

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

*Oliver Windridge**

ABSTRACT: This article reviews and analyses Rwanda's withdrawal of the declaration that allows individuals and NGOs direct access to the African Court of Human and Peoples' Rights, pursuant to article 34(6) of the African Court Protocol, which is a first in the young life of the preventing those accused of genocide minimisation or denial from accessing the African Court, thus seemingly attempting to deny certain Rwandans an avenue to assert their rights. The article further argues that, faced with the first prominent challenge to its authority, the African Court produced a well-reasoned decision that allows withdrawal but only after a 12-month cooling off period. What is of more concern is what appears to be a six-month delay in rendering the publicly available decision, which is unfortunate especially in the context of an envisaged 12-month cooling-off period. The article concludes by noting that any concerns of a flood of similar withdrawals has yet to occur, but adds that the decision puts the African Court in good stead to consider similar applications, as long as the African Court adheres to a stricter timeline for the publication of such decisions.

TITRE ET RÉSUMÉ EN FRANCAIS:

Evaluation du Rwexit: impact et conséquences du retrait par le Rwanda de sa déclaration de reconnaissance de la juridiction de la Cour africaine des droits de l'homme et des peuples faite aux termes de l'article 34(6)

RÉSUMÉ: Cet article examine le retrait de la déclaration du Rwanda autorisant les individus et les Organisations Non Gouvernementales à saisir directement la Cour africaine des droits de l'homme et des peuples, conformément à l'article 34(6) du Protocole à la Cour africaine. Ce retrait est une première dans la vie de la jeune juridiction et qui aurait pour but d'empêcher les personnes accusées de minimisation ou de négation du génocide d'avoir accès à la Cour africaine et apparaît visiblement, par conséquent, comme une tentative de dénier à certains Rwandais une voie de recours pour faire valoir leurs droits. Cet article avance en outre que, confrontée au premier défi majeur à son autorité, la Cour africaine a rendu une décision bien motivée qui autorise le retrait, mais seulement après un délai de 12 mois, considéré comme un préavis. Ce qui est plus préoccupant est le retard de six mois mis pour rendre l'arrêt disponible au public, un fait regrettable eu égard particulièrement à l'option d'un retrait assorti d'un délai de préavis de 12 mois. L'article conclut en notant que la crainte d'une multiplication de retraits similaires ne s'est pas encore réalisée mais ajoute que la décision qu'elle a rendue met la Cour en état d'examiner des demandes similaires pour autant que de telles décisions soient publiées dans des délais plus strictes.

KEY WORDS: African Court on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, Rwanda, article 34(6)-declaration, direct access, fair trial

* LLB (Bournemouth), PGDip (Inns of Court School of Law); international lawyer; oliver.windridge@googlegmail.com

CONTENT:

1	Introduction.....	244
2	Accessing the African Court.....	246
3	Background to Rwexit.....	247
4	Rwexit.....	248
5	Conclusion.....	257

1 INTRODUCTION

The African Court on Human and Peoples' Rights (African Court) is the apex judicial body of the African Union (AU). It has a wide jurisdiction to consider alleged violations of the African Charter on Human and Peoples' Rights (African Charter) and other international human rights instruments ratified by a AU member state subject to a petition.¹ All 55 African Union member states, with the exception of the recently re-admitted Morocco, have ratified the African Charter, providing – at least in theory – near universal protection of human and peoples' rights across Africa. However, when violations of the African Charter and other international human rights instruments occur, accessing the African Court is far from straight forward. Indeed, while the African Court aspires to be a truly continental human and peoples' rights court, so far, its wings have been clipped.

The difficulty in accessing the African Court derives largely from the triple layer of ratifications and signatures needed from an AU member state in order for individuals and NGOs with observer status

1 The African Charter on Human and Peoples' Rights entered into force in October 1986. For jurisdiction of the African Court see rule 26(1) of the Rules of Court 'Pursuant to the Protocol, the Court shall have jurisdiction: a) to deal with all cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned ...'; see also article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol). As to what these 'other international human rights instruments' might include see *Actions pour la protection des droits de l'homme (APDH) v Cote D'Ivoire* Application 1/2014 Judgment on Merits 18 November 2016 concluding that the African Charter on Democracy, Elections, and Governance and the ECOWAS Protocol on Democracy and Good Governance met the standard and found violations of both instruments in addition to violations of the African Charter. This approach will likely be tested further by the pending case of *APDH and Institute for Human Rights and Development in Africa (IHRDA) v Mali* Application 46/2011 which alleges violations of the African Charter on the Rights and Welfare of the Child (ACRWC), the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, but not the African Charter itself – a first for an application before the African Court. As to the jurisdictional scope of the African Court, see also MD Evans & R Murray (eds) *African Charter on Human and Peoples' Rights: the system in practice 1986-2000* (2002); F Ouguerouz *The African Charter of Human and People's Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 77–192. As to jurisdiction see N Jansen Reventlow 'The unique jurisdiction of the African Court on Human and Peoples' Rights: protection of human rights beyond the African Charter' *Doughty Street International Law Bulletin* 18 February 2017 <http://doughty-street-chambers.newsweaver.com/International/j7yocx3x54xla3dst9l3q19?a=1&p=1457008&t=174031> (accessed 18 January 2019).

before the African Commission on Human and Peoples' Rights (African Commission) to directly bring cases to the Court.² Out of the 54 AU member states that have ratified the African Charter, 30 have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol).³ Ratification of the African Court Protocol allows the African Commission, AU state parties that have either lodged complaints or been the subject of complaints before with the African Commission, AU member states whose citizen has been a victim of human rights violations, and African intergovernmental organizations to access the African Court, but not individuals or NGOs.⁴ In order for individuals and suitably qualified NGOs to access the African Court, an additional declaration must be made by a AU member state pursuant to article 34(6) of the African Court Protocol explicitly allowing such access. At the end of 2018, only eight AU Member States have made the declaration, severely limiting access to the African Union's apex human rights organ. But what happens when one of this select group of eight allowing direct access to the African Court decides it no longer wishes to do allow its citizens direct access? Can an African Union member state simply withdraw? And under what circumstances can this occur, and why? The aim of this article is to examine this exact situation. In 2016 Rwanda declared the withdrawal of access for Rwandan individuals and NGOs on the eve of the African Court hearing its first Rwandan case. This event, a first in the African Court's young life, deserves to be examined not only with regard to the implications this will have on Rwanda and its citizens and civil society, but more widely as to what, if any, impact this could have on the African Court's stated aim of becoming a truly continent-wide human rights court.

To examine this watershed case, this article first reviews the perfunctory stages of ratification and signature required to allow individuals and NGOs direct access to the African Court. It then looks at the case that spurred Rwanda to withdraw, before analysing the African Court's approach to Rwanda's withdrawal, which is termed 'Rwexit'. The article then concludes with additional comments and further analysis.

2 It should be noted that for NGOs to directly access the African Court, even when the AU member State in question has signed or ratified all three layers, the NGO must have observer status before the African Commission on Human and Peoples' Rights. This is an important condition which should not be overlooked. For simplification, this article refers to 'NGOs' but this should be read to mean 'NGOs with observer status before the African Commission' unless otherwise stated. For further discussion on observer status before the African Commission and its impact on applications before the African Court see O Windridge 'Necessary checkpoints or immovable roadblocks? Accessing the African Court on Human and Peoples' Rights' (2018) 35 *Wisconsin International Law Journal* 5.

3 <http://www.achpr.org/instruments/court-establishment/>.

4 See article 5 of the African Court Protocol.

2 ACCESSING THE AFRICAN COURT

The African Court's jurisdiction over applications against any particular AU member state depends on that member state's acceptance of a triple layer of instruments: the African Charter, the African Court Protocol and, with regard to direct access and, with regard to direct access, the declaration under article 34(6).

As mentioned above, every AU member state has ratified the African Charter, except Morocco. The African Charter contains many individual rights found in similar international human rights instruments, plus uniquely peoples' rights. This means that almost every case concerning an AU member state violating the African Charter straddles the first jurisdictional hurdle.

While the African Charter contains provision for the existence of the African Court's cousin, the African Commission, it contains no mention of the African Court itself. To begin the jurisdictional journey to the African Court, the second hurdle must be overcome: the African Court Protocol. This additional protocol is the foundation of the African Court and contains the legislative framework for the creation of the African Court. To date, 30 AU member states have ratified the African Court Protocol.⁵ According to articles 5(1) of the African Court Protocol and Rule 33 of the African Court Rules, upon ratification of the African Court Protocol by an AU member state, the African Court may receive complaints or applications submitted by the African Commission, from one of the state parties that has ratified the African Court Protocol which has lodged a complaint at the African Commission or been subject to a complaint before the African Commission, a state party whose citizen is a victim of a human rights violation, or from an African intergovernmental organization. This list is considerably broader than other regional systems since it includes not only the African Commission but also state parties, African intergovernmental organizations (which would include subregional economic communities).⁶ This hurdle, therefore, effectively gives the 30 AU member states who have accepted as binding the African Court Protocol, intergovernmental organizations and the African Commission access to the African Court but crucially, ratifying the African Court Protocol does not provide direct access for individuals and NGOs.

For individuals and NGOs to enjoy direct access to the African Court, a third hurdle must be surmounted. For individuals and NGOs with observer status before the African Commission to directly access the African Court, thereby bypassing the African Commission but still

5 See ratification table https://www.au.int/web/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf.

6 As to the definition of an 'African Intergovernmental Organization' see Advisory Opinion, Request 2/2013, 5 December 2014 paras 58-76 <http://en.african-court.org/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Advisory%20Opinion%20no%20%20002-2013.pdf> (accessed 18 January 2019).

subject to exhaustion of local remedies, an AU member state must sign an additional declaration pursuant to articles 5(1) and 34(6) of the African Court Protocol. Making the declaration is optional, and ratification of the African Court Protocol brings no requirement or timeline for the making such a declaration. As of December 2018, only eight AU Member States have made the declaration: Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Tanzania and Tunisia.⁷ This in effect means citizens of only eight out of 55 AU Member States can directly petition the African Court alleging violations of their rights. Importantly for the subject of this article, Rwanda enjoyed membership of this exclusive club, but withdrew from it in 2016. Why Rwanda withdrew its declaration and the procedure for withdrawal will be addressed in the remainder of this article.

3 BACKGROUND TO RWEXIT

Rwanda's withdrawal of its declaration occurred during the pre-hearing procedures of the *Ingabire v Rwanda* case.⁸ In essence, this case concerned the prosecution of Rwandan opposition politician Ingabire Victoire Umuhoza (Ingabire), the leader of the opposition political party *FDU Inkingi* who was alleged to have made speeches and claims either denying or downplaying the 1994 Rwandan genocide.⁹ It is hard to think of a more sensitive issue than the 1994 genocide within Rwanda, and it is within this context that Rwanda's withdrawal of its article 34(6) declaration occurred.¹⁰

Between 2003 and 2010 Ingabire made a number of comments, including at the Kigali Genocide Memorial, concerning the 1994 Rwandan genocide and Rwanda's leaders.¹¹ Ingabire was prosecuted for these comments under various Rwandan laws designed to prevent the minimisation of the Rwandan genocide.¹² In particular, in October 2012 Ingabire was convicted by the High Court of Kigali of 'conspiracy

7 Tunisia is the latest signatory, signing the Additional Declaration in April 2017. See <http://en.african-court.org/index.php/news/press-releases/item/145-republic-of-tunisia-signs-african-court-declaration-to-allow-ngos-and-individuals-to-access-the-human-and-peoples-rights-court-directly>. For a list of signatures see https://www.au.int/web/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf (accessed 18 January 2019), although it is noted that at the time of writing the current list had not been amended to reflect Tunisia's making the declaration.

8 *Ingabire Victoire Umuhoza v Republic of Rwanda* Application 3/2014 Ruling on Jurisdiction 3 June 2016 (Ruling on Jurisdiction); *Ingabire Victoire Umuhoza v Republic of Rwanda* Application 3/2014 Corrigendum to Ruling on Withdrawal 5 September 2018 (Corrigendum to Withdrawal Ruling); *Ingabire Victoire Umuhoza v Republic of Rwanda* Application 3/2014 Judgment on Merits 24 November 2017 (Judgment on Merits).

9 Ruling on Jurisdiction paras 9-11; Judgment on Merits paras 6-8.

10 In the Judgement on Merits, the African Court considered the 1994 Rwandan genocide as the 'most atrocious genocide in the recent history of mankind'.

11 Judgment on Merits para 134.

12 Judgment on Merits para 8.

to undermine established authority and violate constitutional principles by resorting to terrorism and armed force' and 'minimization of the genocide' and sentenced to eight years' imprisonment with hard labour.¹³ Ingabire appealed these convictions. In December 2013, on appeal, the Rwandan Supreme Court reclassified the convictions, finding her guilty of 'conspiracy to undermine the Government and the Constitution, through acts of terrorism, war or other violent means, of downplaying genocide, and of spreading rumours with the intent to incite the population against the existing authorities'.¹⁴ Ingabire was then re-sentenced to 15 years imprisonment.

Having taken her case to the Rwandan Supreme Court, and therefore as far as possible domestically, Ingabire on 3 October 2014 petitioned the African Court alleging that her arrest, detention, trial and convictions violated the African Charter and the International Covenant on Civil and Political Rights (ICCPR).¹⁵ Specifically, Ingabire argued that her right to fair trial (article 7 of the African Charter) and the right to freedom of expression (article 9(2) of the African Charter and article 19 of the ICCPR) had been violated.¹⁶

4 RWEXIT

In order to properly assess Rwanda's withdrawal of its declaration, which is termed here as 'Rwexit', and the *Ingabire* case that triggered it, some dates are helpful. Rwanda ratified the African Charter on 21 October 1986 and ratified the African Court Protocol on 25 May 2004. It made the article 34(6)-declaration on 22 January 2013.¹⁷ Putting these dates into context with the *Ingabire* case, Rwanda made the declaration approximately four months after Ingabire was convicted by the Kigali High Court.¹⁸ The Rwandan Supreme Court case was dealt with almost a year after the declaration had been put in place. Ingabire then petitioned the African Court on 3 October 2014.¹⁹

Ingabire petitioned the African Court in October 2014 with Rwanda responding on 23 January 2015, to which Ingabire filed her reply on 14 April 2015.²⁰ This sequence of filings is par for the course in African Court litigation, but is notable since at this stage of litigation Rwanda appeared to be fully participating. It cannot be said that Rwanda did not know the content of the application or the identity of the applicant when it chose to respond to the initial petition. The engagement with litigation seems to indicate that Rwanda considered the African Court

13 Judgment on Merits paras 14-25.

14 Judgment on Merits paras 29-33.

15 Ruling on Jurisdiction paras 1 & 12; Judgment on Merits para 9.

16 Ruling on Jurisdiction paras 1 & 12; Judgment on Merits para 9.

17 Judgment on Merits para 2.

18 Additional Declaration signed on 22 January 2013, Ingabire was convicted by the Kigali High Court in October 2012.

19 Ruling on Jurisdiction para 1 & 12.

20 Ruling on Jurisdiction para 14.

a legitimate organ, even if it argued that the case itself was inadmissible and unfounded.

With filing complete, the African Court duly scheduled a public hearing for 4 March 2016.²¹ It appears that in the run up to this hearing Ingabire's legal team wrote to the African Court, seeking an adjournment of the public hearing, while seeking to be heard on procedural matters.²² With four days to go before the public hearing was to take place, on 29 February 2016 Rwanda notified the African Union Commission of its intention to withdraw its declaration.²³ The government's *note verbale* reads as follows:

CONSIDERING the 1994 genocide against the Tutsi was the most heinous crime since the Holocaust and Rwanda, Africa and the world lost a million people in a hundred days;

CONSIDERING that a Genocide convict who is a fugitive from justice has, pursuant to the above-mentioned Declaration, secured a right to be heard by the Honourable Court, ultimately [sic] gaining a platform for re-invention and sanitization, in the guise of defending the human rights of the Rwandan citizens;

CONSIDERING that the Republic of Rwanda, in making the 22nd January 2013 Declaration never envisaged that the kind of person described above would ever seek and be granted a platform on the basis of the said Declaration;

CONSIDERING that Rwanda has set up strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues;

NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court on Human and Peoples' Rights to receive cases under article 5(3) of the Protocol and shall make it afresh after a comprehensive review.²⁴

Rwanda's ambassador to the African Union explained further: 'We quickly realised that [the African Court] is being abused by the judges on absence of a clear position of the court vis-à-vis genocide convicts and fugitives, and that is why we withdrew'.²⁵ Significantly, Rwanda sent its first letter of withdrawal to the AU Commission. Only in a second letter dated 1 March 2016, did Rwanda notify the African Court of its deposit of an instrument of withdrawal with the African Union Commission.²⁶ This sequence appears deliberate. As will be examined in greater detail below, Rwanda sought to argue that the issue of withdrawal of its declaration was a matter for the AU Commission and had nothing to do with the African Court. Rwanda seems to have attempted to strengthen its position by engaging the African Union Commission first, with a subsequent courtesy letter to the African Court

21 Ruling on Jurisdiction para 15.

22 Ruling on Jurisdiction para 17.

23 Judgment on Merits paras 2 & 42.

24 See Centre for Human Rights, University of Pretoria 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' 22 March 2016 https://www.up.ac.za/en/faculty-of-law/news/post_2254556-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court (accessed 18 January 2018).

25 See 'Rwanda rejects calls to endorse African rights court' *The Citizen* 13 July 2016 <http://www.thecitizen.co.tz/News/Rwanda-rejects-calls-to-endorse-African-rights-court/1840340-3292644-1hosozyz/index.html> (accessed 18 January 2018).

26 Ruling on Jurisdiction para 18; Judgment on Merits para 41.

informing it of the action. In its letter to the African Court, this approach is further reinforced by Rwanda arguing that the African Court should suspend hearings involving Rwanda until a review of the withdrawal of the declaration was completed, and that the African Court would be notified in due course, again seemingly attempting to side-line African Court participation.²⁷

Given the contents of the *note verbale* and subsequent diplomatic explanations, the reason for Rwanda's withdrawal seems clear; the declaration's extended jurisdiction was being used by Rwandans alleged to have been involved in genocide minimisation or denial, something the Rwandan government could not accept. In effect, the Rwandan government was taking the stance that access to the African Court was open to Rwandans, just not *all* Rwandans. This position is clearly problematic. Despite the undoubted tragedy that is the Rwandan genocide, the African Charter contains no caveats on who enjoys rights. Simply put, even those accused of the most serious crimes still have protection under the African Charter and other international human rights instruments including the right to a fair trial and the freedom of expression. While the reason for withdrawal does not affect the legitimacy of withdrawal *per se*, the foundations for the withdrawal are nevertheless an important clue to potential future withdrawals by other AU member states.

Despite Rwanda's attempts to halt proceedings, the African Court proceeded with its public hearing on 4 March 2016.²⁸ This can be seen as the African Court's first bold move. It would have been feasible for the African Court to, at the very least, push the date of the public hearing back in order to fully consider Rwanda's withdrawal. However, despite having only a few days' notice, the African Court went ahead with the hearing, indicating perhaps that the African Court was determined to control the timeline of the withdrawal rather than allowing Rwanda to do so. Ingabire's legal team appeared at the public hearing, but Rwanda was unrepresented.²⁹ Ingabire took the opportunity to raise a number of issues concerning the lack of client access and other procedural issues, but the matter of the withdrawal itself was not discussed in any detail during the public hearing.

Following this public hearing, on 18 March 2016, the African Court rendered an interim order giving all parties an opportunity to address the issues of Rwanda's withdrawal of its declaration.³⁰ The order requested that parties file written submissions on the effect of Rwanda's withdrawal of its declaration within 15 days of receipt of the order, and that its ruling on the effect of the Rwanda's withdrawal

27 Judgment on the Merits para 41.

28 Ruling on Jurisdiction paras 20-22

29 Ruling on Jurisdiction para 23. Judgment on Merits para 43. This public hearing largely comprised of procedural matters, with Ingabire's legal team requesting, *inter alia*, the African Court order Rwanda to comply with disclosure of documents and allow access to Ingabire in prison.

30 *Ingabire Victoire Umuhoya v Republic of Rwanda* App 3/2014 Interim Order 18 March 2016 (Interim Order).

would be handed down at a later date.³¹ This again can be seen as a move by the African Court to control the narrative. It also gave all parties an opportunity to set out its thoughts with more clarity than simply the letter of withdrawal.

In its response to the interim order, Rwanda did indeed flesh out somewhat the arguments first raised in its letter of withdrawal. It argued that having deposited its instrument of withdrawal with the AU Commission, by virtue of the principle of 'parallelism of forms', only the AU Commission was empowered to decide the withdrawal and its effects.³² Rwanda contended therefore that the African Court and the parties in the case 'have nothing to do' with the withdrawal and its effect once the instrument of withdrawal was deposited with the AU Commission and that the debate regarding withdrawal was a matter for the AU.³³

Ingabire argued that while preventing member states from withdrawing from a voluntary declaration may be 'too radical a position', this should not allow AU Member States to withdraw 'at any moment and in any manner'.³⁴ Ingabire further argued that since there were no provisions within the African Court Protocol concerning withdrawal of the declaration, the African Court should be guided by article 56 of the Vienna Convention on the Law of Treaties (Vienna Convention).³⁵ Ingabire contended that the African Court should be further guided by the principle of *pacta sunt servanda*; that parties to a treaty perform their duties in good faith and that this meant any withdrawal must take effect only after a 'reasonable amount of time' served as a cooling off period.³⁶ In support, Ingabire pointed to the International Court of Justice decision in *Nicaragua v United States of America, Jurisdiction and Admissibility Judgement*, which argued for a reasonable time for withdrawal from treaties that contain no termination provision.³⁷ Ingabire argued that requiring advance notice of withdrawal is to discourage 'opportunistic defections' that would cause the treaty base system to 'unravel'.³⁸ Ingabire also pointed to the European Court of Human Rights and Inter-American Court of Human Rights that provide for notice periods of six and twelve months respectively, arguing that the African Court should apply a similar standard to withdrawals.³⁹

As to the effect on her case, Ingabire argued that Rwanda's withdrawal of its declaration should have no effect on cases pending before the African Court based on the principle of non-retroactivity, relying on article 70(1)(b) of the Vienna Convention, which provides

31 Interim Order para 7; Judgment on Merits para 44.

32 Ruling on Jurisdiction para 36.

33 As above.

34 Ruling on Jurisdiction para 38.

35 As above.

36 Ruling on Jurisdiction paras 38-39.

37 Ruling on Jurisdiction para 40.

38 Ruling on Jurisdiction para 41.

39 As above.

that the termination of a treaty, unless otherwise agreed, does not affect pre-existing obligations or legal situations.⁴⁰ Ingabire argued that complaints submitted to the African Court after withdrawal would still be admissible to the extent that they address alleged violations in Rwanda that occurred during the period when Rwanda was still bound by the declaration.⁴¹

The Court also considered an *amicus curiae* brief from the Coalition for the African Court (Coalition).⁴² The Coalition focused on two issues. First, whether Rwanda was entitled to withdraw its declaration and second, if Rwanda could withdraw, the legal effects of withdrawal on pending proceedings.⁴³ Similar to Ingabire, the Coalition argued that since there was a lack of express provision in the African Court Protocol, Rules of the Court or African Charter on the withdrawal of a declaration, the African Court should rely on article 56 of the Vienna Convention.⁴⁴ The Coalition further argued that in making the declaration, Rwanda was under international obligations, and that any reservations included pursuant to article 19(c) of the Vienna Convention must be compatible with the object and purpose of the treaty.⁴⁵ The Coalition then went further, arguing that withdrawal of declaration was inconsistent with the 'spirit' of the AU's human rights instruments.⁴⁶

As to what effect the withdrawal has on pending proceedings, the Coalition argued that Rwanda was required to serve notice of its intention to withdraw at least 12 months in advance to comply with article 56(2) of the Vienna Convention, and that Rwanda's request for an immediate suspension of pending cases breached the provisions of international law on treaties, the African Charter and African Court Protocol.⁴⁷ It noted that the role of the African Court is to preserve, complement and reinforce progress made in the protection of human rights across Africa by the African Commission, which includes ensuring compliance with the criteria on the equality of parties to a trial whether or not a party is a sovereign state.⁴⁸ The Coalition also contended that the African Court should aim at ensuring observance of the right of any victim to seek an effective legal remedy in line with article 7 of the African Charter and the Principles on the Right to a Fair Trial and Legal Assistance in African, as adopted by the African Commission in 2003.⁴⁹

In its decision, the African Court first dealt, albeit briefly, with Rwanda's argument that the African Union Commission rather than

40 Ruling on Jurisdiction para 42.

41 As above.

42 Ruling on Jurisdiction paras 43-47.

43 Ruling on Jurisdiction para 43.

44 As above.

45 Ruling on Jurisdiction para 44.

46 Ruling on Jurisdiction para 45.

47 Ruling on Jurisdiction paras 46-47.

48 Ruling on Jurisdiction para 47.

49 RulAs above.

the African Court had jurisdiction to decide on the issue of withdrawal.⁵⁰ Relying on article 3(2) of the African Court Protocol, which states that in the event of debate over whether the African Court has jurisdiction the African Court shall decide, the African Court found that it was going to do just that and dismissed Rwanda's submissions.⁵¹ Rwanda's arguments on withdrawal appear, at least on the summary submissions available, to have been based solely on the theory that having deposited the instrument of withdrawal with the AU Commission, the issue was out of the African Court's hands. This position can be best described as hopeful. Since the African Court had the express power to consider challenges to its jurisdiction under article 3(2) of the African Court Protocol, Rwanda's attempts to steer the matter away from the African Court to the AU Commission were unlikely to ever to succeed.⁵² Whether Rwanda was keeping its powder dry for further submissions before the AU Commission is unclear, but given the unlikelihood of the African Court leaving a matter as important and so relevant as this to the AU Commission, it may have benefitted Rwanda to have added further submissions on the nature of its withdrawal before the African Court.

With jurisdiction firmly established, and Rwanda's arguments seemingly spent, the African Court was left to consider whether the withdrawal was in fact allowable and if so when it would take effect and what the effect would be. To do this the African Court divided its analysis into three parts: (i) is the withdrawal valid; (ii) if it is valid, what are the conditions for withdrawal?; and (iii) what are the effects of withdrawal?⁵³

With regards to whether Rwanda's withdrawal was valid, the African Court acknowledged that the African Court Protocol does not contain any provisions for the withdrawal from either the African Court Protocol or the declaration contained within it.⁵⁴ The African Court therefore first considered whether the Vienna Convention applies as argued by Ingabire and the Coalition. It noted that the declaration found under article 34(6) of the African Court Protocol necessarily emanates from the African Court Protocol which in turn is subject to the law of treaties, but the making of the declaration is a unilateral act that is not subject to the law of treaties, and therefore the Vienna Convention does not apply to the Additional Declaration.⁵⁵ In a corrigendum to the ruling issued in September 2016 the African Court amended its reasoning to read that with regard to the applicability of the Vienna Convention on the declaration, while the declaration emanates from the African Court Protocol, which is subject to the law of treaties, the declaration itself is a unilateral act that is not directly

50 Ruling on Jurisdiction paras 49-52.

51 Ruling on Jurisdiction para 52.

52 See Article 3(2) African Court Protocol which states 'In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.'

53 Ruling on Jurisdiction para 48.

54 Ruling on Jurisdiction para 53.

55 Ruling on Jurisdiction para 54.

subject to the law of treaties.⁵⁶ This sounds similar if not exactly the same as the African Court's first explanation. However, in the Corrigendum, the African Court added some nuance by finding that while the Vienna Convention does not apply directly to the declaration, it can be applied by analogy, and the African Court can 'draw inspiration from it when it deems appropriate'.⁵⁷

With this in mind, the African Court held that its consideration on the validity of Rwanda's withdrawal of its declaration was to be guided by 'relevant rules governing declarations of recognition of jurisdiction as well as the international law principle of state sovereignty'.⁵⁸ In particular, this meant that the African Court looked to the rules governing recognition of jurisdiction of international courts, with the African Court noting that 'related declarations' are generally optional in nature, such as those relied on for the recognition of jurisdiction of the International Court of Justice, European Court of Human Rights, and Inter-American Court of Human Rights.⁵⁹

The African Court found that in comparison, the declaration is of a similar nature to these other declarations, since although it emanates from the African Court Protocol, the article 34(6) declaration is optional in nature and is therefore separable from the African Court Protocol and is subject to withdrawal independent of the African Court Protocol.⁶⁰ The African Court reinforced this view with the principle of state sovereignty.⁶¹ It held that as far as unilateral acts were concerned, state sovereignty commands that states are free to commit themselves and they retain the discretion to withdraw their commitments.⁶² With all this in mind, the African Court found that Rwanda was entitled to withdraw its declaration and that such withdrawal is valid under the African Court Protocol.⁶³ The African Court's finding that the African Court Protocol and declaration remain separate is an obvious but welcome clarification. It would have been detrimental to the African Court's future had there been any ambiguity as to whether withdrawal of the declaration meant withdrawal from the African Court Protocol too. However, the African Court's decision to separate the African Court Protocol and the declaration follows a convoluted and somewhat unnecessary line of reasoning. To simply say that the declaration is optional, but is clearly contained within the African Court's Protocol and Rules and therefore is subject to the Vienna Convention, seems like the most common-sense approach to the issue.

56 Corrigendum to Withdrawal Rulings para ii.

57 As above.

58 Ruling on Jurisdiction para 55.

59 Ruling on Jurisdiction para 56 referring to article 36(2) of the Statute of the International Court of Justice, article 46 of the European Convention on Human Rights (before the entry into force of Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms and article 62(1) of the American Convention on Human Rights.

60 Ruling on Jurisdiction para 57.

61 Ruling on Jurisdiction para 58.

62 As above.

63 Ruling on Jurisdiction para 59.

The complicated route taken by the African Court seems to have played a large part in the concerning delay of the decision being rendered publicly. The addition of a corrigendum appears to have been an attempt to clarify a situation which needed little clarification. To recall, Rwanda filed its withdrawal at the end of February 2016. The official decision on jurisdiction was dated 3 June 2016, yet this decision was not made public until much later in September 2016.⁶⁴ The reason for rendering the decision but not making it public is unexplained. Alongside the June 2016 decision, the public decision that did emerge also included the corrigendum dated 3 September 2016. It appears that having rendered the decision in June 2016, the African Court decided to amend its reasoning slightly, thus delaying the public availability until September 2016. This approach is concerning. The purpose of a corrigendum is usually to correct a judgement or decision already publicly issued. In any event, in these circumstances, the decision should be considered handed down in September 2016. This is of particular importance since a delay of seven months is highly significant when considering that the African Court knew from June 2016 the decision would be to impose a 12 month notice period. Simply put then, the African Court rendered its decision telling the public, and most importantly Rwandans, that it had 12 months left before the declaration was effectively withdrawn with only six months remaining of the notice period. The African Court therefore halved the notice period available to Rwandans.

Nevertheless, with withdrawal found valid, the African Court turned to the conditions of withdrawal. The African Court held that even if withdrawal is unilateral, the discretionary character of withdrawal 'is not absolute', particularly where the act, in this case signing the declaration, creates rights to the benefit of third parties, the enjoyment of which require legal certainty.⁶⁵ Put another way, the African Court recognised that the signing and withdrawal of the declaration effects not only Rwanda the African Union member state, but Rwandan individuals and NGOs who, through the declaration, obtain the right to directly petition the African Court. The African Court found that in such circumstances, even when states can withdraw, they should be required to give prior notice to prevent an abrupt suspension of rights which would inevitably impact the rights of individuals and NGOs, the very holders of the rights, and that any immediate withdrawal without notice has the potential to weaken the human rights protection regime provided for in the African Charter.⁶⁶

As to how long such notice period should be, the African Court looked to the Inter-American Court of Human Rights, and the case of *Bronstein v Peru* in particular, where the Inter-American Court of Human Rights found that on the basis of the principle of legal certainty, a formal notice of 12 months would need to be given in the case of withdrawal for the sake of juridical security and continuity. With this

64 See Ruling on Jurisdiction.

65 Ruling on Jurisdiction para 60.

66 Ruling on Jurisdiction paras 61-62.

practice in mind, the African Court found notice is compulsory in cases of withdrawal of the declaration.⁶⁷

As to the period of notice, the African Court was again inspired by the practice of the Inter-American Court of Human Rights and article 78 of the American Convention on Human Rights as applied in the case of *Bronstein v Peru* which provides for 12 months, the notice period found in article 56(2) of the Vienna Convention.⁶⁸ The African Court therefore found the period of one year shall apply to the withdrawal of Rwanda's declaration.⁶⁹ The length of the notice period was not however unanimously supported. Judge Niyungeko and Judge Ramadhani issued a dissenting opinion arguing for a six month notice period.⁷⁰ The length of the notice period cannot be unduly criticised but it appears the African Court relied on the practice of the Inter-American system solely in arriving at its conclusion, without looking at other regional courts or international human rights organs. However, given the concerning issues over the public rendering of the decision, the 12 month notice period allowed at least some notice to Rwandans that a six month notice period would not have.

Finally, as to the legal effects of the withdrawal, the African Court considered two distinct issues.⁷¹ First, the precise date of the notice period. Based on the African Court's decision to impose a 12 month notice period on any withdrawal of a declaration, the African Court found that Rwexit could only take effect after the expiry of the 12 month notice period, from 1 March 2017.⁷² Second, the African Court considered the possible effect of the withdrawal on pending cases.⁷³ It found that Rwanda's withdrawal of its declaration cannot divest the African Court of jurisdiction to hear the *Ingabire* case, a position supported by the principle of non-retroactivity which stipulates that new rules apply only to future situations. The African Court therefore held that Rwanda's notification of intention to withdraw its declaration had no legal effects on cases pending before it.⁷⁴ However, while the decision is clear that cases currently pending before the African Court are not affected, it leaves at least two other scenarios that the African Court did not explicitly deal with. The one scenario concerns future cases filed before 1 March 2017, that is to say cases filed between the rendering of the decision and 1 March 2017. These cases are presumably safe since the African Court clearly stated that withdrawal takes effect on 1 March 2017. In the other scenario, and this may be more complicated, cases have been filed after 1 March 2017 but relating to events occurring before 1 March 2017. This scenario is especially applicable to cases where delays have occurred while bringing cases

67 Ruling on Jurisdiction para 64.

68 Ruling on Jurisdiction para 65.

69 Ruling on Jurisdiction para 66.

70 Dissenting Opinion of Judge Niyungeko and Judge Ramadhani 3 February 2017 para 20.

71 Ruling on Jurisdiction paras 67-68.

72 Ruling on Jurisdiction para 67.

73 Ruling on Jurisdiction para 68.

74 As above.

domestically in order to fulfil the exhaustion of local remedies requirement. Certainly, the requirement that applicants first exhaust local remedies has the potential to stymie cases being filed before the African Court by 1 March 2017 and this may be an ongoing issue that the African Court will have to resolve.

Following the rendering of this watershed decision, the African Court stayed true to its promise to examine the case on the merits, handing down a judgement on 24 November 2017. The judgment itself is notable for its examination of the right to fair trial pursuant to article 7 of the African Charter and right to freedom of expression pursuant to article 9(2) of the African Charter. In particular, the African Court developed an important precedent on what can be considered legitimate restrictions on freedom of expression, developing the notions of restrictions proscribed by law, serving a legitimate purpose and whether they are necessary and proportional.⁷⁵

5 CONCLUSION

As the African Court acknowledged, the African Court Protocol, African Court Rules and African Charter have no provisions on the withdrawal of a member state from the African Protocol or declaration made under article 34(6) of the Court Protocol. Rwanda's withdrawal of its declaration was a first for the African Court. Its impact would be felt not only in Rwanda but across Africa where curious nations watched to see how the African Court would deal with it. Reject the possibility of withdrawal and the African Court would appear inflexible and may put off potential ratification of the African Court Protocol or declaration. Allow Rwanda to withdraw immediately, rendering current cases inadmissible and risk appearing to pander to member states. The African Court instead chose a pragmatic and sensible middle ground that is likely to stand it in good stead moving forward. The African Court's decisions that withdrawal is valid and should take place after a notice period are of safe ground. It would defy international practice and common sense not to allow a state to withdraw voluntarily from a declaration it made voluntarily. Any decision that a withdrawal was prohibited would have scared off potential declarations. In the end the African Court appears to have taken the pragmatic line to follow the Vienna Convention, Inter-American Court and European Court by granting the withdrawal subject a notice period. While the length of the notice period did not attract unanimous support amongst judges, it does fall in line with international practice. While precedent exists for a six months notice period, the decision to plump for 12 months seems most pragmatic. Certainly, a period other than six months or 12 months

75 See Judgment on Merits paras 137-138 (proscribed by law), paras 139-141 & 147 (legitimate purpose), paras 162-163 (necessary and proportional). For further discussion on the freedom of expression element of the Judgment on Merits see O Windridge 'A fine balance: assessing restrictions on freedom of expression at the African Court on Human and Peoples' Rights' (2017) 1 *Gambia Law Review* http://gambialawreview.com/index.php/issue/2018/right-to-free-speech#_ (accessed 18 January 2018).

would have seemed less rational, and given the issues over rendering the decision and the ongoing issues surrounding the African Court's difficulties in raising its profile in AU member states, a relatively short notice period of six months may have been too short.

The African Court's decision places it alongside other regional courts and avoids any accusations of bending to the will of AU member states over and above what is appropriate. The break is not however entirely clean and some questions remain. How will the African Court approach cases filed during the twelve-month notice period? It seems that Rwanda has no interest in engaging with these cases, so how will the African Court seek to implement decisions if violations are found? The African Court's decision is also somewhat unclear on the possible jurisdictional situation of cases involving alleged violations of rights during the period in which Rwanda was an declaration signee. While these questions linger, particularly given the surfeit of Rwandan cases still pending before the African Court,⁷⁶ any concern over a coattail effect, and the sudden rush of withdrawals, has thus far failed to materialise. At the time of writing, none of the other AU member states that have made the declaration have sought to withdraw.

How influential the African Court's Rwexit decision and subsequent judgment on the merits has been within Rwanda and on Rwandan authorities is difficult to gauge. It should be noted however that in September 2018 reports emerged that Rwandan authorities had released Ingabire following a presidential pardon.⁷⁷ What, if any, influence the African Court's approach to Ingabire's case had on this decision is debatable. While it would likely be too far a stretch to point to the African Court's decisions as the sole reason for Ingabire's release, it at least potentially demonstrates that African Court decisions can be part, if not the complete reason for AU member states' complying with human rights obligations.

Clearly, much is still to be done for the African Court to achieve its mandate as a truly continent-wide human and peoples' rights court, but with Rwexit the African Court has demonstrated when it comes to complex and sensitive matters it is fit for purpose. Let us hope this continues.

76 As of October 2018, the African Court website listed eleven cases still pending see <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#pending-cases> (accessed 18 October 2018).

77 See 'Rwandan opposition leader among 2,100 released from prison' *Aljazeera News* 15 September 2018 <https://www.aljazeera.com/news/2018/09/rwandan-opposition-leader-2100-released-prison-180915094047528.html>; 'Victoire Ingabire: Rwanda frees 2,000 people including opposition figure' *BBC News* 15 September 2018 <https://www.bbc.co.uk/news/world-africa-45532922> (accessed 12 January 2019).