resistance, we limit this article to more overt forms of resistance by looking at the four states that withdrew and the processes triggering this. Second, we do not examine the other eight member states[21] who have made declarations and have potentially exhibited forms of resistance that did not result in a withdrawal of their declaration.

The article is structured in the following way. Following this introduction, the article disaggregates the 'sovereignty argument', through states' interactions with the Court, and identifies the three forms of sovereignty politics. This is followed by an analysis of the processes and outcomes of the resistance to the Court, which traces these forms of sovereignty politics in the concrete empirical cases. The article concludes by summarizing the findings and discussing the question of sovereignty politics and the African Court more broadly.

## 2. Sovereignty and the sovereignty argument

In this section, we explore the place of sovereignty in African international law and institutions and explain how our focus on the politics of sovereignty differs from the study of sovereignty as such. Building on this initial analysis, we formulate our particular approach and develop a matrix of three forms of sovereignty politics, which are then used in the empirical analysis in Section 3.

### *2.1. Sovereignty in the African construction of international law*

In international law, the principle of sovereignty might be viewed as an essentially contested concept.[22] While most agree on its fundamental importance, there is less agreement on its contents. Not only is its definition contested, but its meaning has varied over time.[23] Though often

[19]Ibid., at 208.

[20]Thus, engaging the process, despite the known outcome. Ibid., at 201.

[21]This is the number of states that have made the Art. 34(6) declaration as of 8 August 2023. Data available at African Court on Human and Peoples' Rights Website, www.african-court.org/wpafc/declarations/.

[22]J. Bartelson, 'The Concept of Sovereignty Revisited', (2006) 17 *European Journal of International Law* 463, at 464.

[23]S. Besson, 'Sovereignty', *Max Planck Encyclopedias of International Law* (2011), at para. 3; see Bartelson, ibid.; J. Bartelson, *A Genealogy of Sovereignty* (1995); H. Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (1994), vol. 176.

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understood simply as the 'supreme authority within a territory,'[24] its meaning is entwined with the evolving 'nature and structure of the international legal order and vice-versa'.[25] Given that sovereignty has been extensively debated, we do not reiterate what has previously been discussed. Instead, our aim is to explore how the concept is used by states when resisting ICs and the meanings attached to it in such situations. In other words, our focus is on the application of the 'sovereignty argument' rather than the theoretical underpinnings of sovereignty.

In the African context, due to its colonial history, sovereignty has often been invoked in terms of non-interference in the internal affairs of states as a basis for non-intervention.[26] Georges Abi-Saab has argued that '[f]or the newly independent [African] states, sovereignty is the hard-won prize of their long struggle for emancipation. It is the legal epitome of the fact that they are masters in their own house'.[27] A similar sentiment has persisted post-independence, perhaps most visibly in the context of ICs, irrespective of the fact that the limitation to sovereignty imposed by ICs is by states' own design and consent.[28] In this regard, there has been a continuous tension between African states notions of sovereignty and the very idea of ICs.[29] This tension is compounded by the adjudication of international human rights law related to governance and rule of law, which is especially politically sensitive.

These sentiments were embedded in the Organization of African Unity (OAU), notably Article 3 of the OAU Charter.[30] The OAU was the founding organization that brought together newly independent African states, and under whose auspices the African Charter on Human and Peoples' Rights (African Charter)[31] and the Protocol establishing the Court were both adopted. Even in the earliest days of the OAU, human rights and the idea of sovereignty were often framed as being at odds. Some have argued that the inclusion of a Court in the Charter failed precisely because 'African rulers were too jealous of their state sovereignty and that they were not ready to accept limitations by such an institution'.[32] While some link this 'jealousy' to sovereignty and a lack of interest in human rights,[33] others suggest a nexus between anti-colonialism, self-determination, and human rights in Africa.[34] As argued elsewhere, the story is better understood as more ambiguous, with both some willingness to engage international human rights and some clear resistance to the human rights agenda.[35] This explains, in part, why the African Court was only created years after the African Charter was adopted,[36] and why the Protocol provided an opt-in to the personal jurisdiction of the African Court.

[24]See Besson, ibid. at para. 1.

[25]Ibid.

[26]P. Omach, 'The African Crisis Response Initiative: Domestic Politics and Convergence of National Interests', (2000) 99 *African* Affairs 73, at 77; T. Maluwa, 'The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?', (2004) 98 *Proceedings of the Annual Meeting* (American Society of International Law) 232, at 236.

[27]G. M. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline', (1962) 8 *Howard Law* Journal 95, at 103.

[28]For an analysis of the influence of the sovereignty argument on the African Charter see M. A. Plagis and L. Riemer, 'From Context to Content of Human Rights: The Drafting History of the African Charter on Human and Peoples' Rights and the Enigma of Article 7', (2020) 23 *Journal of the History of International Law/Revue d'histoire du droit* international 556.

[29]See for instance Alter, Gathii and Helfer, *supra* note 8.

[30]OAU, Charter of the Organization of African Unity (25 May 1963), available at www.refworld.org/docid/3ae6b36024.html.

[31]OAU, African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at www.refworld.org/docid/3ae6b3630.html.

[32]G. Baricako, 'The African Charter and African Commission on Human and Peoples' Rights', in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights* (2008), 1 at 2.

[33]H. B. Jallow, *The Law of the African (Banjul) Charter on Human and People's Rights (1988–2006)* (2007), at 22; S. Moyn, *The Last Utopia: Human Rights in History* (2012); U. O. Umozurike, 'The African Charter on Human and Peoples' Rights', (1983) 77 *The American Journal of International Law* 902, at 902–3.

[34]B. Ibhawoh, 'Testing the Atlantic Charter: Linking Anticolonialism, Self-Determination and Universal Human Rights', (2014) 18 *International Journal of Human* Rights 842.

[35]See Plagis and Riemer, *supra* note 28.

[36]See Daly and Wiebusch, *supra* note 4; Jallow also points out that newly independent states did not seem eager to have powerful courts at any level. See Jallow, *supra* note 33.

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Although the OAU was committed to the principle of sovereignty as non-interference, a shift is observed in the application of the concept by its successor, the African Union (AU) as it made normative changes that allowed intervention on the basis of serious threats like genocide, war crimes, and crimes against humanity.[37] It even went further to establish the Peace and Security Council to determine such serious threats.[38] Similarly, the AU has applied the notion of sovereignty to emphasize Africa's right to participate on equal footing with other states in international affairs.[39] The AU, through a resolution, requested that the AU Commission expedite the process to extend the jurisdiction of the African Court of Justice and Human Rights to hear international crimes,[40] as a response to the UN Security Council rejecting appeals to defer prosecution of presidents and vice-presidents at the International Criminal Court (ICC).[41] For the AU, the resolution was a collective means of asserting the sovereignty of African states, while also reserving the right to protect it.[42]

Therefore, within the African context the notion of sovereignty has evolved in a manner that is intrinsically linked to its colonial past and the perception of AU member states as actors in the international relations arena. This same notion is at play in how member states engage with international institutions including the African Court. The premise of this article is that African states have created legal institutions like the Court, and granted them the legal authority to adjudicate over Charter rights. Yet, some states have used the language of sovereignty to contest the Court's authority. Though the use of the language of sovereignty is not particular to African states,[43] the way it is employed against the African Court provides nuanced insights into how and why sovereignty is negotiated within the human rights framework. This is especially true in a region where states sought independence from colonialism through sovereignty.[44] Given that sovereignty is both the legal vehicle for establishing international law and ICs, and the political discursive tool for resisting such developments, it inevitably blurs the meaning of the very idea of sovereignty.

### 2.2. The sovereignty argument disaggregated: Three forms of sovereignty politics

The ideas of sovereignty, which seem to underpin most of the explanations of the developments of international law and ICs in Africa reflect what one scholar, Steve Krasner, has defined as respectively *international legal sovereignty* and *Westphalian/Vattelian sovereignty*. The first form of sovereignty, *international legal sovereignty*, relates to the externally conferred legal recognition that allows states to enter into contracts and treaties and become members of international

[37]Art. 4(h) of the Constitutive Act of the AU, adopted at the Thirty Sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU, July 11 2000, Lome, Togo. Amended by the Protocol on Amendments to the Constitutive Act of the African Union, 3 February 2003 and 11 July 2003. See Maluwa, *supra* note 26, at 235.

[38]See AU, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002).

[39]See Brett and Gissel, *supra* note 4, at 43.

[40]Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Addis Ababa, 30–31 January, 2014, Assembly/AU/Dec.493(XXII), at 2.

[41]Art. 16 of the Rome Statute provides for deferral of investigation or prosecution, where the UNSC by a resolution can request the ICC to defer investigation or prosecution for a year.

[42]See Assembly/AU/Dec.493 (XXII), *supra* note 40, at 1-2. The decision stated that 'the African Union and its Member States, in particular the African States Parties to the Rome Statute, reserve the right to take any further decisions or measures that may be necessary in order to preserve and safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent'.

[43]Similar dynamics can be found in both Europe and the Americas where Venezuela, Hungary, Türkiye, and Russia have overtly challenged the authority of ICs. See X. Soley and S. Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', (2018) 14 *International Journal of Law in Context* 237, at 242; see Courtney, *supra* note 4; A. Huneeus and M. R. 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.

[44]C. Young, *The Postcolonial State in Africa: Fifty Years of Independence, 1960–2010* (2012), at 38.

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organizations. International legal sovereignty is thus the recognition of a political entity as a 'state' which then allows it to enter into (and withdraw) from treaties and international obligations.[45] The second form, *Westphalian/Vattelian sovereignty*, understands sovereignty in terms of the exclusion of external actors from the domestic political sphere of influence of a state.[46] In this view, sovereignty, relates to the equality of states, 'in that they all possess the characteristics of sovereignty', and that there is no one 'with authority over them', as 'international law only exists as between the states'.[47] Krasner also observes a third form of sovereignty, *domestic sovereignty*, which concerns whether a state is actually 'able to regulate and control activities within their territory'.[48] Krasner's disaggregation of sovereignty helps explain how, for example, international legal sovereignty can easily clash with Westphalian/Vattelian and domestic sovereignty. Consent to an international agreement – for example an IC – might be of little importance to actors who believe that an international agreement unduly infringes on the domestic control – or sovereignty – over a specific issue-matter.[49] Importantly, all arguments for and against are based on different ideas of sovereignty.[50]

While Krasner's generic concepts of sovereignty are helpful for disaggregating sovereignty at a more abstract level and developing his ideas of sovereignty as organized hypocrisy, they are not particularly attuned to the specificities of the African context, where for instance Westphalian sovereignty has had a different trajectory. Nor do they engage the more practical level of sovereignty politics related to international human rights, which we are interested in. What we term the 'sovereignty argument' is when states invoke ideas of sovereignty to influence, shield themselves from, or retaliate against international institutions. For the purposes of this exploration, the notion of sovereignty politics is derived from states exercising their sovereignty to create and/or join human rights oversight mechanisms (Krasner's international legal sovereignty). However, they also politicize the concept of sovereignty as a tool to influence the design of international institutions and, later, to shield themselves from these institutions, or even to contest and alter them (combinations of Krasner's Westphalian/Vattelian and domestic sovereignty).

The focus on the way African states invoke the sovereignty argument, rather than the definition(s) of sovereignty as such, allows for a broader understanding of how states engage with ICs and contest their authority within the language of international law. Our notion of the sovereignty arguments might cover both the conventional international law understanding of sovereignty as 'respect for state sovereignty, non-interference in internal affairs and equality of states and peoples',[51] its usages in the post-colonial era regarding 'the principles of non-aggression and non-intervention',[52] as well as other forms of sovereignty argumentation such as domestic control.

Our approach is, also, broader than Krasner's ideas and directed at a different analytical objective. We are open to the possibility that sovereignty arguments might have little to do with sovereignty as such, or are even invoked in bad faith. Our focus is on when sovereignty is invoked to define and control, shield from, or retaliate against the authority of ICs and what, more precisely, is argued when sovereignty is invoked in these contexts. We posit that under the broad yet vague idea of sovereignty, a host of different forms of politics are found. For this purpose, we

[45]S. D. Krasner, 'The Persistence of State Sovereignty', in O. Fioretos (ed.), *International Politics and Institutions in Time* (2017), at 41–2.

[46]S. D. Krasner, *Sovereignty: Organized Hypocrisy* (1999), at 9.

[47]M. Shaw, *International Law* (2008), at 6.

[48]See Krasner, *supra* note 45.

[49]M. R. Madsen et al., 'Sovereignty, Substance, and Public Support for European Courts' Human Rights Rulings', (2022) 116 *American Political Science Review* 419.

[50]See Krasner, *supra* note 46, at 9. Krasner observes a fourth form of sovereignty: interdependence referring to the ways in which states can control information flows. We do not engage with this here.

[51]See Shaw, *supra* note 47, at 35.

[52]Ibid., at 39.

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suggest the following analytical matrix for exploring the withdrawals from the African Court: (i) *sovereignty by design*, (ii) *sovereignty as shielding*, and (iii) *sovereignty as reprisal*.

*Sovereignty by design* refers to how states as part of the diplomatic negotiation of ICs can *ex ante* introduce institutional safeguards of national sovereignty through institutional design, for example by introducing legal opt-ins to direct access provisions for individuals and NGOs, or by limiting jurisdiction. The use of optional clauses with regard to direct access provisions and jurisdiction before human rights courts date back to the original European Convention on Human Rights (ECHR) of 1950 where both the jurisdiction of the court and the right to individual petition were made optional.[53] Later on, the Inter-American system replicated this,[54] and a similar design is found in the African system as already explained. These are baked-in legal options for narrowing the authority of an IC by limiting access and they open up for both straightforward lawful exercises of international legal sovereignty and a politics of sovereignty with this as point of departure. Our concern is the latter, and more specifically, how it allows for limiting IC power and authority both at the stage of negotiating courts and in their subsequent institutionalization.

*Sovereignty as shielding* concerns the situation in which sovereignty arguments are used to shield states from the effects of an IC by, for example, claiming it has overreached or is being too intrusive. This can also occur in a more passive manner in terms of non-implementation of judgments of ICs. This reflects to an extent the Westphalian/Vattelian and domestic sovereignty categories discussed above, yet the act is political and simply uses a quasi-legal vocabulary. The history of ICs provides plenty of examples of states claiming that ICs have gone too far and thereby jeopardise the democratic anchoring of laws or societally entrenched norms.[55] The key question for us is what kind of ideas are being brought forward when sovereignty is claimed as a shield.

*Sovereignty as reprisal* concerns the situation in which sovereignty arguments are used as a means for changing or reorganising an IC, or in the extreme rendering it defunct. It is a form of sovereignty politics that seeks to limit the effects of ICs on states by *ex post* (re)engineering an IC and its power under the banner of sovereignty. Sovereignty arguments are used as a reprisal against ICs with the goal of somehow retaliating against the court to allow the state to reinstate sovereignty. In the literature, the suspension of the Southern African Development Community Tribunal (SADCT) in response to its rulings on land rights in Zimbabwe is often quoted.[56] Other ICs have seen similar attempts being made in the aftermath of controversial rulings but only in the context of the SADCT was it as consequential.[57] As in the two other forms of sovereignty politics, our interest here is not whether such reprisals are efficacious, but the kind of politics that underlies such sovereignty arguments.

## 3. Empirical analysis

In the following, we unpack the politics behind the four states employing 'sovereignty arguments' to resist the African Court by exploring the three forms of sovereignty politics in the context of the withdrawals mentioned earlier. Our analysis of the cases adjudicated before the Court, around the time of the withdrawals, reveals that there are usually a multitude of potentially highly politicizable applications ongoing before the African Court, any number of which, or a combination thereof,

[53]M. R. Madsen, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', in J. Christoffersen and M. R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (2022), 43at 45.

[54]See Huneeus and Madsen, *supra* note 43, at 146.

[55]For example, L. R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes', (2002) 102 *Columbia Law Review* 1832.

[56]T. E. Achiume, 'The SADC Tribunal Socio-political Dissonance and the Authority of International Courts', in K. J. Alter, L. R. Helfer and M. R. Madsen (eds.), *International Court Authority* (2018), 124.

[57]See Madsen, Cebulak and Wiebusch, *supra* note 1.

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could trigger a desire to withdraw (partially) from its jurisdiction. The implications of the Court's decisions concerning cases indicate broader political consequences for states should they continue to allow direct individual and NGO applications to the Court. Therefore, the withdrawals of non-state actors' direct access to the Court are important signals to both the political home of the Court in the AU, the Court itself and domestic audiences.[58] To better understand the withdrawals and underpinning interest triggering sovereignty arguments, we analyze the withdrawals, cases of the Court, and media reported interviews, applying the three forms of sovereignty politics specified above.

### 3.1. Sovereignty by design

The politics of sovereignty by design evokes the idea that the legal construction of the African Court's jurisdiction as a two-tier system allows for resistance. It is a design 'solution' embedded in the history of the Court, which implies that some reluctance towards the Court is not a recent phenomenon. Instead, this form of sovereignty politics finds its origins in the OAU Charter of the 1960s and 1970s when the African Charter was drafted, and states opted to exclude a court. This reluctance made a partial comeback in the 1990s when the Protocol establishing the Court was drafted and required an additional opt-in through a special declaration for individuals and NGOs to have direct access to the Court. All four states under scrutiny participated in the creation of this potential vehicle for resistance,[59] with all four being among the original signing members of the newly drafted Protocol establishing the Court.[60] All four states also used this tool of a more subtle resistance by design in their withdrawals: None of the states fully withdrew from the Court as a whole, nor did any of the states withdraw from the African Charter. They all opted to merely remove the potential of individuals and NGOs from directly accessing the Court.[61] Therefore, with their declarations under Articles 5(3) and 34(6) of the Protocol and subsequent declaration withdrawals, all four states operationalized sovereignty by design to eliminate direct access of NGOs and individuals.

Unquestionably, the institutional design of the African Court itself enables backlash-light tactics. This embedded tactic of opt-ins in institutional designs, allows states to engage effectively in pushback and backlash tactics, yet remain partially within the 'rules of the game' in the sense that they are *not* withdrawing from the IC as such. In other words, this form of resistance allows states to challenge the authority of the Court, and significantly reduce its docket, without the necessity of attacking it directly. Essentially, 'sovereignty by design' was used to introduce treaty loopholes in relation to the African Charter and the Protocol. The consequence is not just that states have the flexibility to make (additional) commitments to the African human rights system, but also the power to withdraw partially from the Court as a tool to express discontent with the Court's decisions and resist it, without appearing to be outrightly against it. In fact, Côte d'Ivoire specifically stipulated in its letter to the then President of the Court, that it continued to 'conform' to its international obligations under the African Charter and the Protocol.[62]

[58]As shown in previous literature, the politics of ICs often played out as two-level political game involving both international and domestic audiences. See M. R. Madsen, 'Two-Level Politics and the Backlash against International Courts: Evidence from the Politicization of the European Court of Human Rights', (2020) 22 *British Journal of Politics & International Relations* 728.

[59]All were founding members who joined on 25 May 1963. See Member States list, available at au.int/en/member_states/countryprofiles2.

[60]All signed on 9 June 1998. See African Court on Human and Peoples' Rights Website, *supra* note 21.

[61]African Court on Human and Peoples' Rights Website, Declarations, Art. 34 of the Protocol [Ratification] stipulates that 'at the time of ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court', see African Court on Human and Peoples' Rights, available at www.african-court.org/wpafc/declarations/.

[62]See Withdrawal Notice Côte d'Ivoire, *supra* note 2; CICG, 'Diplomatie : La Côte d'Ivoire Retire La Déclaration de Compétence à La Cour Africaine Des Droits de l'homme et Des Peuples', *GOUV.CI*, available at www.gouv.ci/_actualite-article.php?recordID = 11086.

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We frame this instrumentalization of sovereignty as 'sovereignty by design' as it came before the fact. The Court was not yet established; therefore its practice (decisions and other behaviours) had no bearing on the decision by states to include this form of sovereignty politics. It was the very idea of the Court that sparked the need for states to create sovereignty-protective tools for themselves *ex ante*. Rwanda alludes to this dynamic in its withdrawal notice specifying that it used its 'sovereign prerogative' to make the declaration, as well as to withdraw it.[63]

From a legal perspective, the establishment of the Court with an opt-in system infringed neither on the (O)AU's norms of non-intervention nor the sovereignty of the member states.[64] Most importantly, the very design of the Court having optional jurisdiction allowed sceptic African governments to consent to the establishment of the Court without necessarily being subjected to its jurisdiction.[65] The result is a three-part hurdle for direct access to the African Court. The first is the need to ratify the African Charter, which most AU states have done. The second is ratifying the Protocol establishing the Court, which some 34 states have done.[66] The third is for state parties to the Protocol to submit a special declaration under Articles 5(3) and 34(6) of the Protocol, which 12 states have done historically. As indicated by the number of ratifications and declarations, exercising international legal sovereignty through sovereignty by design remains salient amongst most states.

Thus, while the Constitutive Act of the AU stressed the safeguarding of human rights and strengthening institutions to ensure they function effectively,[67] the principles of sovereignty and non-interference in internal affairs are deeply embedded in the same AU documents.[68] These deep seeded notions of hard-won sovereignty[69] and non-intervention are part of the history of African states, the OAU, and AU, and make resistance to the African Court neither new nor unique. The cases of Benin, Côte d'Ivoire, Rwanda, and Tanzania involve a small subset of states that have made all three steps towards accepting the full jurisdiction of the Court. Yet, they have also taken a step back and limited access to the Court for various reasons. The next two sections, explore their actions as respective politics of sovereignty as shielding and reprisal.

### 3.2. Sovereignty as shielding

Sovereignty as shielding is an argument employed by states, which seek to limit their exposure to an existing IC in the short- and long-term. There can be multiple reasons why a state seeks to limit their exposure to an IC: They view its judgments as burdensome, they consider the IC as overreaching, or they simply do not want to implement a judgment due to the state of domestic affairs. In contrast to the politics of sovereignty by design, which is *ex ante*, politics of sovereignty as shielding is a pushback (or backlash) against an IC *ex post*; it is the response of a state to the decisions of an IC with the goal of minimizing, even cancelling out, their immediate or future effects. As concerns immediate effects, sovereignty as shielding is typically mobilized in reaction to specific judgments delivered against a state, which the state perceives, or treats, as too interventionist for either legal and/or political reasons. The sovereignty argument is introduced to shield the state from these decisions, viewed as interventions in its internal affairs. Sovereignty as shielding can also be more future-oriented and concerns the possible impending effects of ICs. This form of sovereignty politics thus seeks to restrict the exposure of a state to a 'further burden'

[63]See Withdrawal Notice Rwanda, *supra* note 2.

[64]A. E. Anthony, 'Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa Comment', (1997) 32 *Texas International Law Journal* 511, at 522–3.

[65]Ibid.

[66]See African Court on Human and Peoples' Rights website, *supra* note 21.

[67]See Anthony, *supra* note 64, at 522–3.

[68]Art. 3 of the OAU, Heads of State and Government of the Member States of the Organization of African Unity, Constitutive Act of the African Union (1 July 2000, entered into force on 26 May 2001).

[69]See Abi-Saab, *supra* note 27, at 103–4.

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coming from an IC by utilizing the sovereignty card. For example, the state seeks to shield itself from further burdens related to, for example, responding to a growing number of pending cases at a high cost to the state, the need to undertake major overhauls of legislation, or the expense of potentially large reparations payments to applicants.[70]

In the withdrawals studied, there are two clear examples – Tanzania and Benin – of the politics of sovereignty as shielding. In the case of Tanzania, the potential burden of a high number of cases was clear. The sole reason Tanzania provided in its withdrawal notice for discontinuing individual and NGO direct access to the Court was that the special declaration had been 'implemented contrary to the reservations submitted'.[71] This suggests a critique of over intervention in internal matters on the part of the Court, yet Tanzania's reaction also had an eye to the future. From the decisions of the Court, it is clear that most of the cases brought against Tanzania involved procedures under Tanzania's Penal Code and Criminal Procedure Act. The majority of the 37 of the 155 applications against Tanzania, finalized before its withdrawal of the declaration,[72] concerned cases related to fair trial violations, with some related to capital offenses, and one challenging the Tanzanian electoral system.

The case of Tanzania is special, as it is the host state of the African Court, and was the first state to have an application heard against it by the Court on the merits.[73] Additionally, the caseload that Tanzania was confronted with at the African Court, alongside the accruing pecuniary awards issued against it,[74] most likely linked to the proximity of the Court to Tanzania as its host, led to what Adjolohoun called 'litigation fatigue'.[75] Further compounding the problem, before Tanzania withdrew its declaration, it had, on several occasions, objected to the admissibility of applications[76] that in its view had not exhausted local remedies. These arguments were presented to the Court in the form of objections to material jurisdiction and objections regarding the non-exhaustion of local remedies.[77] However, the objections were generally not upheld by the Court, and most of these cases were decided on the merits.

The use of sovereignty as shielding against potential burdens took a different form with the withdrawal of Benin, with clear financial implications of remaining within the Court's jurisdiction. Although there were only 24 applications filed against Benin before its withdrawal on 24 March 2020, four clusters of cases had already formed. These clusters were essentially multiple applications filed by the same applicant,[78] or an applicant individually as well as part of a group of

[70]A developing trend that could be seen in, for example, the Tanzanian fair trial case law. See M. A. Plagis, 'The Makings of Remedies: The (R)Evolution of the African Court on Human and Peoples' Rights' Remedies Regime in Fair Trial Cases', (2020) 28 *African Journal of International and Comparative Law* 45.

[71]See Withdrawal Notice of Tanzania, *supra* note 2. According to the reservations Tanzania was making the declaration '. . . without prejudice to Article 5(3) of the aforesaid Protocol, such entitlement is only to be granted to such NGOs and Individuals once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania'.

[72]N. De Silva and M. A. Plagis, 'NGOs, International Courts, and State Backlash against Human Rights Accountability: Evidence from NGO Mobilization against Tanzania at the African Court on Human and Peoples' Rights', (2023) 57 *Law & Society Review* 36, 45–6. Statistics of applications brought before the Court on its website as of 19 January 2023, see www.african-court.org/cpmt/statistic.

[73]See De Silva and Plagis, ibid.

[74]For some of these developments in the fair trial cases see Plagis, *supra* note 70.

[75]See Adjolohoun, *supra* note 4, at 10.

[76]A few examples are: *Peter Joseph Chacha v. United Republic of Tanzania*, Application 003/2012, Rulings (Admissibility) of28 March 2014, at paras. 96–8; *Frank David Omary and others v. United Republic of Tanzania*, Application 001/2012, Rulings (Admissibility) of 28 March 2014, at para. 57; *Wilfred Onyango & Others v. United Republic of Tanzania*, Application 006/2013, Judgment (Merits) of 18 March 2016, at para. 81.

[77]See *Peter Joseph Chacha* case, ibid., at para. 100; *Mohamed Abubakari v. United Republic of Tanzania*, Application No. 007/2013, Judgment (Merits) of 20 November 2015, at para. 55. *Evodius Rutechura v. United Republic of Tanzania*, Application No. 004/2016, Judgment (Merits) of 26 February 2021, at para. 34.

[78]Houngue Eric Noudehouenou, who filed two applications before the withdrawal (Application Nos. 003/2020 and 004/2020), and a subsequent four applications before the withdrawal took effect (Application Nos. 020/2020, 028/2020, 032/2020 and 010/2021).

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applicants,[79] or even family members of an applicant.[80] None of the other states to withdraw their declarations had similar dynamics or patterns exhibited in the applications filed against them. Nor did Benin refer to this dynamic in its withdrawal notice. Yet, these patterns likely played a role. Further, it cannot have gone unnoticed by state officials that a very large sum was ordered as part of the reparations judgment in one of these clusters of applications. There were five applications collectively filed by the Beninese opposition leader Ajavon and his family before the withdrawal, of which the merits of one of the applications was decided on 28 November 2019, just four months before the withdrawal. The reparations issued in that case amounted to 114,330,444,947 CFA, a very significant amount.[81] While this decision in itself could have been sufficient to trigger a response, the fact that there were four remaining applications likely only exacerbated the situation.

Closely related are situations in which states mobilize sovereignty as a shield from intervention in the internal affairs of the state, especially when an IC is perceived to have over-reached its mandate. The case of Tanzania, once again, provides a good example. On multiple occasions, Tanzania expressed its concern that it appeared that the Court was, in fact, acting as a domestic appellate court or a court of first instance. This type of argumentation can be found in numerous cases. For example, in the *Jebra Kambole* case, Tanzania argued that the applicant had not attempted to exhaust local remedies, and therefore, it was improper for him to file the application.[82] In the *Majid Goa* case, Tanzania argued against jurisdiction claiming that the Court would otherwise sit in that case 'as a first instance or an appellate court'.[83] Similarly, it argued, in the *Armand Guehi* case, that the applicant was requesting the Court to adjudicate the matter as a court of first instance since the allegations raised in the application should have been raised during the trial before its national courts.[84] Tanzania added that should the Court examine the allegations, it 'would usurp the prerogative of the [Tanzanian] Court of Appeal'.[85]

The Court has refuted such arguments on several occasions.[86] Where the cases were held to be admissible, the general response of the Court to these objections has been that the remedies sought, such as the review of judgements and constitutional petitions for breach of fundamental rights, were not ordinary but rather extraordinary.[87] Thus, forming part of the exception to the

[79]*Ghaby Kodeih ET Nabih Kodeih v. Republic of Benin*, Application 008/2020, Ruling (Provisional Measures) of 28 February 2020; and *Ghaby Kodeih v. Republic of Benin*, Application 006/2020, Rulings (Provisional Measures) of 28 February 2020, and Rulings (Jurisdiction and Admissibility) 30 September 2021. These two applications were filed within days of each other (4 February 2020, and 17 February 2020 respectively).

[80]Collectively, the Ajavon family submitted no less than seven applications before the withdrawal took effect. Three by Sébastien Germain Marie Aikoué Ajavon himself before the withdrawal (Application Nos. 013/2017, 062/2019, 065/2019), and a further two more before the withdrawal took effect (Application Nos. 027/2020 and 002/2021). Additionally, his family, including wife and/or children have submitted two separate applications (Application Nos. 063/3019 and 064/2019) before the withdrawal.

[81]*Sébastien Germain Ajavon v. Republic of Benin*, Application No. 013/2017, Judgment (Reparations) of 28 November 2019, Part VII. A (iii).

[82]*Jebra Kambole v. United Republic of Tanzania*, Application 018/2018, Judgment (Merits and Reparations) of 15 July 2020, at para. 31.

[83]*Majid Goa alias Vedastus v. United Republic of Tanzania*, Application 025/2015, Judgment (Merits and Reparations) of 26 September 2019, at para. 17.

[84]*Armand Guehi v. United Republic of Tanzania*, Republic of Côte D'Ivoire Intervening, Application 001/2015, Judgment of 7 December 2018, at paras. 25–7.

[85]Ibid., at para. 27.

[86]*Lohé Issa Konaté v. Burkina Faso*, Application 004/2013, Judgment (Reparations) of 3 June 2016, at para. 24; *Ernest Francis Mtingwi v. Republic of Malawi*, Application 001/2013, Rulings of 15 March 2013, at para. 14; *Alex Thomas v. United Republic of Tanzania*, Application 005/2013, Judgment (Merits) of 20 November 2015, at para. 130.

[87]For details on the Court's stance on the exhaustion of local remedies see Z. Godzimirska, A. Küçüksu and S. Ravn, 'From the Vantage Point of Vulnerability Theory: Algorithmic Decision-Making and Access to the European Court of Human Rights', (2022) 40 *Nordic Journal of Human Rights* 235, at 246–7.

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exhaustion of local remedies rule.[88] In other words, the Court created an exception to the exhaustion of local remedies, leading to a significant number of applications alleging fair trial rights violations being found admissible because of the structural issues present in Tanzania's domestic legal system.[89]

Another potential instance where Tanzania might well have perceived the Court to have overreached was when it adjudicated over the death penalty. Tanzania asserted that it was in compliance with international norms, yet the Court ordered that the mandatory nature of the death penalty under Tanzania's Penal Code was a violation of the right to life and dignity.[90] This is a highly controversial issue within Tanzanian society,[91] and has been viewed by observers as another factor contributing to Tanzania's withdrawal.[92]

In sum, the politics of sovereignty as shielding was used explicitly by Tanzania, and was also likely a contributing factor to Benin's subsequent withdrawal. Tanzania's use of sovereignty as shielding was triggered by three factors. These are a relatively large caseload, an increasingly high number of decisions against it, which in part was enabled by a liberal interpretation of the exhaustion of domestic remedies requirement by the Court, and the Court issuing judgments on sensitive political topics. By criticizing the Court's interpretation of the exhaustion of domestic remedies, Tanzania sought to provide a legitimate justification for its withdrawal of the declaration as a matter of trespassing on its sovereignty. While Benin did not explicitly invoke this type of sovereignty argument, the underlying dynamics of a growing cluster of applications, and the potential of further large sums of monetary compensation being ordered by the Court, provided a context for attempts at shielding against the Court.

### 3.3. Sovereignty as reprisal

Sovereignty as reprisal is another form of *ex post* sovereignty politics employed in states' responses to ICs. The politics of sovereignty as reprisal has two main components: (i) states adopt it as a measure to limit the jurisdiction of an IC and/or (ii) limit the ability of users to access the IC. In both cases, it is an extra-ordinary critique of an IC in terms of a backlash aimed at changing or re-organizing the court, diminishing its authority, and altering its future direction. It, thus, differs from sovereignty as shielding by the added dimension of seeking not only to limit the effects of an IC (shielding) but also by seeking to alter the court in question.

Sovereignty as reprisal against the jurisdiction of the Court is observed where a state seeks to punish an IC for 'interfering' in domestic matters, which it considers outside the legitimate and legal purview of the IC. Indications of such reprisal politics are often found in the narratives that states present to domestic publics, where they project an image of an overreaching IC that needs to be put in its place.[93] Such narratives tend to concern applications with political connotations and involve political opponents and dissidents. This is most visible when claims of interference in domestic matters are presented in the context of suits brought by the political opposition who do not believe they have redress or will receive a fair trial in their domestic legal systems. Therefore,

[88] *Alex Thomas v. United Republic of Tanzania*, Application 005/2013, Judgment (Merits) of 20 November 2015, at para. 64; *Wilfred Onyango & Others v. United Republic of Tanzania*, Application 006/2013, Judgment (Merits) of 18 March 2016, at para. 96; *Mohamed Abubakari v. United Republic of Tanzania*, Application 007/2013, Judgment (Merits) of 3 June 2016, at para. 72.

[89] On its criminal justice system, see A. Possi, 'It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: The African Court on Human and Peoples' Rights and Fair Trial Rights in Tanzania', (2017) 1 *African Human Rights Yearbook/Annuaire Africain des Droits de l'Homme* 311.

[90] *Ally Rajabu and Others v. United Republic of Tanzania,* Application No. 007/2015, Judgment of 28 November 2019, at paras. 114 and 120 and Operative clause, at para. viii.

[91] See De Silva and Plagis, *supra* note 72, at 48–9.

[92] See Adjolohoun, *supra* note 4, at 9; see Faix and Jamali, *supra* note 4, at 66–7.

[93] Similar logics are found in other regional human rights systems. See for example Madsen, *supra* note 58.

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they take their legal grievances to the international level and use ICs as a legal opportunity structure to seek redress.[94] The politics of sovereignty as reprisal against the users of the Court focuses in those cases on clamping down on certain users of an IC by going after the court. The states lash back at the IC with the aim of preventing specific users from gaining an international platform for their human rights grievances.

### *3.3.1.* Reprisal against jurisdiction

Both aspects of the politics of sovereignty as reprisal are evident in the case of Benin. First, Benin claimed in its withdrawal notice that the Court had overreached, stating that the Court had implemented the declaration in a manner that was worked 'as a licence to interfere with matters that escaped its competence causing serious disturbance to the municipal legal order and legal uncertainty that is fully detrimental to the necessary economic attractiveness of state parties'.[95] The withdrawal notice included, among others, a critique of the order issued by the Court in the *Ghaby Khodeih* case. In that case, the applicant had alleged a violation of his property rights and right to fair trial.[96] Since the case had commercial implications, it had also been referred to the Common Court of Justice and Arbitration (CCJA) of the Organization for the Harmonization in Africa of Business Law (OHADA), which hears economic disputes.[97] Benin argued that as a human rights court, the African Court should have taken the economic implications of the case into consideration in exercising its jurisdiction. The framing of the Beninese withdrawal not only implied that the African Court went beyond its mandate in relation to the OHADA Court, but also left open that there might be other issues at play than the *Kodeih* case.[98]

There were in fact several ongoing cases related to election issues in Benin[99] prior to the *Kodeih* decision, including the cluster of cases by Ajavon and his family, as mentioned above.[100] Ajavon was charged with drug trafficking by a Beninese court and tried *in absentia*.[101] He fled into exile and applied to the Court for a temporary suspension of the municipal elections since he could not participate in the elections as a candidate at the time.[102] The Court granted the application and awarded him significant compensation for economic losses and emotional distress.[103] In addition, just a month before the municipal and communal elections were scheduled to take place on 17 May 2020, the Court granted another request by Ajavon for provisional measures, by ordering a suspension of the elections until it determined the application on its merits.[104]

At the same time, several other highly politicized cases were ongoing. For example, just six days before the withdrawal of the special declaration, Benin filed its response in the *XYZ* case *(App. No. 10/2020)*. Originally filed on 14 November 2019, the application claimed that the new rules for review of constitutional amendments violated the African Charter on Human and Peoples' Rights

[94]J. T. Gathii and J. W. Mwangi, 'The African Court of Human and Peoples' Rights as an Opportunity Structure', in J. T. Gathii (ed.), *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (2020), 211 at 236.

[95]See Withdrawal Notice Bénin, *supra* note 2.

[96]See *Ghaby Kodeih ET Nabih Kodeih* case, *supra* 79, at para. 6.

[97]OHADA website, 'CCJA at a Glance'.

[98]See Adjolohoun, *supra* note 4, at 14.

[99]Ibid., at 12.

[100]*Madamelda Afiavi Goudjo épouse Ajavon & 3 Others v. Republic of Benin*, Application No. 063/2019, 29 November 2019; *Nestor Ajavon & 2 Others v. Republic of Benin,* Application 064/2019, 29 November 2019,; *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin,* Application 002/2021, 4 January 2021.

[101]*Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Application 027/2020, Ruling(Provisional Measures) of 1 April 2021, at paras. 22-23.

[102]See *Sébastien Germain Marie Aikoué Ajavon* (Provisional Measures) case, ibid.

[103]*Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Application 062/2019, Ruling (Provisional Measures) of 17 April 2021. See Adjolohoun, *supra* note 4, at 15; 'Benin Businessman Sentenced in Absentia to 20 Years for Drug Trafficking', *Business Insider UK*, 2018.

[104]See *Sébastien Germain Marie Aikoué Ajavon* case (Provisional Measures), ibid., Part VII.4.

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and the African Charter on Democracy, Elections and Good Governance (ACDEG). Houngue Eric Noudehouenou, a repeat player before the Court, had also filed claims related to participation in the upcoming presidential elections in Benin prior to the withdrawal.[105] However, the Court only issued provisional measures in this case after Benin withdrew its special declaration. Although not specifically mentioned in the withdrawal notice, the Beninese government expressed its view elsewhere that, among others, the provisional measures were an 'interference in the electoral process of a sovereign country'.[106]

Another state that has employed the politics of sovereignty as reprisal is Côte d'Ivoire. Côte d'Ivoire indicated in its withdrawal notice that its contention with the Court lay in its case administration, which undermined, if not disregarded, its domestic legal order. The withdrawal declaration stated that:

> ... due to the serious and intolerable acts that the African Court on Human and Peoples' Rights has allowed itself, in its actions, and which not only undermine the sovereignty of the state of Côte d'Ivoire, the authority and functioning of justice, but are also likely to cause a serious disturbance of the internal legal order of states and to undermine the bases of the rule of law, by the establishment of a real legal uncertainty.[107]

This wording echoes the withdrawal notice of Benin, and like Benin, Côte d'Ivoire had electoral cases brought against it at the time of its withdrawal.

At the time of the withdrawal, Côte d'Ivoire had already partially complied with the *APDH* case,[108] concerning the amendment of a law on the composition of the Independent Electoral Commission (IEC). However, a follow-up application – Suy Bi Gohore Emile and Others – was filed in 2019 to challenge the independence and impartiality of the IEC, stressing the alleged partial compliance with the *APDH* judgment.[109] The applicants also requested provisional measures to hold off appointments for the re-composition of the IEC,[110] which was denied.[111] Although *prima facie* a right to fair trial case, another case with a clear electoral undertone concerned Guillaume Soro, a former Ivorian prime minister who planned to run for office in the 2020 presidential elections, and ten others.[112] The applicants were all (former) politicians and parliamentarians, some of whom held positions as high as the speaker of the national assembly, ministers, and heads of political parties.[113] Mr. Soro and the other applicants brought an application for provisional measures to stay the execution of arrest warrants issued against them,

[105]See note 78, *supra*.

[106]See statement of Alain Orounla, Minister spokesperson for the Government of Benin, 'Élections Locales Au Bénin: Le Gouvernement Dénonce « L'immixtion » De La CADHP', *Jeune Afrique*, *JeuneAfrique.com*, 22 April 2020, available at www.jeuneafrique.com/932281/politique/elections-locales-au-benin-le-gouvernement-denonce-limmixtion-de-la-cadhp/.

[107]See Ivorian government communique by Sidi Tiémoko TOURE, the then Minister of Communication and Media (July 2018 - April 2021) in 'Communique Du Gouvernement | Côte d'Ivoire/AIP', available at web.archive.org/web/20200915224303/https://aip.ci/communique/communique-du-gouvernement-2/. 'Elle fait suite aux graves et intolérables agissements que la Cour africaine des droits de l'homme et des peuples s'est autorisés, dans ses actions, et qui non seulement portent atteinte à la souveraineté de l'Etat de Côte d'Ivoire, à l'autorité et au fonctionnement de la justice, mais sont également de nature à entraîner une grave perturbation de l'ordre juridique interne des Etats et à saper les bases de l'Etat de droit, par l'instauration d'une véritable insécurité juridique.' (French to English translation by authors).

[108]*Actions Pour La Protection Des Droits De 'Hommes (APDH) v. Republic of Côte d'Ivoire*, Application 001/2014, Judgment of 18 November 2016.

[109]*Suy Bi Gohore Emile & 8 Others v. Republic of Côte d'Ivoire*, Application 044/2019, Judgment of 15 July 2020, para. 161.

[110]*Suy Bi Gohore Emile & 8 Others v. Republic of Côte d'Ivoire*, Application 044/2019, (Provisional Measures) of 28 November 2019, at para. 23 (i); see *Suy Bi Gohore Emile & 8 Others* case, Judgment, ibid., at para. 24 (ii).

[111]See *Suy Bi Gohore Emile & 8 Others* case (Provisional Measures), ibid., at para. 34.

[112]*Guillaume Kigbafori Soro and Others v. Republic of Côte d'Ivoire*, Application 012/2020, Ruling (Provisional Measures) of 15 September 2020.

[113]*Guillaume Kigbafori Soro and Others v. Republic of Cote d'Ivoire*, Application 012/2020, Rulings (Provisional Measures) of 22 April 2020, at para. 1.

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and by extension enable them to enjoy their political and civil rights pending the judgment of the Court on merits, which would allow them to also stand for elections.[114] In response, Côte d'Ivoire contended that the measures sought went beyond the scope of provisional measures and could impede the normal functioning of its domestic justice system.[115] Only six days after the Court granted the order, the Ivorian government filed its withdrawal notice.[116]

Reprisal targeted at the jurisdiction of an IC is also evident in the case of Tanzania. Although sovereignty politics as shielding played a role in Tanzania's withdrawal, attempts at limiting jurisdiction also feature in the *Ally Rajabu and Others* case.[117] The *Ally Rajabu* case concerned the abolition of the mandatory death penalty, and was decided just days after the withdrawal was submitted by Tanzania.[118] Generally speaking, Tanzania is a *de facto* abolitionist state, yet its courts continue to hand down the death sentence for certain criminal offences as part of its mandatory sentencing laws.[119] This was the issue of contention in the *Rajabu* application.[120] Because of the significance and political sensitivity of the death penalty – and thus the *Rajabu* application – this case was, according to some, the final straw that pushed Tanzania over the edge and triggered the withdrawal.[121]

### *3.3.2.* Reprisal against users

Among the withdrawals of the four states, sovereignty as reprisal of users of the Court is unique to and prominent in the narrative presented by Rwanda in its withdrawal notice. This form of sovereignty argument is intended to exclude certain individuals from international human rights adjudication. Rwanda deployed this form of sovereignty argument against genocide fugitives who were also members of the political opposition. The withdrawal notice of Rwanda claimed that its original declaration 'was being exploited and used contrary to the intention behind its making'. The sensitive topic of the 1994 genocide in Rwanda played a major role in its withdrawal of the declaration.[122] According to Rwanda, this 'exploitation' was that 'convicted genocide fugitives' could secure a right of audience before the Court using it to gain 'a platform for re-invention and sanitization, in the guise of defending human rights of the Rwandan people'.[123]

It was, however, not only about securing the status quo related to transitional justice, but also about access to the political arena. At the time of the withdrawal, at least three out of the six pending cases against Rwanda involved prominent political opposition figures, namely the *Nyamwasa*, *Gihana*, and *Ingabire* cases.[124] *Nyamwasa & Others* filed an application against the bid of the incumbent President to change the constitution to run for a third term in office,[125] and *Ingabire* challenged memory laws related to the 1994 genocide.[126] *The Gihana* case involved

[114]The arrest and detention of Mr. Soro and the others was also seen as seriously impacting their political rights and stopping their political activities. See the *Guillaume Kigbafori Soro and Others* case, *supra* note 112, at paras. 24–25.

[115]See *Guillaume Kigbafori Soro and Others* case, *supra* note 113, at para. 29.

[116]See Withdrawal Notice of Côte d'Ivoire, *supra* note 2; see also CICG, Diplomatie, *supra* note 62.

[117]See *Ally Rajabu & Others* case, *supra* note 90.

[118]See Withdrawal Notice of Tanzania, *supra* note 2.

[119]See De Silva and Plagis, *supra* note 72.

[120]See *Ally Rajabu* case, *supra* note 90, para. 93. See also ibid., at 48–50.

[121]See Adjolohoun, *supra* note 4, at 9; N. De Silva, 'Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania', *EJIL: Talk!*, 16 December 2019, available at www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/; see Faix and Jamali, *supra* note 4, at 67.

[122]See Daly and Wiebusch, *supra* note 4, at 309–10.

[123]See Withdrawal Notice of Rwanda, *supra* note 2. It was filed on 24 February 2016 and took effect in February 2017.

[124]*General Kayumba Nyamwasa & Others v. Republic of Rwanda*, Application 016/2015, Order on the Request for Interim Measures, 24 March 2017; *Kennedy Gihana & Others v. Rwanda*, Application 17/2015, Judgment of 28 November 2019; *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Application 003/2014, Judgment of 24 November 2017.

[125]See *General Kayumba Nyamwasa and Others* case, ibid., at para. 3.

[126]See *Ingabire Victoire Umuhoza* case, *supra* note 124, at paras. 48, 145–6.

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Stanley Safari, a Rwandan politician, who was convicted for participating in the 1994 genocide. In *Gihana*, Rwanda requested the Court to not grant the applicants standing as they were convicted fugitives that had avoided serving their sentences in Rwanda.[127] It further stated that it had not anticipated that by making the declaration, individuals convicted of serious crimes could have access to the Court.[128] This sentiment was re-iterated in the withdrawal notice, and in an interview of the Rwandan Justice Minister with Rwandan news outlet, The New Times, a few days after the filing of the withdrawal notice.[129] He reiterated that Rwanda had in the previous year objected to the Court entertaining the application of Stanley Safari because it is uncompromising in its stance regarding the issue of genocide. He however, added that Rwanda fully subscribes to the jurisdiction of the Court in resolving human rights issues between states.[130] Later, the Rwandan government also made clear that it would not cooperate with the Court should an individual application be filed against it before the withdrawal took effect.[131]

Gathii and Mwangi have argued that the Rwandan government withdrew the declaration due to mounting pressure rising from the attention that the *Ingabire* case gained on the international stage, putting pressure on Rwanda.[132] They asserted that the withdrawal was also a move to keep applicants – especially opposition politicians – from creating further legal opportunity structures that were beyond the control of the government,[133] which posed a threat to President Kagame's regime.[134] Viljoen also adds that a contributing factor for the withdrawal was that the government did not expect that opposition politicians would file six cases against it over politically sensitive issues within such a short time-span.[135] Hence, the language of Rwanda's withdrawal notice, the narrative of the status of the applicants as genocide convicts and fugitives abusing direct access to the Court, along with statements of Rwandan public officials all point to the politics of sovereignty as reprisal as a means to limit access of these users to the Court.

In the case of Tanzania, the reprisal against users lies just under the surface of the withdrawal. Effectively there are two primary groups of users: First, the vast majority of applicants were indigent prisoners[136] who were seeking what would effectively be an appeal of their domestic court convictions. These included people convicted of serious crimes such as rape, murder, kidnapping, etc. A group not likely to garner broader public sympathy. Second, a political and legal elite has used the Court to assert their political rights in Tanzania – notably in the well-known *Mtikila* case,[137] but also the *Jebra Kambole* application.[138] In *Mtikila*, the applicants brought the matter

[127]See *Kennedy Gihana & Others* case, *supra* note 124, at paras. 14 and 20; F. Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights', (2018) 67 *International and Comparative Law Quarterly* 63, at 66.

[128]See *Kennedy Gihana & Others* case, *supra* note 124, at para. 21.

[129]E. Kwibuka, 'Why Rwanda Withdrew from AU Rights Court Declaration', *The New Times | Rwanda*, 12 October 2017, The Rwandan Justice Minister and Attorney General, Johnston Busingye is quoted saying: 'In making the declaration, Rwanda did believe it was a step toward the promotion and protection of the rights of its people and advancement in the way of human rights protection on the continent. However, the declaration progressively degenerated into a platform which all sorts of organizations and individuals, including convicts of the 1994 Genocide against the Tutsi, could use to promote their agenda.'

[130]Ibid., 'Our reason is that after a genocide fugitive successfully took advantage of the Declaration and gained direct access to the Court and claimed to be a protector of Rwandans' rights under the African Charter, we decided to have the Declaration reviewed so that it reflects the actual intentions of its makers.'

[131]Activity Report of the African Court on Human and Peoples' Rights (AfCHPR) Executive Council Thirty-Fourth Ordinary Session 7–8 February 2019 Addis Ababa, Ethiopia, EX.CL/1126(XXXIV), at 22.

[132]See Gathii and Mwangi, *supra* note 94.

[133]Ibid.

[134]See Daly and Wiebusch, *supra* note 4, at 309–10.

[135]See Viljoen, *supra* note 127, at 66.

[136]See Possi, *supra* note 89; see Gathii and Mwangi, *supra* note 94.

[137]*Consolidated Matter of Tanganyika Law Society and the Legal and Human Rights Centre v. Republic of Tanzania, and Rev. Christopher R. Mtikila v. Republic of Tanzania,* Applications No. 009 /2011 and No. 011/2011, Judgment (Merits) of 14 June 2013.

[138]See *Jebra Kambole* case, *supra* note 82.

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before the Court claiming that Tanzania had violated the African Charter by amending its constitution and prohibiting independent candidates from running in Presidential, Parliamentary, and Local Government elections. The Court ordered Tanzania to take constitutional and legislative measures to remedy the violation. The *Jebra Kambole* application was brought by a lawyer and repeat player at the African Court claiming a violation of the African Charter due to domestic legislation barring the contestation of presidential elections before domestic courts.[139] Although only decided after the withdrawal, Jebra Kambole has been subject to arrest and harassment – a general trend that emerged in relation to lawyers and NGOs engaging human rights issues in Tanzania under the Magufuli regime.[140]

Resistance to ICs may arise from an expression of general resentment to certain legal or political developments. This is evidenced in the narratives of states regarding electoral disputes spilling over from the national level to the regional level by lawsuits from political opponents. A similar pattern arises in the cases related to death penalty and genocide. Sovereignty as reprisal, against jurisdiction and users of the Court, is employed by the four states as an extraordinary critique of the Court for encroaching on the domestic authority of the state and (in)directly as a way of limiting access to the Court. In sum, sovereignty as reprisal in terms of attempts at suppression of opposition politicians as part of semi- or full-blown authoritarian practices have portrayed the Court as a nuisance for governing elites. In Rwanda, the complexities of the aftermath of the genocide became coupled with the oppression of political opposition by an increasingly autocratic regime, which led to opposition leaders' turning towards the Court. The socio-political contexts of Benin and Côte d'Ivoire similarly led to political opposition leaders and business elites seeking redress for electoral and economic disputes at the international level, due to what they perceived as unfair domestic trials. In Tanzania, challenging electoral regimes proved to be a dangerous business as it was tackled as part of a wider crackdown on human rights advocacy. In all these cases, the reaction of the governing elites has been to rally sovereignty with the aim of limiting access to redress at the African Court.

## 4. Beyond sovereignty? Discussion and conclusion

The boundaries between the three types of sovereignty politics examined are not set in stone and particularly sovereignty as shielding and reprisal will in part overlap as reprisals often also seek a form of shielding function by changing or re-organizing the court. Both are variable and arise after the fact (i.e., after court decisions or cases are lodged). What we can observe across the examined empirical cases is that states' turn to sovereignty politics are highly contextual and the three different articulations of sovereignty politics have been employed with regard to quite varied facts. Indeed, the analysis of the four withdrawal notices and associated statements of public officials on sovereignty[141] uncovers 'political discourse that reflects different values, sensibilities and resentments',[142] yet are all framed as sovereignty arguments.

Overall, resistance by way of employing the politics of sovereignty has been a way for all four states to claim that the Court, by entertaining specific cases and issue-areas, was interfering in their domestic affairs or going beyond its delegated authority. Many of the cited cases evoke questions related to the rights of political opponents, significant domestic political issues (i.e., elections, death penalty, genocide, etc.), or basic rule of law issues where the validity of a legislation or an act is brought to question. In these instances, sovereignty arguments became a

[139]Ibid., at para. 3.

[140]See De Silva and Plagis, *supra* note 72, at 43–4.

[141]See Withdrawal Notice of Côte d'Ivoire, *supra* note 2. See also statement of Sidi Tiemoko Toure, the Ivorian government spokesperson and communication minister. See www.aa.com.tr/en/africa/ivory-coast-withdraws-from-african-human-rights-court/1824474#.

[142]See Madsen, Cebulak, and Wiebusch, *supra* note 1, at 207.

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tool of resistance against the Court – as a human rights court – where its decisions were likely to hold governments accountable in important legal and political domains. These decisions are perceived to be costly and ties in with what Sandholtz et al. refer to as regime costs.[143] Particularly, in cases where judgments of an IC are likely to mar the legitimacy of a government of a particular state, we observe harsh reactions such as sovereignty as reprisal.[144]

Additionally, regime costs arising from the perception that the African Court's decisions compromise a state's sovereign domestic control, which in the case of Tanzania is control over its criminal legal system, triggered the use of sovereignty as shielding. The Court was perceived as interfering in its internal affairs by requesting Tanzania to amend its Constitution, the criminal procedural rules to ensure fair trial rights, and admitting applications that made it come across as an appellate Court to Tanzania's Court of Appeal. The politics of sovereignty as shielding was utilized to critique the jurisprudence of the Court due to the huge caseload against Tanzania and potential pecuniary awards and litigation costs. In the same vein, the critique of Rwanda, Benin, and Côte d'Ivoire of the jurisprudence and jurisdiction of the Court reflects their view of the Court's decisions as interference in their domestic political and legal matters most especially involving political opposition members[145] and questions related to fair trial.[146]

Another implication of resistance through politics of sovereignty is illustrated in the critique of users of the African Court via the politics of sovereignty. In their critique of users of the Court, Rwanda, Benin, and Côte d'Ivoire indicated that the Court has become a platform for political opponents, seeking to challenge sitting governments, notably in cases related to elections and political participation.[147] The Rwandan government, for example, withdrew its declaration in order to block the opportunity it provided individuals and NGOs – including political opponents and convicted genocide fugitives – to circumvent the national judicial apparatuses. The ultimate goal was to avoid international scrutiny of internal political and legal affairs.[148] This differs from the case of Tanzania, where critique of users emanates from applications brought predominantly by indigent prisoners but in subject-areas of significant socio-political implications due to the place of capital punishment in Tanzanian society.

One could argue that sovereignty politics are employed as simply justifications for African states to exercise their prerogative under international law to exit an international institution to which they consented to join. That is, however, a too narrow understanding to fully appreciate the situations analyzed. Rwanda, Benin, and Côte d'Ivoire appear to have deployed the politics of sovereignty as reprisal to send a clear signal to the African Court that despite its mandate, not all human rights matters are welcome, and particularly cases that can be seen as judicializing domestic politics. The response has been a combination of arguments related to what these states saw as issues not only outside the purview of the African Court, but also interferences in their internal affairs.

It, thus, follows from the case analyses that the forms and processes of contestation of these states in terms of sovereignty politics, stem – at least in part – from megapolitical issues[149] being brought into the ambit of the regional human rights court. Judicialization of megapolitics is the process where ICs adjudicate over cases that divide domestic societies or inter-state relations, and

[143]See Sandholtz, Bei and Caldwell, *supra* note 10.

[144]Ibid.

[145]See Adjolohoun, *supra* note 4, at 12 and 14; see Gathii and Mwangi, *supra* note 94.

[146]See *Ingabire Victoire Umuhoza* case, *supra* note 124; see *Mtikila* case, *supra* note 137. See *Kennedy Gihana* case, *supra* note 124, at paras. 14 and 20.

[147]See *Ingabire Victoire Umuhoza* case, *supra* note 124; see *General Kayumba Nyamwasa & Others* case, *supra* note 124; see *Guillaume Kigbafori Soro* case, *supra* note 112; see *Sébastien Germain Marie Aikoué Ajavon* case, *supra* note 100.

[148]See Withdrawal Notice of Rwanda, *supra* note 2.

[149]R. Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts', (2008) 11 *Annual Review of Political Science* 93; see Alter and Madsen, *supra* note 10; A. Huneeus, J. Couso and R. Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (2010).

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whose outcome would inconvenience social or political groups considerably.[150] Our four cases show that resistance against the Court has involved highly divisive societal questions like the accusations of genocide denial in Rwanda, the consistent use of the African Court by perpetrators of violent crimes in Tanzania, and economic and political elites using the Court to challenge the sitting governments in Rwanda, Benin, and Côte d'Ivoire.[151] Our analyses further demonstrate that sovereignty politics were already present at the initial stages of creating an IC. Particularly, the very design of the African Court allowed for differentiated commitment from states. The consequence is not only variable geometry in the institutional safeguards against human rights violations, but also that states have the flexibility to make (additional) commitments to the African human rights system and to use the very same tools to express discontent with the Court, and in some cases 'punish' it. This suggests a broader theoretical point on the prevalence of concerns for sovereignty in the institutional design of ICs and how this has allowed for resistance from within their legal construction.

Overall, regardless of institutional framework, the analysis suggests that ICs are easily susceptible to criticism by way of the politics of sovereignty. The four states see themselves as the ultimate authority on domestic and politically sensitive matters, even when framed as international human rights issues. The politicization of sovereignty, therefore, poses a permanent threat to ICs. In that light, what should be done by ICs and those civil society and other actors seeking to maintain or enhance their work? Existing scholarly work on the effects of pushing back against the resistance to ICs in the region[152] and elsewhere,[153] suggests that the maintenance of the authority of ICs is a question of counter-mobilization. While the politics of sovereignty evoke the fundamental building blocks of the international system and, thus, seek to bring conflicts into the ambit of a higher order—questions related to the source of the legitimacy of international law—it is best countered by deconstruction in order to reveal the underpinning of social conflicts. Thus, our analysis clearly suggests that behind the rhetoric of sovereignty are actual legal and political issues, and not just questions of procedural or substantive sovereignty, which need to be excavated from the symbolic smokescreen of sovereignty rhetoric. In other words, the sovereignty argument needs to be countered with concrete legal arguments specific to individual cases. That way, the ball is moved back into the playing field of human rights and away from principled questions related to the construction of international law and its legitimacy.

[150]See Alter and Madsen, *supra* note 12, at 1–2; see also Alter and Madsen, *supra* note 10.
[151]See Madsen, Cebulak, and Wiebusch, *supra* note 1, 204.
[152]See Alter, Gathii and Helfer, *supra* note 8.
[153]See Madsen, Cebulak and Wiebusch, *supra* note 1.

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