Touching where it hurts? revisiting the African Court judgments in relation to Tanzania's restriction of direct access for individuals and NGOs

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ABSTRACT: The article examines Tanzania's withdrawal of its declaration allowing individuals and NGOs direct access to the African Court on Human and Peoples' Rights, arguing that dissatisfaction with the Court's judgments was the primary cause. It explains that Tanzania's claimed reservations – especially on exhaustion of local remedies and adherence to its Constitution – were either legally invalid under international law or misconceived, leading to conflict with the Court's jurisprudence. The analysis highlights major areas of tension, particularly decisions on mandatory capital punishment and citizenship cases, where African Court rulings diverged from Tanzania's domestic legal framework. It argues that these conflicts were exacerbated by evidentiary failures by Tanzanian authorities, differences over burden of proof in citizenship matters, and the absence of an appellate mechanism within the African Court system. Ultimately, the article recommends that Tanzania reconsider its withdrawal, reform conflicting domestic laws, and that the African Union strengthen the Court's structure and encourage broader access to ensure effective human rights protection in Africa.

TITRE ET RÉSUMÉ EN FRANÇAIS

Toucher là où cela fait mal? Relecture des arrêts de la Cour africaine relatifs à la restriction par la Tanzanie de l'accès direct des individus et des ONG

RÉSUMÉ: La présente contribution analyse le retrait par la Tanzanie de sa déclaration reconnaissant aux individus et aux organisations non gouvernementales un accès direct à la Cour africaine des droits de l'homme et des peuples, en soutenant que l'insatisfaction suscitée par la jurisprudence de la Cour en a constitué la cause principale. Il argue que les réserves invoquées par la Tanzanie, notamment en matière d'épuisement des voies de recours internes et de primauté de la Constitution nationale, étaient soit juridiquement dépourvues de validité au regard du droit international, soit fondées sur des interprétations erronées, générant ainsi des frictions avec la jurisprudence de la Cour africaine. L'analyse met en évidence plusieurs foyers majeurs de tension, en particulier les décisions relatives au caractère obligatoire de la peine de mort et aux affaires de nationalité, dans lesquelles les arrêts de la Cour africaine se sont écartés du cadre juridique interne tanzanien. Elle soutient que ces conflits ont été aggravés par des défaillances probatoires imputables aux autorités tanzaniennes, par des divergences quant à la charge de la preuve en matière de nationalité, ainsi que par l'absence d'un mécanisme d'appel au sein du système juridictionnel de la Cour africaine. En conclusion, la contribution recommande que la Tanzanie reconsidère son retrait, procède à la réforme des législations internes en conflit avec les obligations découlant de la Charte africaine, et que l'Union africaine

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renforce l'architecture institutionnelle de la Cour tout en encourageant un accès plus large à celle-ci, afin de garantir une protection effective et durable des droits de l'homme en Afrique.

TÍTULO E RESUMO EM PORTUGUÊS

Tocar no ponto mais doloroso? Uma revisão das decisões do Tribunal Africano dos Direitos Humanos e dos Povos relativas à restrição de acesso direto de indivíduos e ONG por parte da Tanzânia

RESUMO: O artigo analisa a retirada, pela Tanzânia, da declaração que permite que indivíduos e ONG tenham acesso direto ao Tribunal Africano dos Direitos Humanos e dos Povos. Sustenta que a principal causa para tal foi a insatisfação do Estado com decisões proferidas pelo Tribunal. O artigo explica que as alegadas reservas da Tanzânia, especialmente no que respeita ao esgotamento dos recursos internos e à adesão à sua Constituição, eram juridicamente inválidas ao abrigo do direito internacional ou mal interpretadas, o que derivou num conflito com a jurisprudência do Tribunal. A análise destaca grandes áreas de tensão, particularmente decisões sobre casos de pena de morte obrigatória e/ou relativos à cidadania, decisões nas quais o Tribunal entendeu em sentido oposto ao do ordenamento jurídico da Tanzânia. Argumenta que estes conflitos foram agravados por falhas probatórias, por parte das autoridades locais, divergências sobre o ônus da prova em matérias de cidadania e a ausência de recurso da decisão do Tribunal. O artigo recomenda que a Tanzânia reconsidere a sua saída, faça reformas legislativas sanando conflitualidades e que a União Africana reforce a estrutura do Tribunal e incentive um acesso mais amplo para garantir uma proteção eficaz dos direitos humanos em África.

KEY WORDS: African Court; Tanzania; reservations; exhaustion of local remedies; declaration; direct access

CONTENT:

1 INTRODUCTION

The recognition, promotion and protection of human rights by African states is evidenced by several human rights treaties that have been adopted at the continental level, and the formal acceptance of the core continental treaty, the African Charter on Human and Peoples' Rights (African Charter), by all but one of the 55 members of the African Union (AU).[1] However, only 34 of the 54 state parties to the African Charter have ratified the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol).

1 F Viljoen *International human rights law in Africa* (2012) 88; For the list of 54 countries which are state parties to the African Charter on Human and Peoples' Rights, https://achpr.au.int/en/states (accessed 26 May 2024).

Out of the 34 listed countries above, only seven countries currently have in place declarations accepting the jurisdiction of the African Court on Human and Peoples' Rights (African Court) to receive cases directly from individuals and NGOs. The seven countries are Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Malawi, Niger and Mali. Tanzania, Rwanda, Benin, Ivory Coast and Tunisia were also among the African countries that had recognised the competence of the African Court to receive cases directly from individuals and NGOs. Over time, however, these five countries have withdrawn the declarations that permitted individuals and NGOs to have direct access to the Court. Rwanda was the first country to register its withdrawal in 2017, followed by Tanzania in 2019, Benin and Ivory Coast in 2020, and Tunisia in 2025.[2]

Each of these countries had its reasons for the withdrawal. Nevertheless, this article focuses on the reason given by Tanzania, that 'the declaration has been implemented contrary to the "reservations" submitted by the Tanzania when making it on 9 March 2010'.[3] This article does so by revisiting the judgments of the African Court against the 'reservations' entered by Tanzania with the view of establishing the extent to which a crack has grown between the Tanzanian legal framework and the judgments of the African Court, occasioning the withdrawal and impediment in the implementation of the African Court's decisions. Based on Tanzania's reason for the withdrawal of the declaration under article 34(6) of the African Court Protocol, the part below analyses the concept of reservations under international law.

2 RESERVATION UNDER INTERNATIONAL LAW

Historically, the regime of reservation under international law was highly inspired by principles of contract in which the reservation was invalid unless it was unanimously accepted by all states during the treaty negotiation phase.[4] With time, however, such rigidity was abandoned in favour of diversity among states and the universality of international law. The International Court of Justice (ICJ), in its advisory opinion on *Reservation to the Convention on Prevention and*

2 See A Slaimia *Derecognizing the African Court's Jurisdiction: Entrenching Authoritarianism in Tunisia* (2025) The Legal Agenda, https://english.legal-agenda.com/derecognizing-the-african-courts-jurisdiction-entrenching-authoritarianism-in-tunisia/ (accessed 12 December 2025); and M Faix & A Jamali 'Is the African Court on Human and Peoples' Rights in an existential crisis?' (2022) 40 *Netherlands Quarterly of Human Rights* 65.

3 African Union, 'The United Republic of Tanzania: Notice of Withdrawal of the Declaration Made under Article 34 (6) of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, 14th November 2019' https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf (accessed 26 May 2024).

4 M Milanovic & LA Sicilianos 'Reservations to treaties: an introduction' (2013) 24 *European Journal of International Law* 1056.

Punishment of the Crime of Genocide, was the first to stress this change.

The ICJ insisted that the universal character of treaty law and the extensive participation of states in such treaties demand greater flexibility and a departure from the traditional regime of reservation.[5] Generally, therefore, reservations under international law are essential in ensuring participation in a treaty law of multiple state actors despite their differences. Bishop emphasises the important role of reservations by describing them as 'useful tools in getting partial agreement where a total agreement to the treaty proves impractical or impossible, and partial agreement seems worthwhile'.[6]

Despite the vital role of reservations in treaty negotiations, its making and applicability are not unregulated. The first point of reference for the regulations of reservations under international law is the Vienna Convention on the Law of Treaties, 1969 (VCLT). It describes a reservation as 'a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State'.[7]

Article 19 of the VCLT stipulates crucial criteria to be observed by states for their reservations to international conventions to be valid. They include making reservations in areas that are not prohibited by the treaty itself, making reservations to areas specifically pointed out by the treaty that reservations can be made and, lastly, abstaining from making reservations which defeat the object and the purpose of the Convention.

The VCLT does not stipulate the implications of making invalid reservations. Nevertheless, three major doctrines explain the consequences for a state that has made invalid reservations. These are the surgical, backlash and severability doctrines.[8] With the surgical doctrine, a state is accepted as a party to the treaty save for the reserved provisions. In other words, the reserving state continues to enjoy full membership to the treaty except for the reserved provisions which are excised in relation to the particular state.[9] The surgical doctrine has been criticised for allowing reserving states to benefit from their reservations even if they are invalid. For that purpose, the surgical doctrine has been viewed as defeating the rationale of ensuring that invalid reservations are not admitted as they have the danger of frustrating the object and purpose of the treaty.

5 ICJ Advisory Opinion, (1951) ICJ Reports 15 para 4 p 6.

6 B Bishop 'Reservations of treaties' (1961) 103 *Recueil des Cours* 245 quoted in RW Edwards 'Reservations to treaties' (1989) 10 *Michigan Journal of International Law* 405.

7 Vienna Convention on the Law of Treaties, 1969, art 2.

8 R Moloney 'Incompatible reservations to human rights treaties: severability and the problem of state consent' (2004) 5 *Melbourne Journal of International Law* 156.

9 As above.

The backlash doctrine tends to invalidate the consent of the state to the treaty. With this doctrine, the invalid reservation made by a state is treated as if it has lashed back to the instrument of ratification and nullified the consent of a state. The doctrine rejects the tendencies of states pretending to be bound by international legal instruments while, in reality, they have relieved themselves of obligations under such instruments through reservations. Although the backlash doctrine is praised for upholding the principle of state consent under international law, it has also faced criticism for being too rigid to admit states' diversity and the universality of international law.[10]

The criticism of the surgical and backlash approaches has led to the rapid development of the severability doctrine. With severability, a state that has made an invalid reservation is considered a party to the treaty without given the benefit of the reservation.[11] The use of the severability doctrine has increasingly been accepted in human rights treaties.[12] In support of the severability doctrine, the ILC Guide to Practice on Reservations to Treaties provides that an invalid reservation should not dissolve the membership of a state to the treaty. However, the invalid reservation should be accepted as null and void, and the reserving state will have two options: One: It may remain a member of the treaty without the benefits of the reservation. Two: It may clearly state that it does not want to continue being a member of the treaty. In the event the state does not make its intentions clear, it will be presumed to continue to be a party to the treaty without the benefits of the reservations.[13]

3 TANZANIA'S RESERVATIONS TO THE AFRICAN COURT PROTOCOL: THE BEGINNING OF THE END

The African Court Protocol was adopted in 1998 and entered into force on 25 January 2004. Like other international treaties, state parties to the African Court Protocol are entitled to enter reservations that have the effect of excluding or modifying certain provisions of the Protocol as to their applicability to the reserving state.[14] Likewise, Tanzania's

10 Milanovic & Sicilianos (n 4) 1058.

11 S Wei 'Reservation to treaties and some practical issues' (1997) 7 *Asian Yearbook of International Law* 135.

12 G Simma & G Hernandez 'Legal consequences of an impermissible reservation to a human rights treaty: where do we stand?' in E Cannizzaro (ed) *The law of treaties beyond the Vienna Convention* (2011) 63.

13 As above.

14 For the effects of reservations under international law see A Akstiniene 'Consequences of reservations to international human rights treaties concluded in the aftermath of WWII' (2017) 3 *International Comparative Jurisprudence* 106. See also PYS Chow 'Reservations as unilateral acts? examining the International Law Commission's approach to reservations' (2017) 66 *International and Comparative Law Quarterly* 335. See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Advisory Opinion, (1951) ICJ Reports 15.

decision to ratify the African Court Protocol and to make the declaration in favour of individuals and NGOs to have direct access to the African Court was not without reservations. Nonetheless, as depicted in subpart 2 of this article, the VCLT is the leading international legal framework governing the 'reservation' regime globally. It explicitly directs states entering reservations to the provisions of international treaties to do so at the time of accepting, ratifying, signing or approving treaties in question.[15]

Contrary to the explicit directive of the VCLT, Tanzania ratified the African Court Protocol on 7 February 2006 without making any reservations. Nevertheless, it insists that it had made a reservation to the declaration on 9 March 2010.[16] The declaration referred to by Tanzania is established under Article 34(6) of the African Court Protocol. In 2019, Tanzania withdrew its declaration on the basis that it had been implemented contrary to its reservations.[17]

The specific provision of the reservation states as follows: [18]

> The Court may entitle NGOs with observer status before the Commission and individuals to institute cases directly before it in accordance with Article 34 (6) of the Protocol. However, 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.

Analysis of this reservation reveals two major limbs that deserve attention. First, Tanzania was willing to accept the competence of the African Court to receive petitions from individuals and NGOs but subject to exhaustion of domestic legal remedies. Second, Tanzania stipulated that the reception of such petitions should be 'in adherence to' its Constitution. The focus now turns to these two elements of the Tanzanian reservation.

3.1 The exhaustion of domestic legal remedies

The requirement to exhaust domestic legal remedies before one can seek redress from international human rights bodies is not new. It is one of the respected principles of international law that aims to give states the first opportunity to redress the harm occasioned to claimants

15 Vienna Convention on the Law of Treaties, 1969, art. 2. See also C Boyes *et al* 'Social pressure in the international human rights regime: why states withdraw treaty reservations' (2024) 54 *British Journal of Political Science* 241. See also A Pellet 'The ILC Guide to practice on reservations to treaties: a general presentation by the special rapporteur' (2013) 24 *European Journal of International Law* 1061.

16 See the African Union 'List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' https://www.africancourt.org/en/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-May-2020.pdf (accessed 27 May 2024).

17 African Union (n 3).

18 See the reservation made by Tanzania at the time of making her declaration at https://www.african-court.org/en/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-May-2020.pdf (accessed 30 May 2024).

before a resort could be made to international adjudicatory bodies.[19] Article 56(5) of the African Charter codifies the principle of exhaustion of local remedies. The provision requires the African Commission on Human and Peoples' Rights (African Commission) to observe the principle of exhaustion of local remedies in exercising its protective mandate under the Charter. The African Commission stressed this point in the case of *Nixon Nyikadzino v Zimbabwe,* where it stated that 'the purpose of requiring complainants to exhaust local remedies is to give a chance to the respondent state to remedy the alleged human rights violations through its structures and organs. This is done in line with the principle of complementarity, which dictates that properly functioning national courts should not be substituted with regional or international mechanisms.'[20] Most international adjudicatory bodies require compliance with the principle of exhaustion of local remedies because local remedies are cheaper for claimants, deliver justice more quickly, and are more effective than international mechanisms.[21]

The principle of exhaustion of local remedies can only be applied by claimants if the domestic remedies are available, effective, sufficient and do not occasion unreasonable delays. The African Commission emphasised these criteria in the case of *Jawara v Gambia* by affirming that the local remedies can be exhausted only when they are available, effective and sufficient. The Commission proceeded to elaborate that 'the remedy can be said to be available if the claimant can pursue the same without impediment, it is effective if it offers a prospect of success, and it is sufficient if it can redress the claim'.[22] The Commission has had an opportunity to rule that unreasonable delay caused by state authorities may also activate the exception to the principle of exhaustion of local remedies for the complainant. This was ruled in the case of *Odjouriby Cossi Paul v Benin,* where the petitioner alleged that he was dispossessed of his real estate by one Akitobi, who colluded with some judges. On his appeal to the Appeal Court of Cotonou, the petitioner's case was delayed for more than 18 months. He, therefore, filed the communication with the African Commission, claiming that the delay before the Court of Appeal constitutes a violation of the African Charter. The Commission ruled that the case was admissible before it because the silence of the government of Benin and the pending appeal proceedings for 18 months before the Court of Appeal constituted unduly delay.[23]

Similarly, the African Court is required to adhere to the principle of exhaustion of local remedies before considering petitions from

19 MH Adler 'the exhaustion of the local remedies rule after the International Court of Justice's Decision in ELSI' (1990) 39 *International and Comparative Law Quarterly* 641.

20 Communication 340 (ACHPR 2007).

21 Minority Rights Group International, Guidance: Exhausting Domestic Remedies under the African Charter on Human and Peoples' Rights, https://minorityrights.org/app/uploads/2023/12/domestic-remedies-guidance-final.pdf (accessed 30 May 2024).

22 Communication 147/95-149/96 (ACHPR 2000) para 32.

23 Communication 199/97 (ACHPR 2004).

individuals and NGOs. This is evidenced under article 6(2) of the African Court Protocol, which obliges the African Court to abide by the principle of exhaustion of local remedies as stipulated under article 56 of the African Charter when determining admissibility of cases. The Court has had the opportunity to address the question of exhaustion of local remedies as one of the key factors for determining the admissibility of several cases before it. In *Jebra Kambole v Tanzania,*[24] the African Court reiterated that it cannot proceed with the determination of the subsistence of the case without first complying with the principle of exhaustion of local remedies as stipulated under article 56 of the African Charter, as read together with Rule 40 (5) of the Rules of the African Court.[25] A similar stance by the African Court is evident in cases such as *Urban Mkandawire v the Republic of Malawi,*[26] *Mohamed Abubakari v Tanzania,*[27] *Alex Thomas v Tanzania,*[28] and *Frank David Omary and others v Tanzania*.[29]

Since the principle of exhaustion of local remedies is well known, codified, and applied within the African human rights system, the question may legitimately be posed: why did Tanzania include it as a reservation to its acceptance of the deposit of a declaration in favour of direct access to the Court for individuals and NGOs under article 34(6) of the African Court Protocol? Adjolohoun describes a reservation of the nature entered by Tanzania as 'a fake reservation' because it merely restates the exception which is already provided for in treaty law. This is depicted when he stated the following: 'reservations should be clear, and not "fake" … "Fake" reservations are those that are superfluous because they provide an exception that is inherent in the applicable law'.[30] In the circumstances, the first limb of reservation on exhaustion of local remedies does not qualify as a 'reservation', because it does not exclude or modify the applicability of any principle to Tanzania.

3.2 Adherence to the Tanzanian Constitution

The second limb of the reservation made by Tanzania seeks to exclude direct access to the African Court for individuals and NGOs except where the Tanzanian Constitution has been 'adhered to'. In essence, this type of reservation subjects the African human rights system to the scrutiny of Tanzanian domestic law. The Tanzanian reservation,

24 African Court on Human and Peoples' Rights, Application 18/2018 (*Kambole*).

25 *Kambol* (n 24) paras 27-32.

26 African Court on Human and Peoples' Rights, Application 3/2011.

27 African Court on Human and Peoples' Rights, Application 7/2013, paras 53-77.

28 African Court on Human and Peoples' Rights, Application 5/2013, para 53.

29 African Court on Human and Peoples' Rights, Application 1/2012, para 127.

30 SH Adjolohoun 'A crisis of design and judicial practice? curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 8. See also D De Klerk & A Rudman 'The ultimate withdrawal: a critical analysis of the jurisprudence of the African Court on Human and Peoples' Rights' in A Fuentes & A Rudman (eds) *Human rights adjudication in Africa: challenges and opportunities within the African Union and sub-regional human rights systems* (2023) 43.

therefore, demands that the entered declaration be applied in a way that does not conflict with the Constitution of Tanzania. In the case of *Hilaire v Trinidad and Tobago* of 2001, the Inter-American Court of Human Rights (IACHR) found itself battling the validity of a reservation made by Trinidad and Tobago that had features similar to the one made by Tanzania.[31] In the *Hilaire* case, Trinidad and Tobago made a reservation to the American Convention on Human Rights, 1969, which insisted that it would only accept the jurisdiction of the IACHR to the extent that it was not inconsistent with the provisions of its Constitution. The IACHR ruled that a reservation by Trinidad and Tobago was invalid because it designated the domestic constitution as a first point of reference and rendered the American Convention on Human Rights a subsidiary legal regime.[32] The IACHR added further that allowing such a reservation defeats the object and purpose of the Convention.[33]

The position held by the IACHR replicates the international law principle that requires states to accede to international conventions with the intention of honouring the obligations arising therein in good faith. In the same way, a state can neither make a reservation that defeats the objects and purpose of the treaty, nor cite the provisions of domestic law as an excuse for not complying with treaty obligations.[34] Hence, states acceding to international treaties are expected to take all necessary measures to align their domestic laws with the obligations they have willingly entered into under international law.

4 THE RISE OF THE CONFLICT: AFRICAN COURT'S JUDGMENTS IN RESPECT OF TANZANIA'S RESERVATION

This part analyses the judgments of the African Court in respect of the Tanzanian reservations. The major aim is to establish the extent to which a conflict has risen between the judgments of the African Court and the Tanzanian legal framework, and the extent to which it contributed to Tanzania's withdrawal of its declaration and its reluctance in implementing the Court's judgments. To achieve its aims, the judgments are analysed in terms of their variance with the Tanzanian legal regime in issues such as capital punishment, constitutionality questions and citizenship-related matters.

31 IACHR (1 September 2001) No. 1463 2001.

32 As above para 88.

33 *Hilaire* (n 31) para 98.

34 Vienna Convention on Laws of Treaties 1969 art 27.

4.1 Capital punishment and constitutionality

Tanzania is one of the African countries in which capital punishment is legal.[35] It is pronounced on persons who have been found guilty of committing offences of murder or treason.[36] An attempt to challenge the constitutionality of capital punishment in Tanzania was first raised in 1994 in the case of *Republic v Mbushuu Alias Dominic Mnyaroje and Kalai Sangula*.[37] In this case, Mbushuu and Kalai were found guilty of murder before the High Court of Tanzania, thereby convicted and sentenced to suffer death by hanging. This led defence counsel to raise the point that capital punishment is unconstitutional and should not be imposed. To support his argument, he argued that the way in which capital punishment is executed in Tanzania offends the right to dignity under article 13(6)(d) of the Tanzanian Constitution. Apart from offending the right to life, he added that the punishment itself is cruel, inhuman and degrading, contrary to the Tanzanian Constitution.

After reconsideration, the High Court of Tanzania agreed with the counsel for the accused persons that capital punishment is unconstitutional and thereby sentenced the accused persons to life imprisonment. However, on appeal, the Court of Appeal disagreed with the High Court. It ruled that capital punishment is permitted within the Tanzanian Constitution, supported by the majority of Tanzanians, and thereby not unconstitutional.[38] This has continued to be the position of Tanzania to date. The judgment of the Court of Appeal in the case of *Jebra Kambole v Attorney General*[39] in 2019 confirms that capital punishment in Tanzania – in particular, mandatory imposition of the death penalty – is still in harmony with the Constitution.

Against the settled Tanzanian position, the African Court, in *Ally Rajabu and others v Tanzania*, ruled that the mandatory death penalty under the Penal Code of Tanzania is arbitrary and thereby offends article 4 of the African Charter.[40] The African Court reached this decision after examining section 197 of the Tanzanian Penal Code, which provides that 'a person convicted of murder shall be sentenced to death'. The African Court reasoned that the way the penal provision is drafted neither provides room for mitigating factors nor the court's discretion in weighing the facts and the penalty to be imposed. In that regard, it ruled that by maintaining mandatory capital punishment, Tanzania violates the right to life and human dignity as guaranteed under articles 4 and 5 of the African Charter.[41]

35 A Gaitan & B Kuschnik 'Tanzania's death penalty debate: an epilogue on *Republic v Mbushuu*' (2009) 9 *African Human Rights Law Journal* 459.

36 The Penal Code Cap 16 secs 39 (1) (b) & 197. See also GI Shivji *State Coercion and Freedom in Tanzania*, Human and People's Rights (1990) 25.

37 (1994) TZHC 7.

38 See *Mbushuu alias Dominic Mnyaroje and Another v Republic* (1995) TLR 97.

39 (2019) CAT 236. *Jebra Kambole v Attorney General* (2022) – Constitutionality of Mandatory Death Penalty (15 June 2022).

40 African Court on Human and Peoples' Rights, Application 007/2015.

41 *Rajabu* (n 40) para 163.

Assessment of the Tanzanian legal position on capital punishment regarding the African Court judgment presents a significant discord between Tanzania and the Court. Looking at the reservations entered by Tanzania when making the declaration, one may note that 'adherence to the Tanzanian Constitution' was one of the elements for accepting individuals and NGOs direct access to the African Court. Given the firm position under Tanzanian law that mandatory capital punishment is in harmony with the Constitution, it is not a surprise that Tanzania viewed the decision of the African Court in *Ally Rajabu* as encroaching on the Constitution. Situations like this have the effect of occasioning non-implementation of the African Court judgments and ultimately triggering the withdrawal of the declaration.

Nevertheless, this article argues that the view that the African Court encroached on the constitutional mandate of Tanzania has been amplified by two main factors: First, the reservation entered by Tanzania was incompatible with international law. Under international law, a state is not permitted to make reservations that will result in defeating the object and purpose of the treaty. Such a reservation is invalid and calls for the applicability of the severability doctrine, under which the state making the reservation remains a treaty member without the benefit of the reservation itself.[42]

Second, there has been a misinterpretation of the African Court judgment on the death penalty question. Government officials are of the view that the African Court wrongly faulted Tanzania for maintaining the death penalty.[43] They argue that not only is the death penalty constitutional in Tanzania, but there is also no absolute ban on it internationally.[44] In that regard, blaming a country for upholding the death penalty may ultimately prevent the African Court's decision from being implemented in that country. However, a close analysis of the African Court judgment in *Ally Rajabu* shows that the Court never faulted the imposition of the death penalty by Tanzania, as such. It only ruled against the 'mandatory' death penalty. In other words, the African Court's judgment does not prohibit Tanzania from retaining the death penalty in its penal laws. It merely requires Tanzania to amend its penal law to abolish the *mandatory* death penalty by granting judges discretionary power in sentencing after considering the facts and other mitigating factors presented in court.

42 Moloney (n 8) 156.

43 See the presentation by Mr Richard Kilanga, Senior State Attorney from the Ministry of Constitutional and Legal Affairs of Tanzania, when responding to the question as to why Tanzania withdrew her declaration under article 34 (6) of the African Court Protocol in the Centre for Human Rights, 'Conference on Implementation and domestic impact of the decisions of the African Court on Human and peoples' Rights held in Arusha, Tanzania from 27 to 28 June 2024:

44 As above. For details on the absence of an absolute ban on the death penalty globally, see LP Shaidi 'Death Penalty in Tanzania: Law and Practice' (1999) 2 https://www.biicl.org/files/2213_shaidi_death_penalty_tanzania.pdf (accessed 25 October 2024). Day 2 of Implementation Conference', min 3:27:43 – 3:30:54. See the response by Hon. Justice Dennis Dominic Adje at min 4:02:13, https://www.youtube.com/watch?v=_0moDibJJj4 (accessed 12 November 2025).

4.2 Citizenship-related matters

Citizenship is one of the crucial legal fields that has increasingly become complex and is attracting significant debates globally.[45] Conceptually, citizenship is described as the right to have rights.[46] This is because the right to citizenship makes the enjoyment of other rights possible in any given society.[47] Persons with no recognisable citizenship status under the law of any state are normally referred to as stateless persons.[48] They not only lack the protection of any state but are also very vulnerable. It is not possible for them to easily access rights such as the right to free movement, communication rights,[49] access to financial services such as loans, buying and selling landed properties, access to health services, registering one's children in school, as well as the right to marry.

One of the major challenges in dealing with citizenship matters is the question of state sovereignty. Most states treat citizenship matters as exclusive falling within their sovereign mandate. In other words, they are the ones to determine who should or should not become their citizens under their laws. International norms on citizenship are put in place to merely ensure that persons are not arbitrarily rendered stateless when countries exercise their sovereign mandate of determining the composition, quantity and quality of the citizens.

Citizenship matters stand amongst the major areas of law in which a conflict has emerged between the judgments of the African Court and the domestic legal framework for Tanzania. The first point of reference is the 2018 judgment of the African Court in *Anudo Ochieng Anudo v Tanzania,* in which the applicant was challenging the decision of Tanzania to withdraw his citizenship status and expel him to Kenya.[50] The facts of the case indicate that Anudo was born in 1979 in the Mara region within Tanzania. He then relocated to the Manyara region for work-related purposes. His predicament started when he approached the relevant police authorities in the Babati District within the Manyara region to comply with formalities for him to marry. This led to him being suspected of not possessing Tanzanian citizenship. His passport was retained, and a notice of prohibited immigrant was issued against him, causing him to be deported to Kenya. While in Kenya, Anudo was

45 P Mindus 'The contemporary debate on citizenship' (2009) 9 *Journal for Constitutional Theory and Philosophy of Law* 29.

46 A Kesby *Introduction: the right to have rights, citizenship, humanity, and international law* (2012) 1. See also D Owen 'On the right to have nationality rights: statelessness, citizenship and human rights' (2018) 65 *Netherlands International Law Review* 300.

47 S Degooyer *et al The right to have rights* (2018).

48 N Jain 'Manufacturing statelessness' (2022) 116 *American Journal of International Law* 243.

49 In countries like Tanzania, one must have a National Identity Card to register for a Subscriber Identity Module Card (SIM card). This is, therefore, a nightmare for Stateless persons who normally do not have identity cards. See, for instance, The Electronic and Postal Communications (SIM Card Registration) Regulations 2020, G.N. No. 112 of 2020 Reg 5(1)(a)(i).

50 African Court on Human and Peoples' Rights, Application 12/2015 (*Anudo*).

arrested and taken to the Kenyan Court where he was declared to be an irregular migrant, fined for illegal stay and deported back to Tanzania. These actions left him stateless, as he could neither live in Kenya nor re-enter Tanzania and had to live in no man's land between the border of Tanzania and Kenya.

When the case was taken before the African Court, two areas of departure emerged between the judgment of the Court and the Tanzanian position. The first area touches on the reservation of Tanzania relating to the principle of exhaustion of local remedies. As already noted, Tanzania insisted that it has made a reservation according to which individuals and NGOs could only have direct access to the African Court after exhausting all domestic legal remedies and in adherence to the Tanzanian Constitution. In the present case, Tanzania objected to the jurisdiction of the African Court by indicating that Anudo did not exhaust the available domestic remedies before taking the matter to the African Court.[51] Tanzania emphasized before the African Court that Anudo had several options under the Tanzanian legal regime which he did not explore. They included petitioning the Minister responsible for immigration for the waiver or cancellation of the prohibited immigrant notice and filing a judicial review case before the High Court of Tanzania. However, the African Court did not accept the objection raised by Tanzania because Anudo was already outside Tanzania and he was refused entry.[52] In such circumstances, it was difficult or impossible for him to exhaust the suggested remedies.

Following such a firm decision of the African Court, can someone reasonably claim this to be one of the major reasons for Tanzania to withdraw the declaration in favour of direct access to the African Court for individuals and NGOs? This reasonably appears to be implausible. Nevertheless, Tanzania in its withdrawing statement boldly stressed that it had no choice but to withdraw the declaration because it had been applied against the reservations it had entered when making the declaration.[53] As already shown, the principle of exhaustion of local remedies stands out as one of the areas where Tanzania has made a reservation. However, this article argues that such a reservation has been misconceived. This is because the principle of exhaustion of local remedies is already recognised under the African Court Protocol. Hence, a state stating that the principle should be complied with by individuals and NGOs before accessing the African Court does not, in the view of this article, modify the legal effect of the principle to its applicability to that state. This merely shows a total recognition of the principle and all its exceptions as stipulated in the African Court Protocol itself. For that purpose, the reserving state causes itself to be touched where it hurts when the court fully applies the principle as required under the Protocol.

51 *Anudo* (n 50) paras 42-46.

52 *Anudo* (n 50) para 52.

53 JM Mbaku 'The emerging jurisprudence of the African Human Rights Court and the protection of human rights in Africa' (2023) 56 *Vanderbilt Journal of Transitional Law* 408.

The second area of the Anudo judgment which diverts from the Tanzanian legal regime relates to the burden of proof. It is revealed in Anudo that before his expulsion to Kenya, authorities in Tanzania made a thorough investigation at Masinono village, Musoma District, within the Mara region which Anudo had mentioned to be his place of birth. During the interview, several villagers and relatives of Anudo were interviewed, including Anudo Achok (biological father of Anudo), Dorcas Rombo (biological mother) and Alal Achok (Anudo's uncle). Anudo's biological parents and most villagers indicated that they knew Anudo as one of the villagers who was born in Masinono. However, Anudo's uncle, Alal Achok, stated that Anudo was born in Kenya to a woman called Damaris Jacobo and he later relocated to Tanzania.

From these facts, one may note that the authorities in Tanzania never disputed the citizenship statuses of persons claiming to be Anudo's biological parents. Under the Tanzanian Citizenship Act of 1995, a person can become a citizen of Tanzania in one of the following ways. First, a person can become a citizen by birth where a person is born in Tanzania and one or both of the parents are Tanzanians.[54] Second, a person can also become a citizen by descent where a person is born outside Tanzania and one or both parents are Tanzanians except where parents are citizens by descent.[55] Lastly, naturalisation is possible when a person was not born by Tanzanian citizens either in or outside Tanzania.[56]

Analysing the circumstances, Anudo could have qualified as a citizen of Tanzania by birth (if he was born in Tanzania as claimed by most of the villagers and his biological parents), or he could have become a citizen by descent (in line with the statement of his uncle). These two possibilities could all work in favour of Anudo if one crucial piece of evidence were to be secured. This was the DNA test report confirming Anudo Achok as Anudo's biological father. To obtain this piece of evidence, Anudo Achok requested authorities in Tanzania to conduct a DNA test. His request was not met. The African Court, on the other hand, insisted that Tanzania had the burden of proving that Anudo was not its citizen by producing, among other evidence, the report of the DNA paternity test.[57] Insisting on the burden of proof on the part of Tanzania; the African Court reiterated the following:

> In the instant case, the Applicant maintains that he is of Tanzanian nationality, which is being contested by the Respondent state. In this circumstance, it is necessary to establish on whom lies the burden of proof. It is the opinion of the court that, since the Respondent State is contesting the Applicant's nationality held since his birth based on the legal documents established by the Respondent State itself, the burden is on the Respondent State to prove the contrary.[58]

54 Tanzania Citizenship Act 9 of 1995, sec 5.
55 Tanzania Citizenship Act 9 of 1995, sec 6.
56 Tanzania Citizenship Act 9 of 1995, sec 8.
57 *Anudo* (n 50) para 87.
58 *Anudo* (n 50) para 80.

It is not surprising that Tanzania did not produce a DNA report or cause it to be produced. The reason behind this omission can be found in the Tanzanian legal regime, where, different from the position taken by the African Court, the burden of proving that someone is a citizen of Tanzania is left with the person claiming to be the citizen and not the state. This is substantiated under section 44 of the Immigration Act of 1995,[59] in which the law states that in any proceedings where the question in issue is whether any person is or is not a citizen of Tanzania or that his or her presence in the territory of Tanzania is lawful, the burden of proof shall lie to the person maintaining that that person is a Tanzanian or that their presence is lawful. This is another area where a conflict between the African Court judgments and the legal position in Tanzania has arisen. Nevertheless, this article argues that states should always accede to international treaties with the intention of honouring the obligations arising therefrom in good faith. It is not commendable when a country accedes to international treaties and maintains legal provisions that conflict with the international legal regime. On issues of burden sharing in respect of individual rights under citizenship laws, Tanzania needs to improve its legal regime.

Another judgment that presented a conflict between the Tanzanian citizenship regime and the African Court's position was *Robert John Penessis v Tanzania*.[60] In this case, Robert John Penessis was found guilty of illegal entry and presence in Tanzania by the Bukoba District Court within the Kagera region. For that reason, he was sentenced to pay a fine of TZS 80,000 or suffer two years imprisonment in case of default. Dissatisfied with the decision of the Bukoba District Court, Penessis unsuccessfully appealed to the High Court and later to the Court of Appeal. Both the High Court and Court of Appeal held that Penessis failed to prove the lawfulness of his presence in Tanzania.[61] Among the reasons for his failure to prove his lawful presence cited by the Tanzanian Courts were that Penessis owned two passports, one for South Africa and the other one for the United Kingdom. In addition, the certified copies of these passports were tendered before the Court of Appeal of Tanzania were various visa stamps including those of Tanzania were seen on several pages.

In addition, there was evidence of Penessis's affidavit which he submitted before Tanzanian authorities applying for a resident permit. In such an affidavit, Penessis had stated that he had good intentions of processing Tanzanian citizenship if the laws and Tanzanian authorities would permit him.[62] The aforementioned evidence, made the Court of Appeal of Tanzania rule that Penessis had failed to prove the lawfulness of his presence in Tanzania. This triggered Penessis to petition before the African Court claiming, among other things, that his right to Tanzanian citizenship had been violated. To substantiate his claim, he tendered before the African Court a certified copy of his birth certificate

59 The Immigration Act 7 of 1995.

60 African Court on Human and Peoples' Rights, Application 13/2015 (*Penessis*).

61 See *John Robert Maitland v Republic* (2011) CAT 179.

62 As above.

indicating that he was born in Buguma Estate, Tanzania in 1968. The certified copy of the birth certificate also bore the name Anastasia Penessis who was present before the African Court and testified to be Penessis's biological mother. Moreover, Penessis presented a copy of the Emergency Travel Document stating that he was given the same by Tanzanian authorities pending the issuance of a passport. With this evidence at hand, the African Court ruled that Penessis managed to *prima facie* prove that he was a citizen of Tanzania. He was therefore granted nationality guaranteed under the African Charter and the Universal Declaration of Human Rights of 1948.

Analysis of the case of Penessis reveals areas that need improvement both for Tanzania and the African Court. Concerning Tanzania, it is essential for defence attorneys to always arm themselves with all the necessary evidence. For instance, they managed to tender a copy of Penessis's affidavit before the High Court of Tanzania, showing his desire to become a Tanzanian if the laws and authorities allow him. This affidavit was sworn to by him when he was applying for a residence permit. Nevertheless, this valuable piece of evidence was not available before the African Court.

On the part of the African Court, three areas need to be looked at for improvement:

First, the Court needs to go the extra mile not only for justice to be done but also seen to be done by respondent states. The *Penessis* case offered an opportunity for the African Court to demand additional evidence of a DNA test to establish the biological connection between Penessis and Anastasia. It is worth noting that Anastasia appeared before the African Court for the first time, and no one had known of her existence prior to that. She never appeared before the Tanzanian domestic courts in support of the Penessis's case, including the Bukoba District Court, the High Court, and the Court of Appeal. The question which arises is: How can such an important witness be absent during the domestic courts' proceedings? To authenticate what she stated before the African Court, a DNA test was necessary. This would have improved the strength of the ruling of the Court and its acceptability by Tanzania. This article notes that this would have not been the first time for the African Court to move the extra mile in a quest for justice. In the same case, the African Court did not assume a mere umpire status. It made a decision to visit Penessis in prison to obtain a clear picture of the situation so as to deliver an informed judgment.[63] Henceforth, it was expected that the same thing to be done for directing the conduct of a DNA test to establish the biological relation between Penessis and Anastasia.

Secondly, there arguably is a need to revisit the African Court Protocol with the view to introducing two divisions, first instance and appellate.[64] The case of Penessis is a typical example of a case where states would wish to appeal should there be an opportunity to do so. However, the present structure of the African Court does not offer a

63 *Penessis* (n 60) para 18.

64 Adjolohoun (n 30) 32.

chance for the aggrieved state to appeal.[65] The African Court Protocol specifically states that the decisions of the African Court are final and not subject to appeal.[66] The only avenue available to the aggrieved party is to apply for a review, which may be granted only upon satisfaction of the African Court that 'there is a discovery of a new fact or evidence, which by its nature, has decisive influence and was not known to the party at the time the judgment was issued'.[67] As rightly pointed out by Adjolohoun, the requirements for applying for a review under the African Court Protocol are strict and apply only to the discovery of new evidence not known to the party at the time the judgment was delivered.[68] Hence, this has been one of the factors contributing to the states' withdrawal of their article 34(6) declarations.

Third, African states have to demonstrate greater commitment to strengthening the African Court. It is important at this juncture to note that more than 99% of all cases before the African Court are from individuals and NGOs.[69] Hence, it is crucial for more African states to ratify the African Court Protocol if they have not done so. State parties to the African Court Protocol should make declarations under article 34(6) of the Protocol if they have not yet done so, and those that have already made one should not withdraw. By taking the above steps, African states, and Tanzania in particular, will not only fulfil their treaty obligations in good faith but also, by words and deeds, enhance the protection of human rights in Africa.

5 CONCLUDING REMARKS

This article revisited the judgments of the African Court in relation to Tanzania's withdrawal of its declaration in favour of direct access to the African Court for individuals and NGOS. In analysing the judgments, the article established that dissatisfaction with the Court's decision is the primary reason for Tanzania's withdrawal of the declaration.

The article shows that the sources of dissatisfaction are fourfold. First, the failure of Tanzania's reservation to article 34(6) of the African Court Protocol to meet the required international standards. This has given rise to the perception that the Court was issuing decisions in disregard of the entered reservations. Second, the failure of the Tanzanian investigation and prosecution authorities to tender crucial evidence before the African Court. In *Anudo v Tanzania* and *Penessis v Tanzania,* failure to produce crucial evidence was among the key factors that determined the outcome of the two cases before the African Court. Third, the conflicting positions regarding the burden of proof in citizenship-related matters between the Tanzanian legal framework

65 The Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and People's Rights 1998 art 28(2).

66 As above.

67 African Court Protocol (n 65) art 28(3). See also the African Court on Human and Peoples' Rights-Rules of the Court 2020, Rule 78.

68 Adjolohoun (n 30) 19.

69 De Klerk & Rudman (n 30) 30.

and the jurisprudence of the African Court. This has also gradually led to non-compliance with the African Court's decision by Tanzania. Fourth, some judgments of the African Court have left gaps which, if challenged, could have resulted in Tanzania prevailing in such cases. Since the African Court's decisions are final and no appeal is permitted, the only avenue to challenge them is a review process, which has also been found restrictive, multiplying dissatisfaction among states and arguably contributing to the withdrawals.

Henceforth, this article recommends that Tanzania revisit its reasons for the withdrawal so as to reconsider its decision. It is important to remember that the seat of the African Court is in Arusha, Tanzania. It is therefore essential that Tanzania lead by example by providing individuals and NGOs with access to the Court, thereby cementing its leadership position in the promotion and protection of human rights in Africa. The article recommends a review of the African Court's structure to introduce two divisions: first instance and appellate. Lastly, more efforts need to be made at the African Union (AU) level to urge states to allow individuals and NGOs to have direct access to the African Court. This is crucial because the African Court's current sensitisation missions are essential but not sufficient. AU can use its diplomatic route, resolutions, as well as incentive mechanisms to encourage states to make the declaration under article 34(6) of the African Court Protocol. As things unfold, it makes no sense to have a continental court for human and peoples' rights, which cannot be accessed by persons it is intended to protect.